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Why Is International Law Changing? Primary Factors in the Greater Complexity of International Law

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1. Introduction ........................................................................................................................................... 2
2. The possibility of constructing legitimacy through international law ................................................. 4
3. Economic Multipolarity in the Context of Liberalism ....................................................................... 9
4. Notions of Space and Time Fading Due to New Technologies ............................................................. 15
5. The Influence of International Crises: Necessity of Crises for Breaking Down Barriers Created by the
   Legal System ........................................................................................................................................ 19
6. Creation of Involuntary Communities for Crisis Management .......................................................... 23
7. Terrorism crises ..................................................................................................................................... 28
8. Criminal Crises .................................................................................................................................... 32
9. Health and Environmental Crises ....................................................................................................... 34
10. Rise of Transnational Economic Actors .......................................................................................... 36
11. Rise of Transnational Civic Actors ................................................................................................... 41
12. Rise of Transnational Scientific Actors ............................................................................................ 47
13. Conclusions ......................................................................................................................................... 48

Abstract
This paper examines factors of change in post-national law, particularly the effects of globalization
on the international legal order. The end of the cold enabled the strengthening of international law
through new legal norms and the emergence of post-national law. Among the principal factors
accelerating the internationalization of law has been the emergence of a multipolar political and
economic order. In the political realm, the end of the bipolar system between the United States and
the Soviet Union allowed the emergence of various actors and made possible the construction of
power in the international sphere through legal rules. Economically, a number of powers have
ascended, including the European Union, Japan, and China, as well as less important ones, such as
Brazil, India, and Russia and various non-state actors. Meanwhile, multinational corporations, which
control a growing portion of the global market of goods and services—and are interested in the
global standardization of business practices—have grown in importance. But so have decentralized
networks of economic actors organized in transnational production chains. In civil society non-
governmental organizations are ascending, with resources and knowledge that influence the
consolidation of political regimes. In the scientific realm greater importance is placed on experts,

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specialists, and scientists who define the paths and expand the limits of human possibility. Technological change brings cultures together, enables economic interaction, and, through new systems of communication, alters the relationship between time and space. Revolutionary methods of communication such as the Internet, the proliferation of satellites, and near-universal access to cellular telephones have drastically reduced physical and psychological distances among domestic and international actors. While this new context brings numerous positive effects, it also imposes a reality of crises and necessitates an involuntary community of states to address common risks. Crises likewise occur in different branches of law and facilitate its internationalization. Transnational and multinational crimes, including terrorism, have intensified. The increased number of environmental catastrophes can only be managed through the cooperative effort of states. This paper highlights several key forces that push the legal system toward internationalization and impose new perceptions and outcomes in its relationship with foreign and international systems. This paper shows the international law is much more complex than it used to be. There are multiple networks that influence international order and the very idea of sources and subjects of international law must be reconsidered.

1. Introduction

The paper presents some factors of changes in post-national law. I highlight among these factors the effects of globalization on the legal order. The fall of the Berlin Wall created the possibility of building the strength of international law through legal norms, which permitted the emergence of the current post-national law. New technologies have altered notions of space and time. Global problems related to terrorism, health, or the environment create new involuntary communities around the idea of risk. Global crises with broad-ranging effects break through traditional barriers to changes in the legal system.

In our view, international law is today constructed through diverse macro and microprocesses that expand its traditional subjects and sources, with the attribution of sovereign capacity and competences to the international plane (moving the international toward the national). Simultaneously, national laws approximate laws of other nations (moving among nations or moving the national toward the international), and new sources of legal norms emerge, independent of states and international organizations. This expansion occurs in many subject areas, with specific structures: commercial, environmental, human rights, humanitarian, financial, criminal, and labor law contribute to the formation of post-national law with different modes of functioning, different

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actors, and different sources of law that should be understood as a new complexity of law. Law provides concepts and structure for dialogue that political and economic actors cannot ignore whenever they please. Law establishes conditions under which an international community may possibly exist, creating and altering the expectations of visions regarding justice and legitimacy.

As with all processes of transformation on a global scale, there are moments, spaces, and subjects in which the internationalization process accelerates and others in which it slows down. Precisely because it advances at different speeds, this transformation can create a polychronous (one space, varying velocities) or, at times, asynchronous (multiple spaces, varying velocities) scenario when the tempo for each subsystem differs. The legal system, in the face of globalization, finds its greatest difficulty in the idea of pluralist synchronization, with rules in common that respect cultural diversity while also bringing stability to a fictitious global legal order.

The changes in the politics, economy, and technology, and in the relations among key national and international actors impose a new reality on the legal system that is favorable to its internationalization. The new reality does not occur directly, given that the legal system has its own structure. This structure gives it coherence and must be maintained to justify its autonomous identity. Rather, it is an indirect relationship that transforms the law in accord with demands on it. Among the principal factors accelerating the process of the internationalization of law in recent years is the emergence of a multipolar political and economic order. In the political realm, the end of the bipolar system between the United States and the Soviet Union permitted the emergence of various actors. The breakdown of political bipolarity made possible the construction of power on the international plane through legal rules. Economic, civic, and scientific actors in particular have grown in importance. In the economic category, various powers have ascended, such as the European Union, Japan, and China, as well as less important, but emerging actors like Brazil, India,

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10 The phrase is borrowed from Mireille Delmas-Marty, developed in the collection of books, *Les Forces Imaginantes du Droit*. The writings of Delmas-Marty, with whom we maintained a network for discussion of research for three years, are fundamental to this work. Other key authors include Gunther Teubner, François Ost, José Alvarez, Martti Koskenniemi, and Emmanuelle Jouannet, with whom we have established bridges for dialogue in recent years, with conferences and discussions held both inside and outside Brazil. Nonetheless, each of these authors has distinct ideas; this work seeks to carve out its own path, different from these others.
11 This classification comes from Mireille Delmas-Marty, discussed in the Network Pictures of the Internationalisation of Law from 2007-2009, with researchers from different countries. The analytical method for analysis—factors, actors, and processes—was developed by this research network, coordinated by Mireille Delmas-Marty. However, we consider it important to focus on a few precise methodological points, differentiated from the earlier discussions described.
and Russia and various non-state actors. Multinational corporations, which control a growing portion of the global market of goods and services, and are interested in global standardization of procedures and ways of doing business, have grown in importance, but so have decentralized networks of economic actors, organized in transnational production chains. In civil society, there is the ascension of non-governmental organizations with resources or knowledge that influence the consolidation of political regimes. In the scientific realm, there is the greater importance put on experts, specialists, and scientists who define the paths and expand the limits of human possibility.

Change imposed by new technological possibilities brings cultures together, enables economic interaction, and, through new systems of communication, alters the relationship between time and space. The rapid expansion of revolutionary methods of communication such as the Internet, the proliferation of satellites, and near-universal access to cellular telephones has drastically reduced physical and psychological distances among domestic and international actors. While this new context has numerous positive effects, it also imposes a different reality—a reality of crises—and creates an involuntary community of states needed to deal with common risks.

Crisis also occur in different branches of law and facilitate its internationalization. In the scope of criminal law, internationalization of transnational and multinational crimes has intensified, as has terrorism and the growth of criminal networks. As for the environment, an increased number of crises of catastrophic force can only be managed through cooperative effort of states.

It is important to elaborate on some empirical observations that demonstrate the principal factors and actors that impose changes on the legal system. Of course, the intent here is not to digress into an examination of globalization so as to treat each of these cross-cutting issues in depth, as this would detract from the focus of this work. The object is to indicate a few key points that put pressure on the legal system, pushing it toward internationalization and imposing new perceptions and outcomes in its relationship with foreign and international legal systems.

2. The possibility of constructing legitimacy though international law

After 1990, the breakup of the Soviet empire and the rise of economic liberalism as a model of universal aspirations created a favorable environment for the development of legal norms in

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12 José Eduardo Faria, *O direito na economia globalizada* 60 (2004).
common. While the United Nations Security Council\textsuperscript{14} strengthened its role as a source of legal norms applicable to all states, the Bretton Woods institutions were also reinforced, with the creation of the World Trade Organization and the strengthening of the World Bank and International Monetary Fund, as well as regional-scale multilateral economic institutions.

The end of bipolarity between the United States and the Soviet Union enabled the construction of power through legal norms, as well as the rise and consolidation of humanist ideas. The end of the Cold War, marked symbolically by the fall of the Berlin Wall in 1989, created a climate favorable to the construction of law with universal aspirations in fields where the veto power possessed by states from both ideological blocs would have previously blocked action. One notable example is the emergence of a powerful series of UN Security Council resolutions authorizing the use of military force. Before 1990, intervention done in the name of the international community would have been very difficult because when intervention was in the interests of the United States, France, or United Kingdom, both China and the Soviet Union exercised their veto, and vice-versa. Now, it is possible for the planet’s major powers, as members of the UN Security Council, to act in concert and create a set of binding rules for maintaining and reestablishing international peace. In turn, the very concept of “international peace” has broadened to cover new situations previously not contemplated in international law.\textsuperscript{15}

The state continues its central role in the globalized world. However, both great powers and peripheral states have begun to construct their policies at both international and local levels. At the international level, states return to three international law concepts. The first concept is the building of an international society, with progress in different areas aimed at some form of coordination, not simply coexistence, among nations. The second concept is movement toward a concept of international community, with defined interests in common, to lead toward, finally, an idea of international solidarity, building on the concept of humanity.\textsuperscript{16}

\textsuperscript{14} We take license to use the terms “Security Council” and “United Nations Security Council” interchangeably.
\textsuperscript{15} Pierre-Marie Dupuy, \textit{Droit international public} 817-818 (2008).
\textsuperscript{16} Dupuy explains this concept well: the terms “international society, international community, and humanity are three ways of looking at the human family, each with a precise historical date. It would be erroneous to suggest that they are sequentially occurring substitutes; this would project to the reader a notion of new ‘law of three stages under which the law of humanity would succeed the law of community, which succeeds the law of society.’ In reality, these three concepts coexist in the midst of their different principles and of tension in current international political and legal systems. The notion of international society brings to reality the coexistence of sovereign states. The notion of community is more recent and means more than international collectivity, moving beyond the unitary notion of the state to suggest oneness of interests, law, and duties among the different peoples that make up the family of nations. The notion of humanity broadens the perspective further, encompassing not only the present, but future generations, with the notion of solidarity among peoples in the midst of state identities.
The basic logical structure underlying international law, between egotistic and communitarian elements, has not changed since the fifteenth century. Today, however, the prevailing logic is communitarian, based on certain values more or less shared among nations, and a geopolitical scenario that permits greater coordination among global powers toward collective action in accord with their interests, legitimated by law.\(^\text{17}\)

Against this idea of multipolarity stands that argument that the United States uses its political, economic, and military prevalence to impose rules of behavior on the world, rules from which the United States itself is exempt. The United States invokes national values so as to avoid international commitments at the same time that it imposes its vision, through international law, on the rest of the countries in the world.\(^\text{18}\) The origins of American exceptionalism lie in the very history of the country, founded on democracy, opposed to law imposed by elites; on equality of opportunity; on individualism, to the detriment of collective perspectives; on economic liberty; on religious belief, though multiple traditions are present; on skepticism toward political authority; on ever-present militarism; and on the patriotism of the American people. In American legal theory, there are various justifications for adopting the country’s unique positions, including arguments that (1) the United States is the only country with the mission of promoting liberty and democracy and, therefore, should not be subject to international institutions; (2) the fact that some states are more liberal than the United States means that we would place the balance of global integration beyond what the American people tolerate; and (3) that U.S. federalism imposes intransigent limits on global integration.\(^\text{19}\)

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\(^{17}\) A different vision is noted in Martti Koskenniemi. See Martti Koskenniemi, *From apology to utopia. The structure of international legal argument* xiii and 19 (2005), 497.


\(^{19}\) Anu Bradford and Eric A.Posner, above note 18, at 03. As Onuma Yasuaki puts it, this is a contradictory argument, because the same states that invoke exceptionalism as a reason not to submit to international rules encourage other members of the international community to look to them as examples of good conduct to be followed.
I disagree with these positions. The United States does not have the power to impose unilaterally its vision on the world. The United States, as other states, maximize its ambitions and interests in international negotiating fora based on geopolitical possibilities. On the one hand, according to its opportunities in global politics and its own interests, the United States is among the major states that drive processes that increase the complexity of international law. The county has been a principal actor in building nearly all of the regimes used for multilateral negotiation, such as human rights, international trade, humanitarian, and criminal law. It is one of the principal financiers of the United Nations, the principal actor in the World Trade Organization and its Dispute Settlement Body, and it complies with nearly all of the judgments against it in various international courts. On the other hand, the United States failed to comply with the UN Security Council’s decisions not to invade Iraq and has failed to ratify various international treaties on the environment (such as Kyoto), criminal law (such as the International Criminal Court), human rights (the Inter-American Court), and humanitarian law (on land mines and other banned weapons). The United States helped to form but withdrew from the compulsory jurisdiction of the International Court of Justice after the first binding decisions and the first adverse judgments received.20

Just as the United States does, other world powers use their economic and military power to impose their perspectives and advance their interests, according to their respective cultures. The unified European push toward human rights is largely derived from the enormous loss of life during the two world wars. In fact, in Europe at the end of the twentieth century it is rare to find a family without members lost during the wars, not to mention the terrible destruction of various European cities. European exceptionalism is based on a strong culture of defense of human rights and a vision of development that respects popular sovereignty and protects individuals.

European states nevertheless use their economic power to advance legal and political positions in defense of their values and respective economic interests. Sanctions imposed in the 1980s against Turkey and Egypt to force them to change their positions on intellectual property were similar to those imposed by the United States against Brazil under Section 301 of the U.S. Trade Act, in 1988. The exclusion of Myanmar from the European Generalized System of Preferences in 1997, for imposition of forced labor, or of Belarus in 2007, for grave human rights violations, are examples of similar actions taken by European states. The European Union unilaterally entered into the conflict in the Caucasus region, based on the impossibility of acting through the UN Security Council in the name of the international community. Some observers

believe that European pacifism is as much a rational response to global distributions of military force as it is a specific ideology arising out of the two world wars.  

A Chinese exceptionalism can be described according to the guiding principles of Chinese foreign policy since the 1950s, such as respect for territorial integrity and the sovereignty of other states, non-aggression, non-interference with internal affairs, mutual benefits and equality, and peaceful coexistence. In this sense, human rights are guaranteed by the state, which grants them under certain conditions. Thus, each state has its own vision regarding human rights, according to national traditions. Importantly, and more specifically, Chinese foreign policy is based on belief in an international legal system with common but differentiated responsibilities, typical of the law of development of the 1950s and 1960s. The international system should seek the development of all states through redistributive policies. Based on these principles, China opposed the UN Security Council Resolution against Myanmar in January 2007, which placed sanctions due to grave human rights violations, yet it opposed intervention in Kosovo in 1998, alleging that the conflict was an internal matter. However, China did participate in many Security Council resolutions regarding the occupation of other states dozens of times. At the same time that it invokes the principle of non-aggression, China does not hesitate to reaffirm that neighboring states, such as Taiwan, must be reintegrated into the Chinese state because they are derived from the great Chinese empire.

Lafer’s analysis of modernity’s attainment of and departure from the Kantian spirit shows, in a way, the tension underlying a cosmopolitan view that asserts that exceptions are part of a system of coexistence rather that impositions of any one actor’s view on others. In this sense, I may evoke the Kant’s fifth question of whether humankind is in constant progress toward the better. In the early 1990s, the end of U.S.-Soviet bipolarity with the fall of the Berlin Wall seemed to point toward the attainment of a cosmopolitan order characterized by increased uniformity of criteria for legitimacy, a decrease in conflicts regarding how to organize life in society, greater political convergence, the end of apartheid, the Oslo Accords between Israelis and Palestinians, and the holding of various United Nations conferences on sustainable development, in which the vast majority of heads-of-state participated. In fact, since 2000, this convergence has become less clear. International trade and environmental regimes have advanced little, and old exceptions are raised once again. War has changed forms, and global insecurity continues to rise.

23 Celso Lafer, Obstáculos a uma leitura kantiana do mundo, no início do século XXI In: Fernando Henrique Cardoso et alii. Por uma governança global democrática, 73-83, specially 73–75 (2005).
Thus, post-national law is not the result of the political expression of one powerful state, the United States, but rather a consequence of multiple manifestations of power, through many fragmented and often contradictory processes, built by states, but also by new normative processes made of networks of state, sub-state, and private actors. Even if law and policy maintain their importance at the national level, the complexity of international action produces divergent outcomes, for which the same states take on contrary positions in different negotiating fora. This development occurs in the same chronology, but at different times in each negotiation regime, characteristic of a system exhibiting legal and political polychronism.24

3. Economic Multipolarity in the Context of Liberalism

Economic globalization is a principal factor in the differentiation of societies and the transformation of social systems. However, globalization as a process is not solely defined in terms of markets or economics. It involves transformations in science, culture, technology, military, logistics, sports and the environment; reorganization of the global geopolitical scene; and, in a more limited way, transformation of politics and law.25 The 1990s gave rise to the United States as the principal world power in diverse ways, above all in economics, and in many cases with the ambition of hegemony on the legal plane, through the imposition of universalizing models and extraterritorial legal rules. In various legal cases, the American models were accepted globally.

The end of U.S.-Soviet bipolarity and the supervening multipolar international geopolitical situation created a favorable environment for global economic integration. In the legal realm, economic integration is seen in the proliferation of international organizations of a universal nature, such as the World Trade Organization (WTO), and in the new strength and autonomy given to other international organizations that existed during the Cold War, such as the United Nations itself. American hegemony was reduced in several ways, by the opening of China’s political economy in the 1980s and 1990s, the strengthening of the European Union, and the ascension of several emerging powers in the current century, such as Brazil, India, South Africa, Argentina, and Russia.

24 Gunther Teubner, Global Bukowina. In Gunther Teubner (ed.). Global law without a State 3 (Dartmouth, 1997). In this sense, globalization operates in sub-global spheres. No country in the world takes part in every great event, such as the First or Second World Wars; not all are part of the Islamic or Christian world, nor take part in the World Cup of soccer or cricket; nor do all speak English, or Chinese. Cf. William Twining, Normative legal pluralism: a global perspective 20 (2010) Duke J. Comp. & Int’l L. 505.
These states contribute to international action not in a determinative fashion but by participating somewhat more actively in major international discussions.

The creation of the WTO may be the most important result of economic multilateralism in the legal realm. The foundation of the WTO revives the idea of constructing a peaceful scenario based on greater global economic integration and on worldwide growth with the strengthening of trade and economic liberalism, in the Kantian spirit. It has become necessary and possible to create global rules—predictable and having uniform procedures—that reach an almost absolute share of world trade, as well as norms for controlling abuses by protectionist states or states with stronger economies.

At the end of the twentieth and beginning of the twenty-first century, humanity lives in a historic moment similar to what occurred during the fourteenth and fifteenth centuries. With the end of the crusades and greater contact with the east, societies created and strengthened trade routes, such as Flanders and Champagne. The creation of nation-states was due in large part to the interests of the rising bourgeois class, enriched by the trade routes. For trade to flourish, it was necessary to reduce the unpredictability of feudal legal rules, increase security in the transportation and sale of goods, reduce differences in monetary and tax policy among the political bodies of the day, and adopt common rules of procedure. The birth of the state in the low Middle Ages is directly related to financing provided by the bourgeois to feudal lords to support armies capable of convincing other political leaders to submit to their sovereign power.

Today, I see this same process in a new cycle. Trade is no longer local but is instead global. The contemporary “bourgeois” is composed of companies that act throughout the world, beyond state boundaries, circulating their products through various states. In the same form as in the low Middle Ages, this bourgeois requires uniform, predictable rules to enable business models that can be replicated throughout the world, with dispute settlement systems that protect their investments. To accomplish this, global structures for the production, execution, and application of legal rules must be created. In a way, the rise of economic liberalism, even in politically closed countries like China, helps to create the environment necessary for this process.

Within this environment the concept of modernity emerges: a deconstruction, based on individualism, of values. Private values prevail over collective values. Economic concerns dominate all fields and perceptions of social progress. Economic fundamentals, such as efficiency through

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26 On the importance of economics in building legal and institutional structures at the end of the Second World War, see, for example, Hans Kelsen, *Peace through Law* (1973), at 16.
competition or rivalry, compete for space with ideas like citizenship and solidarity in an attempt to explain the distribution of benefits generated by a new reality. The transformation of a market economy to a capitalist economy based on the accumulation of capital goods and the trivialization of reason, cedes space to a rationality based on the accumulation of goods. This is an effect of capitalist domination of the markets.\(^\text{27}\)

I refer to globalization to mean the process of greater global economic integration, which includes commercial, financial, monetary, and other related elements. These elements include innumerable concepts that vary according to the author and the scope of analysis, but I refer here to this simple concept, which I will develop throughout this work. Globalization interacts with and is distinguished from another, parallel process, which French authors would call “mondialisation,” which focuses on greater integration of human rights and other state-centered structures in other areas of law. Highlighted among the principal characteristics of this process of globalization are the “denationalization of rights, deterritorialization of institutional forms, and decentralization of political forms of capitalism; uniformization and standardization of trade practices at the global level; deregulation of capital markets; geographical reallocation of productive investments; volatility of speculative investments; unifying of spaces and social reproduction; proliferation of migratory movements; and radical change in the international division of labor, creating a multipolar political economy structure.”\(^\text{28}\)

While it is multipolar, however, the distribution of power, resources, authority, functions, labor and employment conditions, profitability, payment flows, technology, and information among core and peripheral states is highly asymmetrical. Globalization must not be confused with an ethical universalism, which presupposes a fight against poverty.\(^\text{29}\) Great inequalities remain in the distribution of benefits among core and peripheral countries. We can at least identify good articulations in different rationalities (economic, mercantile, financial, productive and rentier). Even within a liberal framework, there are deep contradictions and continual tensions.\(^\text{30}\) Inequality does not necessarily run in favor of states with larger territories or in favor of states with the longest history of economic domination because some small states, such as the Asian tigers, which invested

\(^{27}\) Christian Coméliau, *Les impasses de la modernité: critique de la marchandisation du monde* 45 (2000), among various other authors. Coméliau suggests a predominance of economic concerns, competition and transformation of a market economy into a capitalist economy, and then speaks of a degradation of reason into a quantifiable and partial rationality based on the accumulation of profits.

\(^{28}\) José Eduardo Faria, above note 19, at 60.


\(^{30}\) José Eduardo Faria, above note 12, at 94.
heavily in development strategies based on the sale of electronic services, with emphasis on the banking system, have managed to obtain a significant level of global influence.

Even at the national level, states’ control over their borders decreases with the expansion of new financial models. Globally, the daily flow of speculative capital surpasses the value generated by the economy of most countries. The trend is that capital becomes highly speculative and sensitive to small political or legal variations. Creating norms in other social systems cannot be done without considering also the potential repercussions on the interests of investors, which cannot be identified as individuals, as was previously the case, but as large investment funds. Large-scale capital flight can result in the destabilization of a country’s production systems. The level of capital invested, which leads indirectly to a state’s employment level and growth rate, often depends on risk assessments undertaken by private companies with no state control. The effect of these risk assessments can be seen in the European crisis of 2011 and 2012. The state must consider the behavior of external economic and financial actors when creating laws or rules with economic effects, even in the domestic political context. Although states substantially maintain formal sovereignty, material control over their borders, inasmuch as it relates to trade or monetary, fiscal, foreign exchange, or even welfare systems, depends less on the workings of domestic law and more on the relative size of their economies; the characteristics of their industry, commerce and services; the education of their people; and the level of modernization of their infrastructure. The great challenge for theorists on the subject is dealing with this rupture “between the formal sovereignty of the state and its substantive decision making autonomy and the consequences of the reconfiguration of the power system caused by the phenomenon of globalization, on the other hand.”

Happening at the same time is a transition from the liberal state to the interventionist state. In the latter, private law becomes public or constitutional, according to the preferences of a few actors. Contracts of adhesion or having open clauses may be subject to intervention. In consumer law, shifting the burden of proof can occur, using procedural preferences to mitigate inequality between the parties, relaxing the idea of *pacta sunt servanda*.32

This process shows the tension between states’ trends toward consumer empowerment and the process of globalization, characterized by transnational structures and by the promotion of rules that facilitate trade, rather than focusing specifically on consumer protection or formal equality among different parties in legal actions. In this context, the interventionist state is induced, by many

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31 José Eduardo Faria, above note 12, at 122.
32 José Eduardo Faria, above note 12, at 205.
actors and interests, to find solutions for problems within its territory through regulation and creation of casuistic rules. This process results in the proliferation of low-efficiency norms typical of a process of “legislative inflation” or “juridification,” which contributes to judicial activism and the judicialization of public policy, based on legal provisions, often constitutional in nature, that broaden the judiciary’s discretion over topics formerly within the ambit of legislative or executive authority.  

As a consequence, there is a break in the democratic legitimacy of the state’s exercise of power within its territory. Modern society was set up through the exercise of democracy, carried out within the scope of the state’s territory. The state, in turn, more or less exercised effective control over the market and its associated economic actors, made possible by three factors—society, state, and market—all working in the same territory. Globalization of markets enabled economic actors to expand their territory, allowing them to act globally. Paradoxically, society remains local. In some very specific instances, society manages to expand its operating territory, through intense contact with other communities. This contact sometimes takes place through supranational structures, such as the European Union, or through non-governmental organization, but such contact is much less intense than that among markets. The state changes little, or when it acts externally, it depends on dialogue with other states, in a system of mutual restraint. Even the most powerful states lack the capacity to effectively regulate global economic actors.  

As a consequence, national law encounters problems in its search for effective norms in various socioeconomic fields. The multiplication of rights claims made on a supranational basis relativizes the role of the state. Legal monism is eroding, allowing for the creation of an environment favorable to normative pluralism. In other words, the expansion of global economic liberalism alters the liberal vision upon which international law is built.

The key concepts of contemporary international law—autonomy, equality, self-determination—are essentially liberal, formulated in an era in which liberalism was practiced

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33 In the words of José Eduardo Faria, as "rules of circumstance" or “regulations by necessity” multiply, the state loses the true dimension of legal value of the rules it uses to regulate behavior. José Eduardo Faria, above note 12, at 205, citando Leon Duguit, *Traité de droit constitutionnel* (LGDJ, 1930).  
34 Jurgen Habermas, above note 3, at 104.  
35 In the words of the author, “All this institutional machinery forged around the nation-state and around legal thought based on principles of sovereignty, political autonomy, separation of powers, legal monism, individual rights, fundamental rights, judicial review, and *res judicata*, is increasingly put in check by the diversity, heterogeneity, and complexity of the process of transnationalization of markets for inputs, production, capital, finance, and consumption. In this sense, depending on the situation (size of the consumer market, weight of economic capacity, control of production technology, degree of modernity in terms of infrastructure, etc.), the state loses the autonomy and independence needed to implement its policies at the internal level (monetary, fiscal, foreign exchange, and welfare policy).” José Eduardo Faria, above note 12, at 23.
especially within state borders. These concepts take on new contours with greater global integration. The justifications for changing an established legal structure vary according to different visions, especially communitarian visions, regarding the necessity of employing uniform market structures at the global level.

Such liberal concepts are derived from a modern international law, devised in the eighteenth century, especially after the work of Emmer de Vattel. Based on Vattel, international law reinforces the idea of an international society. This society was based on the vision of states’ autonomy to regulate internal matters (self-determination of states, with an eighteenth-century liberal slant), but also on interventionism, in the construction of certain values held as positive, evolving during the eighteenth to twentieth centuries out of principles of rescuing peoples, enabling their wellbeing, avoiding poverty, and eventually promoting human rights, development, and, in the twenty-first century liberal logic (a different concept of liberalism), exportation of democratic models. Some authors place the liberal-welfare dialectic as the main engine around which international law has been built since the eighteenth century.

I note also the emergence of networks of private legal relationships, outside the state, with the capacity to act transnationally and the pretense of autonomy. In fact, there are several concepts of normative pluralism or global normative pluralism. I understand the concept as the plurality of normative orders, so as to relate the topic with the idea of complexity or diversity. It involves the multiplication of sources, actors, power centers, communication structures, and methods for conflict resolution in international law.

The three factors of changes mentioned above (society, state, and market) expand the territory in which they act at different speeds, creating a democratic deficit in the new reality. There is asymmetry between globalization and mundialisation. We live in a context in which democracy is run locally, on power that works in a restricted way, trying to influence a market that is now global. The political machinery is unable to effectively implement its decisions. In the words of Habermas, “the self-referential character of self-determination and political self-influence is no longer clearly

36 Martti Koskenniemi, above note 17.
38 William Twining, above note 31, at 516. As such, the concept used here is not to be confused with other similar concepts, which focus on the multiplicity of sources within the state, whether involving traditional communities (Wolkmer) or participatory pluralism (Kumar, Vidya), but rather as a concept specifically referring to the increasing complexity of international law in the end of the twentieth and beginning of the twenty-first century.
defined. Systematically, according to Teubner, one sees a process of extreme differentiation between social orders, a “clash of rationalities,” made manifest in specific examples such as the structures that lead to economic funds, financial speculation, pharmaceutical patents, the drug trade, reproductive cloning, among others. “The sin of differentiation can never be undone. Paradise is lost.”

In this “era of transitions,” territory and the forms of legitimacy are yet undefined. The constructive equilibrium among territorial state, politics, and the legal system no longer holds. The nation-state came into being in the fourteenth and fifteenth centuries for the territorial expansion of markets; a system for the exercise of power was built, attributing its legitimacy to the people. Now, nation-states no longer explain nor legitimize the exercise of power. There is no global “people.” Yet in the meantime, there is no other figure that gives legitimacy to power. Perhaps we will move toward either the creation of legal-political structures for global coordination or the building of fragmented orders with their own specific rules for legitimacy, or even regress toward national protectionism. “Political authority can only ‘gain ground’ in global markets when, in the long term, it is possible to create an infrastructure capable of sustaining an outward-looking domestic policy, which cannot be disconnected from the democratic process of legitimization.” Other actors identify the emergence of private governance regimes with the ability to confer legitimacy not through market mechanisms but through their own varied and decentralized order and procedures.

4. Notions of Space and Time Fading Due to New Technologies

Technological changes, particularly the Internet, have changed modern ways of life and enabled new forms of power. On the one hand, these changes amplify processes for reciprocal influence between communities. The methods for accessing national and international politics widen, creating new democratic practices. Virtually unlimited access to information is possible. On the other hand, private actors gain the ability to destabilize a state’s economy through the rapid

39 Jurgen Habermas, above note 4, at 104–.
40 Gunther Teubner, above note 24, at 2.
41 The concept of legitimacy is understood here as the ability to motivate obedience. The discussion of whether the norm’s legitimacy is found in its authority (positivist thought) or in the community (St. Thomas Aquinas) is quite traditional. See the interesting work of Luciane Cardozo Barzotto, Razão de lei. Contribuição a uma teoria do princípio da legalidade in Revista de Direito GV, v.3,n.2., at 219-260, especially at 235–.
42 Eugen Richter, “Demokratie und Globalisierung,” in Ansgar Klein and RainerSchmalz-Bruns, Politische Beteiligung und Bürgerengagement in Deutschland apud Jurgen Habermas. above note 4, at 115.
43 Gunther Teubner, above note 24, at 3.
movement of large quantities of capital—without effective mechanisms for state control over content or operating methods.

That which is international becomes accessible, present. The state, in general, has less control over the interactions between its nationals and others. Access to information becomes unlimited, or at least so available as to exceed human capacity to learn it. Technological changes create a “cloud of information” that enables groups with common interests to come together, despite being separated by thousands of miles. Psychologically, the foreign is no longer unknown or inaccessible, but becomes present, possible. Although automatic translation tools are still weak, they already enable access to information in practically any language. The Tower of Babel is deconstructed by the advent of technology. Dialogue among people, legislators, public policymakers, and judges expands; mechanisms for administrative transparency and electronically provided government services are created; markets are integrated. “Spatial and temporal distances are no longer ‘conquered’; rather, they disappear without a trace in the ubiquitous presence of duplicated realities,” in a context where technological evolution is autonomous, subject to little state control.

The Internet, specifically, and the technological revolution, more broadly, enable the coupling of different spaces and times in the fields of law and politics. Each state or community experiences this process at its own pace. This difference is not to say that any given community experiences greater or less evolution, because each moves along its own path. There is a process of mutual influence, or mutual irritation, as some authors prefer, in the structure for enlarging the contract among social systems. Economics, politics, science, and law maintain distinct communicative discourses that are not antagonistic but rather complementary to one to another. With the Internet, influences grow in and among these social systems’ other spheres of construction, previously considered either national or foreign, causing stronger interactions between national, foreign, and international ideas, based on the direct and immediate contact of actors involved internally and externally.

Although legal transformations move at different rates in each territorial space, varying according to culture, politics, economics, or other local criteria, the Internet enables influences between very different contexts in time and space. Instantaneous contact with actors in other

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44 Jurgen Habermas, above note 3, at 58.
45 Alberto Febbrajo and Guenther Teunber, Autonomy and regulation in the autopoietic perspective: an introduction in State, law, and economy as autopoietic systems. Regulation and autonomy in a new perspective 4, 7 and 8 (Dott. A. Giufre ed., 1992). Under this logic, the central element of legal discourse is a binary legal/illegal analysis. In the political discourse: government/opposition. As to the economy: those who do/do not own land, etc.
countries allows society to influence and be influenced by distinct environments that occupy different points in time in the discussion of social problems, due to different cultural and normative spaces. This diversity of influences creates a clash of cultures or the possibility of a clash between different, opposing civilizations.\textsuperscript{46} The clash signifies influence and enables interaction and learning. The way of thinking underlying the legal system does not change, but the system must now find ways to deal with multiple contexts. The Internet works in this manner as an important tool in the evolution of social systems as a whole.

Technology also allows individuals to democratize information and bypass a state’s control over what happens within its borders, expanding individuals’ level of access and influence over questions of policy that would normally be outside their reach. Take, for example, the protesters in Iran, in 2009, in Libya, or in political movements in Tibet who shared their videos, recorded on their cell phones, with the international community through the global computer network. They demonstrated that two states that try to monopolize the control of information in their territory were incapable of doing so; nor could those states prevent them from influencing global public opinion in an attempt to put pressure on their home countries. These individuals exerted forms of political pressure from the international level directed at the national level, with the use of the Internet. The same can be seen in the use of social networks for organizing resistance movements in Egypt, with the overthrow of Mubarak, and in other countries during the Arab Spring of 2011.\textsuperscript{47}

At the substate level, capacity for dialogue among public officials expands. They can quickly and easily learn how other countries have dealt with similar problems though Internet searches that make this information readily accessible. As for executive authority, officials can discover tools and best practices for carrying out public policies, interacting with other actors, and learning from mistakes and methods developing far beyond their national borders. In the judiciary, access to other legal-discussion fora and other structures or methods for dealing with the same subjects makes it possible for judges to learn from discussions in foreign courts, distinguished perhaps by different culture and law, and adapt and use these arguments within their own national system. Legislative officials can use e-democracy systems, with opportunities for online participation in drafting bills and conducting opinion polls, as well as searching for patterns in laws used by other countries. In all

\textsuperscript{46} The expression “clash of civilizations” is borrowed from Samuel Huntington, \textit{Choque de civilizações} (Objetiva ed., 1997).

cases, it is possible to influence global debates not only through direct participation, but by making knowledge, discussion, and internal decisions accessible to others.\textsuperscript{48}

Thanks to technology, possibilities are opened for understanding not only other countries but one’s own as well. Public institutions have taken great steps forward in their level of transparency. Brazil, for example, has gained experience rare in other developed countries through live video and radio transmission of legislative debates and judicial proceedings, through the channels TV Câmara (Chamber of Deputies), TV Senado (Senate), and TV Justiça (Judiciary), which reach an important segment of the population. Every judgment of the Supreme Court is transmitted on live on open TV. Citizen interest in these sources of information continues to grow. In turn, officeholders perceive this interest and control more and more, such that it is now common to find a Member of Congress speaking earnestly before an empty chamber, knowing that her words are heard on various channels and in media reports of decisions on leading issues, such as embryonic stem cell research, the importation of retreaded tires, abortion of anencephalic fetuses, or the application of the anti-corruption “clean-slate” (ficha limpa) law in the past several years.

Control of public expenditures and the possibility for submitting complaints for free via Internet or phone, via the “transparency portal,” already allows citizens to control and report problems related to almost all government spending in Brazil, in real time. Of course, the share of the population with real Internet access is still low, but it grows rapidly each year, creating potential for the benefits of this system to increase over time.\textsuperscript{49}

Rapid, seemingly limitless growth in the ability to process massive loads of data on computers enables us to, in an unprecedented manner, exceed the constraints of space in minimal time. In some sectors, a private company gradually replaces the state as the main actor. This is a reordering of social, economic, political, and legal structures that enables the concentration of resources in capital-exporting centers such as Tokyo, London, and New York with control over events occurring in distant places across the planet, in real time.\textsuperscript{50}

Likewise, it becomes possible to integrate markets for goods and, importantly, finances, instantaneously moving impressive amounts of capital between territories. These transfers occur so quickly that they make it possible for financial actors to disrupt the previously solid economic

\textsuperscript{48} Cristiano Ferri Soares de Faria, \textit{O parlamento aberto na era da internet: pode o povo colaborar com o Legislativo na elaboração de leis?} (2012)
\textsuperscript{49} On this point, we highlight in particular the work of Cristiano Ferri Soares de Faria, above note 55.
\textsuperscript{50} José Eduardo Faria, above note 12, at 62, 80.
systems of entire countries in only a few days, without even being identified. Of course, identity can be controlled in financial flows in some states, such as Brazil or the U.S., but the majority of states are unable even to identify those who make large financial movements.

The Internet is regulated only partially and relatively independently of states, through the Internet Corporation for Assigned Names and Numbers (ICANN), which, although it has the mark of U.S. influence, is relatively autonomous and serves as a powerful forum for self-resolution of disputes in the private sector. As a whole, *lex electronica* is perhaps the most private-oriented and autonomous set of laws today, with highly efficient sanctioning power on those who violate its rules of conduct and with strong *de facto* influence over forms of social organization.

The relationship between technology and society results in a dialectic of mutual influences and transformations. Science and technology do not move forward freely, but are guided by people in power, whether public or private, according to their interests. In general, science and technology bear the imprint of those who hold the power. It could be a political interest, in dealing with public investments, or private interests, when deciding about private investment. Public and private are often intimately related in science and technology, but there is, as a rule, in almost all countries, strong public participation, if not a preponderance of public investment toward research and development. Defined investment priorities are *a priori* related to society’s interests in general, articulated by their political representatives. This does not mean that scientific developments, such as the Internet, were caused or stimulated only by state interests or previously existing power structures. Technology, due to its benefits, can spread rapidly and transform society in a short period of time. The fact is that once it is transformed, society responds by influencing the evolution of networks and other technologies, putting in place a perennial cycle of mutual transformations.^[51 Jurgen Habermas, *Ciencia y técnica como ideología*. Traducido por Manuel Jiménez Redondo 87 (1986).]

### 5. The Influence of International Crises: Necessity of Crises for Breaking Down Barriers Created by the Legal System

An important motivation for global cooperation among states and other actors is the necessity of dealing with risks arising out of shared problems. This context creates a new social arrangement, focused not only on the promotion of social welfare but also on finding adequate and democratic responses for a global society with global risks.

Crises reveal the strength of non-institutional powers, especially regarding the dismantling of powers in the sense of national institutions, the democratic deficit in the essentially bureaucratic
decision making process, and the fragmentation of powers in the sense of international institutions.\textsuperscript{52} Local societies are familiar with the risks that they routinely face and create scientific systems for explaining and dealing with them. However, the existence of global crises, whose treatment requires effort beyond national borders, requires states to amplify and buttress the tools for international cooperation, to deal jointly with certain risks, which implies a unity of reasoning that is not always evident.\textsuperscript{53}

Global crises create a type of involuntary international community because diverse actors are forced to work together.\textsuperscript{54} In this sense, I believe that the engine driving integration of states is not only the desire to create an integrated global community around positive values, or the fear of sanctions by international organizations for breaches of international law,\textsuperscript{55} but also the necessity of dealing with shared global risks.

With the process of industrialization, society develops a capacity for self-destruction, giving rise to the concept of reflexivity. That is, society may be subject to the destructive effects of its own

\textsuperscript{52} Mireille Delmas-Marty, \textit{Les forces imaginantes du droit I. Le relatif et l’universel} 18 and 19 (2007). In the words of the author, "si les crises paraissent d’abord conduire à l’impasse, en révélant l’absence de modèle théorique permettant de se représenter les pratiques liées à l’organisation des pouvoirs, un vide, avons-nous dit, entre ce qui n’est plus et ce qui n’est pas encore -, elles ouvrent aussi à leur manière la voie pour en sortir, en révélant les difficultés à résoudre, et d’abord la désarticulation des pouvoirs au sein des institutions nationales et leur fragmentation au sein des institutions abovenationales ; mais elles suggèrent aussi, de façon encore implicite, la montée en puissance des pouvoirs non institués qu’il faudra intégrer à la refondation."In English: «If crises appear and first result in stalemate, revealing the absence of theoretical model to represent the practices related to organization of powers, a vacuum, as we have said, between what is no longer and what is not yet—they also open the way for their way out, revealing the difficulties to be resolved first and the disarticulation of power within national institutions and fragmentation within abovenational institutions, but they also suggest, still implied the rise of powers not established that it will integrate with the refounding.» (free translation)

\textsuperscript{53} Marie-Angèle Hermitte. \textit{La foundation juridique d’une société des sciences et des techniques par les crises et les risques in Mélanges en l’honneur de Michel Prieur} 145–6 (2007).

\textsuperscript{54} Mireille Delmas-Marty, above note 52, at 26. Neves, criticizing Habermas’ view, believes that Habermas’ notion of a “conscience of compulsory cosmopolitan solidarity” can “cover up serious problems that depend on variables far too complex to be dealt with adequately in the political and legal realm.” Of course, the abstract idea of a global republic without a government is a complex phenomenon, with multiple variables, hampered by various barriers such as culture and language; nonetheless, in our view, these variables and barriers are dealt with by Habermas and by Mireille Delmas-Marty, from distinct viewpoints. In Marcelo Neves, \textit{Transconstitucionalismo} 87 (2009).

\textsuperscript{55} Cf. José Álvarez, \textit{Do States socialize?} 54 Duke LJ, 965–966 (2005). This position is particularly presented by Jürgen Habermans, in different texts, but specially at Post-national constellation and “Era das transições”, as well as Urich Beck, who identifies the emergence of a global risk society. In France, there is Marie-angèle Hermitte, Christine Noiville and other at the Center for Law, Sciences and Techniques, at the University of Paris. Each one of them hás different understandings about global integration, but they all agree there is a integration process based on the need for survival.
Problems at a global level require preventive tools, with the participation of various involved states, which require techniques that develop as quickly as the human capacity to self-destruct. In this process, while science clarifies causal relationships, excessive specialization paradoxically hinders the common person’s access to such explanations. With technological advances, only the specialists in each field can perceive causal relationships. With the increase in amounts of information produced and with specialization itself, occurring in almost every sector, specialists also lose the ability to determine the causes of crises, blinded by the limits inherent in greater specialization. As a result, understanding multidisciplinary causes and effects now requires joint interpretation by specialists from different systems. Science is the only process capable of establishing causal relationships and mechanisms for predicting and preventing crises, at least with regard to environmental or health crises.

Thus it is necessary to rethink the limits of science, which are two-fold. First, science is limited in offering solutions that society will tolerate because of its distinct ways of thinking, which are not always compatible with political or cultural values. Second, scientific freedom itself has limits, especially in an era in which science has reached the technical capacity to denature the human being itself, as with modern biotechnology, genetic intervention with embryos, and human-machine integration. Science also has, at various times, the ability to place all of humanity at risk, with problems that attend the channeling of resources specifically for research related to specific applied knowledge. Various national laws, as well as the EU Charter of Fundamental Rights, in articles 1, 3, and 13, place scientific freedom within the framework of respect for human dignity, requiring the defense of physical integrity against advances in medicine and biology. There is, thus, a crisis arising out of scientific progress itself that highlights different understandings about the world and doubt of the viability of global solutions as well the idea that all problems should be handled locally.

In all these subjects, as in others not discussed here, successive crises, local and international, have been critical factors in pushing forward changes in consolidated paradigms of law. The process

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58 Scientific production is heavily concentrated in a few countries, with investments directed toward their own concerns. These investments are merely reproduced in peripheral countries, whether by reproducing standards of conduct, international legal norms based on locally produced knowledge, or even the reproduction of norms in poor countries based on knowledge produced by and for developed nations. The relationship between knowledge production and political power sets in place a new context for international hegemony. Cf. Mireille Delmas-Marty, above note 52, at 196. See also Marie-Angèle Hermitte, above note 53.
of internationalization of law is generally slow and comes up against limits imposed by strong states as well as influential non-state actors. Psychological and cultural barriers, as well as stronger legal values, may impede the expansion of law.

To enable more rapid surmounting of well-established obstacles, crises must be of a supervening nature. Yet how many crises have occurred in recent years! Since the fall of the Berlin Wall, humanity has experienced various important crises—in politics, financial systems, terrorism, health, environment, security, human rights—that create the necessary environment for establishing norms that would not previously have been accepted by the international community.

In the area of humanitarian law, the September 11 attacks caused a security crisis severe enough to change the paradigm of possible action on the part of the United Nations and even on the part of some states to act in isolation to combat terrorism. States approved a series of measures that would have been unlikely in an earlier geopolitical context. They included the possibility of detaining suspects for indefinite durations, in clear violation of human rights norms, especially the case of the United States and the United Kingdom.\textsuperscript{59} The United States and several European countries enacted laws with extraterritorial effects and applied to individuals measures that were previously only applicable to states.\textsuperscript{60}

At the same time, the existing institutions’ lack of capacity to effectively deal with these new problems became evident. The UN structure failed to act preemptively or with sufficient time to avoid aggravation of conflicts in Rwanda; in Yugoslavia, even with the deployment of peacekeeping forces in 1993 and 1994; in Iraq, soon after contrary resolutions by the Security Council; and in the case of corruption in oil-for-food programs. In addition, the UN structure has failed to prevent the proliferation of nuclear, chemical, biological, and radiological weapons and other weapons of mass destruction that contribute significantly to global insecurity.\textsuperscript{61}

Criminal law presents a unique case of action in confronting crises. Interestingly, the field of law is typically internal, linked to cultural traditions, and more resistant to internationalization. The formation of international criminal networks, increases in the consumption of illegal drugs, and the issue of terrorism all created a new crisis that impelled states to act collectively.\textsuperscript{62} Cases of financial fraud with global impacts, such as Enron, Tyco International, Adelphia, and WorldCom in the


\textsuperscript{60} Eyal Benvenisti, above note 59.

\textsuperscript{61} Mireille Delmas-Marty, above note 52, at 13.

\textsuperscript{62} Jurgen Habermas, above note 4.
United States, or Parmalat in the European Union, have stimulated a recrudescence of state-imposed limits in the form of banking regulation. Enron was an American corporation, a world leader in energy, with 22,000 employees and more than $100 billion in annual revenue. In 2001, it was discovered that the company’s success was based on fictitious accounting. Some of the company’s important projects and assets were outside the United States, which led to a crisis felt throughout the financial system, causing billions of dollars in losses worldwide and distrust regarding the effectiveness of standards applicable to companies that operate globally. These accounting crises created an environment that made it possible for the United States to establish laws with extraterritorial effect to control crimes against the financial system, even by non-U.S. companies. For example, the United States enacted the Sarbanes-Oxley Act in 2002, which imposed international accounting standards and auditing rules, as well as harsh prison sentences of up to 20 years for crimes committed in other countries, even reaching nationals of other countries.

6. Creation of Involuntary Communities for Crisis Management

Involuntary communities are created around shared problems, whether known or unknown. They arise out of increased global interdependence. Risks of major accidents, such as those of a chemical, nuclear, or ecological nature, may be unpredictable, uninsurable, irreparable, and intolerable. Such risks may be unpredictable because they have not occurred in the past with sufficient historical regularity to allow calculation of future occurrences and, as a rule, are constructed through series of statistics with little realistic basis. They are irreparable because there are no instruments for remedying large-scale damage and no resources available for actors involved. What occurs is a process of socialization of risks, with set limits on insurance values, through the creation of funds that aim to provide minimal protection, but do not effectively repair large-scale harms. Likewise, the analysis is no longer centered on what percentage of risk to tolerate within a probability analysis matrix because the harm itself is intolerable regardless of the benefits gained.

Cutting-edge technologies, while contributing effectively to the improvement of social welfare, create risks with the potential to transform society itself—risks that cannot be measured

64 Maira Machado, Similar in their differences: transnational legal processes addressing money laundering in Brazil and Argentina In: Law & Social School Inquiry, (2011).
beforehand, only judged after the fact. The very changes that make contemporary society an “information society” also transform it into a society of risks, increasingly integrated and increasingly global.66

There is a process of expansion of state-provided services designed to promote a state of social welfare that is also accompanied by the loss of state control over the institutions capable of resolving problems. The creation of regulatory agencies and mixed-capital companies, or even the attribution of control over risks related to certain products or services, may be interpreted as a process of decentralization of the state’s power of control. In some cases, private networks, such as those providing seals for organic products or technical standards, are the only instruments at the international level with set standards and social reliability.67

Citizens in this society of risk, according to their culture and negative experiences or distrust in their own state’s ability to manage risks, create parallel regulatory and standard-issuing communities, based on para- or non-state institutions. In Europe, for example, consumer sensitivity is noticeably higher than on other continents, especially because of strongly negative experiences in which the failures of public institutional structures were particularly severe. Take, for example, the failure of state structures as to mad cow disease or contaminated blood. In the first example, thousands of people were exposed on the European continent (especially in Germany and France) when sales of meat from the United Kingdom, which turned out to be contaminated with bovine spongiform encephalopathy (mad cow disease), were authorized, even though there had been strong suspicions of contamination in imported products. In the second case, the French government continued using blood products from machines that simultaneously processed thousands of donors’ blood, allowing one sole donor contaminated with HIV to infect thousands of receivers, even when...
there was suspicion that the disease was transmitted in this manner, creating an AIDS epidemic in the country and the deaths of thousands in the early 1980s.68

Technological successes have not only changed our consciousness of risk, but have affected even our ethical self-awareness. Even specialists may be laypersons in a multitude of areas and other specializations that arise in any specific case. While risk awareness increases, risk becomes part of, and no longer destabilizes, the daily routine.69 In most cases, these risks do not respect borders.

The channels for discussion of risks are no longer political representatives or traditional forms of democratic exercise, but rather the media and the Internet. Democracy in the global society of risks is media, concentrated on TV, made possible by information. Wide access to information, beyond the relative capacities for absorption, maturation, or certainty of its validity safety, is one of the defining elements of contemporary society.70

A new social contract is founded, based on science. “Once we recognize the existence of a health and environmental crisis and the need to get out of this crisis, this leads to the birth of a new people, characterized by the unity among citizens, politicians, scientists, and industry, capable of putting aside for a moment their differences in order to reestablish the social contract, integrating the parts of nature and cultural artifacts that surround us.”71 The central problem is the lack of

68 Marie-Angèle Hermitte, Le sang et le droit. (Seuil, 1996). Há vários outros incidentes recentes, como das próteses de silicone PIPO, que demonstram o problema.
69 Jurgen Habermas, above note 14, at 57.
70 Ulrich Beck, above note 56, at 64.
71 Bruno Latour, La science en action. Introduction à la sociologie des sciences. (La Découverte, 1989). Elsehwere, Latour has written, “Les sciences et les techniques ne sont pas remarquables parce qu’elles sont vraies ou efficaces – ces propriétés leur sont données par surcroît et pour de tout autres raisons que celles des épistémologues, mais parce qu’elles multiplient les non-humains enrôlés dans la fabrique des collectifs et qu’elles rendent plus intimes la communauté que nous formons avec ces êtres. C’est l’extension de la spirale, l’ampleur des enrôlements qu’elle va susciter, la distance de plus en plus grande où elle va recruter ces êtres qui caractérisent les sciences modernes et non pas quelque coupure épistémologique qui romprait pour toujours avec leur passé préscientifique. Les savoirs et les pouvoirs modernes ne sont pas différents en ce qu’ils échapperait à la tyrannie du social, mais en ce qu’ils ajoutent beaucoup plus d’hybrides afin de recomposer le lien social et d’accroître encore son échelle. Non seulement la pompe à air, mais aussi les microbes, l’électricité, les atomes, les étoiles, les équations du second degré, les automates et les robos, les mouliniers et les pistons, l’inconscient et les neurotransmetteurs. A chaque fois, une nouvelle traduction de quasi-objets relance la redéfinition du corps social, des sujets comme des objets. Les sciences et les techniques, chez nous, ne reflètent pas plus la société que la nature ne reflète les structures sociales chez les autres. Il ne s’agit pas d’un jeu de miroirs. Il s’agit de construire les collectifs mêmes à des échelles chaque fois plus grandes. Il y a bien des différences de taille. Il n’y a pas de différences de nature – et encore moins de culture.” Bruno Latour, Nous n’avons jamais été modernes. Essai d’anthropologie symétrique 146-147 (La Découverte, 1991). Science and technology are not remarkable because they are true or effective. These properties are given by addition and for any other reasons than the epistemologists, but because they multiply nonhumans enrolled in the «factory of collectives» and make it more intimate community that we form with these beings. This is an extension of the spiral, the magnitude of enlistments that will spark the distance growing where it will recruit these beings that characterize modern science and not some epistemological break that would break forever with their prescientific past. Knowledge and
effective procedural mechanisms, to enable a global democracy, that are sufficient to deal with cultural diversity in the world and with shared risks.

The movement of crises is due also to scientific and technological progress in recent years. Various processes of internationalizing norms, such as those dealing with the ozone layer or climate change, were based on scientific predictions, rather than actual harms experienced. Both at the international and domestic levels, scientific experts now play an essential role in guiding judicial decisions and legislative deliberations and in executive authorities’ efforts to mobilize resources. Emerging from this is what some authors call the “empire of science,” justified by the increased legitimacy or even the monopoly on legitimacy that science holds in explaining the causes of and determining the solutions for global crises.

The increased importance of scientific knowledge results from decoupling systems for explaining harms from the supernatural. People believe less in magic or religion as the cause of natural events, such as droughts, storms, harvests, or diseases, instead giving scientific explanations. An understanding of natural phenomena, from the simplest to the most complex, as well as a system of imposing liability for harms—whether through the state, with strict liability, or private actors through insurance—allows us to change the focus from a system based on compensation to one based on prevention. Take, for example, the way we build urban cities, so as to avoid the effects of catastrophes like fires (through security systems and minimum space requirements between residences), floods (water collection systems), and diseases (sewers and other health services), or practices for workplace safety. These systems and others are directly related to scientific advances, often fueled by the need to generate savings in pensions, in insurance, or in civil liability.

With industrialization, especially in the twenty-first century, industrial societies began a new, more robust phase of innovation of experimentation. Scientists themselves were responsible for proposing solutions and establishing causal relationships in dealing with problems. Certain risks may have already been experienced as economic or legal problems, but what we could properly call a “society of risk” had not yet been constituted, largely due to the lack of coherence among the modern powers are no different in that they escape the tyranny of the social, but they add a lot more hybrids to reconstruct the social bond and further increase its scale. Not only is the air pump, but also microbes, electricity, atoms, stars, quadratic equations, automata and robos, mills and pistons, the unconscious and neurotransmitters. Each time a new translation of quasi-objects revival redefinition of the social body, subjects as objects. Science and technology in our country do not reflect the company more than nature reflects social structures among others. This is not a game of mirrors. It is build collectives same scales, each time bigger. There are many differences. There is no difference in nature—and even less culture.

responses given to similar problems. The great transformation has occurred since the 1970s, with the rise of a knowledge-based economy, in which science becomes a critical element of the state’s development model. The adoption of global scientific standards to avoid crises leads to the adoption of shared normative standards at the international level based on the same premises. Law seeks solutions through a scientific explanation of the world and decision-makers derive legitimacy for their policies from science as well.

Nevertheless, society does not evolve at a constant speed. Nor does it move always in the same direction as science. Change in social and scientific rationalities occurs at different speeds (polychronic) and in different directions (polydirectional). The mindset of society, which I may call social rationality, distances itself from a scientific rationality, not only as to whether it will tolerate effects from certain technologies, but also in the relationship between probability and perception of risks involved and the willingness to bear the burden of prevention. While scientific rationality requires proportionality between the probability of harm and the preventive measures taken—an adjustment based on both the cost effectiveness of prevention mechanisms and the number of people affected—for social rationality, other elements may be more important. Resistance to a specific technology may not necessarily be due to the risks involved, but also on the degree of novelty of the technology, the occurrence of earlier crises due to similar technologies, or the economic benefits enjoyed by those affected. The acceptable cost level depends not only on its effectiveness, but also on media attention, proximity in time between a crisis and its solution, and the severity of harm, even if felt only by a few people.73

In the field of law, while the problem-solving capacity of science is overvalued, there are conflicts as to the method for understanding and producing evidence to science and to law. While law reflects its surroundings, interprets the world in its binary legal/illegal logic, science has its own dichotomy (true/not true), incompatible with the certainty required in the legal world. The lack of means for guaranteeing a system that is not too specialized but that can encompass different aspects of a structured, multidisciplinary assessment makes direct dialogue among different social systems difficult. There is the problem also of experts who perform incomplete, unreliable, or incorrect work.74

73 Various authors have discussed the topic. See, for example, the work of Ulrich Beck (society of risk), Niklas Luhman (sociology of risk); Marie-Angèle Hermite (various works), who share a more critical view of the problem.
Scientific crises lead to extreme legal solutions. Denmark went so far as to prohibit the commercial sale within its borders of any new food enriched with vitamins and minerals until the people’s nutritional need for the additives could be proven. This action was later censured by the European Union’s Court of Justice. If science is unable to prove the safety of certain food products, what would be more logical than to base one’s food consumption only on known, traditional products? Such a stance was considered a trade barrier, because no doubt was found regarding the safety of the banned products.\(^{75}\)

To deal with this internationalization of risks, the state is then led to incorporate different elements into its decision-making process, beginning with information and decisions frequently made outside its territory. We no longer speak in terms of safe or unsafe, but in terms of acceptable risk. Choosing an acceptable level of risk, a kind of national margin of appreciation and one of the cornerstones for allowing the internationalization of law, requires acknowledging what is acceptable or unacceptable. Involuntary communities of victims or risk managers cross borders but require institutions or regional or global arrangements to become possible.\(^{76}\) Definitions of acceptable levels of risk at the national level must be thought out and adapted with global risks in mind. The consequence is a “cosmopolitanism within the national space,” which is forced to deal with the external in order to deal with its more mundane, day-to-day risks.\(^{77}\)

7. Terrorism crises

Some examples of crises result from the growth of organized crime and terrorism, whether through networks of private actors, without any specific nationality and not coordinated by any state; through the strengthening of transnational organized crime; or through relatively anonymous electronic instruments, with high capacity to transfer capital.\(^{78}\) These changes have created a new type of enemy that can only be confronted through concerted transnational action by multiple states. States are obligated to cooperate and to loosen their attachment to having a monopoly on the

\(^{75}\) Among the examples highlighted in the case were vitamin-enriched milk and fluorinated water. CJCE. Comission v. Denmark (C-192/01). Decision of 23/09/2003. According to the European Court, “Indeed, that practice, which requires that the marketing of foodstuffs enriched with vitamins and minerals coming from other Member States where they are lawfully manufactured or marketed be made subject to proof of a nutritional need in the Danish population, makes the marketing of such foodstuffs more difficult, if not impossible, and, consequently, hinders trade between the Member States », at para. 41.


\(^{77}\) Ulrich Beck, *Qu’est-ce que le cosmopolitisme?* 339 (Aubier, 2006). O autor cita, na mesma página, que mais de 50% das decisões sobre risco são tomadas no plano europeu e não nos planos nacionais.

\(^{78}\) José Eduardo Faria, above note 12.
legitimate use of force within their boundaries. With regard to the fight against terrorism, after the attacks of September 11, 2001, we see the development of a new type of enemy—now global—depersonalizing victims and requiring cooperation among states. With regard to organized crime, recognizing the low effectiveness of existing institutional structures gives rise to the proliferation of treaties on the issue and to innovative, deeper agreements for infra-state cooperation. With respect to environmental and sanitary risks, inter-state there is a reinforcement of inter-state cooperation.

The rise of various terrorist groups, such as the notorious Al Qaeda, responsible for the September 11 attacks against the United States, has led to important changes in the contours of international law. The organizational structure of global terrorism—in cells scattered among different countries, organized in networks that are not necessarily hierarchical, operating through decentralized electronic systems difficult to recognize—impedes the effectiveness of any state’s unilateral action. These challenges create an involuntary community of states, united by their fight against a shared, non-state enemy.

The attack on the United States, the world’s largest military power, by a private (non-state) group was a key factor in changing the old way of organizing states in the fight against terrorism. States expanded coordination and information-sharing systems in order to build multilateral security systems, and developed a set of standards to enable the suppression of individual rights and guarantees in the name of collective, transnational defense.

The enemy of the states ceases to be another entity subject to international law, becoming rather a group of individuals, with no legal personhood or state recognition, that operates within various allied states simultaneously without their knowledge and against their will, through networks of terrorist cells. Traditional law of war was focused on a known, sovereign enemy, or in some cases, fighting with armed internal groups, such as the ETA in Basque country, the IRA in Ireland, and other separatist or destabilization movements. Now, the enemy is neither external nor internal.

Previous to 9/11, targets were agents of enemy states, or potentially their civilian populations. Now, they may include any group of people, whether nationals or foreigners. Victims are dehumanized, no longer thought of as the dead or wounded in attacks, and are not chosen specifically for any personal reason, but rather for symbolic purposes. The goal of the attacks is to

80 Christine Noiville, above note 67.
destabilize a state or political group’s power, or even to destroy the state or group. The attackers seek not to kill specific people, but to free political prisoners or oppose policies or regimes.\textsuperscript{81} Some seek to justify their actions based on their dissatisfaction with a certain view of democracy, based on their respect for traditions, or based on territorial control by a political group or foreign state, as in the case of liberation movements in the Arab Spring or in Europe. Others focus on opposition to liberalism or societal encouragement of multiculturalism as a justification, as in the case of the attack in Norway in July 2011.\textsuperscript{82}

The diversity of motivations does not prevent states from classifying political movements as terrorist, even when other countries recognized those movements as legitimate. Take, for example, the Chinese government’s request to the United States that President Obama not receive a visit from the Dalai Lama, the Tibetan leader, in February 2010, on the grounds that they considered him an international terrorist.

In the legal realm, states take measures both at the international and domestic levels. At the international level, we see proliferation of treaties and UN Security Council actions. Within the category of treaties, consider the anti-money laundering treaties analyzed above. The Security Council has issued a growing number of resolutions calling for freezing of assets, restrictions on movement of people or technology, immediate arrest of suspects in any territory, bans on arm sales, and prohibiting assistance to or training in regions suspected of terrorist involvement.\textsuperscript{83} When a state is accused of promoting or tolerating terrorist groups, these resolutions can block transfers of resources to that state or begin escalating sanctions under the UN Charter. Note that many legal regimes, such as that of Brazil, do not have a mechanism for coherently incorporating Security Council resolutions. These resolutions can create restrictions on liberty and access to bank information, constitutionally guaranteed freedoms, through the application of norms that, in general, lack binding force to bring about the intended results, but which are nonetheless complied with in practice.

\textsuperscript{81} Mireille Delmas-Marty, above note 52, at 290.
\textsuperscript{82} New York Times, February 24, 2012.
\textsuperscript{83} Resolutions 1267 (1999), 1333 (2000), 1390 (2002), as well as the resolutions reiterating these earlier ones, such as 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008), 1904 (2009), etc.
In parallel, the Security Council has created various institutions to penalize crimes against humanity and acts of terrorism. The creation of the International Criminal Court, specific courts for war crimes related to Rwanda and Yugoslavia, and the Special Court for Libya are examples.

At the domestic level, the extraterritorial application of laws and constitutional guarantees are being revised. U.S. actions related to General Noriega and Colombia are interesting examples. The then-president of Panama was captured by U.S. forces in the Panamanian capital, carried to the United States, and sentenced by U.S. judges to 40 years in prison. Colombia executed treaties with the United States authorizing extradition of its nationals, due in part to Colombia’s recognition of the fragility of its judicial and penitentiary system. These treaties were criticized by the Colombian Supreme Court in 1986 and 1989 and were ultimately overruled by the Constitution of 1991, which prohibited extradition of its citizens. However, in 1997, the Constitution was amended to permit extradition, resulting in the extradition of various Cali and Medellín cartel leaders, including Fabio Ochoa and Rodriguez Orejuela—action that some authors have called the “humanitarian imperialism” of the United States.

In this regard and in general, the process of internationalization is driven by factors that operate under distinct logical schemes and, as a result, can lead to opposing outcomes. While the expansion of international human rights seeks to bolster individual rights and liberties, the protection of humanitarian law is built on the idea of limiting specific individual rights and guarantees in the name of protecting society as a whole.

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85 Created in 1993 for adjudication of crimes committed in the former Yugoslavia in the 1990s.
86 Created in 2007 by Resolution 1757 (2007) for adjudication of the assassination of Prime Minister Rafik Hariri and 22 others on February 14, 2005.
87 These actions are the result of the United States’ intensified programs to combat drug trafficking in Colombia, which was at that point the world’s largest producer. Extradition from Colombia was a rule strongly affected by corruption and violence among drug traffickers in the 1980s and 1990s, to the point that it impacted the effectiveness of the U.S.-Colombia extradition treaty of 1979, which had been incorporated into domestic law in Colombia by Act No. 27 of 1980. In the 1980s, a number of judges and other public actors who refused to work with the traffickers were assassinated in Colombia, such as Minister of Justice Lara Bonilla, who was assassinated by the Medellín Cartel. Due to this situation and constant pressure from the traffickers, the Colombia Supreme Court held the law unconstitutional on December 12, 1986, prohibiting the extradition of Colombians. The rule stood until 1997, when Article 35 of the Constitution was amended to allow extradition, though this amendment was not made retroactive. According to the United States’ interpretation, the treaty remained in force, and the United States eventually succeeded in extraditing several traffickers from the Medellín Cartel, such as Fabio Ochoa in 2001, and the Cali Cartel, such as Rodriguez Orejuela in 2004, among others. See Mireille Delmas-Marty, above note 52, at 272-273. On the extradition of Fabio Ochoa and Rodriguez Orejuela, respectively, see http://www.state.gov/documents/organization/8693.pdf; http://www.state.gov/documents/organization/62382.pdf.
8. Criminal Crises

The strengthening of international cartels that traffic in human beings, drugs, arms, or wildlife, as well as some states’ permissiveness in dealing with such trade, provides strong motivation for the international community to take action to respond to these problems globally. Although criminal law is one of the areas of law most closely linked to national customs and cultural traditions, it was one of the first areas to experience the internationalization process, precisely to deal with these new challenges.

The growth of international organized crime, especially in terms of drug, arms, and wildlife trafficking, occurs through efficient and largely internationalized transnational networks. These networks transport goods across boundaries, passing through multiple countries, taking advantage of minimal regulation and control in territories held by humankind in common, such as international air space and waters. International traffickers move significant amounts, especially through electronic transactions in financial havens. They launder the proceeds through seemingly legal operations anywhere in the world. Organized crime, especially drug trafficking, creates a break in the “traditional boundaries between the world of legality and of infraction, between the world of work and of delinquency,” in which children and adolescents excluded from the labor force serve as true employees of organized crime, and in which transnational financial structures launder the proceeds. This new organized crime, acting on a global scale, calls for new forms of cooperative action among states to maintain their institutions’ capacity to deal with these enemies that are simultaneously internal, foreign, and international.

Thus, transnational organized crime creates the need for new structures with distinct forms of cooperation among states. Some scholars suggest that the failure of international structures to respond to the new reality reveals their uselessness. It would therefore be important to impose coercive mechanisms with particularly dense levels of cooperation, casting off from the international financial system countries that refuse to cooperate. Others see current structures as a transition phase, necessary in the development of society.

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88 José Eduardo Faria, above note 12, at 259.
89 José Eduardo Faria, above note 12, at 259.
90 “The need for crime in order to make society (and, in turn, law) progress is the object of Durkheim’s provocation. It is necessary that human originality be able to flourish; or, so that the originality of the idealist who dreams of surpassing her time may manifest itself, it is necessary that the originality of the criminal, which is ahead of its time, be possible. Each depends on the other.” Mireille Delmas-Marty, above note 52, at 170. Durkheim follows the same logic. He says that crime contributes to making legal and moral values resistant to change. This requires that a criminal, ahead of her time, put in question the effectiveness of consolidated values. “Crime is therefore
The same technology that facilitates organized crime also allows states to deal with these matters globally. One of the key tools for coordination exists at the infra-state level, through the activity of the Financial Action Task Force (FATF), which is within the scope of the Organization for Economic Cooperation and Development (OECD) but has now incorporated other states. The FATF is a working group that requires states to implement increasing levels of transparency. It has the strength to create a legal environment that legitimizes tough sanctions on states that fail to provide sufficiently transparent information on regulation of money laundering and financing of terrorism. This working group, instituted in 1990, developed a methodology of mutual evaluation in pairs, through which states must respond to questionnaires regarding the adequacy of their financial system in preventing fraud, money laundering, and financing of terrorism. The system is based on forty recommendations, refined over time, that focus on several themes, including a common definition of money laundering and terrorist financing; the possibility of taking precautionary measures involving the confiscation of property or goods; measures taken by banking institutions, such as recordkeeping, reporting suspicious transactions, and other preventive measures for avoiding international crimes; authority that should be granted to national institutions; and international cooperation measures.

Logically, this means greater control over financial flows, and as a consequence, restrictions on individual liberty and banking secrecy. In general, working groups lack authority to impose internationally binding measures, especially when the group operates within an international organization vis-à-vis non-member states or states that oppose individual rights against international administrative standards. However, if states fail to comply with a specified number of recommendations, they may be placed on watch lists or have trade flows restricted, with a negative effect on their ability to obtain foreign financing. In practice, this gives the working group significant power in forcing states to adopt international standards.

The opportunity for the FATF was catalyzed by the adoption of the UN Convention against Transnational Organized Crime (the Palermo Convention of 2000), followed by the various provisions created after the attacks of September 11, 2001. Soon, a working group (without legal

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91 Brazil, China, Argentina, and other countries accepted the rules of the FATF, but implementation has been different in each case. See Maíra Machado, *Similar in their differences: transnational legal processes addressing money laundering in Brazil and Argentina* in Law & Soc. Inquiry, 2011.

92 Maíra Rocha Machado, above note 63.

93 Maíra Rocha Machado, above note 63.
recognition) will be able to, considered as the final instance, will be able to order a state to review its constitutional guarantees if they are found to enable money laundering or terrorist financing, under penalty of the state’s exclusion from the international financial market.  

In a way, focus shifts from the punishment of individuals toward seeking to punish organizations and to control financial flows related to illegal activity. Criminal law’s response to organized crime ends up legitimating repressive action in other areas, such as the Merida Convention against Corruption of 2003. Treaties focus especially on fighting trafficking in drugs, human beings, and arms, as well as corruption and money laundering. In practice, “fighting organized crime” is a Trojan horse. It creates a model of super-criminalization that requires super-repression, enforced through transnational police and judicial cooperation that provides for provisional arrests and detention, confiscation of goods or resources, leniency agreements consideration of prior crimes committed in other countries, infiltration by agents and the use of telephone wiretapping and satellite location monitoring, all of which drives and leads toward the internationalization of law.

9. Health and Environmental Crises

Greater global integration, advances in technology, and the organizational structure of contemporary society catalyze the international impact of health and environmental problems that would previously have been domestic matters. Local problems have great potential to spread due to the concentration of the places of production and diversification of export markets. This has been especially true since the turn of the twenty-first century, as local problems quickly spread worldwide. A disease transmitted through the consumption of chicken or beef in Brazil could reach more than 140 countries in one week. One machine’s calibration error at a soft drink manufacturer in Belgium in 1999 caused dozens of children to be hospitalized in one single day in multiple locations because they had gotten sick from the drink at their school lunch. The concentration of production of pharmaceuticals and agrochemicals, for example, means that one product can quickly affect millions of people, which in turn requires domestic public authorities to interact and organize in new ways.

New technologies and forms of productive organization mean that an accident’s effects may stretch thousands of kilometers, as in the case of nuclear accidents, such as Chernobyl and

96 Ulrich Beck, above note 56.
Fukushima; oil spills, such as Erika, Prestige, and Exxon Valdez; or diseases that can, in a matter of days, place the entire world on alert, such as swine flu, avian flu, H1N1, and many others. The current form of global social organization, based on the shared use of common technological solutions, creates risk at a planetary level. Planetary risks have been seen as the widespread use of CFC gas destroyed part of the ozone layer and as our fossil fuel-based economy, with its global warming effects, threatens to destroy life on the planet.

Globalization meanwhile places limits on states’ autonomy in dealing with local environmental and health concerns. Solutions to the most important problems—those that require quick action—are only effective if they are employed through international networks subject to global standards and within a precautionary framework, in which a reasonable apprehension of some harm is sufficient for authorities to act to avoid or mitigate it. Precautionary measures require action even though the cause or even the precise nature of the harm and action to be taken has not been clearly established.

Even when causation is clear, states encounter difficulties in obtaining compensation for transboundary harms or harms caused by foreign corporations within their territory. Oil spills such as Erika, Exxon Valdez, and, more recently, the massive Deepwater Horizon accident in the Gulf of Mexico, are enough to change the limits of the state’s international liability. Domestic law is not able to deal with with the strategy of creating shadow corporations without assets, making it practically impossible to sue parent corporations located in other countries for environmental or health-related damages.

Transnational crises have led states seeking common solutions to act in concert. Opportunities for discussion and for finding solutions to shared problems become less centralized. Essentially all of the most important international organizations have authority to respond to health and environmental concerns. Yet when all have power, no one in fact is responsible. Entangled,

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98 Shadow corporations or société-écran are companies created by business groups in peripheral countries to hold little in terms of significant assets. They are designed to shield assets from potential lawsuits or avoid taxation by countries with high tax rates.
99 Developed countries, which are generally more resistant to international civil liability, when affected by major accidents, can mobilize sufficient political resources to change the limits of liability, circumvent the companies’ legal strategies to avoid liability. Similar situations have occurred in several other crises like the explosion in Chernobyl nuclear power plant, an important event to the rise of strict liability for nuclear accidents. The International Law Commission proposed an interesting project in which there is an expansion of strict, although not accepted by the international community. CDI. Projet d’articles sur la responsabilité de l’État pour fait internationalement illicite et commentaires y relatifs, (2) Annuaire de la Commission de Droit International (2001).
overlapping authority enables simultaneous and contradictory action due to conflicting goals and regimes, between regional and global-scale organizations, multilateral banks, or even among institutions within the UN system. The legal framework for international law is made up of over 500 multilateral treaties that cover an extremely wide range of topics and a myriad of international organizations with their own operating structures.\textsuperscript{100}

Where there are public health issues, trade is inevitably involved. While the enviro-health legal subsystem seeks to create structures for taking precautions against and preventing risks, the international trade subsystem charts out its own solutions—which are not always compatible—to the problem. The World Trade Organization began to apply environmental regulations through the lens of the most-favored-nation and national-treatment principles, applying to environmental law the same level of consistency and logic used elsewhere. In a way, each country’s freedom to set its own level of acceptable risk in health and environmental matters, based on the legal disputes, as the EC—Asbestos, EC—Hormones and Brazil—Tires,\textsuperscript{101} that confirm states’ ability to enforce their own policies to promote public health and preserve the environment within their territory.

Here, once again, the complexity of international law reveals antagonistic tendencies among legal subsystems that, according to some authors, can cancel each other out, damage legitimacy, and cause fragmentation and other problems discussed below. To address these problems, international health and environmental law norms have expanded and deepened. These norms are more or less accepted by states, according to economic and cultural interests affected by each particular subject area. What arises, in contrast to western law, which is typically regular and predictable, is a confusing, conflicting, non-hierarchical framework that carries varying levels of authority and commitment, depending on the state.\textsuperscript{102}

10. Rise of Transnational Economic Actors

Organized civil society, business, and scientific associations exert influence on the process of internationalization of law. In general, I treat these as a single category: non-governmental organizations. In fact, this is a quite heterogeneous group of organizations seeking differing

\textsuperscript{100} Alexandre Kiss, *Droit international de l’environnement*. (1991)

\textsuperscript{101} Respectively, WTO Dispute Settlement Body, European Communities—Measures Affecting Asbestos and Products Containing Asbestos (WT/DS135); WTO Dispute Settlement Body, European Communities—Measures Concerning Meat and Meat Products (Hormones) (WT/DS26, 48); and WTO Dispute Settlement Body, Brazil—Measures Affecting Imports of Retreaded Tyres (WT/DS332).

\textsuperscript{102} The idea of variable, à la carte international law is a constant theme in Delmas-Marty’s work.
objectives; thus, division into sub-categories may contribute to a better understanding of the whole. Non-state actors exert strong influence in the construction of post-national law. In a sense, the economic and military-industrial complex does not control the multiple centrifugal tendencies of global civil society, given the multitude of economic, civic, and scientific actors and their increasing manifestations of power.

By economic actors I mean national and foreign companies, as well as business associations. While these associations have a non-profit nature, they act with the goal of promoting, directly or indirectly, the profit-generating interests of their members. By civic actors, I mean non-governmental organizations that act on the basis of altruistic values, such as the protection of human rights or the environment. Many definitions for this category exist, depending on the level or possibility of public financing for an organization’s activities or on the specific goals or objectives the organization seeks. Scientific actors may be private or public, for-profit or non-profit, but their main purpose is the advancement of science, within a scientific knowledge-generating system. Each such group has its own methods for communication, spreading knowledge and defining group membership. In different ways, each of these actors influences the internationalization of law.

There is a strong rise in the participation of multinational corporations in all sectors. With the possibilities globalization provides, even small- to medium-size national companies can expand their capacity and participate in the international market. Economic actors influence states’ domestic and foreign relations policy. They have developed effective private-sector standards for the entire consumption chain and have become key players in the internationalization of law. Traditionally, the state acts as spokesperson for its companies. The difference is that territory is now global, and the spokesperson should therefore speak globally.

The rise of multinational corporations has created a world in which some large companies generate revenues greater than the gross domestic product (GDP) of many small states. Moreover, small states find it difficult to act individually to regulate the activities of these large companies, due to the ease of capital movement and the companies’ ability to create flexible structures that take advantage of legal fictions, under which subsidiaries are treated as if they are independent of the parent companies. These companies are important not only because of the immense resources

103 Gunther Teubner, above note 31, at 02.
they oversee (financial, human, technological, and so on), but because they can at times induce their home states to move international law to further their interests. Because most multinational companies are headquartered in the strongest states, such as the United States, Japan, and European Union states, their power is catalyzed by the political strength of their states.\textsuperscript{105}

In this context, I differentiate theorists who defend the idea of reflexive law or law within a systematic structure, in which the state is not the center of legal relationships but rather an actor involved in the complex legal system. In such a system, there would be a multitude of “complex organizations,” each with the ability to create policies and norms that legitimize them. In an environment of rapid changes in markets and regulatory regimes pressured heavily by competitive markets, state macro-corporate arrangements, though apparently rigid, centralized, and immovable, give way to micro-corporate agreements, with capacity for effective, flexible, and rapid auto-regulation. These agreements involve state bureaucracy as well as other economic actors, within a structure of “highly flexible operative symbiosis between the various arms of the state and ‘complex organizations’ [...] which some authors call procedural neo-corporativism or ‘publicly responsible self-regulation in decentralized social systems.’”\textsuperscript{106}

The discussion forum created along with the World Trade Organization (WTO) in 1995 is an important example. In only a few years, it became a privileged site for multilateral trade negotiations. States act as true spokespersons for their companies, defending the specific products on their trade agenda. More than ever, public and private law are hybridized. Essentially, all of the states that are party to WTO disputes focus their claims on defending large multinational companies precisely because these are the companies that trade products globally. Although states continue to be represented in the disputes by diplomats, a significant portion of the pleadings and production of information is done by private law firms hired by the companies affected by the case. Even in disputes involving wealthier member states, such as the United States, Japan, or European Union states, participation of such private firms hired by companies predominates.\textsuperscript{107} There is, then, an important interaction between public and private interests in the use of economic diplomacy to strengthen those companies most integrated into national policy. Brazil is a striking example. Although it is one of the most frequent users of the WTO Dispute Settlement Body, the country has been in most cases guided by the interests of private companies. These companies hired law firms

\textsuperscript{105} Alexandre Kiss, above note 99.
\textsuperscript{106} Gunther Teubner, \textit{Unitas Multiplex: Corporate Governance in Group Enterprises, in Regulating Corporate Groups in Europe} 80 (D. Sugarman & G. Teubner eds., 1990).
\textsuperscript{107} See especially WTO/DSB, Japan—Measures Affecting Consumer Photographic Film and Paper (WT/DS44).
that helped in defending or raising claims at the WTO. In the first seventeen years of the WTO, in only a single case, one involving tires, did Brazil act without help from the private sector.108

Motivations for large, midsize, and small companies to participate in international legal regulation are based primarily on three factors. First, companies face increased competition within national borders against foreign products—a result of opening trade. Often, small companies compete with large foreign companies with greater competitive ability and rely on creating trade barriers for their survival. Second, as globalization expands, these companies begin to trade, exporting and importing products, even with geographically large and culturally inward-looking countries, such as Brazil, India, China, the United States, and Russia. Third, international trade standards now regulate subject areas that were previously within the purview of domestic law, such as labels, technical standards, health standards, and antidumping.

The number and importance of private legal regimes that operate parallel to or in conjunction with state law has also increased. Networks of private contracts among economic groups, certification standards (ISO and others), sports law (FIFA, for example), cyber law, and other fill gaps in or operate as a substitute for state procedures for conflict resolution and development of public policy. The ISO 14000 family of standards on environmental management, for example, or ISO 19000 on labor protection, may create effects throughout a company’s production chain. In the case of large multinational companies, the actual effects of certification procedures or specific rules established by contractual networks may be relevant and lead to change in the national regulatory environment. With hundreds of businesses linked in the production chain, commitments made by one can have as great as or greater effect than state standards on the product. In poor countries with low institutional capacity for enforcing compliance with environmental or labor standards, or that perhaps even lack any adequate protective legal framework, enforcement through private-sector mechanisms takes on the role generally fulfilled by state protection.109 Private actors not only participate in the political process of building capacity for global governance but also create their own regimes outside institutionalized policy fora.110

Each of these new models requires rules that at least appear to be more egalitarian for the actors involved, creating an impression of equality among states.111 The result is a process of

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109 This point will be addressed below.
110 Gunther Teubner, above note 7, at 9.
institutionalizing international economic relations and dispute resolution mechanisms. This process is seen, for example, in the variety of economic tribunals, such as the WTO Dispute Settlement Body, in the strengthening of the World Bank’s International Centre for Settlement of Investment Disputes, and in private arbitration chambers, such as the International Chamber of Commerce in Paris or the London Court of International Arbitration—judicial mechanisms explicitly or implicitly open to private actors.

The institutionalization of trade dispute resolution has the positive effect of reducing the likelihood of retaliatory action by economically stronger states against weaker ones. For example, the cotton case between Brazil and the United States before the WTO worked because it allowed Brazil to threaten retaliatory measures without countermeasures by the United States and contributed effectively to reducing illegal U.S. subsidies.112 Nevertheless, institutionalization with a liberal bias also has negative effects, such as the creation of virtually identical rules that apply to states with drastic disparities in their ability to compete, such as the set of rules guiding the WTO, as well as disparity in states’ ability to defend against claims of violations brought against them in international adjudicative bodies.

Market-oriented actors want to avoid unregulated activities that are capable of destabilizing confidence in their businesses; as a result, in many cases, they end up favoring increased international regulation, whether public or private. “Liberalism, after favoring deregulation and the decoupling of economic space and territorial politics, causes the appearance of new actors marked by stronger ethics and the internationalization of responsibility.”113 Companies’ efforts to self-regulate using standards that are either non-binding or that cannot be cited as sources of law in international arbitration have proven ineffective in creating the stability needed for trade expansion. Codes of good conduct, developed under the auspices of the International Chamber of Commerce (ICC), Organization for Economic Cooperation and Development (OECD), International Labour Organization (ILO), or the UN itself have proliferated and demonstrate limits imposed by companies themselves, while overseen by international organizations. Such limits serve as parameters for what is permitted or tolerated in business activity.114

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112 Symbolic examples occurred in dozens of cases between parties with even greater asymmetry, such as Trinidad and Tobago versus the European Union (then European Communities) on the exportation of bananas. In the order United States. Subsides on upland cotton (WT/DS/267) and European Communities – Regime for the importation, sale and distribution of bananas (WT/DS/27).
113 Mireille Delmas-Marty, above note 52, at 152-153, v. III: La refondation...
114 Olivier de Schutter, above 104.
New models for structures of production are based on diversification in industrial production in factories spread throughout the world. A new information-based model is beginning to be more valued than the traditional Fordist production model. The Fordist model was characterized by large companies’ production structures, with specialized factories, well-defined managerial hierarchy, low-skilled labor and the production of the same parts for use through the world. The information-based model emphasizes a highly skilled workforce and more flexible factories for turning out different products, depending on global distribution and production needs, with greater value added and greater technological knowledge.\textsuperscript{115}

This process has negative aspects as well. Methods for decision making among private actors create obstacles to effective responsibility. In particular, hierarchical or depersonalized control instruments that exclude senior management positions from liability, the ability to create shadow companies without their own assets, and shifting production to countries with low environmental and social standards all increase the risk of major accidents or human rights abuses on a global scale.\textsuperscript{116} This shifting occurs without anyone to hold responsible or provide any meaningful opportunity for recourse. In the most extreme circumstances, in a prevailing scheme of information as goods, the labor market made up of employees and employers is replaced by a market of only goods and services.\textsuperscript{117} As a consequence, regulatory instruments shift from a focus on promoting full employment and employee welfare to promoting a free trade system, which may bring with it economic distortions. Even those organizations in favor of free trade recognize the absence of a direct link between expanding domestic and international trade and the creation of jobs or the reduction of inequality.\textsuperscript{118}

11. Rise of Transnational Civic Actors

\begin{itemize}
  \item \textsuperscript{115} José Eduardo Faria, above note 12, at 78.
  \item \textsuperscript{117} José Eduardo Faria, above note 12, at 78.
  \item \textsuperscript{118} The direct relationship between trade and development is widely studied in terms of trade between developed and developing countries. However, the current situation, characterized by greater diversification of all the major countries’ exports shows that this direct relationship is not always observed. In technologically-intensive structures, with trade between partners of the same level of development, impacts may be different. In this sense, see WTO and ILO, Trade and employment, Challenges for policy research. Geneva: WTO and ILO, 2007.
\end{itemize}
Civic actors\textsuperscript{119} are distinguished from economic actors based on the altruistic interests they pursue, focused on the good of humanity, as an example, rather than meeting private economic interests. In recent years, influential international civic organizations have increased dramatically, both in number and in terms of their role and profile. The number of UN-recognized international non-governmental organizations increased tenfold from 1990 to 2000.\textsuperscript{120} In diverse areas such as humanitarian law, international protection of human rights, and environmental law, non-governmental organizations have played an essential role in carrying forward the process of internationalization of law. As Foucault might say, in analyzing the role of Amnesty International, Terre des Hommes, and Doctors of the World (Médecins du Monde), NGOs are capable of challenging state governments’ monopoly on legislative and judicial authority in the name of universally applicable principles.\textsuperscript{121}

Thus, NGOs play an important role along with the three typical branches of the state: legislative, executive, and judiciary. Still, to suggest that NGOs are more important than states would be an exaggeration. NGOs’ influence on the direction of international law is different from that exercised by the state because states can act directly at all stages of development and implementation of international law. However, NGOs participate in the formation of law, directly or indirectly, by supporting delegations in their travel, chairing conventions,\textsuperscript{122} or providing information in support

\textsuperscript{119} Mireille Delmas-Marty, above note 52, at 27, v. III: La refondation des pouvoirs. Editions du Seuil, 2007. Civic actors, such as NGOs, are characterized thus by the author, given that they seem to foreshadow a global citizenship to be placed above national, and sometimes regional, citizenship, and can contribute to the emergence of a collective will. From the original: “Mais les ONG ont aussi leur propre pouvoir d’action, grâce à des budgets parfois considérables. [...] Ces acteurs « civiques » puisqu’ils préfigurent une citoyenneté mondiale qui se superposerait à la citoyenneté nationale et parfois régionale (européenne notamment) – peuvent ainsi contribuer à l’émergence d’une volonté collective. En l’absence de toute démocratie représentative formelle, on peut voir dans ces mouvements de citoyens l’ébauche d’une démocratie participative, à la condition d’être attentif aux risques de clientélisme et d’instrumentalisation.” We use here the expression non-governmental organization also to describe civic actors, noting that different organizations and authors also use this expression for economic or scientific actors. See especially Marcelo Dias Varella, Le rôle des organisations non-gouvernementales dans le développement du droit international de l’environnement, 132 (jan-mar) Journal du Droit International, 41-76 (2005).

\textsuperscript{120} The number of NGOs recognized by the UN is roughly 3,500 with consultative status before the Economic and Social Council (ECOSOC), which gives access to nearly all of the intergovernmental processes of the United Nations, DPI-ONG, NU, Section des organisations non-gouvernementales, Accessed Mar. 13, 2012.

\textsuperscript{121} In the words of Focault, it is necessary to change actors’ roles. Those who govern do not listen; in general, they only speak, and never stop speaking. In the original: “Amnesty International, Terre des hommes, Médecins du monde sont des initiatives qui ont créé ce droit nouveau: celui des individus privés à intervenir effectivement dans l’ordre des politiques et des stratégies internationales. La volonté des individus doit s’inscrire dans une réalité dont les gouvernements ont voulu se réserver le monopole, ce monopole qu’il faut arracher peu à peu et chaque jour. Michel Foucault, Dits et écrits 708 (1954–1988, IV) (1994).

\textsuperscript{122} Examples include CITES and the Ramsar Convention, for which the International Union for Conservation of Nature housed the Secretariat.
of or against states’ positions. During treaty negotiation, they participate by providing technical support and information to delegations and giving financial support to international organizations.

This process is not new. During the nineteenth and twentieth centuries, the International Red Cross was one of the key actors in the development of humanitarian law, dating to the first treaties on protection for civilian populations and prisoners of war (1949–1977). With the end of the Cold War, more specialized NGOs, some neutral and some not, such as Doctors of the World and Doctors Without Borders (Médecins Sans Frontière), played a key role in breaking down barriers and driving change in terms of the right to interfere in opening up humanitarian channels. In various cases, NGOs may participate as amicus curiae or as protestors against negotiations, as in Seattle and subsequent WTO conferences on intellectual property. NGOs like Oxfam, with 4500 employees, 30,000 volunteers, and more than a million donors, with officers in key cities on the international negotiating stage (Geneva, Brussels, Washington, New York) have the ability to spread information rapidly and mobilize thousands in support of human rights in a matter of days.

Notable also is participation in judicial fora by NGOs like Human Rights Watch and the International Federation of Human Rights. Examples include involvement in the Pinochet case or in the European Court of Human Rights and high courts in various countries, as well as influence in the International Criminal Court, especially regarding victims’ participation in investigations of crimes against humanity.

The actors that participate in these cases have a different profile than those with influence at the domestic level. NGOs internationally take on many different forms. Unions, for example, struggle to exert the same influence internationally that they are capable of domestically. Even among non-union NGOs, two categories of organizations take shape: on one side, those with vast resources, global representation and action, and thousands of supporters (including states), such as the Red Cross, Doctors of the World, International Federation of Human Rights, Greenpeace, WWF, and ATTAC; on the other, small associations with high technical capacity and mobility to produce documents that impact specific points in international negotiations, such as RAFI and GRAIN on environmental issues or CEJIL on human rights.

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124 Marcelo Dias Varella, above note 119, at 45.
125 www.oxfam.org
Large international civic organizations attract thousands of supporters and mobilize important resources. They fund delegations from less-wealthy countries that want to support their positions, such as when WWF funded travel for Indonesia, Tanzania, and Zimbabwe. They may also even fund international organizations to allow negotiations to continue, as in the case of the National Hunters Association support for CITES meetings.\textsuperscript{127} Such organizations even at times co-chair international conventions, as did IUCN for the Ramsar Convention and CITES.\textsuperscript{128} They contribute to the creation of model standards adopted by various countries and produce technical or scientific information to support states’ positions; some organizations even participate by acquiring land in developing countries for the creation of privately held conservation areas. The worldwide importance of the International Committee of the Red Cross is particularly striking. In Brazil, for example, with each disaster caused by floods or mudslides, the Red Cross shows its importance, as it generally is able to organize a response even before the state itself in receiving and distributing donations for victims. The same pattern occurs throughout the world.

Small, specialized organizations, on the other hand, typically have only a small number of high-level employees who specialize in collecting and disseminating information crucial for influencing international negotiations on specific topics. They quickly gain a reputation in their respective areas due to the quality of the material they produce, and can therefore distribute millions of copies of their reports in only a day or two through websites or email lists of people interested. Examples include GRAIN, RAIFI, and various others that work on access to genetic resources and environmental issues.\textsuperscript{129}

Of course, civic actors may still encounter problems involving identification, legitimacy, or independence,\textsuperscript{130} particularly because they may represent specific groups with their own specific or radical interests or because business or governments may use ostensibly independent organizations to legitimize their claims. The international community uses various criteria for recognizing and accepting civic actors—standards that vary according to the international organization or negotiating forum. Some organizations, like the UN, adopt stricter standards, with the result that the accepted groups tend to be a smaller number of international organizations with greater resources. The WTO

\textsuperscript{127} Marie-Laure Lambert-Habib, above note 130, at 225. and Marcelo Dias Varella, above note 126, at 50-51.
\textsuperscript{128} UNEP initially appointed the non-governmental organization IUCN and delegated to it all of the functions of the Secretariat. This was provisionally done for one year but was extended until 1984, when the Permanent Committee questioned the designation, given that not all States were members of IUCN, making it inappropriate for them to submit to the NGO’s control. Marie-Laure Lambert-Habib, above note 130, at 222–223.
\textsuperscript{129} Ver dados do artigo da Clunet. Marcelo Dias Varella, above note 119, at 50.
\textsuperscript{130} Mireille Delmas-Marty, above note 52, at 169
uses more flexible criteria and a wider definition of “non-government organization” that includes everything from business associations to natural persons, albeit with limited practical opportunities for participation. Criteria for legitimacy vary with the organization’s objectives or mode of operation. NGOs that respond to natural or human disasters gain legitimacy from perceptions of the effectiveness of their work; think tanks, according to the quality of the information they provide; lobbying organizations, insofar as they can demonstrate the ability to push states to approve policies—these criteria may be associated with other, more subjective factors, such as the integrity and transparency of the internal decision-making process. In some cases, legitimacy is associated with the level of internal democracy in making decisions.

Civic actors can act in favor of, against, or independently of states in the process of internationalization of law, which is in practice not necessarily tied to the origin of the NGO. On the one hand, it is quite common for members of NGOs to participate in national delegations, especially when the NGO’s specialty is being discussed. Often, NGOs release documents that are adopted as a starting point for negotiations in building, implementing, and monitoring public policy or legal standards at the national and international level; in addition, such documents can be used as part of international organizations’ information sharing, such as the United Nations Centre for Human Rights, where 80% of the information comes from NGOs. The importance of NGOs in this process can be measured by various factors, including the awarding of two Nobel Peace Prizes in 2000 and 2001 to coalitions of NGOs for their action on humanitarian assistance and fighting to ban the use of land mines, respectively.

Against states, NGOs act not only to defend their own positions in international negotiations, but also in the judicial realm, whether at the domestic, regional, or supranational level. Cases brought before the Inter-American Court of Human Rights or the European Court of Human Rights demonstrate well how the actions of NGOs have led to important changes by states. In Brazil, examples of this process include reform of domestic violence law (Maria da Penha Act), the mental institution system, wiretapping laws, and the recent controversy regarding amnesty and illegal deforestation. CEJIL, a private non-profit association, with about 25 employees, helped bring around half of all cases adjudicated in the history of the Inter-American Court—more than 100 cases, as of 2012. CEJIL’s choice of cases, based on a strategic analysis of the subjects not yet dealt

132 J. Laroche, Politique internationale, at 137.
with by the Court, against states in which decisions would have a significant political impact, both
domestically and regionally, has allowed the organization to maximize the results and change it has
affected on the policy structure in many countries.\textsuperscript{133}

However, many international organizations and courts remain closed to participation by
non-state actors. The ICJ’s resistance, for example, is largely due to two frustrated attempts to open
access to the Court in its early days; the move led to an unorthodox pattern in which NGOs provide
petitions and documents to the Court’s library that are later cited in the Court’s decisions. The WTO
was created with its own procedural device that permits \textit{amicus curiae}, such participation is limited,
but has had noticeable effect in certain cases.\textsuperscript{134} At the domestic level, through the institution in
Brazil of the public civil action (\textit{ação civil pública}), for example, true instances of legal guerilla tactics
have been successful, as in the case of legal debate around prohibition of genetically modified
organisms. In many cases, the NGOs that bring public civil actions end up withdrawing from the
suit when it is absorbed by Brazil’s public prosecutors (\textit{Ministério Público}); however, the value of the
NGO in raising the issue cannot be ignored.

Civic actors often use the tactic of acting through networks that rarely involve state laws and
regulations, with little in the way of formal legal ties. One of the first coalitions of civic actors at the
international level—formed against Nestlé—illustrates this point well. In the 1960s, a Chilean
researcher published an article on the increase in mortality for children who
consumed Nestlé’s baby
formula. The health problem occurred due to the formula used, the concentration of production in
Europe, and the methods of transportation to distant countries. A U.S. NGO requested that the
author summarize the article for international publication, leading to the famous pamphlet, “Nestlé
Kills Babies.” In a short time, over 10,000 associations joined a global campaign to boycott the
Swiss company’s products. After several years of struggle, the two sides came to an agreement,
under which Nestlé drastically changed its manufacturing process for baby formula, which
UNESCO approved as a quality standard. In return, the NGO coalition agreed not to attack the
Nestlé brand for ten years, which was fulfilled. It is important to note that the agreement, though it
was signed only by a representative of NGOs that had no formal connection to each other, operated
as though it were legally binding on the parties involved.\textsuperscript{135}

\textsuperscript{133} Interview with Francisco Quintana, CEJIL, on 06.07.2012.
\textsuperscript{134} United States – Import prohibitions of certain shrimp and shrimp products (WT/DS58). Shrimp/Turtle case;
European Communities – measures affecting asbestos and products containing (WT/DS135), among others.
\textsuperscript{135} www.oxfam.org
12. Rise of Transnational Scientific Actors

One distinguishing feature of the scientific community is its ability to organize itself to handle shared problems more quickly than the political community; this ability gives the scientific community important influence over other systems. The scientific community’s ability to trace, almost automatically, causal relationships among events that occurred in the past enables it to exert greater control over such events. Gradually, society ceases to believe in witches and magic and begins to believe more in science, allowing society to shape its own future, or at a minimum, try to influence it based on the knowledge it has already acquired. Thus, the political and legal system’s scope for decision making broadens.136

The scientific system is also guided by its own communicative logic (true/untrue), marked by its own peculiar way of thinking, based on the use and release of results to move the system itself. I call this manner of thinking scientific rationality. The scientific community's method of communication varies according to the branch of science; nonetheless, while social scientists, for example, do not think exactly like disciples of hard sciences, both can find common language and methods that tie them to the scientific community's communicative discourse.137

With the advancement of technology, society can better establish and predict causal relationships between its actions and potential harms. Scientific knowledge becomes a central element in various social systems. The field of law utilizes such knowledge especially in developing legal standards, whether as a justification for or limit on policy choices. In the judiciary, scientific knowledge, contributed by experts, legitimizes and influences decisions. In the executive, it dictates how the state should act in undertaking impact studies, in interpreting legal rules, and in achieving public policies. At the institutional, national, or international level, scientific knowledge enables continuous reproduction of specific elements and operating procedures such that organizations can better position themselves and interact with other organizations.138 This process creates a scenario some others call the “global specialization of governance,” with a closer approximation between knowledge and power. It does not, though, create a fusion of those concepts, given that decision-

138 José Eduardo Faria, above note 12, at 174.
making authority continues in the hands of a political class that is increasingly able to relate to, but is not identified with, the scientific community.139

The spokespersons for scientific rationality are members of the scientific community. Scientific actors managed to establish certain assumptions of legitimacy, which increased scientists’ potential to contribute to the process of internationalization of law. Freedom of scientific research, peer review, and the recognition of limits and the absence of certainty contribute to science’s own logical structure, which is self-legitimizing and imposes itself on the legal world. In some cases, scientists are true global legislators because when they define the safety or insecurity of a particular product or process, they manage to, through legitimate structures at the international and domestic level, prohibit or control those products or processes. There are many examples, such as groups of specialists tied to the World Health Organization (WHO) in the event of pandemics or the standards in the Codex Alimentarius, strengthened by WTO law.140

In many sectors, groups of scientists mobilize to influence policymakers on crafting legal standards so as to avoid international catastrophes. In the area of climate change, for example, the World Meteorological Organization (WMO) organized a research program on climate change in 1979 aimed at analyzing the effects climate change could cause and proposing solutions to the international political community. In 1986, the group gave rise to the Intergovernmental Panel on Climate Change (IPCC), whose reports now serve as the basis for negotiations on the issue, under the auspices of UNEP and the WMO.141 The IPCC even shared a Nobel Peace Prize for its contributions in 2007. In public health, decisions made regarding the level of acceptable risk and measures to be taken to avoid a pandemic of H1N1 influenza in 2009 and 2010 led to changes in behavior across the planet in only a few hours, with a level of effectiveness unmatched by any legal action.

13. Conclusions

A process of globalization of scientists is occurring, with experts organized into international cooperation networks that are high on nearly every country’s list of priorities for research funding. Networked activity, verified through consistent peer review, within a structure specific to science,

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139 Mireille Delmas-Marty, above note 52, at 204
140 The Codex Alimentarius already has more than 3,000 standards for regulating products and production methods. Mireille Delmas-Marty, above note 52, at 213 and Krish, above n. 5, at 216–217.
141 Mireille Delmas-Marty, above note 52, at 196-197, and www.ipcc.ch.
with almost instantaneous access to the world’s scientific research for a large proportion of scientists, enables strong linkages in the scientific world, making it perhaps the most highly integrated of any social group. However, the methods for producing and legitimizing knowledge and power in the world of science are not based on democratic principles; they lack participation. When it comes to global crises such as those due to climate change, biotechnology, and nuclear energy, we need not only global organization but also a democratic expansion in decision making and evaluation, as well as control and regulation of technological advances based on ethical criteria adapted for the global scale. It will be necessary to link experts with other governance networks to ensure that science and other social systems move in the same direction. The idea is not to control or establish “knowledge,” but rather to link powers, desires, and knowledge, placing policy decisions at the intersection of this knowledge, linking not only scientific but also social knowledge (gained through human experience).\footnote{Christine Noiville, \textit{Du bon gouvernement des risques} (2003). Mireille Delmas-Marty, above note 52, at 198-199, v. III: La refondation.}

One problem is the trend toward the disappearance of traditional knowledge—knowledge that does not follow scientific methods for legitimization, but is inherent in the cultural evolution of local peoples. Some international norms, such as UNESCO’s Universal Declaration on Cultural Diversity in 2002 and subsequent convention, provide for the protection of traditional knowledge. However, modern society is clearly moving farther away from the notion of a global multicultural society that respects and values traditional peoples’ knowledge, passing through the information age toward a knowledge society in which the intersection of knowledge (saviors) leads to dialogue among cultures. Instead, we are seeing a quasi-unilateral influence on knowledge that copies traditional economic relations structures without any true cultural exchange. Developing countries and non-European centers (in the case of human rights) become mere consumers of standards and norms without any impact on their global articulation.\footnote{Mark Toufayan, Identity, Effectiveness, and Newness in Transjudicialism’s Coming Age, 31 \textit{Mich. J. Int’l L.} 314.} Mechanisms for “translating” this knowledge are lacking. Paul Ricoeur spoke of the miraculous effect of translation, which creates similarity where only plurality seemed to exist. Forming a transversal, multicultural, knowledge-based society will only be possible if scientific knowledge can incorporate mechanisms for translation of local knowledge and incorporate that knowledge into the values that shape society, rather than letting traditional knowledge become extinct.\footnote{Paul Ricoeur, \textit{Projet universel et multiplicité des héritages}, In: J. Bindé (org). \textit{Où vont les valeurs?} 75–80 (éntretiens du XXI siècle, II), (UNESCO/Albin Michel, 2004) and Mireille Delmas-Marty, above note 52, at 277}
and 250. Ricoeur reminds us that translation has always been an important element in cross-cultural contact. Emissaries were always accompanied by interpreters. The challenge now is to create mechanisms of translation for entire peoples that enter into direct contact. The difficulty lies in the fact that language is a reflection of culture and that it can be difficult, aside even from language, to understand others, based on differences in culture.