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The Architecture of International Cooperation:

Transgovernmental Networks & the Future of International Law

Kal Raustiala*

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I. INTRODUCTION

What form will international cooperation take over the next century? Interdependence among states—the linkages between national economies and societies—has never been higher.[1] Yet the prevailing form of cooperation in the 20th century, known as liberal internationalism, has increasingly come under attack.[2] Based on multilateral treaties, often coupled with international organizations, liberal internationalism has drawn fire from many quarters. Some critics argue that international organizations such as the World Trade

1. Some argue that the pre-1914 era was in fact the high-water mark for economic interdependence. There is significant evidence to the contrary, however, in particular concerning the nature of the current wave of globalization. *See* Miles Kahler & David Lake, *Globalization and Governance*, *in* GLOBALIZING AUTHORITY: ECONOMIC INTEGRATION AND GOVERNANCE 10-14 (Miles Kahler & David Lake eds., forthcoming 2003); *see also* RICHARD BALDWIN & PHILIPPE MARTIN, TWO WAVES OF GLOBALIZATION: SUPERFICIAL SIMILARITIES, FUNDAMENTAL DIFFERENCES (Nat'l Bureau of Econ. Research, Working Paper No. 6904, 1999).

2. The United Nations is the paradigmatic example of liberal internationalism.

Organization threaten national sovereignty and ought to be curtailed.[3] In the streets of Seattle, Washington, and Genoa, critics increasingly condemned these organizations as inaccessible and unaccountable.[4] Other critics claim that the era of liberal internationalism is already ending. Globalization and the rise of non-state actors, they argue, are challenging state power, and with it the traditional statist foundation of liberal internationalism.[5]

One notable response to this debate asserts that liberal internationalism is waning but the state is not declining in power or importance. This view argues that the enduring relevance of the state is, in part, overlooked because much contemporary international cooperation is not inter-*national* at all; rather, it is occurring among discrete, specialized agencies of governments. Modern states are composed of legislatures, executives, agencies, and courts.[6] These constituent parts—especially regulatory agencies tasked with elaborating upon and enforcing the laws that manage complex societies[7]—are increasingly networking with their counterparts abroad.

3. The International Criminal Court is a salient recent example. On the general issues *see* Symposium, *Trends in Global Governance: Do They Threaten American Sovereignty?*, 1 CHI. J. INT'L L. 205 (2000) (proceedings of a conference at the American Enterprise Institute); on the WTO in particular *see* CLAUDE E. BARFIELD, FREE TRADE, SOVEREIGNTY, AND DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION 7-9, 42-45 (2001).

4. Joseph S. Nye, Jr., *Globalization's Democratic Deficit*, FOREIGN AFF., July-Aug. 2001, at 2-3.

5. *See, e.g.*, KENICHI OHMAE, THE END OF THE NATION-STATE (1995); *see also* SUSAN STRANGE, THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY (1996); SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION (1996); Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 COLUM. J. TRANSNAT'L. L. 7 (1997) (disputing the decline of the state and arguing, *inter alia*, that the horizons of international law are simply expanding); Symposium, *The Decline of the Nation State and its Effects on Constitutional and International Economic Law*, 18 CARDOZO L. REV. 903-1128 (1996); *What Future for the State?* 124 DAEDALUS 2 (1995). Some argue that the future is one of new-medievalism, meaning a return to the overlapping sovereignties of that era. *See, e.g.*, Philip G. Cerny, *Globalization and the Changing Logic of Collective Action*, 49 INT'L ORG. 595, 624 (1995) ("[G]overnment per se will essentially become privatized, losing much of its public character. The world will be a neo-feudal one, [with] overlapping and democratically unaccountable private regimes. . ."). The term originated in a classic work of international relations by Hedley Bull. HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 264-81 (1977). *See also* ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY 171-84 (1999); Jessica T. Mathews, *Power Shift*, FOREIGN AFF., Jan.-Feb. 1997, at 50.

6. And increasingly, constitutions to delineate and structure these powers and functions. *See* Bruce Ackerman, *The Rise of World Constitutionalism*, YALE LAW SCHOOL OCCASIONAL PAPERS, 2d Ser., No. 3 (1998).

7. Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.-Oct. 1997, at 183, 189 ("The densest area of transgovernmental activity is among national regulators."); Scott H. Jacobs, *Regulatory Co-operation for an Interdependent World: Issues for Government*, *in*

In the process they are sharing information, ideas, resources, and policies. Much of this agency-to-agency cooperation addresses domestic laws that, in a globalizing world, have growing international salience. As the problems policymakers address have gone global, this argument claims, so have the policymakers.[8]

The chosen vehicle for this new line of cooperation, however, is not the traditional liberal internationalist organization and treaty.[9] Instead, it is the adaptable and decentralized network model. These transgovernmental networks are expanding rapidly, and their growth is especially apparent in regulatory cooperation.[10] They are

REGULATORY CO-OPERATION FOR AN INTERDEPENDENT WORLD 15 (1994) ("Regulation knows fewer and fewer boundaries."); George A. Bermann et al., *Introduction* to TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS (George A. Bermann et al. eds., 2000) ("While national authorities are still the principal actors in the regulatory arena, regulation is increasingly an international affair.").

8. *See* TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY (Mark A. Pollack & Gregory C. Shaffer eds., 2001); Slaughter, *Real New World Order*, *supra* note 7; Anne-Marie Slaughter, *Agencies on the Loose? Holding Government Networks Accountable*, *in* TRANSATLANTIC REGULATORY COOPERATION, *supra* note 7; Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 199 (Gregory H. Fox & Brad R. Roth eds., 2000); David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281 (1998); Renaud Dehousse, *Regulation by Networks in the European Community: The Role of European Agencies*, 4 J. EUR. PUB. POL'Y 246 (1997); Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-liberalism*, 17 NW. J. INT'L L. & BUS. 1014 (1996-97); Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343 (1997); Scott C. Fulton & Lawrence I. Sperling, *The Network of Environmental Enforcement and Compliance Cooperation in North America and the Western Hemisphere*, 30 INT'L LAW. 111 (1996); THOMAS RISSE-KAPPEN, COOPERATION AMONG DEMOCRACIES: THE EUROPEAN INFLUENCE ON U.S. FOREIGN POLICY (1995); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, REGULATORY CO-OPERATION FOR AN INTERDEPENDENT WORLD (1994). Transgovernmental relations were first studied in Robert O. Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 WORLD POL. 39 (1974); *see also* Joseph S. Nye, Jr. & Robert O. Keohane, *Transnational Relations and World Politics: An Introduction*, 25 INT'L ORG. 329 (1971).

Throughout this article I treat transgovernmentalism and liberal internationalism as distinct modes of international cooperation. This view is not without its critics, however. José Alvarez argues that "dichotomous descriptions of the respective worlds of 'traditional' versus 'transgovernmental' forms of law-making oversimplify complex realities." José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183, 245 (2001). I agree that this dichotomy is simple, but believe the simplification is valid and worth employing for its expository and analytic gains.

9. Even within the context of the European Union, the network model has often supplanted more centralized alternatives. S*ee* Dehousse, *supra* note 8, at 254-55.

10. *See, e.g.*, Paul B. Stephan, *Regulatory Cooperation and Competition: The Search for Virtue*, *in* TRANSATLANTIC REGULATORY COOPERATION, *supra* note 7, at 202 ("By almost any standard of measurement, international regulatory cooperation has grown significantly in the last two decades and promises to expand even further."); Kalypso Nicolaïdis, *Regulatory Cooperation*

"transgovernmental" because they involve specialized domestic officials *directly* interacting with each other, often with minimal supervision by foreign ministries. They are "networks" because this cooperation is based on loosely-structured, peer-to-peer ties developed through frequent interaction rather than formal negotiation. Thus defined, the phrase "transgovernmental networks" captures a strikingly wide array of contemporary cooperation. Proponents believe that transgovernmental networks are "the optimal form of organization for the Information Age."[11] As such, networks represent, in Anne-Marie Slaughter's words, "the blueprint for the international architecture of the 21st century."[12]

These claims are decidedly controversial.[13] Some critics argue that there is less to transgovernmental networks than meets the eye: networks may arise only in areas of "low politics," such as antitrust, where broad international ramifications remain weak.[14] Others concede the importance of networks but charge that they reduce transparency and impede political accountability.[15] Because networks are club-like, they may reinforce the dominance of the major economic powers, particularly inequalities between North and South.[16] Critics also fear

and Managed Mutual Recognition: Elements of a Strategic Model, *in* TRANSATLANTIC REGULATORY COOPERATION, *supra* note 7, at 571 ("Regulatory cooperation deserves analytical attention both in its own right and as a forerunner for the effect of interdependence on other policy areas and international governance in general."); *see also* REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES (Daniel C. Esty & Damien Gerardin eds., 2001).

11. Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 204 (Michael Byers ed., 2000).

12. Slaughter, *Real New World Order*, *supra* note 7, at 197.

13. *See, e.g.*, Robert Howse, *Transatlantic Regulatory Cooperation and the Problem of Democracy*, *in* TRANSATLANTIC REGULATORY COOPERATION, *supra* note 7, at 469; Slaughter, *Agencies on the Loose?, supra* note 8, at 521; Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT'L L. 435 (1997); Alvarez, *supra* note 8, at 183.

14. Another critique is that transgovernmental cooperation occurs in the shadow of an implicit veto by legislatures and/or foreign ministries, and hence is not as significant a change as it might seem. This critique is plausible, but hardly fatal for either transgovernmental theory or the arguments of this article. I am not centrally concerned with the claim that networks operate in a radically free manner. Rather, I am interested in exploring where and why networks arise, the nature of their impact of domestic regulation, proposing explanations for that process, and assessing its significance for the future of international cooperation.

15. *See, e.g.*, Howse, *supra* note 13; Alston, *supra* note 13; Alvarez, *supra* note 8; Picciotto, *supra* note 8. For a partial response *see* Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347 (2001) (distinguishing between national and global accountability and between different types of transgovernmental networks).

16. As Stephen Toope argues, "[n]etworks. . .are sites of power, and potentially of exclusion and inequality." Stephen Toope, *Emerging Patterns of Governance and International Law*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS 96-97 (Michael Byers ed., 2000). Similarly,

that networks present the political right with a useful but ultimately dangerous substitute for traditional multilateralism.[17] While these critiques have surface plausibility (and suggest that the rise of transgovernmental networks has a dark side) our understanding of transgovernmentalism is thin. Hence our ability to assess its deeper significance—in particular to assess whether it is truly the "international architecture of the 21st century"—remains limited. Consequently, understanding the dynamics of transgovernmentalism is a crucial task.

This article assesses the future of international cooperation by examining transgovernmental networks and evaluating their relationship to liberal internationalism. My central claim is that transgovernmental cooperation is a significant development in international law, but it is likely to bolster liberal internationalism as much—or more—than it will undermine or displace it. Thus, rather than competitive architectures of cooperation, the two are often synergistic. (For simplicity I sometimes refer to the two as *networks* and *treaties*). Under some conditions networks should make treaties work better. Under other conditions networks perform a gap-filling role: where treaties are politically or economically precluded, networks provide an alternative mode of cooperation. In still other situations networks may smooth the negotiation of treaties.[18] Liberal internationalism, in turn, can provide a focal point and setting for transgovernmentalism. The relationship is complex, but the most plausible prediction is that transgovernmentalism will supplement, rather than supplant, the traditional tools of international law.

My claim of synergy builds on several subsidiary arguments. First, an empirical examination of three networks—securities, competition (antitrust), and environmental regulation—demonstrates that networks

David Kennedy has questioned whether exploring the "disaggregation of the state and the empowerment of diverse actors in an international 'civil society' without asking who will win and who will lose by such an arrangement" is prudent. David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 412 (2000). A more general critique of recent liberal theories of international law, including transgovernmentalism, can be found in Martti Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law and International Relations*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS, *supra* note 11, at 29-34.

17. In comments at a Yale Law School forum, Slaughter noted that her work on networks had received significant attention from the right. Anne-Marie Slaughter, Comments Before the Public International Law Panel, Yale/Stanford Junior Faculty Forum (May 31, 2002); *see also* the argument in Alston, *supra* note 13.

18. For example, in competition policy. S*ee, e.g.*, Andrew T. Guzman, *Is International Antitrust Possible?* 73 N.Y.U. L. REV. 1501, 1504 (1998) ("The incentives facing individual countries make it extremely difficult–perhaps impossible–to negotiate substantive international antitrust agreements."). *See also* Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 INT'L ORG. 589 (2001).

are an active and growing part of contemporary cooperation. Second, I argue three chief factors are driving the evolution of regulatory networks: the expansion of domestic regulation, increased economic interdependence, and technological innovation. Third, while enforcement has been a key driver of transgovernmental cooperation, the cases suggest that networks promote what I term "regulatory export": the export of regulatory rules and practices from major powers to weaker states. While it is important not to overstate the case, this process promotes policy convergence among states.[19] I offer a theory of this process of convergence that builds upon the special qualities of networks and especially the role of what economists term "network effects."[20] Fourth, and most importantly, the cooperation that networks permit and the regulatory convergence that they facilitate, while significant in their own right, have important implications for liberal internationalism. In particular, by building bureaucratic capacity, networks can improve domestic regulation and thereby enhance treaty compliance and effectiveness. Put differently, there are good reasons to believe networks will, under some conditions, make *treaties* more effective by making *governments* more effective.

Together, these related claims lead me to predict that, far from a threat, transgovernmentalism will largely prove a positive force for liberal internationalism. In so arguing, I do not mean to imply that the rise of networks is normatively attractive on balance. That evaluation is one that requires extensive attention to factors that fall outside the scope of this article, such as the transparency and accountability of networks, the substantive law at issue, and even the value of international cooperation itself. Nonetheless, supporters of liberal internationalism—which are legion—should not reflexively reject transgovernmentalism as a dangerous and unwelcome development. The era of the international treaty is not ending; in fact, if the arguments in this article

19. There is a significant debate about the degree of policy convergence generally in the global economy. *See, e.g.*, Beth Simmons & Zachary Elkins, *Globalization and Policy Diffusion: Explaining Three Decades of Liberalization* (paper prepared for the Conference on Globalization and Governance, La Jolla, California, March 2001); REGULATORY COMPETITION AND ECONOMIC INTEGRATION, *supra* note 10; PAUL N. DOREMUS ET AL., THE MYTH OF THE GLOBAL CORPORATION (1998); Geoffrey Garrett, *Global Markets and National Politics: Collision Course or Virtuous Circle?*, 52 INT'L ORG. 787 (1998); NATIONAL DIVERSITY AND GLOBAL CAPITALISM (Suzanne Berger & Ronald Dore eds., 1996). I do not engage this vast literature directly; rather, I note points of tangency where relevant but focus on the role of networks in promoting some degree of convergence and the specific efforts of U.S. and other agencies at regulatory export.

20. Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479 (1998).

prove correct, treaties and international organizations may become more important—in the sense effectiveness—than ever before.

The article is organized as follows. Part II details the history and theory of transgovernmental cooperation and analyzes the rise of networks in contemporary cooperation. I identify three chief factors behind the recent rise of networks, but note that networks have a longer history—both in practice and in scholarship—than is sometimes supposed. Part III explores three examples—competition, securities, and environmental law—focusing on U.S. agency involvement. These cases support the basic premises of transgovernmentalism: networks are active and significant in at least three key areas. The cases also present three "distributions of regulatory power." By regulatory power I mean the power to achieve desired regulatory ends. In securities law regulatory power is highly concentrated; in competition law, power is moderately concentrated; and in environmental law, power is widely diffused. The key point is that the presence of liberal internationalism varies under different distributions of regulatory power. When power is highly asymmetric, liberal internationalism is shunned; when it is highly diffuse, it flourishes. As a result, the role of networks varies. Nonetheless, networks are present across the spectrum of regulatory power, and in all three cases, transgovernmental cooperation is deepening.

Part IV considers regulatory convergence in more detail. In each case, powerful states are using networks to export their preferred regulatory models. The U.S. Securities and Exchange Commission (SEC), for example, believes it can better control the effects of globalization, and benefit U.S. firms and investors, if the rest of the world's securities regulators resemble the SEC.[21] While efforts at legal export are not novel,[22] networks foster a process that—because it promotes uniformity without centralization—has significant implications for world politics. I argue further that regulatory networks exhibit some degree of "network effects" as these are understood in

21. *See* Practicing Law Institute, International Developments: The SEC Speaks in 1998, 1037 PLI/Corp 149 (1998), at 11 [hereinafter The SEC Speaks in 1998]; Paul G. Mahoney, *Securities Regulation By Enforcement: An International Perspective*, 7 YALE J. ON REG. 305, 320 (1990); James A. Kehoe, *Exporting Insider Trading Laws: The Enforcement of U.S. Insider Trading Laws Internationally*, 9 EMORY INT'L L. REV. 345, 351-52 (1995).

22. Jacques deLisle, *Lex Americana? United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179 (1999); GETTING GOOD GOVERNMENT: CAPACITY BUILDING IN THE PUBLIC SECTORS OF DEVELOPING COUNTRIES (Merilee S. Grindle ed., 1997); David M. Trubek & Mark Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1975).

contemporary economic theory.[23] These effects create incentives to harmonize and to promote capacity building abroad. The evidence to date is preliminary, but largely consistent with this logic.

Part V brings the foregoing together by examining the broader implications of networks for liberal internationalism. Leading theories of compliance, for example, imply that by building domestic capacity networks will improve treaty implementation and thus compliance.[24] All else being equal, this should make treaties more effective. I explore a number of other plausible interactions between networks and treaties. On balance, I conclude that the rise of networks should improve liberal internationalism as a tool of global governance.[25]

My analysis in this article is broad in scope and, by necessity, often speculative. While the phenomenon is not wholly new, the scholarly literature on transgovernmentalism is in its infancy.[26] This article seeks to inform the emerging dialogue on networks, to link it to the broader study of international law, and to generate hypotheses for future research. A word on methodology: the three cases described in this

23. *E.g.*, Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424 (1985); Lemley & McGowan, *Legal Implications of Network Economic Effects*, *supra* note 20. A network effect exists when "the utility that a user derives from consumption of the good increases with the number of other agents consuming the good." Katz & Shapiro, *supra*.

24. *See, e.g.*, THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE (David G. Victor, Kal Raustiala & Eugene B. Skolnikoff eds., 1998) [hereinafter INTERNATIONAL ENVIRONMENTAL COMMITMENTS]. The relationship between compliance and implementation is also not straightforward; *see generally* Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387 (2000). But generally speaking implementation is a critical step toward compliance.

25. Improve in the sense of change state behavior more effectively. Normatively, this is not clearly advantageous, to the degree that treaties are collusive or to the degree that networks decrease equity, access, and transparency in international cooperation. *See, e.g.*, Enrico Colombatto & Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925, 952 (1996); Howse, *supra* note 13; Alston, *supra* note 13.

26. The topic is increasingly addressed in the public policy literature, less so in the legal literature. Contributors to TRANSATLANTIC REGULATORY COOPERATION, *supra* note 7, address networks in many chapters but do not focus explicitly on transgovernmental theory. A search of the Westlaw journals and law reviews database on August 20, 2001 produced two articles containing the phrase "transgovernmental regulatory networks," (one by me), and nine articles containing the phrase "transgovernmental networks." The vast majority in all three categories mention the concept only in passing and/or merely cite Slaughter, *Real New World Order*, *supra* note 9. The same search, run almost one year later as this article was going to press, indicated 19 articles with the phrase "transgovernmental networks" and three with the phrase "transgovernmental regulatory networks." While there is still relatively little original research on the topic (compared to critique or reference), clearly the issue is starting to catch the attention of the international law community.

article are neither randomly selected nor are they "least-likely cases" for networks to be active.[27] Rather, they represent regulatory arenas with significant global dimensions, which vary in important ways, and in which networks are established and U.S. agencies are active. This case selection is useful for describing a novel phenomenon, but problematic for causal inference. As a result, I cannot make robust claims about variation in the development of networks, the depth of policy convergence, or the influence of networks on liberal internationalism.[28] However, I can and do use these cases descriptively (to chart transgovernmental cooperation), to probe the plausibility of various causal explanations, and to speculate deductively about networks' larger impact on international law and organization.

II. TRANSGOVERNMENTALISM & INTERNATIONAL COOPERATION

Transgovernmentalism offers a distinctive approach to international cooperation, keyed to the empirical and theoretical context of the 21st century. Grounded in the twin hallmarks[29] of our era—"globalization" and "the information revolution"—it asserts the resilience of the state in the face of rapid international change. Building on liberal theories of international relations, that focus on the domestic politics and institutions of states, transgovernmentalists contend that, despite many claims to the contrary, the state is not disappearing as the major force in the international system.[30] The state is instead *disaggregating* for purposes of cooperation: domestic officials are reaching out to their foreign counterparts regularly and directly through networks, rather than through state-to-state negotiation of the kind that dominated 20th century cooperation. This notion of "disaggregated sovereignty" is at

27. *See* GARY KING ET AL., DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 209-10 (1994). For a case study of an issue in which networks have only minimally developed, *see* Marney L. Cheek, *The Limits of Informal Regulatory Cooperation in International Affairs: A Review of the Global Intellectual Property Regime*, 33 GEO. WASH. INT'L L. REV. 277 (2001).

28. *See* KING ET AL., *supra* note 27, at 216; Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002). Testing the hypotheses I advance will require new cases and new data.

29. "Buzzwords" may be more apt.

30. Liberal theory in international relations has three core assumptions: the primacy of individuals and private groups as actors, the notion that states represent some subset of these actors, and the notion that the configuration of the resulting state preferences shapes behavior. *See* Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995). Slaughter in particular builds on liberal theory in her work on transgovernmentalism.

the center of transgovernmental theory.[31]

Unbundling the state—and reconnecting the constituent parts across national borders—creates a conceptual reconfiguration of state power that, while markedly new, retains the state as the pivotal actor of the international system. There are two key points in this line of argument: First, the state remains the primary site of power and law in the international system, though it exercises this power in a disaggregated manner. Second, networks, not treaties and international organizations, will be the primary vehicle for international cooperation in the future. In this section, I elaborate on these arguments, explaining first why networks are increasingly common today and then detailing the theoretical claims of transgovernmentalists.

A. The Rise of Networks

By all accounts transgovernmental cooperation has expanded enormously in recent years. Yet it is not a new phenomenon.[32] The 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, for example, mandated the creation of new national agencies to coordinate international efforts at drug control.[33] Such communications were to be carried out directly between these agencies rather than

31. Slaughter, *Real New World Order, supra* note 7, at 184 ("The state is not disappearing, it is disaggregating into its separate, functionally-distinct parts."); *see also* the seminal works of Robert Keohane & Joseph Nye, *Transnational Relations and World Politics*, *supra* note 8, and *Transgovernmental Relations and International Organizations*, *supra* note 8. The complexity of the state, and the concomitant need to reject or modify the "states as billiard balls" approach of much international relations scholarship, has been noted for a long time. Graham Allison's influential work, for example, attacked that view from the inside in *Conceptual Models and the Cuban Missile Crisis*, 63 AM. POL. SCI. REV. (1970), while Keohane and Nye looked at the international dimension more closely in *Transgovernmental Relations and International Organizations*, *supra* note 8. As Pollack and Shaffer note:

> transgovernmental relations were the subject of intense interest for a brief period in the 1970s, when scholars began to challenge the unitary state model of international relations, and they returned to the scholarly agenda in the 1990s as a possible model for a "real new world order" of governance by transgovernmental networks of government experts.

Mark A. Pollack & Gregory C. Shaffer, *Transatlantic Governance in Historical and Theoretical Perspective*, *in* TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY, *supra* note 8, at 5.

32. Nor is it new to scholarship; *see* Allison, *supra* note 31; Keohane & Nye, *supra* note 31. Even in 1978, Peter Gourevitch could write, in assessing the state of the international relations literature of the time: "much is made of interdependence, permeability, transnational actors, and the decline of sovereignty. While it is certain that the present is not identical to the past, this claim for newness is overstated." Peter Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 INT'L ORG. 881, 882 (1978).

33. Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs, June 26, 1936, 198 L.N.T.S. 4648; *see also* S.K. CHATTERJEE, LEGAL ASPECTS OF INTERNATIONAL DRUG CONTROL 168-85 (1981).

through normal diplomatic channels. The 1936 Convention thus attempted to create a network for drug control. While this is a notable early example—and unusual in its explicit fostering of a network by a treaty—more limited networks likely have existed throughout history. For example, U.S. antitrust regulators have long promoted U.S.-style laws abroad through peer-to-peer contacts that are broadly network-like. As Brian Portnoy describes, "a network of American antitrust regulators and their allies in foreign countries developed after [World War II]. Djelic (1998) labels them 'missionaries' and 'modernizers' respectively. They formed, collectively, a principled transnational network geared toward restructuring various national economies."[34]

While antitrust may have been the leading edge, it seems reasonable to assume that throughout the 20th century officials in other policy areas saw advantages to maintaining regular contact with one another. Undoubtedly, technology was a major limiting factor. Reliance on mail, telegraph, ship, and train travel placed severe bounds on long-distance communication in the pre-World War II period. The rise of the telephone, the jet, the fax and now email and the Internet has progressively made long-distance communication, and thus networks, far easier and (all else being equal) more prevalent.[35] Indeed, in every interview with U.S. regulators advances in information technologies were highlighted as a central permissive cause of the contemporary network phenomenon. Technological advances provide the means for networks to develop with greater frequency and at lower cost.

Technological innovation is thus one major factor behind the rise of networks. A second is the rise of the regulatory state. In the New Deal and immediate postwar eras, domestic regulatory law expanded markedly in the U.S. and across the globe.[36] To a surprising degree,

34. Brian Portnoy, Constructing Competition: Antitrust and the Political Foundations of Global Capitalism at 64 (2000) (unpublished Ph.D. dissertation, University of Chicago) (citing MARIE-LAURE DJELIC, EXPORTING THE AMERICAN MODEL: THE POSTWAR TRANSFORMATION OF EUROPEAN BUSINESS (1998)).

35. Good data on the prevalence of networks is unavailable. But there is little evidence of networks in the pre-World War II era, and anecdotal data indicates that network activity has grown in the last decade.

36. On the early development of the regulatory state in the U.S., *see* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1982); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986); *see also* THOMAS K. MCCRAW, PROPHETS OF REGULATION 61 (1984). *But see* GABRIEL KOLKO, RAILROADS AND REGULATION, 1877-1916 33 (1965) ("The common impression that the Supreme Court's *Wabash Ry. v. Illinois* decision was responsible for action is largely incorrect, since that decision was handed down on October 25, 1886, and by that time both the Senate and House wanted legislation and were determined to have it."). The history of U.S. regulation is presented via biography in MCCRAW, *supra* (presenting biographies of

modern states look functionally similar—something sociologists have termed "structural isomorphism."[37] The similar nature of state organization means that regulators in State A usually have a functional counterpart in State B, often in an identically named ministry or agency. Nonetheless, diverse states naturally have regulated their societies and economies in different ways.

The third factor, globalization (or economic interdependence), has now brought many of these substantive differences to the forefront of world politics.[38] Economic interdependence in the postwar period, coupled with the "compromise of embedded liberalism"[39] that marked the Bretton Woods Accords, compelled states to engage in ever-increasing cooperation as they regulated their economies. Globalization, a hallmark of the current era, can be understood for the purposes of this article as an extension or intensification of economic interdependence.[40]

Adams, Brandeis, Landis, and Kahn).

The New Deal and World War II introduced a marked acceleration of the creation of the regulatory state. *See* Rabin, *supra*, at 1252-53 ("In historical perspective, the New Deal appears as a distinct break from the past. . .even the more traditional regulatory aspects of the New Deal conceived of government activity as a permanent bulwark against deep-rooted structural shortcomings in the market economy."). Charles Schultze describes the development of the regulatory state as follows:

> Even as late as the middle 1950s the federal government had a major regulatory responsibility in only four areas: antitrust, financial institutions, transportation, and communications. In 1976, eighty-three federal agencies were engaged in regulating some aspect of private activity. Thirty-four of those had been created since 1960 and all but eighteen since 1930.

CHARLES SCHULTZE, THE PUBLIC USE OF PRIVATE INTEREST 8 (1977).

Another fertile period occurred beginning in the 1960s. *See infra* note 46. These "rights revolution" era agencies—with the exception of the EPA—tend to be involved in transgovernmentalism to a far lesser degree than their New Deal era counterparts.

Internationally, the signal political achievement of the aftermath of World War II was what John Gerard Ruggie famously termed the "compromise of embedded liberalism." Modern western democracies sought international economic liberalism yet domestic economic stability achieved through the regulatory state. Liberalism was thus embedded in a structure of domestic interventionism and the welfare administration; regulation—both domestic and international—was central to the quest of avoiding the destructive unchecked liberalism of the 1930s. John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, *in* INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983).

37. John Meyer et al., *World Society and the Nation-state*, 103 AM. J. SOC. 144 (1997). These authors take the view that nation-states are more or less exogenously-constructed entities: "the many individuals both inside and outside the state who engage in state formation and policy formulation are enactors of scripts rather more than they are self-directed actors." *Id*. at 150.

38. Indeed, an earlier incarnation of transgovernmental theory was developed by Keohane and Nye, who also pioneered the study of interdependence in modern international relations theory. Keohane & Nye, *Transgovernmental Relations and International Organizations*, *supra* note 8.

39. Ruggie, *supra* note 36.

40. Keohane and Nye define it is as networks of interdependence that span intercontinental

Globalization remains an amorphous concept, but it captures important aspects of contemporary life: the world is growing smaller and more connected, and older forms of demarcation—such as territorial boundaries—appear to have diminished in importance.[41] As globalization has accelerated, it has increased the incentives for domestic regulators to extend their reach abroad. For example, in the competition context "[r]eductions in tariff barriers and the evolution of genuinely global markets in many industries have helped create the conditions for the apparent increase in international cartel activity to its highest level in decades."[42] Transgovernmental regulatory cooperation is one reaction to this evolution. The discovery of novel shared problems, such as money laundering, has further expanded the gains from such cooperation.

The confluence of a globalized world economy and diverse national regulations prompts cooperation, both through liberal internationalism and through networks. For example, efforts to negotiate a multilateral antitrust treaty to iron out regulatory differences are numerous but, to date, unsuccessful.[43] The beef hormones dispute between the EU and the U.S. is another salient example.[44] The trade implications of regulatory diversity push states to harmonize or mutually recognize differing standards.[45] Networks, as I will describe further, provide another, more

distances. Robert O. Keohane & Joseph S. Nye, Jr., *Globalization: What's New? What's Not? (And So What?)* 118 FOREIGN POL'Y 104, 105 (2000). *See also* THOMAS FRIEDMAN, THE LEXUS AND THE OLIVE TREE 7 (1999) (defining globalization as "the inexorable integration of markets, nation-states and technologies to a degree never witnessed before…."). Michael Zürn argues that the two are fairly distinct:

> [T]he notion of globalization differs from that of interdependent in that it refers to qualitatively different conditions. Whereas the notion of interdependence refers to a growing sensitivity and vulnerability between separate units, globalization refers to the merging of units. . .nevertheless, the causal mechanisms mentioned in connection with the driving forces and the ongoing change in world politics are quite similar in both fields.

Michael Zürn, *From Interdependence to Globalization*, *in* THE HANDBOOK OF INTERNATIONAL RELATIONS 235 (Walter Carlsnaes et al. eds., 2002). Several alternative views can be found in THE GLOBALIZATION READER (Frank Lechner & John Boli eds., 2000).

41. *See generally* Kahler & Lake, *supra* note 1; Geoffrey Garrett, *Global Markets and National Politics*, *in* EXPLORATION AND CONTESTATION IN THE STUDY OF WORLD POLITICS (Peter J. Katzenstein et al. eds., 1999).

42. Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, AM. J. INT'L L. 479 (2000).

43. *See generally* Guzman, *supra* note 18.

44. WTO Appellate Body Report, *EC Measures Concerning Meat and Meat Hormones*, AB-1997-4 (Jan. 16, 1998). For a general discussion *see* Jeffery Atik, *Science and International Regulatory Convergence*, 17 NW. J. INT'L L. & BUS. 736 (1996-97).

45. *See, e.g.*, Giandomenico Majone, *Regulation in Comparative Perspective*, 1 J. COMP. POL'Y ANALYSIS 309 (1999); Kalypso Nicolaodis, *Mutual Recognition of Regulatory Regimes:*

subtle means to pursue harmonization.

At the same time, some areas of domestic regulation create few international frictions and only minimal externalities. They therefore provide little incentive for either treaty negotiations or the development of regulator networks. For example, with the exception of national environmental agencies, which were largely formed in the early 1970s around the globe, there is little transgovernmental cooperation among the regulatory agencies created in the second great wave of regulatory activity, sometimes called (at least in the U.S.) the "rights revolution" era agencies.[46] These agencies include the Equal Employment Opportunity Commission (EEOC) and the Occupational Health and Safety Administration (OSHA).[47] One distinction between the "rights revolution" agencies and their New Deal counterparts is that the former mainly regulate persons, domestic workplaces, and the like, which create fewer incentives for international cooperation. (One facet of contemporary globalization is that the "borderless world" is not so borderless when it comes to persons and migration.)[48] Whatever the reason, networks, for the moment at least, have a decidedly economic and environmental, rather than social, regulatory character.[49]

In short, three core factors—technological innovation, the expansion of domestic regulation, and the rise of globalization—have promoted the development of networks. These factors have surprisingly long histories, however. Indeed, the transnationalism/"sovereignty at bay" debates of the 1970s presaged much of the current debate over

Some Lessons and Prospects (Jean Monnet Working Paper No. 7/97, 1997), *at* http://www.jeanmonnetprogram.org/papers/97/97-07.html (last visited Oct. 5, 2002).

46. *See, e.g.*, CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 24 (1990) ("The most notable set of initiatives since the New Deal period occurred during the 1960s and 1970s. This period marked a revolution in the category of legally protected rights—a revolution that build on and materially expanded the New Deal"); *see also* PETER L. STRAUSS ET AL., ADMINISTRATIVE LAW 464 (9th ed. 1995) ("The Environmental Protection Agency, the Occupational Safety and Health Administration, the Consumer Product Safety Commission, and the Equal Employment Opportunity Commission all date from the 1960s-70s, a period of regulatory blossoming that rivaled the New Deal.").

47. For example, there is a small department of two people in OSHA that handles international visitors and gives presentations at their request, but there are no memoranda of understanding or other agreements between OSHA and its international counterparts. OSHA does cooperate with the European Union, and in November 2000 held its second joint conference on Critical Issues in Occupational Health.

48. *See, e.g.*, SASSEN, *supra* note 5.

49. As Pollack and Shaffer note in the transatlantic context, the "new world order of governance by [networks] is limited to specific issue-areas…." Mark A. Pollack & Gregory C. Shaffer, *Who Governs?*, *in* TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY, *supra* note 8, at 298.

networks.[50] But each factor appears to be intensifying in the 21st century, creating greater incentives for regulators to cooperate with their peers.

The development of networks, however, is not evenly distributed, either in geographic or issue-area terms—just as globalization itself is not evenly distributed.[51] Networks are most apparent among regulatory officials, though they can also be found among judges and legislators.[52] Networks are concentrated among the wealthier, more industrialized states that possess complex administrative states. The development of networks across policy areas especially varies due to differing functional imperatives. Indeed, as I contend in detail in Part IV of this article, the choice to pursue liberal internationalist or transgovernmental cooperation can be best understood by considering the varying incentives states face. The incentives for state officials to embrace liberal internationalism are often weak for three often-related reasons: because substantive regulatory differences are large; because regulators do not want to compromise their own domestic systems; and because regulatory power is highly asymmetric. In these situations networks are particularly likely to be active. In other situations, where the incentives to pursue liberal internationalism are strong, networks may be less active but play a different, though perhaps more important, role. Before considering these issues in detail, I first describe transgovernmental theory, contrast it with its theoretical competitors, and then, in Part III, provide a detailed empirical look at networks in action.[53]

50. Yet another analogous line of work looks at the impact on international cooperation of communities of experts who share positive and normative notions about a particular issue-area. These "epistemic communities" are not, however, solely or even mostly composed of government officials; rather, they typically comprise scientific experts drawn from academia, think tanks, and NGOs who, when able to gain access to policymaking positions, influence policy in line with their expert consensus. *See* in particular the works of Peter Haas. PETER M. HAAS, SAVING THE MEDITERRANEAN (1990); *Special Issue: Knowledge, Power, and International Policy Coordination*, *in* 46 INT'L ORG. 1 (Peter M. Haas ed., 1992).

51. Kahler & Lake, *supra* note 1, at 11 ("Globalization remains uneven across markets for capital, goods, and labor; across economic sectors; and across regions.").

52. Slaughter, *Real New World Order*, *supra* note 7.

53. Slaughter distinguishes between three kinds of networks: networks of national regulators that develop within existing international organizations; networks that develop within the context of a negotiated treaty; and networks that develop outside any formal framework. *See* Slaughter, *Accountability of Government Networks*, *supra* note 15. As she acknowledges, these three types are interlinked in many ways. For the most part I do not distinguish among them because for my purposes the distinctions are not particularly germane. However, in some contexts they matter: as I note below, the impact of the network of environmental regulators (both within and without North America) has a different impact than that of securities regulators because there are many international environmental treaties and there are not many international securities treaties. I also note that the North American environmental network is in many ways supported by and spurred

B. The Theory of Transgovernmental Networks

1. Liberal Internationalism and Its Discontents

It is undisputed that the dominant contemporary paradigm for international cooperation is liberal internationalism. The postwar story of cooperation is one of an ever-increasing number of international institutions, constituted by a legally binding treaty, with expanding powers of governance.[54] The paradigmatic case is the United Nations system: an international organization, constituted by treaty, which, in turn, has generated many other organizations and treaties. While still robust, liberal internationalism is increasingly facing challenges. The deepest may be the persistent unwillingness of states to yield further power.[55] The most recent is the growing clamor against unaccountable and undemocratic international bureaucrats. The slow pace, formal procedures, and high bargaining costs of multilateral institutions—compounded by the dramatic increase in the number of states in recent decades—also may discourage the negotiation of new treaties and institutions, though the evidence of this is mixed.[56]

To some observers, liberal internationalism is cumbersome, inflexible, and incapable of rising to the new challenges on the global agenda. Accordingly, it will fade in importance.[57] To other observers the continued growth of liberal internationalism is a more likely scenario: more multilateral organizations playing ever-greater roles in global governance.[58] To still others, the combined effects of rapid innovation in

by NAFTA.

54. *See* Zürn, *supra* note 40, at 241. The enduring strength of the liberal internationalist program is reflected, for example, in calls for the creation of a new World Environment Organization, modeled on the World Trade Organization. *See, e.g.*, Frank Biermann, *The Emerging Debate on the Need for a World Environment Organization: A Commentary*, 1 GLOBAL ENVTL. POL. 45 (2001); Steve Charnovitz, *A World Environment Organization*, 27 COLUM. J. ENVTL. L. 323 (2002).

55. Picciotto, *supra* note 8; Slaughter, *Real New World Order*, *supra* note 7.

56. Liberal internationalist institutions such as the WTO continue to be formed and continue to grow in many cases.

57. Slaughter, *Real New World Order*, *supra* note 7, at 183.

58. Anthony Clark Arend describes the possible development of the international system as follows:

> While there are undoubtedly an infinite variety of ways in which the international system could move over the next half century or so, I will limit the discussion here to two plausible scenarios. First, it is conceivable that as time passes there may be greater centralization of the system. Global multilateral organizations—the United Nations in particular—may come to play a much greater role in international politics and the creation of legal rules. Second, with the rise of a variety of nonstate actors, the international system could become what Hedley Bull has called a "new-medieval" system….

information technology and deepening processes of globalization will empower individuals, connect societies, and blur territoriality,[59] causing a "power-shift"[60] that will generate a more pre-Westphalian political order.[61] This latter view echoes more commonplace claims that national borders are being erased, the state is fading in importance, and power and allegiance are shifting to non-governmental organizations (NGOs) and supranational institutions.[62] Champions of transgovernmentalism

AREND, *supra* note 5, at 166.

59. On the importance and history of territoriality for the concept of international sovereignty *see* John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139, 151 (1993) (" . . .the distinctive feature of the modern system of rule is that it has differentiated its subject collectivity into territorially defined, fixed, and mutually exclusive enclaves of legitimate dominion. As such, it appears to be unique in human history"); *see also* John Agnew, *The Territorial Trap: The Geographical Assumptions of International Relations Theory*, 1 REV. INT'L POL. ECON. 53 (1994).

60. Mathews, *supra* note 5.

61. *Id*.; AREND, *supra* note 5. *But see* Robert O. Keohane & Joseph S. Nye, Jr., *Power and Interdependence in the Information Age*, FOREIGN AFF. Sept.-Oct. 1998, at 81-82. This view is sometimes called "new-medievalism." Like most strains of international theory, neo-medievalism is not wholly new. The Arend quotation, *supra* note 58, alludes to the late Hedley Bull who prophetically asked over two decades ago (and well before the rise of the Internet as a social phenomenon), "[i]s there any evidence that the states system may be giving place to a secular reincarnation of the system of overlapping or segmented authority that characterized mediaeval Christendom?" BULL, *supra* note 5, at 264.

62. Mathews assumes a zero-sum view of power: power gained by non-state actors is power lost by states. Yet many of the issues she identifies are fundamentally new (*e.g.*, global environmental management). As a result power may be expended on an expanding pie of regulatory opportunity, and thus power gained by NGOs does not translate into power "lost" by states. *See* Kal Raustiala, *States, NGOs, and International Environmental Institutions*, 41 INT'L STUD. Q. 719 (1997); Thomas Risse-Kappen, *Structures of Governance and Transnational Relations: What Have We Learned?*, *in* BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS 280 (Thomas Risse-Kappen ed., 1995); Janice E. Thomson & Stephen D. Krasner, *Global Transactions and the Consolidation of Sovereignty*, *in* GLOBAL CHANGES AND THEORETICAL CHALLENGES 195 (Ernst-Otto Czempiel & James N. Roseneau eds., 1990); M.J. Peterson, *Transnational Activity, International Society, and World Politics*, 21 MILLENNIUM 371 (1992).

On the role of non-state actors in contemporary international law and politics *see generally* P.J. Simmons, *Learning to Live with NGOs*, 87 FOREIGN POL'Y 82 (1998); Stephen J. Kobrin, *The MAI and the Clash of Globalizations*, 87 FOREIGN POL'Y 97 (1998); Kal Raustiala, *The "Participatory Revolution" in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537 (1997); NGOS, THE UN, AND GLOBAL GOVERNANCE (Thomas Weiss & Leon Gordenker eds., 1996); Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996); Philip G. Cerny, *Globalization and the Changing Logic of Collection Action*, 49 INT'L ORG. 595 (1995); Paul Wapner, *Politics Beyond the State: Environmental Activism and World Civic Politics*, 47 WORLD POL. 311 (1995); Peter J. Spiro, *New Global Communities: Nongovernmental Organizations in International Decision-making Institutions*, 18 WASH. Q. 45 (1994); Lester M. Salamon, *The Rise of the Non-profit Sector*, FOREIGN AFF., July-Aug. 1994, at 109; Benedict Kingsbury, *Whose International Law? Sovereignty and Non-state Groups*, 88 AM. SOC'Y INT'L L. PROC. 1 (1994); HENRY J. STEINER, DIVERSE PARTNERS: NON-GOVERNMENTAL ORGANIZATIONS IN THE HUMAN RIGHTS MOVEMENT

agree that the information revolution and globalization are changing world politics and international law.[63] But they believe the state is resilient and will remain the centerpiece of the international system. The state increasingly exercises its power, however, in a disaggregated, flexible fashion that echoes the complexity of the world around it. Networks illustrate the state adapting to a more complex, interdependent, private actor-driven world.

2. The Network Form and the New Century

Transgovernmentalism builds on several strands of research in international relations, most notably Robert Keohane and Joseph Nye's pioneering work in the 1970s.[64] They defined "transgovernmental relations" as "sets of direct interactions among sub-units of different governments that are not controlled by the policies of the cabinets or chief executives of those governments."[65] Keohane and Nye argued that transgovernmental relations may be most significant in issue-areas in which traditional international organizations already operate: the existence of an international organization brings the key governmental actors together, leads to greater autonomy for these actors, and strengthens the legitimacy of joint decision making.

Indeed, the bulk of Keohane and Nye's exploration of transgovernmental relations was devoted to demonstrating how transgovernmentalism furthered international organization. This agenda reflected arguments in then-contemporary scholarship that

(1991); THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS IN THE PROMOTION AND PROTECTION OF HUMAN RIGHTS (G. Castermans et al. eds., 1990); PRESSURE GROUPS IN THE GLOBAL SYSTEM (Peter Willets ed., 1982).

63. *E.g.*, Slaughter, *Real New World Order*, *supra* note 7, at 184 ("A new world order is emerging, with less fanfare but more substance than either the liberal internationalist or new medievalist visions.").

64. Keohane & Nye, *Transgovernmental Relations and International Organizations*, *supra* note 8. Keohane and Nye were writing in the early 1970s as part of a first wave of research on transgovernmentalism within political science, though the topic had earlier been broached in international law by Philip Jessup under the broader rubric of transnationalism. *See generally* PHILIP C. JESSUP, TRANSNATIONAL LAW (1956). Research on transgovernmentalism within political science more or less abated during the late 1970s and 1980s, but was somewhat revived by Peter Haas' (and John Ruggie's) conception of "epistemic communities." *See* the works of Peter Haas, *supra* note 50. Epistemic communities are communities of like-minded experts who foster policy coordination. The current wave of explicit attention to transgovernmental networks dates to the mid-1990s and has been accelerating.

65. Keohane & Nye, *Transgovernmental Relations and International Organizations*, *supra* note 8, at 43; *see also* Raymond Hopkins, *Global Management Networks: The Internationalization of Domestic Bureaucracies*, 30 INT'L SOC. SCI. J. 31 (1978).

internationalism was "a dead end"[66] and transnationalism the wave of the future. This 1970s debate loosely paralleled the current debate over the future of the state that has given rise to contemporary transgovernmental theory. Unlike contemporary network theorists, however, Keohane and Nye sought to show that transgovernmental relations were integral to the power of international organizations.[67] International organizations, they claimed, are not necessarily weak because they were forums for national action or rested on sovereignty.[68] Because international organizations nourish and enhance transgovernmentalism, they have a central role in the future of world politics.[69]

More recent scholarship echoes this treatment, though with much less attention to the interaction between transgovernmentalism and liberal internationalism. Transgovernmentalists today argue that the state has adjusted to change in the international system by, in essence, mimicking the practices of "issue networks" and "transnational advocacy coalitions" composed of non-governmental organizations.[70] Rather than a shift in the locus of power—from states to something else—they claim we are witnessing a shift in the modes by which state power is deployed and the forms by which states interact. While this new form of cooperation can found in areas as unlikely as the judiciary,[71] it is most apparent in regulation.

For example, Scott Jacobs argues that

> [A]n interdependent world requires new forms of governance. . . . Regulatory actors and processes are crossing national, regional, and local borders. . . . As a result, a web of formal and informal intergovernmental regulatory arrangements is emerging in the

66. Samuel Huntington, *Transnational Organizations in World Politics*, 25 WORLD POL. 333, 368 (1973).

67. Keohane & Nye, *Transgovernmental Relations and International Organizations*, *supra* note 8, at 55 ("Thus far we have discussed two ways in which international organizations are relevant in world politics—as arenas and as members of transgovernmental coalitions. They may also be important as points of potential governmental intervention in predominantly nongovernmental transactional systems.").

68. *Id*. at 61.

69. *Id*. at 61-62.

70. Picciotto, *supra* note 8, at 1020 ("The difficulty of reaching agreement, except at the most basic level of common state interests, means that general international law establishes only a very loose framework of coordination.… An alternative, but in many ways complementary, response has been the construction of a complex maze of regulatory or administrative networks…."); Issue networks are discussed in MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998).

71. Slaughter in particular emphasizes this. *See* Slaughter, *Real New World Order*, *supra* note 7.

> [Organisation for Economic Cooperation and Development (OECD)] area (and beyond) that simultaneously empowers and constrains governments with respect to their ability to solve problems through regulation. Although it is as yet uneven and fragile, this web of regulatory relationships signals the evolution of the sovereign state toward a state that is, de facto, somewhat less sovereign, but is better adapted to promote its citizens' interests within the realities of the contemporary era. . . . [These changes] *are part of a profound and long-term change, stretching across a widening spectrum of policy issues, in the way governments define and solve problems*.[72]

Rising transnational activity has not stymied states; instead, it has led domestic regulators to follow their regulated entities as they have internationalized.[73] Globalization, by "jeopardiz[ing] the effectiveness of domestic regulatory institutions,"[74] prompts regulators to seek novel solutions.[75] States themselves are increasingly organized in similar ways—not only Weberian rationalist bureaucracies, but corresponding functional divisions within the broader state bureaucracy.[76] This development affords regulators counterparts in foreign jurisdictions who share these problems and with whom they can work.

Technological change makes networks feasible. To some observers of world politics, technological change enhances the decline of state power.[77] Transgovernmentalists turn this argument on its head, positing that these same technological changes allow government officials to interact regularly and rapidly.[78] Transgovernmentalism recasts the state

72. Jacobs, *supra* note 7, at 15-17, 22 (emphasis in original).

73. Hopkins, *supra* note 65, gives exactly the same argument—back in 1978. For an account for some early efforts at the regulation of transnational practices *see* Janice Thomson, *Explaining the Regulation of Transnational Practices: A State-building Approach*, *in* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

74. Cheek, *supra* note 27, at 277.

75. Rising world trade levels have made these issues more salient. Regulatory rules and procedures "have long been recognized to be potential impediments to international trade even when justified by legitimate national concerns." Atik, *supra* note 44, at 739.

76. The work of sociologist John Meyer and his students elucidates this point in many varied ways. For an overview of the Meyer School *see generally* Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology's Institutionalism*, 50 INT'L ORG. 325 (1996).

77. Yet another take on the information revolution and the state is Keohane & Nye, *Power and Interdependence in the Information Age*, *supra* note 61, at 94 (suggesting that the claims of technological "modernists" are overstated and that "geographically based states will continue to structure politics in the information age, but they will rely less on material resources and more on their ability to remain credible to a public with increasingly diverse sources of information.").

78. *E.g.*, Slaughter, *The Real New World Order*, *supra* note 7.

as a supple actor able to capitalize on, rather than be circumvented by, the information age.

The technological changes of the information revolution also suggest new structures of organization: decentralized networks of peers versus hierarchical, stratified, and linked organizations.[79] Transgovernmentalists argue that domestic regulators have created flexible legal innovations keyed to the challenges of an interdependent regulatory environment. "Positive comity," for example, reworks the traditional legal theory of comity of nations in a more dynamic manner.[80] Rather than simply signifying deference to another sovereign and its laws, positive comity entails an active agreement to undertake investigations and employ state power at the behest of a partner government.[81] Non-legally binding "Memoranda of Understanding" (MOUs) structure much of transgovernmental cooperation. While regulators occasionally employ Mutual Legal Assistance Treaties (MLATs), binding treaties that may address a wide array of legal issues,[82] MOUs are frequently used to create a loose and adaptable framework in which to share information, ideas, and resources. MOUs are soft law agreements: non-binding as a legal matter but, at least in the view of many regulators, highly effective and far more flexible.[83]

A 1993 MOU between the SEC and its Chilean counterpart is representative. It contains principles for consultations, mutual exchange of information, enforcement assistance, confidentiality, and cost-sharing, and has an extensive section devoted to technical assistance. [84]

79. Echoing the work of sociologists such as Manuel Castells. MANUEL CASTELLS, THE INFORMATION AGE: SOCIETY, ECONOMY AND CULTURE (1996-2000).

80. *See, e.g.*, Tarullo, *supra* note 42, at 496. Comity was defined by the Supreme Court in *Hilton v. Guyot* as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation." 159 U.S. 113, 163-64 (1895).

81. *See* Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1 (1997); Eleanor M. Fox, *Competition Law: Linking the World*, *in* TRANSATLANTIC REGULATORY COOPERATION, *supra* note 7; Slaughter, *Agencies on the Loose?*, *supra* note 8, at 538-39.

82. Regulators have also negotiated treaties that are specific to a particular subject, such as antitrust. For example, the U.S. has legally binding executive agreements with Germany, Australia, Canada, the EU, Israel, Japan, Brazil, and recently Mexico. *See* International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, Annex 1-C, at iv (2000) [hereinafter ICPAC Report]; Press Release, DOJ, DOJ and FTC Sign Antitrust Cooperation Agreement with Mexico (July 11, 2000), *at* http://www.usdoj.gov/atr/public/press_releases/2000/5137.htm (last visited Oct. 5, 2002).

83. On soft law and MOUs *see generally* Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000); ANTHONY AUST, MODERN TREATY LAW AND PRACTICE (2000).

84. Memorandum of Understanding between the United States Securities and Exchange Commission and the Superintendcia de Valores y Seguros of Chile on Consultation, Technical Assistance, and Mutual Assistance for the Exchange of Information (June 3, 1993), SEC Docket

Regulators have also created their own organizations, which act as centers or focal points for networks. The Basle Committee on Banking Supervision, for example, consists of representatives of the world's twelve most important central banks; the International Association of Insurance Supervisors (IASC) comprises nearly 100 insurance regulatory agencies; and the International Organization of Securities Commissioners (IOSCO) over 100 securities commissions.[85] These organizations are not international organizations under international law:[86] as David Zaring argues, they instead occupy a "twilight" legal existence.[87]

These innovations evidence an important evolution in international law. Characteristically legal entities—domestic regulatory agencies—are engaging one another across political boundaries without using traditional international law. MOUs, for example, have only a quasi-legal authority. They are by their terms not legally binding. Groups like IOSCO fit none of the traditional categories of public international law.[88] The decisions of the Basle Committee are private, made by consensus, and purely advisory.[89]

3. The Advantages of Networks

Networks are not only pervasive, proponents argue; they offer significant advantages. Multilateral organizations are cumbersome and bogged down by procedural rules. Fundamental concerns over sovereignty are endemic. They contend networks are, by contrast,

vol. 54, no.5 (June 15, 1993), at 542.

85. Zaring, *supra* note 8, at 282-83; *see also* Geoffrey R. D. Underhill, *Keeping Governments Out of Politics: Transnational Securities Markets, Regulatory Cooperation, and Political Legitimacy*, 21 REV. INT'L STUD. 251 (1995).

86. The definition of international organization used by the Restatement (Third) of the Foreign Relations Law of the United States is an organization "created by an international agreement [with] a membership consisting entirely or principally of states." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 221 (1987); *see also* LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 344 (3d ed. 1993) ("In international law, the term 'international organization' is generally used to refer to organizations composed entirely or mainly of states and usually established by treaty.").

87. Zaring, *supra* note 8, at 281.

88. José Alvarez has pointed out to me that this characterization depends on embracing the Restatement view. As this remains the dominant view in international law, however, I am comfortable embracing it here.

89. The Basle Committee's recommendations nonetheless have significant regulatory impact. *See, e.g.*, ETHAN B. KAPSTEIN, GOVERNING THE GLOBAL ECONOMY: INTERNATIONAL FINANCE AND THE STATE 103-28 (1994) (discussing the 1988 Capital Adequacy Accord); Ethan B. Kapstein, *Between Power and Purpose: Central Bankers and the Politics of Regulatory Convergence*, 46 INT'L ORG. 265 (1992).

flexible and adaptable. They foster experimentation and innovation. They dispense with the juridical equality and the time-consuming formality of traditional international organizations.

The rise of networks is aided by the perception that many regulatory issues are technocratic. Much as the belief in agency expertise has justified deference to agency decision making in the U.S.,[90] political deference to agency actions in international affairs appears justified by a sense that the issues are narrowly technical—and thus appropriately controlled by a domestic agency—rather than broadly political, and thus best guided by the foreign affairs bureaucracy. While foreign ministries and heads of government clearly can step in when they desire, much of the cooperative activity is left to the discretion of substantive agencies.[91]

Transgovernmentalists believe that such peer-to-peer cooperation is largely self-enforcing because each agency can better implement its domestic mandate as a result of the network. While incentives to "violate" "obligations" exist, common interests predominate.[92] Power is not absent in networks, but it is primarily "soft power" rather than hard power that is at play; persuasion and attraction rather than coercion and compulsion.[93] Nonetheless, networks do appear to strengthen the power of the already powerful; as the case studies in this article show, the traditionally powerful states play leading roles in networks and it is the weak nations of the world that are adopting many of the regulatory policies of the more powerful. While difficult to evaluate, the resulting convergence process often favors dominant economic actors such as the U.S.[94]

90. The classic argument is JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938); a more recent variant is STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993).

91. As David Andrews, former Legal Adviser in the State Department, recently wrote with regard to U.S. participation in transatlantic regulatory cooperation, "[r]ealistically speaking, the State Department has a very limited role to play on substantive aspects of transatlantic regulatory cooperation. Since the political responsibility and technical expertise naturally reside in the specialized agencies of the U.S. Government, the Department of State typically does not take the lead on such matters." David R. Andrews, *Listening in on the US-EU Legal Dialogue*, *in* TRANSATLANTIC REGULATORY COOPERATION, *supra* note 7. Of course, State can and does step in when issues become hot, or when, for political reasons, low-level networking needs to be brought to the fore and "packaged" for political consumption. My argument is only that State, and its counterparts abroad, largely pursue a policy of benign neglect with regard to networks. Peak actors in the Executive branch clearly retain the power to rein in or expand and highlight transgovernmental cooperation when necessary. I thank Harold Koh for discussions on this point.

92. Slaughter, *Real New World Order*, *supra* note 7, at 217.

93. On soft power *see* Joseph S. Nye, Jr., *The Power We Must Not Squander*, N.Y. TIMES, Jan. 3, 2000, at A19; *see also* JOSEPH S. NYE, JR., THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE (2002).

94. Though as I argue below in Part IV both the importers and the exporters may experience

This aspect of transgovernmentalism is one source of concern to critics.[95] Networks are based on flexible and functional peer relationships. Their very informality and clubishness, however, invite exclusion and make monitoring and participation by non-state actors and other government officials often difficult. The salience of this critique of exclusion is currently high because the transparency, accountability, and legitimacy of international institutions is a burning topic in international law; ironically, this is because of the vastly increased scope of liberal internationalism in the last several decades.[96] As Sol Picciotto notes, "a chronic lack of legitimacy plagues direct international contacts at the sub-state level among national officials and administrators."[97] Critics charge that liberal internationalism is normatively superior because democratic legitimacy "often requires turning to a treaty formally ratified by domestic legislative processes."[98] Some of the very attributes that cause proponents to herald the rise of networks, in short, vex critics concerned that the move to networks will derail the progress of liberal internationalism and exclude civil society, while simultaneously leaving much of the non-OECD world behind. Network enthusiasts acknowledge the depth of these charges and provide a partial counterattack—sometimes convincing, other times not.[99] While outside the scope of this article, a comprehensive normative evaluation of networks remains a critical task.

The many changes taking place in world politics render the current era "truly a time of perplexity in international law."[100] Transgovernmentalists, surveying this landscape, believe that the golden age of the treaty is coming to a close. Yet they contend that those who claim that the state is waning misread the legal and political changes afoot. For transgovernmentalists, whatever the normative shortcomings of the network model, networks are an increasingly significant form of cooperation that nonetheless will retain the state in a central role. Networks solve the paradox of an increased need for uniformity coupled with resistance to further international centralization.[101] They "constitute

"gains from trade."

95. *E.g.*, Toope, *supra* note 16, at 96-97 ("Networks. . .are sites of power, and potentially of exclusion and inequality."); Kennedy, *When Renewal Repeats*, *supra* note 16, at 412.

96. *See, e.g.*, Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT'L L. 401 (2000).

97. Picciotto, *supra* note 8, at 1047.

98. Alvarez, *supra* note 8, at 228.

99. *See* in particular Slaughter, *Agencies on the Loose?*, *supra* note 8.

100. David J. Bederman, *Constructivism, Positivism, and Empiricism in International Law*, 89 GEO. L. J. 469, 498 (2001) (reviewing AREND, *supra* note 5).

101. Dehousse, *supra* note 8, at 259; Jacobs, *supra* note 7, at 16, 17.

a direct response to a felt need, on the part of [regulatory] officials, for closer cooperation on an international scale to fulfill their national responsibilities."[102] The result, proponents claim, is the harnessing of state power to the flexible, decentralized forms employed by NGOs.[103] This, Anne-Marie Slaughter argues, is the "real new world order."[104] Furthermore,

> Disaggregating the state into its functional components makes it possible to create networks of institutions engaged in a common enterprise even as they represent distinct national interests. Moreover, they can work with their subnational and supranational counterparts, creating a genuinely new world order in which networked institutions perform the functions of a world-government—legislation, administration, and adjudication—without the form.[105]

III. TRANSGOVERNMENTAL REGULATORY NETWORKS: THREE CASES

Transgovernmentalists consider regulation the leading edge of the network phenomenon. In this part I empirically examine three regulatory policy arenas in which networks have arisen.[106] In each, U.S. regulatory officials are active.

This empirical account serves three purposes. First, there are relatively few empirical examinations of government networks. The case studies thus provide an empirical foundation for the remainder of the article. Second, in detailing these cases I probe the basic claim that networks are increasingly active in contemporary international cooperation. While I cannot conclusively show that networks are a currently playing a major role in international cooperation, I can demonstrate that the most fundamental assertion—that networks are a meaningful and growing component of contemporary regulatory cooperation—is supported in at least three key areas. In so doing, I also show that a central component of this cooperation is the diffusion of regulatory rules and procedures through the capacity building and

102. Picciotto, *supra* note 8, at 1039.

103. And organized crime. On the generic advantages of the network model *see* DAVID RONFELDT, TRIBES, INSTITUTIONS, MARKETS, NETWORKS: A FRAMEWORK ABOUT SOCIETAL EVOLUTION (1996) *and* Mark Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360 (1973).

104. Slaughter, *Real New World Order*, *supra* note 7.

105. *Id*. at 195.

106. There is no clear and accepted definition of a network that would permit objective verification. But as the cases reveal, if networks do in fact exist, these surely fall within the class.

technical assistance efforts that accompany transgovernmental ties.

The third reason for undertaking this empirical investigation is that the underlying contexts of these cases vary in important ways. The cases fall across a spectrum of regulatory power. By regulatory power I mean the power to achieve domestic regulatory ends. In securities law, regulatory power is highly concentrated. The U.S. is by far the dominant regulator. Treaties are few; those international rules that do exist typically mirror U.S. domestic law. The U.S. can choose policies unilaterally, and in so doing can force those states to react to the new status quo.[107] In competition policy, by contrast, multilateral solutions have not succeeded for different reasons. Fundamental differences in the economic and political bases of antitrust in the key world markets have blocked proposed multilateral treaties. The key states each possess the power to maintain their distinctive approach to competition; hence, regulatory power is hence moderately diffused. Lastly, in the area of environmental protection, the public goods nature of many environmental problems prompts states to negotiate collective, often universal treaties that fit the liberal internationalist model well. Public goods disperse regulatory power, because they enable otherwise weak states not only to free-ride on effective regulation by remaining outside the circle of cooperation but also, in some cases, to block it through divergence.[108] Regulatory power is diffused in the environmental arena; largely duopolistic in the competition arena; and nearly monopolistic in securities law.

Despite these differences, networks are active in each case. However, the effects of networks vary in important ways. The concentration of regulatory power has two implications. First, it encourages harmonization because other jurisdictions typically have greater incentives to converge on the dominant actor's model.[109] When regulatory power is diffuse, harmonization is possible but less likely and less dramatic. Second, the significance, for international law, of regulatory convergence and especially of capacity building depends on the distribution of regulatory power. Where regulatory power is diffuse,

107. Simmons, *International Politics of Harmonization*, *supra* note 18, at 591. This is akin to the notion that the U.S. possesses what Lloyd Gruber terms "go it alone power." The U.S. can implement policies unilaterally, either to force cooperation (in Gruber's study) or simply to achieve a domestic end. LLOYD GRUBER, RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS 38-52, 81-92 (2000).

108. For an extensive study of public goods *see* GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY (Inge Kaul et al. eds., 1999).

109. Though not always; *see* Simmons, *International Politics of Harmonization*, *supra* note 18.

multilateral treaties and organization are numerous. Consequently, convergence and capacity building can strengthen the operation of treaties, improving compliance and effectiveness. When regulatory power is concentrated, blunting incentives for liberal internationalist cooperation, the lack of treaties renders this process of synergy largely moot. I discuss these implications in Parts IV and V below.

Overall, the cases show that transgovernmentalism is an important phenomenon that international legal scholars should not ignore. Regulators are actively collaborating in peer-to-peer information sharing and enforcement, as well as in technical and legal assistance, and are doing so without employing the usual forms of liberal internationalism. Each of the networks I examine incorporates two related aspects.[110] The first are bilateral arrangements, typically operationalized through MOUs that structure interaction. These are the building blocks of the second aspect of networks: a loosely-arranged peak organization that acts as a focal point and forum for the various bilateral networks. In the words of one interviewee, these peak organizations act as the "router" through which the network members meet and interact.[111] In the cases that follow, the securities and environment networks have well-established peak organizations; in competition law, the U.S. has recently called for the creation of a similar forum.

A. Securities Regulation

Securities regulation addresses markets and financial instruments such as stocks and bonds, as well as the myriad derivatives that are based on these instruments.[112] Securities regulation was once an almost purely domestic concern. However, rising interdependence and the globalization of capital markets have made securities law increasingly international, to the point where "international cooperation. . .is

110. Slaughter argues these are separate (Slaughter, *Governing the Global Economy Through Government Networks*, *supra* note 11, at 179) but they are better understood as integral parts. Without the bilateral linkages between agencies, there is no web of contacts, to use a frequent metaphor in the transgovernmental literature. The core forums, such as IOSCO (discussed below), both promote the development of bilateral linkages (for example, through model MOUs) and provide regular meetings and opportunities for network members to meet one another, learn from one another, and strengthen contacts.

111. Telephone Interview with Durwood Zaelke, INECE Secretariat (Jun. 2002).

112. *See* MARC STEINBERG, SECURITIES REGULATION 35 (3d ed. 1998). Even beaver pelts have been held to be securities within the meaning of the U.S. Securities and Exchange Act. *See* Cont'l Mktg. Corp. v. SEC 387 F.2d 466, 470-71 (10th Cir. 1967), *cert. denied* 391 U.S. 905 (1968).

blossoming among the world's regulators."[113] Nonetheless, there are no major multilateral securities agreements or organizations on par with those found in monetary affairs (e.g., the International Monetary Fund) or in trade (e.g., the World Trade Organization).[114] Liberal internationalism, in short, has not been successful. Rather than treaties, regulators have embraced networks.

The U.S. is the world's leading capital market, with some 50 percent of total world stock market valuation.[115] The SEC began to actively cooperate with foreign agencies in the 1980s as more of its enforcement actions involved foreign actors.[116] At this time, securities regulation did not exist in many foreign jurisdictions or, if it did, often was not well developed. While this is particularly true for developing countries and countries with economies in transition, even a state as economically advanced as Germany only recently established a securities agency.[117] The SEC's logic in seeking contacts abroad was that internationalization of securities posed both an enforcement and a race-to-the-bottom challenge; both could best be met through cooperation and, most critically, by changing foreign practices to match those favored in the As former SEC Commissioner, Bevis Longstreth, revealingly argued in 1983, "the trick will be to encourage the securities regulators of the other major trading nations to develop systems that provide protections to investors substantially similar to those provided in this country. . . "[118]

By the late 1990s, the SEC was at the center of a web of transgovernmental contacts. As of 1998, the SEC had entered into more than 30 MOUs with foreign authorities.[119] The MOU idea caught on quickly: many emerging market states have also been quite active in entering into similar MOUs. For example, Brazil has entered into in 26 MOUs, including one with the SEC creating a joint monitoring system

113. Zaring, *supra* note 8, at 282.

114. Simmons, *International Politics of Harmonization*, *supra* note 18, at 590-92.

115. *Id*. at 594 n.25 (citing ECONOMIST, June 17, 2000).

116. *See* Mahoney, *supra* note 21, at 314-16.

117. James H. Freis, Jr., *An Outsider's Look into the Regulation of Insider Trading in Germany: A Guide to Securities, Banking, and Market Reform in Finanzplatz Deutschland*, 19 B.C. INT'L & COMP. L. REV. 1 (1996).

118. Bevis Longstreth, *The SEC After Fifty Years: An Assessment of its Past and Future*, 83 COLUM. L. REV. 1593 (1983) (book review).

119. Practicing Law Institute, International Affairs: The SEC Speaks in 2001, 1235 PLI/Corp 977 (2001), at 1000 [hereinafter The SEC Speaks in 2001]; *see also* Faith Teo, Memoranda of Understanding Among Securities Regulators: Frameworks for Cooperation, Implications for Governance 14 (May 1998) (unpublished paper, Harvard Law School); Joel P. Trachtman, *Unilateralism, Bilateralism, Regionalism, Multilateralism, and Functionalism: A Comparison with Reference to Securities Regulation*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 69, 88 (1994) ("MOUs are the leading example of international cooperation in securities regulation.").

for companies traded in both jurisdictions.[120] These MOUs describe the kind of assistance and cooperation that the parties intend to engage in. For example, the SEC MOU with the Superintendencia de Valores y Seguros of Chile discusses the general need for cooperation, principles for assistance, and procedures for requests from one agency to the other.[121] The MOU also discusses technical assistance from the SEC on a number of topics, including clearance and settlement mechanisms; trade recording and comparison systems; order handling systems; privatization of state-owned companies; regulatory mechanisms related to accounting and disclosure; and regulatory requirements relating to market professionals and capital adequacy.[122] This list is suggestive, not exhaustive, and is typical of SEC MOUs.

The widespread use of MOUs as a cooperative tool largely arose from functional imperatives. Existing treaty arrangements "were seen as inadequate because they are too general and inflexible for highly technical and rapidly evolving securities markets in which intense surveillance of legal activities is needed to detect illegal activities."[123] Extraterritorial investigations or assertions of power were either difficult or, increasingly, diplomatically troublesome. MOUs evolved as an attempt to circumvent these obstacles and introduce a more flexible, lower-profile alternative.[124] By predicating SEC cooperation on reciprocal authority abroad, this approach helped replicate important informational features of U.S. law.[125] MOUs provided the framework, for instance, within which Canadian and U.S. regulators gained the legal authority to undertake investigations on behalf of a foreign regulatory body.[126] This form of cooperation has since been extended to many other jurisdictions.[127] The SEC notes that "cooperative arrangements modeled after the SEC's [MOUs] are now used by securities regulators

120. *See* International Agreements Endorsed by CVM, *available at* http://www.cvm.gov.br/ingl/inter/mou-e/asp (last visited Oct. 5, 2002).

121. *SEC Docket* 54, 5, (June 15 1993) at 542.

122. *Id*.

123. TONY PORTER, STATES, MARKETS, AND REGIMES IN GLOBAL FINANCE 114 (1993).

124. *See id*.; *see also* Trachtman, *supra* note 119, at 88.

125. Former SEC Chair David Ruder stated in 1988 congressional hearings that the requirement of reciprocity provides " a substantial incentive for foreign securities authorities to enter into mutual assistance arrangements with the [SEC] or to make commitments to provide information in similar situations." 1988 Banking Comm. Hearings at 38, H.R. REP. NO. 100-1065 (1988).

126. Teo, *supra* note 119, at 12-13. In the U.S., necessary provisions were enacted via the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. 100-704, 102 Stat. 4677 (1988) and the International Securities Enforcement Cooperation Act of 1990, Pub. L. 101-550, 104 Stat. 2714 (1990).

127. Teo, *supra* note 119.

around the world. Consequently, with growing ease, the SEC is able to obtain enforcement-related information from numerous jurisdictions, including emerging and developed markets."[128] The SEC has, on occasion, employed MLATs, which permit the SEC to reach abroad more effectively in criminal prosecutions.[129] Where "dual criminality" requirements have stymied the SEC, as in the case of Switzerland, the SEC lobbied effectively to alter Swiss law.[130]

In addition to this web of MOUs, the International Organization of Securities Commissions (IOSCO) acts as a forum for securities cooperation and gives structure to the regulatory network. IOSCO comprises over 130 member commissions and meets regularly.[131] IOSCO is not a traditional international organization—no members are states. Founded in 1984, 85 percent of the world's capital market is under IOSCO member supervision.[132] Among IOSCO's main activities are the promulgation of core principles of securities regulation, the development of shared accounting standards, and the regulatory impact of the Internet.[133] IOSCO provides an arena for discussion, policy coordination, and technical training for regulators in emerging markets; IOSCO members have negotiated over 500 MOUs amongst themselves.[134] SEC officials note the importance of IOSCO as a forum for promoting cooperation and the spread and strengthening of securities law to new areas of the globe.[135]

In short, though there is no major multilateral securities treaty, through IOSCO, MOUs, and regular interaction domestic securities regulators are sharing information, policy innovations, and enforcement

128. The SEC Speaks in 2001, *supra* note 119, at 996.

129. MLATs tend to be negotiated with major banking centers and havens, such as Switzerland and the Caymans. *See, e.g.*, Treaty Between the Swiss Confederation and the United States on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., 27 U.S.T.S. 2019; Treaty Concerning the Cayman Islands and Mutual Legal Assistance in Criminal Matters, July 3, 1986, U.S.-U.K., 26 I.L.M. 536. The SEC's efforts at negotiating agreements were aided by the International Securities Enforcement Cooperation Act of 1990, Pub. L. No. 101-550, 104 Stat. 2714.

130. Kehoe, *supra* note 21, at 369.

131. *See* Underhill, *supra* note 85; Zaring, *supra* note 8. General information, as well as reports and press releases, can be found at http://www.iosco.org (last visited Oct. 5, 2002).

132. Zaring, *supra* note 8, at 292.

133. The SEC Speaks in 1998, *supra* note 21, at 11. IOSCO members recently negotiated a multilateral MOU in May 2002; *see* http://www.iosco.org (last visited Oct. 5, 2002).

134. *See* http://www.iosco.org (last visited Oct. 5, 2002).

135. Interviews with SEC officials, SEC Headquarters, in Washington, D.C. (Apr. 2000) (on background). The success of the IOSCO model has led to regional spinoffs. The Council of the Securities Regulators of the Americas, formed in 1992, is a regional version of IOSCO, as is the Forum of European Securities Commissions, formed in 1997.

resources with one another. Through this process securities regulators from the U.S. (and Europe) are providing extensive technical advice, training personnel, and drafting legislation for regulators in emerging markets.[136] An important outcome is the dissemination of what one interviewee termed the "regulatory gospel" of U.S. securities law.[137] This gospel includes the following elements: strict insider trading rules; mandatory registration with a governmental agency of public securities issues; a mandatory disclosure system; issuer liability regarding registration statements and offering documents; broad anti-fraud provisions; and government oversight of brokers, dealers, exchanges, etc.[138] In the words of one commentator,

> the SEC has responded to internationalization of the securities markets with calls for uniformity in securities regulation, a uniformity that is to be based on the American model. Internationalization has also provided the SEC with opportunities to use its enforcement powers as a lever to press for greater cooperation and uniformity among the world's securities regulators. As foreign markets grow and attract a greater share of worldwide investment, the SEC's desire to maintain the primacy of the American model of securities regulation may lead to an increase in the SEC's efforts to export regulation, resulting in greater friction between the SEC and foreign regulators.[139]

The extent of SEC technical assistance is marked. The SEC hosts a major training program each year for foreign securities regulators, the "International Institute for Securities Market Development," which is taught by SEC officials and outside experts. As of 2000, nearly 800 participants from 101 countries had taken part.[140] This training provides grounding in the basic principles and approaches employed by the SEC (such as the merits of disclosure-based versus merit-based regulation

136. As Joel Trachtman notes, "as securities law is a relatively immature area of law in most non-U.S. jurisdictions, their policies and methods may be more malleable than they might be, for example, in contract law." Trachtman, *supra* note 119, at 90.

137. Interviews with SEC officials, *supra* note 135. I borrow this term from an interviewee.

138. *See* Mahoney, *supra* note 21, at 305; *see also* Theodore Levine & W. Hardy Callcott, *The SEC and Foreign Policy: The International Securities Enforcement Cooperation Act of 1988*, 17 SEC. REG. L.J. 115, 123 (1989), *cited in* Kehoe, *supra* note 21, at 354: "The SEC raised foreign consciousness about the harmful effects of insider trading, and this directly led to legislation criminalizing insider trading or increasing enforcement in countries such as Switzerland, Japan, Canada, and England."

139. Mahoney, *supra* note 21, at 320; *see also* Policy Statement of the Securities and Exchange Commission on the Regulation of International Securities Markets, Securities Act Release No. 6807 (Nov. 1988), *cited in* Kehoe, *supra* note 21, at 351.

140. The SEC Speaks in 2001, *supra* note 119, at 991.

and the importance of transparency) and provides opportunities for regulators to share problems and solutions. The SEC also holds an International Institute for Securities Enforcement and Market Oversight, in which approximately 670 regulators from 65 countries have participated.[141] In 2000 alone, approximately 460 securities regulators from 71 countries were trained by the SEC.[142] SEC officials argue that, aside from spreading the gospel and building the rule of law abroad, these sessions help to build important ties and contacts for future cooperation on concrete cases.[143]

It is worth underscoring that foreign officials are not forced to attend training programs, or to take part in IOSCO.[144] Indeed, SEC officials indicate that they are inundated with requests for training—and to date have only been able to satisfy about 10 percent of the demands.[145] Moreover, the SEC has required that recipients of technical assistance have legislation in place that permits them the same margin of independence from legislators that the SEC possess in the U.S.[146] The SEC push for U.S.-oriented securities law also extends to advanced industrial democracies. The SEC has pressured Japan and Switzerland, for instance, to develop insider-trading regimes similar to that in place in the U.S.[147] Similarly, the SEC "made its disapproval of [Germany's] current system known both directly and indirectly through the prosecution of high-profile cases. . .that violate United States insider trading laws."[148]

The SEC believes transgovernmental cooperation serves important U.S. interests.[149] SEC officials argue that cooperation enhances the ability of the U.S. to police fraud that undermines U.S. markets. The spread of securities law strengthens the rule of law and "exports

141. *Id*.

142. *Id*.

143. Interview with former SEC official, in Washington, D.C., (Apr. 2000).

144. *But see* Mahoney, *supra* note 21, arguing that in enforcement actions with other advanced industrial states (such as the UK) the SEC may be coercive.

145. Interviews with SEC officials, *supra* note 135. In fiscal year 2000, SEC staff responded to 222 written technical assistance requests and provided analysis and commentary on securities laws in China, Croatia, Egypt, Ghana, Macedonia, Russia, and Trinidad and Tobago. The SEC Speaks in 2001, *supra* note 119, at 993.

146. Slaughter, *Agencies on the Loose?*, *supra* note 8, at 534.

147. Stephan Choi & Andrew Guzman, *National Laws, International Money: Regulation in a Global Capital Market*, 65 FORDHAM L. REV. 1885, 1890 (1997); Colombatto & Macey, *supra* note 25, at 952.

148. Daniel J. Standen, *Insider Trading Reforms Sweep Across Germany: Bracing for the Cold Winds of Change*, 36 HARV. INT'L L.J. 177 (1995), *cited in* Colombatto & Macey, *supra* note 25, at 952.

149. Interviews with SEC officials, *supra* note 135.

capitalism" worldwide.[150] And it promotes the stability of financial markets. In the wake of the Asian financial crisis in particular, the stability of foreign markets has taken on new importance, and the SEC has worked with the U.S. Agency for International Development (USAID) to strengthen its overseas export effort in Asia. An SEC official argued that the USAID program "reflects the SEC's commitment to strengthening global securities markets and making them safer for both American and foreign investors."[151]

All investors may be said to gain from the security and stability that strengthened securities law abroad represents. The gains, however, are not limited to such general ends; rather, when foreign jurisdictions mirror or approximate these elements of U.S. law, U.S. firms, dealers, and investors are also on familiar turf. Because they are knowledgeable about such a regulatory structure already, they can readily compete in new markets.[152]

In the SEC's own words,

> Because the world's markets are closely interwoven and cross-border securities transactions are commonplace, the SEC has forged an international approach to ensure high regulatory standards and protect against fraud in the US. The SEC has developed formal and informal relationships with foreign authorities for regulatory and enforcement cooperation, and has developed mechanisms for information-gathering so that international borders cannot be used to escape detection and prosecution. . . .[153] In 1997, the SEC made 240 requests for assistance to foreign regulators and responded to over 360 requests from abroad. . . .[154] The SEC [also] conducts a comprehensive technical assistance and international training program for emerging and developed securities markets. The program is designed to benefit both the United States and recipient countries. Benefits to the US include an improved

150. *Id.* I borrow this term from an SEC interviewee.

151. Press release, USAID and SEC to Advise Emerging Securities Markets Across Globe under New Agreement Signed Today, September 2, 1997, *at* http://www.sec.gov/news/press/pressarchive/1997press.shtml (last visited Oct. 5, 2002).

152. As one USAID official noted, "[w]ho better than the SEC and USAID to team up to export U.S. expertise in this area and protect the interests of the U.S. investor?" USAID Associate Administrator Sally Shelton-Colby, Press Release, USAID and SEC to Advise Emerging Securities Markets Across Globe under New Agreement Signed Today, September 2, 1997, *at* http://www.sec.gov/news/press/pressarchive/1997press.shtml (last visited Oct. 5, 2002).

153. The SEC Speaks in 1998, *supra* note 21, at 1.

154. *Id*. at 5.

> foreign investment climate and regulatory foundation for foreign offerings in the United States. The encouragement of US style market structures and regulatory principles also promotes open entry and competitive market conditions that may be enjoyed by US participants and service providers.[155]

In short, the transgovernmental securities network is active and growing, with the SEC playing a critical and active role. For the SEC, networking with foreign regulators is a conscious strategy aimed at enhancing its enforcement powers in a globalizing economy while at the same time promoting the institutionalization of U.S.-style securities laws abroad through its technical assistance programs.[156] The SEC's unwavering approach is to bring other jurisdictions to the U.S. model, not to modify the U.S. model. This is even true of the SEC's cooperative efforts with regulators from other advanced industrial states. The U.S./Canadian Multijurisdictional Disclosure System, for example,

> does not evidence significant regulatory compromise on the part of the SEC. . .the principle of mutual recognition. . .is followed only to the extent that the foreign rules satisfy the SEC's regulatory goals. . .in some cases, other jurisdictions are changing their laws to get into a position to reach [similar] agreements with the SEC.[157]

SEC officials confirm that the SEC is far less interested in learning from its foreign counterparts than it is in imparting the wisdom it has accumulated regulating the world's largest financial markets. A statement by Richard Breeden, then Chairman of the SEC, reflects the SEC's dim view of convergence as a two-way street: "I'm interested in knowing the capital rules in other countries to know how big their buffers are. I'm not at all interested in what the French think US capital standards ought to be." [158]

B. Competition Policy

Competition policy seeks to ensure that markets are not subverted through private restraints on trade, and that consumer welfare and

155. *Id*. at 17.

156. Mahoney, *supra* note 21; Interviews with SEC officials, *supra* note 135.

157. Trachtman, *supra* note 119, at 95.

158. *Cited in* Trachtman, *supra* note 119, at 112. *See also* Mahoney *supra* note 21; James R. Doty, *The Role of the Securities and Exchange Commission in an Internationalized Marketplace*, 60 FORDHAM L. REV. 77 (1992).

economic efficiency are maximized.[159] Like securities regulation, competition policy aims to regulate a central component of modern market economies.

Rising economic interdependence in the 1980s and 1990s has led to a internationalization of many competition problems.[160] One result has been increased cooperation and convergence (as well as conflict) among regulators, and the expansion of competition law itself to new jurisdictions.[161] Like securities regulation, the existence of competition law is new for many states. Of the 80 states today with competition laws, more than half adopted their laws in the last decade, and over 20 have significantly reformed their competition systems.[162] Similarly, of the 13 states with competition laws in the Western Hemisphere, the majority created their competition laws after 1990.[163] Approximately 20 states are currently drafting competition laws.[164] Antitrust regulation is thus spreading around the globe rapidly. While this diffusion is broadly positive, it has created its own problems: more jurisdictions reviewing mergers,[165] more extraterritorial assertions of domestic law,[166] and more enforcement efforts to coordinate. While "a consensus is beginning to emerge within the transnational community of lawyers and competition

159. This is the dominant U.S. view today, though in the past there was a strong element of protectionism toward small and medium-size firms. Eleanor M. Fox, *Antitrust and Regulatory Federalism—Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1789-90 (2000).

160. While the problem is not new, *see* American Banana v. United Fruit Co., 213 U.S. 347 (1909), and has led to the development of extraterritorial application of domestic competition law—in particular in the U.S., *see* United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945)—globalization has led to a marked increase in the international dimensions of competition law.

161. Fox, *Competition Law: Linking the World*, *supra* note 81, at 244-45; Gary N. Horlick & Michael A. Meyer, *The International Convergence of Competition Policy*, 29 INT'L LAW. 65 (1995).

162. Fox, *Antitrust and Regulatory Federalism*, *supra* note 159, at 1782; Saskia Sassen, *The Locational and Institutional Embeddedness of the Global Economy*, *in* TRANSATLANTIC REGULATORY COOPERATION, *supra* note 7, at 86. The latter figure is from Portnoy, *supra* note 34, at 75. Portnoy argues that there are 83 states, as of 2000, with antitrust laws. *Id*. at 74. Some of these states are hardly developing; Italy first created its competition law in 1990. *Id*. at 77. Mark Palim claims that there as of 1996 there were 70 states with competition laws, and 79% of those dated from 1980 or later. Mark R. A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis*, 43 ANTITRUST BULL. 106, 109 (1998).

163. Robert H. Lande, *Introduction* to Symposium, *Creating Competition Policy for Transition Economies*, 23 BROOK. J. INT'L L. 339, 340 (1997); *see also* Susan K. Sell, *Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion, Choice*, 49 INT'L ORG. 315 (1995).

164. Fox, *Antitrust and Regulatory Federalism*, *supra* note 159, at 1783.

165. Diane P. Wood, *United States Antitrust Law in the Global Market*, 1 IND. J. GLOBAL LEGAL STUD. J. 409, 427-28 (1994).

166. The U.S. in particular has asserted extraterritorial reach for the Sherman Act. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945).

officials who have learned to think, speak, and write about competition issues in a similar way,"[167] differences remain.

The spread of competition law and its impact on international trade has led to proposals for a multilateral competition treaty, perhaps under the auspices of the WTO.[168] Indeed, WTO members recently agreed in Doha to begin negotiations on a multilateral competition framework.[169] At least five prior efforts at the creation of an multilateral regime have occurred, but none have been successful.[170] The development of a liberal internationalist solution faces serious obstacles, not least of which is the myriad of objectives, some contradictory, that undergird the competition laws of the main economic powers. While the push for a competition treaty is in stasis, cooperation through networks is occurring with frequency.[171] As in securities regulation, the U.S. is particularly active.[172] The U.S. Department of Justice ("DOJ") has over 20 MLATs in place, which permit and foster a range of cooperative activities with foreign regulators.[173] The DOJ also has a series of more informal

167. Waller, *Internationalization of Antitrust Enforcement*, *supra* note 8, at 347-48 ("Most commentators have failed to note the extent to which harmonization has already taken place. Already, most nations have antitrust rules that are substantially similar on a textual level, and most do their best to enforce them.").

168. *E.g.*, Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1 (1997), proposing a Trade-Related Aspects of Antitrust Measures (TRAMs) accord within the context of the WTO.

169. *See generally* WTO Ministerial Declaration, Doc. WT/MIN(01)/DEC/1 (Nov. 20, 2002), *available at* http://docsonline.wto.org.

170. As Andrew Guzman notes, "At present. . .no meaningful international agreement exists to govern the application of antitrust policies to cross border activities." Guzman, *supra* note 18, at 1535; *see also* Tarullo, *supra* note 42. The League of Nations, the ill-fated ITO, ECOSOC, the OECD, and UNCTAD have all tried and failed to harmonize competition law. Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 KAN. L. REV. 557 (1994). One reason for the demise of the ITO was Congressional concern over the antitrust provisions. *See* Diane P. Wood, *The Internationalization of Antitrust Law: Options for the Future*, 44 DEPAUL L. REV. 1289 (1995); *see also* John Gerard Ruggie, *At Home Abroad, Abroad at Home: International Liberalisation and Domestic Stability in the New World Economy*, 24 MILLENNIUM 507, 509 (1995).

171. *See* Symposium, BROOK. J. INT'L L. *supra* note 163; Wood, *Internationalization of Antitrust Law*, *supra* note 170; Waller, *Internationalization of Antitrust Enforcement*, *supra* note 8; Nina L. Hachigian, *International Antitrust Enforcement*, ANTITRUST, Fall 1997, at 22.

172. "The United States has committed a substantial amount of its prestige and resources to promoting greater enforcement cooperation. The other major players may not be as enthusiastic as the United States, but they do not have serious objections to cooperating on a case-by-case basis." Waller, *Internationalization of Antitrust Enforcement*, *supra* note 8, at 399-400.

173. A. Douglas Melamed, International Cooperation in Competition Law and Policy: What Can be Achieved at the Bilateral, Regional, and Multilateral Levels, Address Before the WTO Symposium on Competition Policy and the Multilateral Trading System (Apr. 17, 1999), *in* 2 J. INT'L ECON. L. 423 (1999); Interview with Ed Hand, Antitrust Div., Dep't of Justice, in Washington, D.C. (Apr. 2000).

international agreements, which, though not labeled MOUs, resemble MOUs in several respects.[174]

Enforcement actions with international dimensions have led the way to more cooperation with foreign jurisdictions. For example, DOJ prosecutions of international cartel activity in 1997-1999 totaled over $1.3 billion—over 90 percent of the total fines in that period.[175] The development of a competition network has been aided, in the case of the U.S., by the passage of the International Antitrust Enforcement Assistance Act of 1994.[176] The Act expanded the range of cooperative activity of the DOJ and U.S. Federal Trade Commission (FTC) (for example, to share confidential information) with regulators in foreign jurisdictions. The Act authorizes the Attorney General and the FTC to conduct investigations and provide assistance to foreign authorities regarding a possible violation of the foreign antitrust laws (regardless of legality under U.S. law) if U.S. authorities are confident that the foreign authorities will reciprocate.[177] This is a similar dynamic to that of securities law.[178] Participating foreign agencies must give protection to antitrust evidence that is "not less than the protection provided under the laws of the [U.S.]."[179] In theory the passage of the Act will further

174. DOJ officials view these as legally-binding sole executive agreements. When read, these agreements are sufficiently general that they approach MOUs in substance, if not in form. *See* http://www.doj.us.gov. In interviews, DOJ officials surmised that the avoidance of the MOU form so prevalent in the SEC is probably path dependent. Early examples had to be in treaty form because part of the milieu was the political battles over U.S. exterritorial assertions of the Sherman Act. As one interviewee said, it was "easier to continue this practice, even though the agreements could easily be MOUs." Telephone Interview with Dep't of Justice official, (Jun. 2002) (on background).

175. *See* 1999 U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANN. REP. 5. *See also* Gary Spratling, Deputy Assistant Attorney General, Negotiating the Waters of International Cartel Prosecutions, Address at the National Institute on White Collar Crime (Mar. 4, 1999), *available at* http://www.usdoj.gov/atr/public/speeches/2275.pdf; Press Release, U.S. Department of Justice., U.S. Company Agrees to Pay $110 Million Fine for International Conspiracy: Fine is Largest in Antitrust History (Apr. 7, 1998), *cited in* David M. Knight, Global Antitrust Cooperation: The Role of Transnational Networks in Competition Policy Formation and Enforcement (unpublished paper, Harvard Law School, 1998). The Hoffman-La Roche vitamin prosecution alone netted a fine of $500 million in 1999; there were two other international cartel prosecutions that year with fines totaling $360 million. *See* 1999 U.S. DEP'T OF JUSTICE., ANTITRUST DIV., ANN. REP. 7.

176. 15 U.S.C. §§ 6201-6212 (2000). The Act is phrased in terms of U.S. assistance to foreign competition offices, but cooperation cannot proceed unless an "antitrust mutual assistance agreement" has been negotiated with the state in question. 15 U.S.C. § 6201 (2000). In essence, states must agree to cooperate with the U.S. in order to receive assistance from U.S. antitrust officials. *See also* Waller, *Internationalization of Antitrust Enforcement*, *supra* note 8, at 370-74.

177. Fox, *Competition Law: Linking the World*, *supra* note 81, at 247.

178. *See supra* Part III.A.

179. ICPAC Report, Annex 1-C, *supra* note 82, at x.

accelerate the development of transgovernmental cooperation, though few states have taken advantage of its provisions to date.[180]

In addition to enforcement cooperation, U.S. competition officials, like their SEC counterparts, provide extensive technical assistance to foreign regulators.[181] U.S. regulators have been stationed abroad for extended periods of time.[182] In the 1993-1998 period, the only period with complete data on these activities, the DOJ and FTC initiated an average of 51 missions per year.[183] Some 35 foreign regulators were trained in the U.S., on average, in each year of these programs. In some cases U.S. technical assistance has been quite long-lived: U.S. antitrust officials were in Poland for four years.[184] There they provided extensive, hands-on advice concerning draft legislation as well as the interpretation and implementation of existing laws.[185] More advanced economies have received similar treatment: when New Zealand sought to reformulate sections of its antitrust code in 1998, for example, it elicited extensive assistance from the U.S. DOJ and FTC.[186] U.S. officials also participate in a welter of regularized meetings and forums for antitrust discussion, such as the OECD Competition Law and Policy roundtables and the annual Fordham Law School Conference on International Antitrust Law and Policy. The OECD process in particular has been critical for the emergence of transgovernmental cooperation among competition regulators.[187]

180. Australia appears to be the only state to have signed such an agreement. Stuart M. Gerson, *Extraterritorial Enforcement of US Antitrust Laws*, 63 A.L.I.-A.B.A. 187, 195 (2000).; *see also* Fox, *Competition Law: Linking the World*, *supra* note 81, at 247:

> Nations have been reluctant [to cooperate under the Act], for they fear that the United States, not they, will be the beneficiaries, and they fear that the shared information might be used against their firms for purposes that go beyond the US request (e.g., for private class actions and treble-damage cases).

However, DOJ officials suggested that an agreement under the Act with Canada was likely because Canada had recently passed legislation enabling their agencies to share information with foreign jurisdictions. Telephone Interview with Dep't of Justice official, *supra* note 174.

181. Spencer Weber Waller, *Comparative Competition Law as a Form of Empiricism*, 23 BROOK. J. INT'L L. 455 (1997).

182. *Id*.; *see also* DEVTECH SYSTEMS, INC., FINAL EVALUATION OF THE FED. TRADE COMM'N AND DEP'T OF JUSTICE COMPONENT ON THE PROJECT ON COMPETITION (1996) [hereinafter DEVTECH REPORT].

183. As with the SEC, this is often budgeted out of USAID, but employs DOJ and FTC officials. These figures were calculated using data in the ICPAC Report, Annex 6-A, *supra* note 82.

184. *See* Interview with Ed Hand, *supra* note 173; Telephone Interview with Dep't of Justice official, *supra* note 174.

185. DEVTECH REPORT, *supra* note 182 at 6-7.

186. Knight, *supra* note 175, at 30-31.

187. As Tarullo argues, the OECD committee "involves a system of structured international activities through which national laws and regulations are made more congruent, the enforcement

The U.S. DOJ has recently proposed a International Competition Network,[188] which would be a forum, much like IOSCO in the securities arena, for regulators from developed and developing countries. The International Network would "formulate and develop consensus on proposals for procedural and substantive convergence in antitrust enforcement."[189] According to the DOJ, participating officials will work to "reach consensus on proposals for procedural and substantive convergence" on competition policy and enforcement.[190] Moreover, the International Network will "assist developing countries in building a competition culture based on sound economic principles."[191] There are presently about 60 members engaged in the network, and a first conference is scheduled for September 2002.[192] The DOJ was the motive force behind the International Network launch and will surely play a major role in these processes in the future.

As Spencer Weber Waller notes,

> the rest of the world looks to the United States as one of the most important sources of learning about competition law. Foreign legislators considering antitrust legislation often turn to the United States enforcement agencies and the American Bar for comments on the best path to choose. Foreign enforcement officials read American cases. . .attend international conferences, and frequently interact with their foreign counterparts. Attorneys and experts, frequently Americans, are often involved in foreign

of similar laws is coordinated internationally, or both. This approach may often not include a formal international agreement. It relies instead on contact and cooperation between national regulatory officials." Tarullo, *supra* note 43, at 495.

188. Originally called the "Global Competition Network."

189. Charles James, International Antitrust in the Bush Administration, Address Before the Canadian Bar Association Annual Fall Conference on Competition Law (Sept. 21 2001) *at* http://www.usdoj.gov/atr/public/speeches/9100.htm:

> My views on GCI are simple. It should be a forum for antitrust agencies from developed and developing countries to formulate and develop consensus on proposals for procedural and substantive convergence in antitrust enforcement. Because our ultimate goal is convergence, I believe GCI's general approach to issues should be as practical and concrete as possible and that we should avoid abstract discussions that are unlikely to lead to improvements in the practice of antitrust enforcement. Unlike OECD, WTO, and UNCTAD, the GCI would not deal with trade issues, or even non-antitrust issues that could reasonably be included in the rubric of "competition policy." It would be all antitrust, all the time.

190. Press release, U.S. Dep't of Justice, U.S. and Foreign Antitrust Officials Launch International Competition Network: New International Venue Will Assist in Global Convergence on Important Antitrust Enforcement Issues (Oct. 25, 2001), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/9400.htm (last visited Oct. 5, 2002).

191. *Id*.

192. In Naples, Italy. Telephone Interview with Dep't of Justice official, *supra* note 175.

> competition proceedings at various levels. Foreign case reports and agency decisions are filled with citations to United States cases, guidelines, and scholarly commentary.[193]

Like SEC officials, DOJ and FTC regulators claim that networking with foreign regulators, technical assistance efforts, and the accompanying export of U.S. regulation directly benefit the For example, former FTC Chairman Janet Steiger argued that the competition reforms pursued by the FTC and DOJ abroad "not only benefit the citizens of the region, but will enhance the competitiveness of American industry by helping to open new markets and investment opportunities."[194] Networking is generally seen as promoting the rule of law. U.S. (and other) business interests often have a preference for standardization in competition law.[195] The more familiar and transparent the competition laws in place in a foreign jurisdiction, the easier it is for such firms to compete and ensure that they are not disadvantaged vis-à-vis competitors who may have powerful political and economic connections.

One important difference between competition and securities regulation is that in securities, regulatory power is highly concentrated, while in competition, the regulatory power is moderately concentrated. Consequently, while the U.S. is actively pursuing the export of its competition policy, so is the European Union. In Eastern Europe the EU has largely won this competition.[196] As a precondition for consideration in EU enlargement, the so-called "Visegrad states" have signed the "Europe Agreements," in which they agree to adopt or approximate EU competition laws.[197] Thus, regulatory restructuring in these states is

193. Waller, *Comparative Competition Law as a Form of Empiricism*, 23 BROOK. J. INT'L L. 457-58; *see also Justice Department, FTC Receive Funds to Support Competition Counseling Aid*, 8 Int'l Trade Rep. (BNA) 871 (1991). Waller elsewhere claims that "national competition law systems do not easily transfer from place to place…." Waller, *Internationalization of Antitrust Enforcement*, *supra* note 8, at 348.

194. *Id*. at 871.

195. Waller, *Internationalization of Antitrust Enforcement*, *supra* note 8, at 385-86. This is particularly so in the area of mergers, where differing rules and requirements can stymie transactions. But as Waller notes, some firms will not be advantaged by convergence because they want to engage in opportunistic behavior that will be blunted by the increased cooperation that is both the cause and consequence of convergence. *Id*. at 387.

196. Fox, *Antitrust and Regulatory Federalism*, *supra* note 159, at 1799 ("In any event, the European Union is winning the competition. More nations are finding the EU model, in contrast to the U.S. model, congenial to their economies and polities."). Not that the U.S. didn't try. *See* Kathleen McDermott, *US Officials Provide Competition Counseling to Eastern Europe*, ANTITRUST, Fall/Winter 1991, at 4. This effort involved $7.2 million in USAID funds and visits (often measured in months) by DOJ and FTC regulators.

197. Eleanor M. Fox, *The Central European Nations and the European Union Waiting Room:*

explicit and is driven by an EU, rather than a U.S., model. As Eleanor Fox argues, there is "a particular competition between the [US] and [EU] for expanding the geographic scope of their [antitrust] law," and many believe the EU is in the lead.[198] The stakes are high because "[t]his competition [regards] exporting law, not importing law. The dominant exporter will have the stronger position in the world when, and if, multinational businesses find it no longer tenable not to have one overarching set of rules of the game."[199] At the same time, it is important not to overstate the degree of competition. There is significant cooperation between the EU and the U.S. on cases of shared interest, and, some argue, convergence in policies as well. As one observer puts it, "the daily interaction between [competition] agencies. . .fostered increasingly cooperative attitudes among officials on both sides of the Atlantic as they came to redefine their roles as members of a transatlantic community of professionals dealing with common problems."[200]

Like the EU, Japan has a distinctive competition policy that it has sought to disseminate, though less aggressively than the EU and U.S. In the 1990s, Japan initiated what it termed a "familiarization plan," in which senior officials from Asian states were invited to training sessions run by Japanese regulators.[201] The OECD has also issued several recommendations regarding cooperation on enforcement, and has

Why Must the Central European Nations Adopt the Competition Law of the European Union?, 23 BROOK. J. INT'L L. 351 (1997).

198. Fox, *Antitrust and Regulatory Federalism*, *supra* note 159, at 1799; *see also* Sassen, *supra* note 162, at 88; Karl M. Meesen, *Competition of Competition Laws*, 10 NW. J. INT'L L. & BUS. (1989). As the Report of the ABA Sections on Antitrust Law and International Law notes:

> The recent trend. . .is to adopt competition laws along the style either of the United States or the European Union, with variations that include a larger fairness component (fairness to weaker firms as against more powerful ones), as in the Asian economies. The EU model has attracted many more adherents than the US model.

The Internationalization of Competition Law Rules: Coordination and Convergence, 1999 A.B.A. SEC. ANTITRUST L. & INT'L L. REP. 19 [hereinafter 1999 ABA REP.]. The EU has even influenced Mexican competition law. *See* Jorge Witker, *Ley Federal de Competencia*, BOLETIN MEXICANO DE DERECHO COMPARADO, May-Aug. 1998, at 584. The competition notion is not completely accepted, however. *See, e.g.*, Waller, *Internationalization of Antitrust Enforcement*, *supra* note 8, at 392 ("Despite the United States' general geopolitical power, it does not appear to be a hegemon for antitrust purposes. If there is a competition between models of antitrust law, the United States is not winning.").

199. Fox, *Antitrust and Regulatory Federalism*, *supra* note 159, at 1799.

200. Youri Devuyst, *Transatlantic Competition Relations*, *in* TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY, *supra* note 8, at 127-28. According to Devuyst, between 1991 and 1999, EU and U.S. officials consulted each other in 689 different cases.

201. *JFTC Will Provide Training for APEC Officials*, Antitrust & Trade Reg. Rep. (BNA) (Sept. 19, 1996).

created an Outreach Program.[202]

In short, competition regulators are interacting extensively, and regulation is spreading to new jurisdictions at a rapid rate. In particular, developing and transitional economies have readily adopted competition law and become engaged in the competition network with their more experienced counterparts.[203] However, the key distinction between securities and competition is that no one model of competition law is predominant globally. As a recent ABA report argued,

> [c]lusters of nations are tending to adopt one or another of the different models. . .[Mexican law] appears on its face to be quite close to U.S. law.
>
> The laws of certain South American countries (Argentina, Brazil, Chile, Columbia [sic], Venezuela), adopted in recent years, combine aspects of EC and U.S. law, as do longer-established laws in Australia and New Zealand. . . .
>
> On the European continent, EC law is the general standard. . .
>
> Many of the smaller, trade-oriented Asian nations tended to model their competition laws along the lines of the Japanese and Korean laws.[204]

As transgovernmental cooperation proliferates, rivalry among competition laws has consequently developed. The leading economic powers are engaging in regulatory networks while seeking to export their preferred model to other, less powerful states, many of whom are only now creating competition laws as they liberalize their economies.

C. Environmental Regulation

Unlike the first two cases, environmental regulation is an area with widely diffused regulatory power and, correspondingly, a myriad of international treaties. Multilateral environmental agreements were negotiated at a rapid pace in the 20th century.[205] While accords continue to be developed, implementing existing commitments has become a major focus.[206] This focus has drawn attention to the capacity—or lack thereof—for environmental regulation that many states possess. A

202. *See, e.g.*, OECD Doc. C(86)44(Final) (May 21, 1986), *cited in* Hachigian, *supra* note 171. International conferences on competition law have begun to occur; in 1996, for example, a conference on "Competition Policies and the Economic Reform Process in Latin America" drew regulators from most Western Hemisphere states. Lande, *supra* note 163.

203. Portnoy, *supra* note 34, at 75.

204. 1999 ABA REP., *supra* note 298, at 36-37.

205. See the partial list in the ENTRI database, *at* http://www.ciesin.org (last visited Oct. 5, 2002).

206. INTERNATIONAL ENVIRONMENTAL COMMITMENTS, *supra* note 24.

contemporaneous and, as I will argue below, related development has been the rise of government networks.

As with the securities law area where IOSCO is the primary forum for networking, the emerging environmental network has been solidified—though not controlled by—a forum organization: the International Network for Environmental Compliance and Enforcement (INECE). Here, however, networks play a different role than in securities regulation. Because treaties remain the core approach to environmental rulemaking, the network of environmental regulators is primary focused on enhancing the capacity of regulators to regulate. In other words, capacity building, rather than creating new agencies or embracing particular substantive rules, is the primary activity.

INECE is jointly sponsored by the United States Environmental Protection Agency (EPA) and the Netherlands' Ministry of Housing, Spatial Planning and Environment (VROM), and began with the signing of an MOU between those two agencies in 1985.[207] Dutch requests to the EPA for technical assistance were followed by similar requests from Poland in 1991 and a plethora of other nations since.[208] Beginning in 1990, a series of international conferences were organized.[209] The most recent had regulators from 80 nations in attendance.[210] INECE itself was christened in 1997, "to signal the commitment to an ongoing network and set in place an ambitious two year work program."[211] While conferences are a central part of INECE, and permit regulators to meet, exchange ideas, and make connections, information technology is expanding its reach. INECE maintains a website which will soon have streaming training videos that can be downloaded by regulators around the world.[212] The EPA maintains a powerful presence in INECE, co-chairing the Executive Committee and serving as a motive force behind

207. *See History of INECE*, *at* http://www.inece.org/history.htm (last visited Oct. 5, 2002). One result of the MOU was a series of seminars in Washington for Dutch officials, introducing them to U.S. techniques of enforcement and compliance assurance.

208. *Id*.

209. *Id*. The first was in Utrecht. Subsequent conferences were convened in Budapest, Hungary in 1992, Oaxaca, Mexico in 1994, Bangkok, Thailand in 1996, and Monterey, California in 1998. One outgrowth of the 1994 meeting was the "Oaxaca Declaration" in which participants from the Americas committed themselves to work together to establish a regional network of regulators. *Id.*

210. Telephone Interview with Durwood Zaelke, *supra* note 111.

211. *Id*. There is now a twice-yearly newsletter, an elaborate Internet presence, access to confidential lines of communication for regulatory officials, a databank and technical assistance to enable officials to maintain communication with other network members. *See* www.inece.org/history.html (last visited Oct. 5, 2002).

212. Interview with Cheryl Wasserman, EPA, in Washington, D.C. (Apr. 2000).

the network.[213] The small INECE Secretariat (essentially 3 staff members) also has a U.S. presence, maintaining its headquarters in Washington, D.C.[214]

In addition to its central role in launching INECE, the EPA has developed an elaborate series of technical training and capacity building programs aimed at introducing U.S. regulatory practices to foreign jurisdictions. The EPA offers 24 "courses" touching upon a wide range of regulatory issues.[215] In the EPA's words,

> EPA's international technical assistance, training, and information exchange programs play a key role in fulfilling the Agency's mission. Exchanging environmental management, regulatory, and technical expertise with other nations can help solve environmental problems around the world. . . . In the 1990s, responding to an enormous need for environmental training and assistance in the emerging democracies of Central and Easter [sic] Europe, EPA developed an initial set of training modules to impart this information on key environmental management techniques employed in the United States. The modules are now being successfully applied in other regions as well, including large parts of Africa, Asia, Latin America, and Russia and the Newly Independent States.[216]

In 1997, for example, the EPA delivered 27 courses in 13 countries.[217] Some are quite general: one course entitled "Principles of Environmental Enforcement" covers a wide array of regulatory issues, ranging from the basic ("What is Compliance?"; "What are the

213. The Executive Planning Committee membership at present includes representatives from a diverse group of domestic agencies, international organizations, and non-governmental organizations: *inter alia*, Nigeria, Mexico, United States, India, South Africa, United Kingdom, the World Bank and the Environmental Law Institute. *See* http://www.inece.org/EPCnames.html (last visted Oct. 5, 2002).

214. *See* http://www.inece.org (last visited Oct. 5, 2002).

215. *See* http://www.epa.gov/oia/modules.htm (last visited Sept. 2000). These courses include, *inter alia*, Chemical Safety Auditing at Industrial Facilities; Ecological Risk Assessment and Decision-making; Environmental Compliance and Enforcement: Principles; Managing an Environmental Organization; Economic Incentives for Environmental Decision-making; Principles of Pollution Prevention; and Principles of Risk Management for Hazardous Waste Sites.

216. *See id*.

217. *See* U.S. EPA, EPA STRATEGY FOR PROMOTING U.S. ENVIRONMENTAL EXPORTS: A REPORT TO CONGRESS, (May 1998) [hereinafter EPA STRATEGY FOR EXPORT PROMOTION], *available at* http://www.epa.gov/oia/exp420.htm. (last visited 2001). In the same report, the EPA claimed that its web site receives 5.5 million page requests per month, and that in January 1998 alone individuals from over 40 foreign nations used the site. Exactly what percentage consisted of students researching third-year papers while on vacation abroad was not estimated.

Components of a Successful Enforcement Program?";) to the more advanced ("When Should Civil or Criminal Responses be Used?"; "What Enforcement Responses are Appropriate for Government-Owned and/or Operated Facilities?") to the structural ("Dividing Responsibilities Among Government Levels"; "Staffing Level").[218] Courses such as these essentially provide a handbook—"environmental regulation in a nutshell"—that is closely tied to U.S. practice. The combination of technical assistance, enforcement cooperation, and general peer-to-peer ties among environmental regulators appear to be forging some convergence in approaches. But because it is so closely tied to local conditions, and because regulatory power is so widely diffused, environmental regulation probably demonstrates the least convergence of the three cases in this article.

In addition to direct technical training, the EPA actively showcases U.S. environmental technologies to their foreign counterparts.[219] By creating demand for U.S. products abroad, the EPA nudges foreign regulatory rules and practices toward American ones. Indeed, the EPA's export promotion activities are tied to training programs. As the EPA acknowledges, "increasingly, these training programs prepare the way for the introduction of U.S. technologies."[220] While the EPA is assisting U.S. firms through its technical assistance activity, it is also incrementally aiding its goal of greater convergence in foreign regulatory practices—convergence that is based explicitly on U.S. approaches. This, in turn, has positive externalities for the U.S. environment, particularly when regional states, such as Mexico, are involved.

In short, between bilateral activities and INECE, EPA regulators are actively interacting with regulators from many foreign jurisdictions. INECE also promotes regional networks,[221] and the EPA is active both in the wider hemispheric network for the Americas and in a network involving the parties to the North American Free Trade Agreement, or NAFTA. A North American network of environmental regulators began to develop bilaterally (with the U.S. at the core), prior to NAFTA, through cooperation engendered by the La Paz and Boundary Waters Treaties.[222] NAFTA and its environmental side agreement, the North

218. U.S. EPA, PRINCIPLES OF ENVIRONMENTAL ENFORCEMENT (EPA/300-F-93-001) (July 1992).

219. EPA STRATEGY FOR EXPORT PROMOTION, *supra* note 218.

220. *Id*.

221. *See* http://www.inece.org (last visited Oct. 5, 2002).

222. The primary area of cooperation for the U.S. and Canada is the Great Lakes Region, governed by the Treaty on Boundary Water, Jan. 11, 1909, U.S.-Can., 36 Stat. 2448. The

American Agreement on Environmental Cooperation (NAAEC), have given a significant political spur to this cooperation.[223] Mexican environmental regulation was a major political issue in the NAFTA debate.[224] The NAAEC provides important mechanisms to further environmental cooperation. At the same time, in practice the NAAEC provides a medium through which a regional regulatory network has developed. U.S. regulators, as described further below, have been actively cooperating with and training their Mexican counterparts, in the process shaping the structure and process of Mexican environmental regulation. Because of the great significance of NAFTA for Mexico, U.S. capacity building and regulatory export efforts have been particularly successful here.

Mexico's first major step in the wake of NAFTA was to create a new enforcement office, the Procuraduría Federal de Protección al Ambiente (PROFEPA). In 1992 Mexican and U.S. inspectors also announced their first coordinated effort at enforcement actions in the border area. Since then regulators from both federal agencies, as well as local and state officials, have met frequently to coordinate investigations and surveillance efforts. As a result, U.S. observers believe Mexican enforcement and compliance programs have improved substantially.[225]

As Scott Fulton and Larry Sperling describe, between 1992 and 1994 the EPA conducted seven inspector training courses in Mexico as well as a train-the-trainer workshop.[226] These early efforts trained 561 PROFEPA inspectors—nearly all of Mexico's enforcement personnel—

International Boundary and Water Commission was established in 1944 by the Treaty on the Utilization of Waters of the Colorado and Tijuana Rivers, and of the Rio Grande, Feb. 3, 1944. U.S.-Mex., 59 Stat. 1219. In 1983 the Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, U.S.-Mex., T.I.A.S. No. 10,827 (the "La Paz Agreement") was signed, and since then five annexes to the accord have been negotiated.

223. *See* especially Fulton & Sperling, *supra* note 8. At the time of publication Fulton and Sperling were, respectively, Principal Deputy Counsel and Senior Attorney-Advisor, U.S. Environmental Protection Agency.

224. The U.S.-Mexico relationship is exceedingly complex; by some counts, there are more U.S. government agencies assigned to the U.S. embassy in Mexico than any other (more than 30) and increasing conflict among them. "[E]ach agency conducts its own foreign policy with little or no attachment to a central core of principles and interests. And there is precious little coordination between, among, or even with the distinct agencies involved." Howard J. Wiarda, *Beyond the Pale: the Bureaucratic Politics of United States Policy in Mexico*, 162 WORLD AFF. 174, 187 (2000). As this description suggests, the rise of networks of regulatory officials is part of a larger process of disaggregated sovereignty—exactly what transgovernmentalists highlight as the core of the new cooperative order.

225. Interviews with EPA officials, in Washington, D.C. (Mar. 1999) (on background); *see also* Richard Steinberg, *infra* note 227.

226. Fulton & Sperling, *supra* note 8, at 120.

and helped build inspector training capacity significantly.[227] The EPA trained PROFEPA in the use of aerial surveillance techniques, the preparation of environmental impact assessments, the inspection of volatile organic compounds, and so forth.[228] The EPA also created a bilingual training video for Mexican customs inspectors on compliance with the bilateral controls on hazardous waste movements developed under the La Paz agreements.

Richard Steinberg argues that in the wake of NAFTA "Mexico appears to have drastically improved its environmental enforcement regime. . .[it] has created a new [environmental] agency. . .which has built a staff of over five hundred inspectors operating out of ten regional offices."[229] What is most critical is that "almost all of these inspectors were trained with help from [EPA]. . . . This has led to at least a four-fold increase in the number of annual environmental inspections of firms operating in Mexico."[230] EPA has not limited its efforts at training Mexican officials in U.S. enforcement and compliance assurance techniques to lower-level inspectors. EPA has presented major training courses on the "fundamental principles for designing and implementing environmental enforcement programs" for Mexican policymakers at PROFEPA headquarters.[231] Revisions of Mexican environmental statutes have, as a result, been modeled on U.S. statutes.[232] More recently, EPA has promoted the use of innovative hybrid enforcement-regulatory techniques, such as "supplemental environmental projects" (SEPs), in Mexico.[233] To a lesser degree, regulators from the EPA and Environment Canada have also cooperated for enforcement and inspection purposes.[234] They have established a standing North American Working Group on Environment Enforcement and Compliance Cooperation composed of regulators from the three NAFTA parties.[235] Thus, NAFTA has provided a framework as well as

227. Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AM. J. INT'L L. 231 (1997).

228. Fulton & Sperling, *supra* note 8, at 120. Customs officials have also been trained in the identification of hazardous waste materials and ozone-depleted substances. Interview with Tim Whitehouse, Office of Enforcement and Compliance Assurance, EPA, in Washington, D.C., (Mar. 25, 1999).

229. *Id*.

230. Steinberg, *supra* note 227, at 251.

231. Fulton & Sperling, *supra* note 8.

232. Telephone Interview with EPA official (May, 2000).

233. *Id.* SEPs essentially trade a penalty reduction from a specified compliance failure for an often unrelated but desired environmental project, such as a land set-aside.

234. Fulton & Sperling, *supra* note 8, at 120.

235. One frequent activity is the preparation of reports on environmental policy. *See, e.g.*, North American Working Group on Environmental Enforcement and Compliance Cooperation,

an impetus for the emergence of a North American network.

As in the competition and securities cases, the environmental network has served as a conduit for the export of regulation from the U.S., though not as dramatically as in the first two cases. And, as in the securities context, an organization of regulators (IOSCO, INECE) has developed to structure and promote the network. The NAFTA experience illustrates that the regulatory diffusion that networks promote can also be strongly influenced by existing liberal internationalist institutions. NAFTA provided additional incentives for regulatory cooperation and an institutional structure within which regulators' collaborative and capacity building activities are organized.

D. Summary

These three cases illustrate the contemporary activities of transgovernmental networks. In each, agencies that in the past rarely considered the international sphere are actively cooperating with their foreign counterparts. These agencies are responding to the pressures of a globalizing world economy by cooperating in matters of enforcement, policy development, capacity building, and information sharing. This cooperation is frequently guided by informal or non-legally binding agreements, and takes place through peer-to-peer collaboration—sometimes in person and sometimes virtually. In each case participants have also created a peak organization to structure the network: INECE for environmental regulators; IOSCO for securities commissions; and, most recently, the new International Competition Network for antitrust.

Many of the descriptive claims of transgovernmental theory are supported by these cases. Each was selected knowing that a network was active, and thus selection bias is an important consideration when drawing inferences. Nonetheless, the cases provide much useful information. At a minimum, they are consistent with the claim that networks exist and that domestic regulators are actively engaged in them. At a maximum, they illustrate that networks can enhance regulators' power and effectiveness, promote regulatory uniformity without centralization and, under some circumstances, present a compelling alternative to liberal internationalism.

The cases also show that networks play different roles across the spectrum of regulatory power. The concentration of regulatory power in

Environmental Management Systems and Compliance (June 1998). The Commission Secretariat itself also produces related studies. *See, e.g.*, Secretariat of the CEC, Voluntary Measures to Ensure Environmental Compliance: A Review and Analysis of North American Initiatives (March 1998).

securities law encourages harmonization, because other jurisdictions have strong incentives to converge on the U.S. model.[236] When regulatory power is diffuse, as in environmental regulation, harmonization is possible but less likely and less dramatic. Here, however, the NAFTA story illustrates how incentives to converge can be amplified by a treaty setting. As I demonstrate in Part V of this article, the environmental case also illustrates the ability of network-led capacity building to strengthen the operation of treaties, improving compliance and effectiveness. The concentration of regulatory power blunts incentives for liberal internationalism, rendering this process of synergy largely moot.

It is critical to underscore what the cases do not demonstrate. They do not show that networks are presently the leading form of international cooperation.[237] They also do not show that transgovernmental cooperation lacks meaningful limits; rather, while networks can do much, they cannot, given their informal and flexible nature, achieve everything that regulators might desire or even what a strong multilateral agreement could. Nor is it clear from these cases that networks are rapidly expanding to the detriment of liberal internationalism.[238] Indeed, the more persuasive argument is that the development of transgovernmental networks, while significant, will not come at the expense of the traditional tools of liberal internationalism. There is significant scope for synergy between the two forms of cooperation.

To understand why synergy is more likely than conflict, it is important to consider the factors that drive transgovermental cooperation and, in particular, the processes of regulatory export and capacity building that networks facilitate. Because the potential for networks to build capacity and promote convergence has received little attention, yet is vitally important, in Part IV I analyze this process in detail. I then focus, in Part V, on exploring several ways that networks and treaties may influence one another. Many, though not all, of these ways suggest that networks will interact with treaties in a manner that promotes stronger, more effective international law.

236. Though not always; *see* Simmons, *International Politics of Harmonization*, *supra* note 18.

237. Though when this study is combined with other studies, such as Slaughter, Zaring, Dehousse, Bermann, *supra*, the overall picture is arguably one of significant networked cooperation.

238. *See also* Pollack & Shaffer, *Who Governs?*, *supra* note 49, at 297 (arguing that their cases studies suggest that at the moment there is "at best patchy support for Slaughter's ideal-type image of a transgovernmental world order.").

IV. TRANSGOVERNMENTAL COOPERATION AND POLICY CONVERGENCE

Transgovernmentalists argue that globalization creates incentives for national regulators to cooperate across borders in a flexible, functional manner. Cooperating directly with peers in other jurisdictions permits government officials to maximize their ability to fulfill their domestic mandates and more effectively enforce domestic law. Networks, they assert, help preserve regulators' power in the face of an increasingly complex and interdependent world economy.

As the case studies in this article reveal, this set of arguments is largely accurate. As transgovernentalists have stressed, enforcement challenges constitute the primary driver behind the rise of networks. In the process, however, government networks are often a conduit for the diffusion of regulatory ideas, rules, and practices. This outcome of transgovernmental cooperation—the diffusion of regulatory approaches—has been largely overlooked. In this Part I examine the linkages between networks, domestic policy change, and convergence. I first introduce the basic issues and consider the evidence that networks in fact promote regulatory convergence. I then consider the motivations of strong states to export their regulatory approaches and of weak states to import them. Finally, I advance a theory of regulatory export, which builds on the concept of "network effects" as understood in economic theory.

A. Networks and the Export of Regulation

A striking aspect of transgovernmental cooperation is that many jurisdictions appear eager to replicate U.S. and EU regulatory approaches as they increasingly interact with their counterparts in other nations. The result is the diffusion of regulatory rules and practices around the world. As the term "diffusion" suggests, when networks promote regulatory change, change occurs more through persuasion than command. This does not mean that power is absent in transgovernmental cooperation. Rather, as the case studies demonstrate, power plays a critical role. But power is exercised more in the guise of what Joseph Nye calls "soft power" than in traditional hard power.[239] Soft power is the power to attract; hard power the power to coerce. In networks, soft power is exercised by traditionally dominant states—no state has more soft power than the U.S.—and the dominant direction of

239. Nye, *Power We Must Not Squander*, *supra* note 93.

diffusion is clearly from the U.S. (and EU) and toward less advanced economies.[240] But as a result the mechanism by which networks alter domestic policies and practices is distinctive.

Policy convergence is important for two chief reasons: convergence can permit deeper cooperation over time and can decrease tensions in the trade arena. The trade tensions created by regulatory divergence are legion; indeed, they are "what the trade policy agenda increasingly has come to be about."[241] Trade agreements are often seen as the most powerful lever of regulatory change, and in many agreements governments negotiate specific harmonized rules or create systems of mutual recognition.[242] But networks may be an alternative source of convergence.[243] Moreover, networks appear to promote convergence in a distinctive manner. Rather than a formal, multilateral process of negotiation, convergence is fostered through a decentralized, incremental process of interaction and emulation.

Regulatory export clearly can occur in the absence of a network. Neither conscious emulation nor explicit attempts at regulatory diffusion are *necessarily* dependent upon the existence of networks. Nor is the existence of a network *sufficient* to produce regulatory export. But for several reasons, which I elaborate further below, networks *promote* these dynamics. Networks provide a means for the transfer of regulatory ideas and policies. They socialize regulators from new jurisdictions. Most importantly, networks increase the gains for states to engage in capacity building efforts. As I discuss below, building capacity and

240. There is certainly some small degree of cross-fertilization. The EPA, for example, has at least argued that "EPA staff. . .benefit from working with partners outside of the International capacity building programs expose staff to alternative approaches to environmental management and, in turn, help inject creativity and innovation into our domestic programs." No firm examples are given. U.S. EPA, BEST PRACTICES FOR EPA'S INTERNATIONAL CAPACITY BUILDING PROGRAMS: REPORT OF AN EPA TASK FORCE, at 8 (November 1999).

241. Ruggie, *At Home Abroad*, *supra* note 170, at 516; Bruce Stokes & Pat Choate, *Democratizing US Trade Policy*, Council on Foreign Relations Paper (2001), at 37 ("In the 21st century, trade negotiations and international commercial agreements are less and less about tariffs, quotas, and other formal at-the-border impediments to foreign commerce, and more and more about domestic regulatory environments and how they impede or enhance international competition.").

242. *See generally* REGULATORY COMPETITION AND ECONOMIC INTEGRATION, *supra* note 10.

243. As Eleanor Fox notes in the competition law context:

> [C]onvergence of law and practice has occurred and is occurring. Numerous meetings and workshops among competition officials, scholars, and practitioners, and technical assistance especially by the United States, the European Union, and Germany to nations that are newly adopting competition laws, have provided cross-fertilization and produced increasingly higher levels of common understanding.

Fox, *Antitrust and Regulatory Federalism*, *supra* note 159, at 1787.

disseminating regulatory approaches is particularly advantageous if both parties to the transaction plan to cooperate on regulatory matters and enforcement actions in the future.

Just as a network is neither necessary nor sufficient for regulatory export to take place, regulatory convergence can occur with or without a network. Convergence occurs for many reasons. Convergence is a controversial topic in international political economy; it is often attributed to broad pressures resulting from globalization, though many studies cast doubt on this claim.[244] I do not engage this controversy directly. Rather, I argue only that processes of policy convergence, however else they may occur, are *fostered* by networks. The critical point is that key actors in networks aim to, and often succeed at, producing some convergence. That convergence may be simple, as when one jurisdiction creates a regulatory agency for the first time, and in so doing broadly converges its (previously implicit) policy with those of other states. Or convergence may be deeper, as when the Visegrad states explicitly adopted EU-style competition laws.

Efforts at legal export or diffusion have a substantial history. The law and development movement in the 1960s explicitly sought to transfer legal models to developing states, with only limited success.[245] The international emulation (or imposition)[246] of domestic institutions has been analyzed in many other disciplines as well.[247] The export of U.S.

244. *E.g.*, Garrett, *supra* note 19; Simmons & Elkins, *supra* note 19. As Zürn notes, discussing the literature on globalization and races to the bottom:

> Convergence—be it downward or upward—can thus not be expected to take place. The evidence produced in these studies clearly demonstrates that neither the convergence nor the deregulation trend exist in a strong and dominant sense…. The debate and evidence produced so far, however, are still inconclusive for a number of reasons.

Zürn, *supra* note 40, at 243.

245. Galanter & Trubek, *supra* note 22.

246. *See, e.g.*, John M. Owen, IV, *The Foreign Imposition of Domestic Institutions*, 56 INT'L ORG. 375 (2002). Owen notes that states typically impose their own institutions. ("If one wants an actor to behave in a certain way on the world stage, what better method is there than to see to it that it has the 'right' kind of government?" *Id.* at 400 (citing STANLEY HOFFMAN, THE STATE OF WAR: ESSAYS AND THE THEORY AND PRACTICE OF INTERNATIONAL POLITICS 11 (1965)). *Id*. at 400.

247. Arnold Toynbee long ago termed this "mimesis": "the reception and adoption of elements of culture that have been created elsewhere and have reached the recipient by a process of diffusion." ARNOLD J. TOYNBEE, 12 A STUDY OF HISTORY: RECONSIDERATIONS 343 (1964). In sociology, John Meyer and his students have argued that states resemble one another, both in policy and in structure, to a tremendous degree and that this resemblance is often driven by a shared set of global structures. *See, e.g.*, John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144 (1997). Paul DiMaggio and Walter Powell influentially advanced several hypotheses relating to organizational homogeneity and "institutional isomorphism," many of which apply to international processes. Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Field*s, 48 AM.

law accelerated with the end of the Cold War; as one scholar recently argued, in the 1990s the U.S. embarked on an "extraordinarily ambitious and multifaceted drive. . .to transplant laws and legal ideas and to foster legal reform or development abroad."[248] Much of this wave of legal export efforts focused on legislation rather than institutional capacity.[249] By contrast, the activities described in this article address legislation, but go well beyond to touch on issues such as the structure of enforcement and the training of personnel. (This an important addition that may render the impacts of legal export more lasting and consequential.)[250]

The degree to which regulatory export efforts are the cause of policy convergence is nonetheless uncertain, and will remain so in the absence of substantial empirical research over longer timescales. But preliminary evidence, and the views of participants themselves, suggests that there has often been appreciable impact. At a minimum, the claim that the efforts of the SEC, DOJ, and EPA have had *no* impact on foreign regulators and their policies is implausible and inconsistent with the evidence that does exist.[251] U.S. regulators devote significant resources, particularly in terms of manpower, arguing that they yield

SOC. REV. 147, 149 (1983) ("isomorphism is a constraining process that forces one unit in a population to resemble other units that face the same set of environmental conditions."). In political science, scholars have examined "policy bandwagoning" and "social learning." G. John Ikenberry, *The International Spread of Privatization Policies: Inducements, Learning, and "Policy Bandwagoning," in* THE POLITICAL ECONOMY OF PUBLIC SECTOR REFORM AND PRIVATIZATION, (E. Suleiman & J. Waterbury eds., 1990). The social learning concept was first introduced by Ernst Haas. Ernst Haas, *Why Collaborate? Issue-Linkage and International Relations*, 32 WORLD POL. 357 (1980). The spread of Keynesianism in the mid-20th century has also been analyzed as a process of policy and ideational diffusion. THE POLITICAL POWER OF ECONOMIC IDEAS: KEYNESIANISM ACROSS NATIONS (Peter Hall ed., 1989). More recently, students of advocacy have described "a model of transnational change that is not just one of 'diffusion' of liberal institutions and practices, but one through which the preferences and identities of actors engaged in transnational society are sometimes mutually transformed through their interactions with each other." KECK & SIKKINK, *supra* note 70, at 214.

248. deLisle, *supra* note 22, at 180.

249. In his survey of various U.S. legal export efforts, deLisle argues that four conditions accentuate the impact of legal export: the exercise of power by the U.S. that presses the recipient state to conform to U.S. standards; high regard in the importing state for the U.S. law(s) in question; low political controversy over the substantive issues; and a relatively small gap between U.S.-favored standards and pre-existing indigenous rules. *Id*. at 274.

250. *Id*.

251. The DevTech Report, at *supra* note 182, analyzed the activities of DOJ and FTC staff in Eastern and Central Europe. That report assessed the program very positively, calling it "extraordinarily effective" and have achieved a "very high degree of sustained impact." DEVTECH REPORT, *supra* note 182 at i. Moreover, the report argued that "The American advisors' extensive role in helping draft or amend relevant laws was freely acknowledged and universally appreciated. In no country had there been a subsequent attempt to weaken or repeal the laws drafted with their help." *Id*. at 7.

qualitative policy changes in foreign jurisdictions. Indeed, the one extensive empirical study of the impact of U.S. technical assistance efforts described in this article, in the area of competition, found the policy impact to be sustained and significant.[252]

Other evidence, as described in Part III above, is largely anecdotal but is consistent with the claim that networks, through their cooperative activities, incrementally re-cast regulatory agencies and their policies, promoting convergence. Important components of Mexico's environmental enforcement program are now modeled on that of the U.S.; the securities regulatory structure of many emerging markets parallels that of the U.S. in important respects; and both the U.S. and EU models of competition have been embraced—albeit sometimes weakly—by various developing (and industrialized) states around the world.[253] And while difficult to measure, socialization processes within networks should further promote this process of regulatory export, even in the absence of explicit capacity building efforts.[254] Networks bring regulators, as individuals, together on a repeat basis. As Keohane and Nye argue, as a result these officials may come to "define their roles partly in relation to their transnational reference group rather than in purely national terms. . .regularized patterns of policy coordination can therefore create attitudes and relationships that will at least marginally change policy or affect its implementation."[255]

B. Cooperative Choices and the Incentives for Diffusion and Convergence

1. Why converge?

One clear lesson of the three cases in this article is that U.S. regulators often believe that regulatory convergence is useful and makes

252. *Id*. That said, importing jurisdictions inevitably alter models from abroad. For example, the Japanese Constitution, drafted by the U.S., clearly operates differently than intended.

253. *See supra* Part III. As Fox notes with regard to export efforts by the U.S. and EU, while different techniques are used in some cases, "[t]he common vehicle is advocacy in the course of advice and technical assistance for implementing competition laws." Fox, *Antitrust and Regulatory Federalism*, *supra* note 159, at 1799.

254. Many of the government officials (as well as officials of network secretariats, such as INECE) stressed this factor.

255. Keohane & Nye, *Transgovernmental Relations and International Organizations*, *supra* note 8, at 39. Tarullo argues similarly in the competition context: "ongoing discussions about both general principles and specific regulatory issues furnish ample opportunities for cognitive convergence. . .as a result of substantial interaction and argument, the beliefs of participants concerning the principles and techniques underlying sound antitrust regulation may converge to a greater or lesser degree." Tarullo, *supra* note 42, at 495.

robust cooperation possible.[256] For example, Douglas Melamed of the DOJ recently stated that "cooperation in specific cases 'can be successful only among countries which have relatively similar legal systems [and] common economic experience and trust each other.'"[257] In Melamed's view, cooperation can in turn encourage the evolution of "common views and…understandings" about substantive and procedural issues, which facilitates shared enforcement responsibility and leads to deeper, more effective cooperation.[258] Similarly, a top FTC official stated that "the constant contacts [with foreign regulators] enable us to understand each other's analysis, lead to convergence in our approaches toward competition matters—in some measure due to an increasingly common economic analysis—and benefit parties insofar as we are often able to arrive at complementary remedies."[259] Policy convergence and participation in networks are, in this view, mutually reinforcing.

To be sure, U.S. (and other) regulators do not always favor convergence.[260] But often it is attractive. Differences in procedural rules, for example, can be major impediments to regulatory cooperation. Different requirements and timelines for merger review inhibit

256. *See supra* notes 111, 135, 143, 173-74, 212, 225, 232 (interviews and telephone interviews with SEC, DOJ and EPA officials).

257. Melamed, *supra* note 173, at 432 (quoting Frédéric Jenny).

258. *Id*. at 425. As the DevTech Report describes with regard to antitrust regulation:

> A Lithuanian staff professional described, for example, how the American advisors had "opened her eyes" to the difference between regulation or prevention of price "speculation," versus assuring that the prices advertised were not deceptive. This type of change in "mentality" or outlook, resulting from interaction with the American advisors, was described frequently by staff in respect to their understanding of key competition and consumer protection concepts, such as product and geographic market definition, barriers to entry, price collusion [etc.]. Its importance for sustainability lies first in the fact that these concepts underpin the fundamental re-orientation of the public sector institutions being assisted. Second, it was clearly the case that the persons who described their understanding of the concepts conveyed by the American advisors were quite capable of training other staff in these concepts.

DEVTECH REPORT, *supra* note 182 at 8.

259. Debra Valentine, General Counsel of the FTC, Remarks at a 1998 American Bar Association panel, *cited in* Knight, *supra* note 175, at 30. As the DOJ ICPAC Report notes, "[s]ubstantive and procedural differences between the U.S. and non-U.S. legal systems can also generate frictions between nations." ICPAC Report, Annex 1-C, *supra* note 82, at iii. *See also* Slaughter, *Agencies on the Loose?*, *supra* note 8, at 540 ("[MOUs] have led not only to greater cooperation between states, but also to more effective enforcement of the antitrust statutes of both parties.").

260. Incentives for regulatory divergence exist in many instances: environmental regulation is one example, where differing costs and preferences can lead states to prefer lower levels of protection when other states want high levels. As I discuss below, money laundering is another example: some states seek to be money havens and thus prefer to diverge from the regulatory position of states like the U.S.

cooperation among competition regulators.[261] Differences in confidentiality rules constrain the degree to which U.S. regulators can actively cooperate with foreign regulators.[262] As the DOJ *ICPAC Report* notes with regard to a U.S.-Australian competition agreement, "from a U.S. perspective, it was feasible to enter into such an agreement with Australia because of two features of the Australian system. First, Australia has a strong regime of confidentiality laws that will protect non-public information obtained from U.S. companies. Second, its laws authorize entry into agreements under which such information may be exchanged in antitrust matters."[263]

As the preceding statement suggests, a basic but highly important issue of policy convergence is the requisite legal authority to cooperate meaningfully with foreign regulators. The United States enacted legislation in the 1980s that permitted the SEC to assist foreign regulators pursuing fraud enforcement actions.[264] In so doing Congress "strengthened the SEC's ability to extend its influence, and consequently protect its autonomy, by expanding the agency's discretion and providing a vehicle for reciprocity at the international level."[265] Numerous jurisdictions have enacted legislation that has facilitated cooperation among securities regulators; these enactments are similar, to varying degrees, to the facilitating legislation in the U.S.[266]

Policy convergence can also make it easier for regulators to divide and share work related to the fulfillment of their domestic mandates. In the competition arena, for example, the U.S. and EU, which increasingly review the same large multinational mergers, have begun to create "work-sharing" arrangements in which one agency relies on investigations or decisions made in the other in order to save resources and avoid duplicative review.[267] Similarly, the SEC notes that

261. Merit Janow, *'Soft Harmonization' and Multilateralism*, *in* TRANSATLANTIC REGULATORY COOPERATION, *supra* note 7, at 258.

262. Annex 1-C of the ICPAC Report, *supra* note 82, notes that the U.S. entered into its first and only IAEAA agreement with Australia in 1999. ICPAC Report, *supra* note 82, at vii.

263. *Id*.

264. The Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (1988) and the International Securities Enforcement Cooperation Act of 1990, Pub. L. No. 101-550, 104 Stat. 2714 (1990).

265. Colombatto & Macey, *supra* note 25, at 954. Hong Kong followed the U.S.' lead in the early 1990s; the United Kingdom did so in 1990. Teo, *supra* note 119, at 39; *see also* Helen Lee, Information and Inter-Market Surveillance in the Asia-Pacific Region, Address Before the Taipei SFC (Aug. 18, 1997), *at* http://www.hksfc.org.hk/eng/press_releases/html/index.html (last visited Oct. 5, 2002).

266. Teo, *supra* note 119, at 43.

267. As one D.C.-based antitrust attorney writes of such an arrangement, "[i]t was a success because the regulators operated with closely attuned policies and with a basically similar

"cooperative arrangements modelled [sic] after the SEC's [MOUs] are now used by securities regulators around the world. Consequently. . .the SEC is able to obtain enforcement-related information from numerous jurisdictions, including emerging and developed markets."[268]

While both substantive and procedural regulatory convergence can enable regulators to better achieve their domestic mandates, convergence may also benefit multinational firms. To the degree it renders disparate regulatory landscapes similar and provides regularity and predictability across borders, convergence is advantageous for multinationals. The current patchwork of national competition laws, for example, undoubtedly imposes costs on multinational firms.[269] Similarly, harmonization of environmental regulations permits firms to readily adapt equipment and processes from one jurisdiction for use in others. While the advantages are numerous, the preceding considerations should not be read to contend that regulatory convergence is necessarily or always a positive development. In some circumstances diversity and competition may instead be optimal from a global welfare perspective[270] or preferred from an individual state perspective.

2. Convergence on What Model?

Above, I provided several arguments for why regulators prefer convergence in many areas of policy. Here, I consider distributional issues: if convergence is beneficial, whose preferred policy approach becomes the focal point for convergence? While functional incentives drive much transgovernmental cooperation, U.S. regulators also typically believe in the efficacy of their own regulatory models. Indeed, interviewees in Washington at times spoke of the "gospel" of their regulatory system and the normative desire to export that gospel.[271] (Undoubtedly EU regulators are not immune to this belief). Thus both

analytical framework. The confidence that the U.S. and EU competition authorities are acting based on a common approach toward a common objective is what makes this sort of bilateral convergence work." Barry Pupkin, *The Internationalization of Antitrust Law and the Increased Convergence of US and EU Antitrust Law* (Jan. 16, 2001), *at* http://www.ssd.com/library/pdf/pupkin.pdf (last visited Oct. 5, 2002).

268. The SEC Speaks in 2001, *supra* note 119, at 996.

269. Tarullo, *supra* note 42, at 483.

270. For example, Stephen Choi and Andrew Guzman argue that a spectrum of securities regimes is advantageous. Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903 (1998); Choi & Guzman, *National Laws, International Money*, *supra* note 147, at 1875.

271. This was particularly true of SEC interviewees.

the belief in substantive regulatory superiority and the advantages of convergence appear to undergird regulatory export processes.

As this implies, in practice the common understandings that U.S. regulators refer to and seek to concretize are not neutral: they reflect specific national practices. As regulators in the U.S. or EU persuade other jurisdictions to develop or modify regulatory laws and practices, they generally encourage the replication of *their* regulatory structures.[272] Frequently, economically weak jurisdictions embrace a substantial part of the regulatory models of the dominant powers.

What incentives exist for weak jurisdictions to import the regulatory approaches of the advanced industrial democracies? In a complex, uncertain economic environment, the strategy of adopting successful foreign models can markedly reduce regulatory costs.[273] Importing jurisdictions do not bear the (often considerable) expense of creating the regulatory institutions they adopt.[274] While these institutions "may not match domestic conditions precisely. . .[they] are ready-made, pre-tested, and provide international compatibility."[275] Foreign regulatory rules and systems also may come "pre-interpreted"—with a body of case law and other decisions that have elaborated and improved the rules over time.[276] Finally, technical assistance programs further ease the transition and enable regulators to learn from experienced practitioners.

When the costs of regulatory change are high, the benefits to importing jurisdictions may not justify change. But where the costs of change are low—or zero, as in the case of state that previously lacked a particular regulatory system—there can be substantial gains from choosing off-the-shelf models. "The costs of independent invention (including the 'trial and error' of pursuing blind alleys already explored by others or the expenses of devising genuinely new laws and institutions) can easily outweigh the expected marginal gains from an

272. *See, e.g.*, Sassen, *supra* note 162; David J. Gerber, *Is Reconciliation Possible?: The US-European Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective*, 34 NEW ENG. L. REV. 123, 133(1999) "[f]or U.S. participants, points of convergence are easily imagined: a world of competition law systems resembling the U.S. system." Paralleling the argument made here, Portnoy asserts that "For the most part, LDCs [Less Developed Countries] imitated western competition rules. However, imitation implies independent choice….Instead, antitrust ideas and institutions were transferred through a well-organized transnational dialogue between antitrust experts and willing LDC policymakers." Portnoy, *supra* note 34, at 108-09.

273. Giandomenico Majone, *Cross-National Sources of Regulatory Policymaking in Europe and the United States*, 11 J. PUB. POL'Y 79 (1991).

274. Nancy Birdsall & Robert Z. Lawrence, *Deep Integration and Trade Agreements Good for Developing Countries?*, *in* GLOBAL PUBLIC GOODS, *supra* note 108, at 135-36.

275. *Id*. Birdsall and Lawrence do not discuss networks per se.

276. I thank Damien Gerardin for making this point.

indigenously crafted arrangement that might better suit local needs and circumstances."[277] The incentives to adopt pre-existing approaches are likely to be compounded if regulators also gain power and prestige through their association with foreign regulators and their techniques.[278] DiMaggio and Powell contend that organizations "tend to model themselves after similar organizations in their field that they perceive to the more legitimate or successful."[279] The prestige and legitimation that foreign regulators can offer can help regulators in newly-created agencies to increase their own political power and entrench the newly imported rules and programs.[280]

Regulators in foreign jurisdictions may also import innovations from leading jurisdictions because of market pressures. In some cases firms in a global market will seek harmonization, as in accounting rules, in order to reduce the transaction costs of multinationality—a dynamic I discuss further below.[281] This process can be pushed along as firms respond to assertions of extraterritoriality from jurisdictions such as the U.S. (a major issue in competition law).[282] The debate on races to the bottom and the top is long; the key point here is simply that where races to the top do occur, regulators are often "importing" regulatory rules.[283] Collectively, these varied incentives to import help offset some

277. deLisle, *supra* note 22, at 289; *see also* Birdsall & Lawrence, *supra* note 274.

278. Simmons & Elkins, *supra* note 19, note a process of "social emulation" that is related to that discussed here. *Id*. at 19.

279. DiMaggio & Powell, *supra* note 247, at 152. They also stress the importance of professionalization and professional norms—for example, among economists involved in securities regulation. *Id*.

280. As Giandomenico Majone argues, "an agency that sees itself as part of a transnational network of institutions pursuing similar objectives and facing analogous problems. . .is more motivated to defend its policy commitments and professional standards against external influences." By external, Majone means actors outside the regulator's field of expertise, such as politicians or other agencies. Giandomenico Majone, *International Regulatory Cooperation: A Neo-Institutionalist Approach*, *in* TRANSATLANTIC REGULATORY COOPERATION, *supra* note 7, at 138-39.

281. *See infra* Part V; *see also* Simmons, *International Politics of Harmonization*, *supra* note 18, at 610:

> Widely varying accounting rules can add to transactions costs for firms that want to offer shares on foreign exchanges, potentially deter cross-border listings, and confuse investors. . . .Market dominance in equities is central to the process of harmonization. A key factor is the insistence by the [SEC] that any firm listed on a US exchange must use USGAAP.

282. *See, e.g.*, Fox, *Antitrust and Regulatory Federalism*, *supra* note 159, at 1799. The U.S. has a long history of asserting extraterritorial effect for the Sherman Act. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

283. On races up, *see* DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY (1995). The dominant argument is races to the bottom, but that has been attacked on empirical and theoretical grounds. *See, e.g.*, Garrett, *supra* note 19.

important countervailing concerns—such as sovereignty costs—that surely exist.[284]

The incentives to converge regulatory policies also vary given the distribution of regulatory power. Concentrated regulatory power can make efforts at harmonization easier, because other jurisdictions will often have strong incentives to adopt the dominant actor's model. Engagement in a regulatory network, and efforts at regulatory export, further increase the incentives for convergence in other areas of securities regulation, such as insider trading, where market pressures are weaker.

While concentrated regulatory power appears to foster convergence, when regulatory power is diffuse, as in environmental protection, convergence is possible but less likely and less dramatic. States sometimes will have incentives to *diverge* rather than converge. Indeed, money laundering rules are an example in which regulatory power is diffused and other jurisdictions have incentives to diverge from the policies of the U.S. or other large regulators.[285] When regulatory power is moderately concentrated, as in competition policy, policy convergence is likely to occur along multiple tracks. As the competition case illustrates, there is a clear divide between the EU-oriented world and the U.S.-oriented one. Nonetheless, U.S. and EU regulators continue to cooperate with one another and, in the eyes of at least some observers, are also slowly moving toward a shared regulatory model.[286]

3. The Motivations of Regulators

My analysis of transgovernmental cooperation does not rest on a specific motivational theory of regulators, such as the public choice conception of regulators as self-interested, even venal, utility maximizers. Rather, I have presented a wide-ranging set of reasons why regulators from differing jurisdictions might participate in networks and might seek, in the process, to try to export or import regulatory models. While my approach has been catholic in terms of motivation, it is not inconsistent with either a public choice or a public interest theory of regulators.

284. I borrow this phrase from Abbott & Snidal, *supra* note 83. By this they mean essentially " a loss of authority over decision making in an issue-area." *Id*. at 436.

285. *Id*.

286. *E.g.*, Devuyst, *supra* note 200. Pupkin, *supra* note 267.

Public choice theory, for example, argues that regulators maximize their personal power that regulators may create and participate in networks to strengthen their power vis-à-vis political rivals and regulatees—and perhaps to collude with their foreign counterparts in the process. (Some regulators even might engage in networks and specific technical assistance programs because they represent nothing more than a personally consumable travel perk.)[287] By contrast, the public interest approach would contend that regulators, as rational problem solvers, use networks to address the negative externalities of economic interdependence. They may rationally seek convergence as a way of reaching their goals. While my analysis more frequently (if implicitly) favors the public interest approach, both these approaches are consistent with the broad core of my argument.

C. A Network Economics Theory of Transgovernmentalism and Policy Convergence

I have argued that government officials may export or import regulatory approaches and rules for several varied reasons. These include enhanced enforcement cooperation and information sharing; external market pressures; variations in regulatory power; benefits for national firms; the desire to gain prestige and political power through association with powerful foreign regulators; ideational beliefs about superior regulation; and rational cost-saving through the adoption of "off the shell" regulation. These arguments, however, do not depend directly on the network form. They could also explain bilateral cooperation or generalized policy harmonization, though the existence of networks strengthens these incentives significantly.

In this section I propose an account of transgovernmentalism and regulatory export that stresses the unique qualities of networks *as networks*. This account, which draws on theories of network effects in economics, adds to the factors I have already discussed.[288] I do not claim to fully "explain" transgovernmental cooperation, a task that requires

287. This might underlie a sizeable chunk of international law-making in many areas; as John Jackson wrote about the international trade order, for example, "the chance to go 'tooting off in private jets to negotiate with other national leaders at comfortable locations or three-star restaurants' is a key plum of otherwise dull government jobs, a high government ex-official once indicated." JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 84 (1989). But that incentive, while casting doubt on the motivations of putative importers, does not necessarily imply that legal export is unlikely to succeed.

288. Katz & Shapiro, *supra* note 23.

extensive cross-national research.[289] Rather, I present a first cut at a theory of networks and regulatory export. The core intuition is that the organizational form of networks—a series of interconnected but decentralized nodes—provides or enhances incentives for convergence and cooperation. [290]

1. The Economics of Network Effects

I begin with the thesis that the role of "network effects" as they are understood in contemporary economics can help explain why regulatory policies converge government networks. [291] Network effects exist when "the utility that a user derives from the consumption of a good increases with the number of agents consuming the good."[292] Networks can be evaluated along a continuum, with actual (physical) networks at one extreme, simple positive feedback loops at the other, and "virtual" networks in between.[293] The telephone system is an actual network: one phone is worthless, only valuable when linked to others. The more phones, the more valuable each phone is. Virtual networks exist when increasing the number of members increases the utility of other members, even though a single item or member is not useless. In other words, virtual networks are virtual because there is no physical link, as in the phone system or the Internet. Computer software exhibits virtual network effects: a program on its own is useful to the owner, but one shared by millions of others, such as Microsoft Word, is far more useful because users can easily trade files with one another. Credit cards and languages also exhibit virtual network effects.[294] While

289. Moreover, the research design of this article does not permit especially firm causal claims. Because I have in effect selected on the dependent variable my claims are necessarily limited to proposing plausible causal arguments that could be tested through future cases. *See generally* KING ET AL., *supra* note 27, at ch. 4.

290. As Lemley and McGowan argue, the adaptation of network effects arguments to novel fields is fraught with peril. Lemley & McGowan, *supra* note 20, at 487-88. Cognizant of this risk, I use the network effects concept metaphorically; (*see id*. at 15, describing Liebowitz & Margolis, *Network Externality*, *infra* note 291, as treating language as a "metaphorical network" in which there may be direct interaction with physical connections among network participants). Future research may reveal more about the network effects that exist in social networks of the kind I describe here.

291. Lemley and McGowan distinguish network effects and network externalities, but for my purposes this distinction is not germane. *See* Lemley & McGowan, *supra* note 20, at 482 & n.5 (citing S.J. Liebowitz & Stephen E. Margolis, *Network Externality: An Uncommon Tragedy*, 8 J. ECON. PERSP. 133 (1994)).

292. Katz & Shapiro, *supra* note 23.

293. Lemley & McGowan, *supra* note 20, at 488-95; Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 1 (1994).

294. *See* Lemley & McGowan, *supra* note 20, at 489-90, 492-93. As with other virtual

transgovernmental networks are at the limit of what might be considered virtual networks, my claim is that the resemblance is sufficient to generate several arguments about networks and cooperation.

Transposed to international cooperation, the concept of network effects helps illuminate why both powerful and weak jurisdictions which are members of networks might, as a concomitant of cooperation with one another, engage in the export and import of regulatory frameworks. Networks are characterized by extensive sharing of information, coordinating enforcement efforts, and joint policymaking activities. These activities plausibly exhibit network effects: the more regulatory agencies that participate in coordinating and reciprocating enforcement efforts, for example, the better off are all the other agencies. The same logic applies to information-sharing: the more jurisdictions that share information about financial markets or international cartels, for instance, the better off any one jurisdiction is at enforcing its law and punishing (and deterring) corruption and collusion. If U.S. officials like Melamed are correct that "cooperation in specific cases can be successful only among countries which have relatively similar legal systems,"[295] then the greater the number of jurisdictions that resemble one another, the more valuable cooperation among them ought to be.

2. Tipping, Standard-Setting, and Policy Convergence.

One key aspect of the concept of network effects is that it challenges a central tenet of economic theory: returns to scale diminish.[296] In a setting characterized by network externalities, returns to scale increase rather than decrease. The larger the number of individuals that have the same or compatible software, the more useful that software is. Networked markets, as a result, exhibit "lock-in" or "tipping" effects.[297]

networks, languages demonstrate a quasi-standard-setting dynamic when coupled with interdependence. As global interdependence has grown, two noteworthy effects have occurred: English has become the de facto international standard, and many of the world's languages have begun to disappear as potential new speakers instead learn more widely spoken languages such as Spanish. More than 50 percent of the world's languages are in danger of dying out in the next century. *See Cultural Loss Seen as Languages Fade*, N.Y. TIMES, May 16, 1999, at A12.

295. Melamed, *supra* note 173, at 432 (quoting Frédéric Jenny).

296. Lemley & McGowan, *supra* note 20, at 484.

297. Tipping can also occur outside of virtual networks. Malcolm Gladwell argues that tipping points frequently occur in social phenomena in a way that mimics the spread of

Once a standard emerges in a network, it can rapidly dominate that network. Once that occurs there is little incentive for actors to change standards, even if a more efficient alternative exists.[298] For example, in the oft-used videotape story, VHS and not Betamax became the dominant standard in videotape. This was not because VHS is the superior technology, but because VHS secured more "members" in its network—more owners of VHS-compatible VCRs, more films, and so forth. In so doing, VHS tipped the market in its favor decisively. While a new technology, DVD, may dislodge videotape altogether, no other videotape standard will dislodge VHS.[299]

This suggests the following argument. By adopting the emerging regulatory standards, understood here as rules, policies, enforcement practices, and the like, regulators maximize the depth of their engagement with other regulators and the effective reach of their own regulatory efforts. Given the existence of a government network, regulatory convergence increases the number of jurisdictions with which a powerful state can usefully cooperate.[300] Over time, network theory predicts that tipping occurs, leading to an equilibrium in which one (or more; see below) regulatory standard dominates. Network effects thus aid policy standardization. Again, this is not to say that convergence is "caused" by network effects, but rather that network effects boost the existing incentives to standardize. As in the simple

epidemics. Gladwell acknowledges the link to network economics at times; in an afterword he describes network effects (in the context of the rising value of a fax machine as the virtual network expands) and argues that:

> epidemics create networks as well: a virus moves from one person to another, spreading through a community, and the more people a virus infects, the more "powerful" the epidemic is. But this is also why epidemics so often come to a crashing halt. Once you've had a particular strain of the flu, or the measles, you develop an immunity

MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE 272-73 (2002). He goes on to argue something analogous in the context of virtual networks: while the expansion of a network demonstrates increasing returns to scale,

> as a network grows in size, however, it is also the case the time and nuisance costs borne by each member of the network grow as well. . .the phone network is so large and unwieldy that we are increasingly only interested in using it selectively. We are getting immune to the telephone.

Id.

298. Lemley & McGowan, *supra* note 20, at 497-98.

299. Similarly, the continued dominance of the QWERTY keyboard has frequently been taken to demonstrate (with some controversy) that in networked markets inferior technologies can thrive and persist if they attain sufficient market dominance. Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. 332 (1985). *But see* S.J. Liebowitz & Stephen E. Margolis, *The Fable of the Keys*, 33 J.L. & ECON. 1 (1990).

300. *See supra* Part III. Adding to these incentives are the beliefs that regulatory export increases the welfare of national firms and is normatively superior.

VHS story, if a VCR owner never wanted to rent tapes or share tapes with anyone else, the incentive to choose VHS over Betamax is weak. But if that actor did want to rent and share with others, she can only do so effectively if she adopts the dominant standard.[301]

The interesting question is which "standard" dominates in a given situation and why. In regulatory networks, it is likely to be the standard of the most powerful actor, often the U.S.[302] For seemingly technical, apolitical regulatory laws and standards, "[e]mulating U.S. examples or following U.S. prescriptions can seem to involve either making no choice at all or making the only instrumentally rational choice."[303] As I discuss further below, in situations where regulatory power is highly asymmetric, as in securities regulation, the actor possessing preponderant power can propose a regulatory policy that other actors will be compelled to adopt. Often market forces aid this process. U.S. accounting practices, for example, have essentially become global accounting practices because the importance of entering U.S. capital markets, and thus complying with their accounting rules, is paramount.[304] As the number of firms doing so grows, the incentives for other states to codify the U.S. standard grow.

While this dynamic does not depend on the existence of networks to occur, network effects can strengthen this tendency toward convergence in asymmetric situations. When many agencies are regulating a field in a similar manner, and cooperating with one another through networks, network effects can push agencies to adopt the dominant regulatory standard, leading to or accelerating a tipping process. These two arguments—regulatory asymmetry and network effects—are not mutually exclusive, but rather are complementary. U.S. dominance, or any marked asymmetry in regulatory power, can be reinforced by the presence of weak network effects which encourage states to adopt the dominant mode of regulation. Whenever network effects are present, as the case studies in this article demonstrate, the regulatory standard is likely to have been set by a powerful state, especially the U.S. The

301. Of course, a far-sighted network theorist would recognize the impending lock-in process and might try to pick the winner, going with that standard on the grounds that only it will survive over time.

302. In the economics literature there is much discussion of the first mover advantage. That is important here as well, as I note below. But in international politics not all states can be credibly vie to be first movers—for Botswana such an effort is hopeless; for the U.S., EU, and Japan, it is reasonable.

303. deLisle, *supra* note 22, at 286.

304. *See* the discussion *infra* and Simmons, *International Politics of Harmonization*, *supra* note 18.

concept of network effects thus supplies an alternative, and better specified, answer than "power" to the question of why empirically the U.S. is a regulatory exporter and Chile an importer. Power is clearly important—particularly in its soft guise—but network effects compound or amplify soft power.[305]

Network effects thus create incentives for weak jurisdictions to import regulatory models in line with the emerging international "standards" in regulation, and for powerful jurisdictions to try to export their standards. For weak states the import of regulation can be thought of as "a price of admission" to the fullest range of benefits provided by the network. Particularly when regulatory bodies are new, that price may be negligible.[306] If so, it is likely to be outweighed by the benefits of rough harmonization with others in the network.

It is important to underscore that this network effects argument does not imply that multiple regulatory standards are impossible. In fact, the more a network is virtual rather than actual, the more likely there are to be multiple standards.[307] But network effects do imply that convergence on one or more standards is likely and this convergence is likely to be relatively sticky. Once actors in a network setting adopt a standard, switching to a new standard requires extensive and costly, and hence rarely achieved, collective action.

The tipping or lock-in that network effects promote suggests at least two additional inferences relevant to transgovernmental cooperation. One, even if the adoption of a new potential international regulatory "standard" is beneficial for a given state, processes of tipping may occur in which a globally less efficient standard dominates a more efficient one. That is the stylized Betamax story (or, in the view of many Mac users, the Macintosh-Windows story): network effects permit inferior standards to defeat superior standards.[308] Consequently, without significant attention to context the stickiness network effects produce is, in aggregate welfare terms, indeterminate. Two, as the term lock-in implies, deviation from the dominant standard is costly for an individual

305. Or the reverse: soft power is amplified by network effects. It is not clear which is more accurate, and, at least at this point, not obvious that the answer would make any analytic or prescriptive difference.

306. Or even negative, if the jurisdiction is introducing regulation for the first time.

307. Lemley & McGowan, *supra* note 20 at 592. Moreover, they note that "Network effects are not always absolute; sometimes multiple products can each build a core of users with its own partial network effect." *Id*.

308. But it is still often superior, from a welfare perspective, to an inferior standard than to have no standard at all. Arguably that is the case in both these examples, though it may not be so in other cases.

actor. Thus, unlike an international institution in which defection from the agreed standard is a central problem, actors have few incentives to defect in a network context with a dominant standard. In other words, if network effects exist, cooperation in networks may come to resemble coordination games, which are largely self-enforcing. Anne-Marie Slaughter, for example, has previously argued that agreements to cooperate among regulators are self-enforcing. [309] Network effects help explain why that is likely to be true.

In sum, in this account, the existence of a network strengthens incentives for jurisdictions to seek convergence because convergence allows for deeper and broader cooperation. The analysis here predicts that powerful jurisdictions will, as a result, compete as standard-setters within the network; weak jurisdictions will often import these standards. This account can help explain why networks form and persist,[310] while it also helps explain why convergence occurs among members. Exporting jurisdictions reap the gains of convergence around their preferred outcome (avoiding the costs of change in the process) and gain the benefits of deeper access to a wide array of peer regulators. Importing jurisdictions gain deeper access to peer regulators, but bear some, perhaps marginal, costs of institutional change.[311] The costs of change are partly absorbed by exporting states, in the form of technical assistance and capacity building programs. In sum, the import of U.S. or EU regulation not only assists a new jurisdiction in cooperating with the U.S. or EU; by extension, it promotes cooperation with other, similarly situated jurisdictions that also embrace those particular approaches. The incentives to harmonize regulatory policies can flow from many factors; my argument here is that networks, and network effects, significantly *strengthen* these incentives.

309. Slaughter, *Real New World Order*, *supra* note 7.

310. In transaction cost-based functional theories of international institutions, such as that of Keohane, the institutions of interest are international. Here, while networks are in some sense international, the institutions of interest are largely domestic. Because the institutions involved in networks are domestic and have a dual role—both internal and external—the costs of change are much higher than for purely international institutions. If this is true, the policy changes associated with network-induced regulatory export may be more robust—or rigid—than comparable policy adjustments associated with the operation of traditional international regimes for two reasons. First, networks promote lock-in around a standard. Second, because the location of the change is domestic regulatory bureaucracies, institutional stickiness may be greater than the institutional stickiness associated with international institutions.

311. As Ikenberry argues, often the guiding rule for states is "copy what works." Ikenberry *supra* note 247, at 103; *see also* Birdsall & Lawrence, *supra* note 274; DiMaggio & Powell, *supra* note 247.

3. Whose Model Dominates?

A focus on network effects also sheds light on the distributional consequences flowing from the choice of one regulatory standard over another.[312] One implication of network effects is the creation of first-mover advantage. As Lemley and McGowan claim, in markets with network effects, being first in a market and establishing the dominant standard often provides important advantages over later would-be standard-setters.[313] Transposed to international relations, first-mover advantage implies that those regulators who engage in networks and seek to export their regulatory models first will set the international regulatory standards. They will reap whatever distributional gains come from being the standard-setter. This suggests regulatory bureaucracies in other states are converging on U.S. or EU regulatory models not because those models are the most efficient—or because the U.S. is using its power directly to coerce other regulators—but because U.S. and EU regulatory agencies were the first to actively export their models to foreign regulators. In other words, one reason why the U.S. and EU are engaged in a "competition over competition law"[314] is that each is seeking to set the dominant global (or regional) standard.

This argument fits the empirical record only moderately well. While it is true that the U.S. and the EU are competing with one another to disseminate their regulatory approaches abroad, the concept of first mover advantage does not explain why other states, such as Canada or Norway, are not successfully replicating their regulations in other jurisdictions. Only the U.S., the EU, and perhaps Japan seem to plausibly have the economic, political, and "soft" power to even be first movers and play a major standard-setting role (for Japan, their lack of soft power is marked). That said, *among* the major powers, it does seem plausible that some degree of first-mover advantage is present: the EU,

312. Functional theories of international institutions, which draw on transaction-cost economics, have been criticized for overly concentrating on the problem of cheating or defection. As a result they allegedly fail to account for distributional concerns, and thus fail to explain where on the Pareto frontier cooperation ultimately rests. Stephen Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 WORLD POL. 336 (1991). A network economics-based theory of networks by contrast suggests that distributional questions are critical.

313. Consequently, one implication of network effects is first-mover advantage. Lemley & McGowan, *supra* note 20 at 495; *see also* Stanley Besen & Joseph Farrell, *Choosing How to Compete: Strategies and Tactics in Standardization*, 8 J. ECON. PERSP. 117, 119 (1994). Because the returns to the standards-winner will be higher in a network market than in normal markets, risky strategies such as predation can be rational in a networks market where they would irrational elsewhere. Mark A. Lemley, *Antitrust and the Internet Standardization Problem*, 28 CONN. L. REV. 1041 (1996).

314. Fox, *Antitrust and Regulatory Federalism*, *supra* note 159, at 1799.

by inducing the Visegrad states to embrace EU competition principles, has probably locked-in those states to an EU approach for a long time. Similarly, the U.S. has had a strong impact in Latin America, and Japan in Asia,[315] and that dominance is unlikely to be usurped by a second-mover.

Regulatory "standards" are very different from software programs or languages. But nonetheless there are comparable elements. Regulatory agencies are likely to be better able to cooperate on a wide range of issues if they are similarly structured than if they are differentially structured. The larger the number of jurisdictions that are similarly structured, the more advantageous the network is for its members. Given this, a claim of weak network effects is reasonable. Analogizing to network economics in turn provides a theoretical basis for a novel account of the behavior of actors within regulatory networks and especially of processes of policy convergence.[316] This account adds to the other explanations I have offered for the rise of transgovernmental networks and for policy convergence among network actors.

V. THE IMPLICATIONS OF TRANSGOVERNMENTALISM FOR INTERNATIONAL LAW & ORGANIZATION

What are the ramifications for international law of a globalizing world? Proponents of transgovernmentalism assert that "an interdependent world entails new forms of governance."[317] Networks, they believe, provide such a new form of governance. Transgovernmentalists argue that liberal internationalist institutions such as the UN "cannot function effectively independent of the major powers that compose it, nor will those nations cede their power and sovereignty to an international institution. Efforts to expand supranational authority. . .have consistently produced a backlash among member states."[318] Moreover, "the complex networks that have grown up in the sphere of international business and economic regulation can be seen as a response to some of the problems of coordination of state

315. 1999 ABA REP., *supra* note 198, at 36-37.

316. Clearly there are other possible accounts; the pattern described in Part III of this article is also consistent with many aspects of realist as well as constructivist theories in international relations, for example. On realism and constructivism *see* ANDREAS HASENCLEVER, ET AL., THEORIES OF INTERNATIONAL REGIMES (1997).

317. Scott H. Jacobs, *Why Governments Must Work Together*, OECD OBSERVER NO. 186, Feb./Mar. 1994, at 16.

318. Slaughter, *Real New World Order*, *supra* note 7, at 183.

regulation within the classic framework of liberal internationalism."[319] Indeed,

> [d]isaggregating the state into its functional components makes it possible to create networks of institutions engaged in a common enterprise even as they represent distinct national interests. Moreover, they can work with their subnational and supranational counterparts, creating a genuinely new world order in which networked institutions perform the functions of a world government—legislation, administration, and adjudication—without the form.[320]

In other words, transgovernmentalists assert that liberal internationalism cannot adequately adapt to a changing global order.[321] The golden age of the treaty as the central tool of international cooperation is ending.[322] Defenders of liberal internationalism counter that "there is certainly no evidence that treaty-making. . .is slowing down or that transnational networks are displacing [treaties]."[323] It is, they claim, "too early to suggest that international actors are no longer turning to international organizations created by treaty and governed by traditional rules of international institutional law"[324] Moreover, "much of [network] activity arises under the shadow of an intricate web of obligations arising from obligations assumed under treaties and international organizations."[325]

In the near term, multilateral treaties will continue to increase in number and networks will, by necessity, coexist with traditional

319. Picciotto, *supra* note 8, at 1038.

320. Slaughter, *Real New World Order*, *supra* note 7 at 195.

321. As Picciotto argues, "there has been a growing fragmentation of the classic liberal internationalist system. . .[attempts at reform] suffer from the limits and strains of liberal internationalism." Picciotto, *supra* note 8, at 1017, 1020.

322. Neo-medievalists largely concur in this critique of liberal internationalism, arguing that "if current trends continue, the international system 50 years hence will be profoundly different. During the transition, the Westphalian system and an evolving one will exist side by side." Mathews, *supra* note 5. Fascination with the evolution of the state is growing within the legal academy as well; the Cardozo Law Review published a recent symposium, *The Decline of the Nation State and its Effects on Constitutional and International Economic Law*, *supra* note 5. While alternative forms of global governance appear to be on the rise, in many respects the state's role is also growing and evolving, not receding, as globalization gathers steam and the shared nature of many social problems becomes apparent. In most advanced industrial states, the state's presence in the economy has remained constant at somewhere between 30%-50% percent control over GDP. *See* Keohane & Nye, *Power and Interdependence in the Information Age*, *supra* note 61, at 82.

323. Alvarez, *supra* note 8, at 211.

324. *Id*. at 212.

325. *Id*.

international agreements.[326] Ultimately the thrust of transgovernmental theory is that networks, and not treaties, represent the "real new world order."[327] Indeed, critics such as Philip Alston bemoan the way in which transgovernmentalism shunts aside traditional international law.[328] My contention in this Article is that while the changes taking place in the international system are real and significant, the two architectures of cooperation are more likely to exhibit synergy than discord. The complementarities between networks and treaties are numerous and complex. Networks are not always supportive of treaties—or vice versa—but there is good reason to believe they will often be so.

In this section, I first consider the role of regulatory power and the incentives to choose liberal international or transgovernmental cooperation. Next I analyze the relationship between networks and treaty compliance, arguing that the leading theories of compliance suggest substantial synergy. I then explore some more general plausible internactions between the two architectures of cooperation. On balance, I predict that synergy, rather than conflict, is the most likely result.

A. Regulatory Power and the Choice to Cooperate

A key underlying premise of my argument is that the incentives to create networks or to negotiate treaties vary across the spectrum of regulatory power. As a result, networks play different roles under different distributions of regulatory power, and in turn appear to interact with liberal internationalism differently. When regulatory power is highly asymmetric, as in securities law, liberal internationalism tends to be shunned and networks primarily fill gaps in cooperation. Conversely, when regulatory power is diffuse, and therefore treaties are an essential cooperative tool, the domestic capacity building that networks promote may increase compliance with, and the effectiveness of, treaty law. When regulatory power is moderately concentrated, networks may help

326. Picciotto even argues that "the phenomenon of networking is somewhat inherent in the system of liberal internationalism." Picciotto, *supra* note 8, at 1036.

327. Slaughter, *Real New World Order*, *supra* note 7; *see also* Portnoy, *supra* note 34 ("the network is creating the institutional foundations for modern global capitalism. . .contrary to popular wisdom, the state remains an important actor in the world economy.") Jacobs, *supra* note 7. Elsewhere Slaughter suggests that networks "coexist and interact with international agreements," a view at least broadly consistent with that argued here. Slaughter, *Government Networks*, *supra* note 8, at 220. However, Slaughter also has noted that the "conventional wisdom" on networks is that they provide a complete alternative to liberal internationalism and will indeed facilitate a move away from liberal internationalism. Slaughter, Comments at the 2002 Yale-Stanford Junior Faculty Forum, (June 1, 2002).

328. Alston, *supra* note 13.

smooth the path to a liberal internationalist solution by promoting convergence in regulatory approach.[329] In short, the distribution of regulatory power helps account for the presence of treaties and therefore helps explain when, and how, networks may interact with treaties.

Consider first highly asymmetric distributions of regulatory power, exemplified by securities law. Beth Simmons' recent account of capital market regulation treats the U.S. as a dominant player who innovates in capital market regulation based purely on domestic concerns.[330] Other jurisdictions react to this innovation based on the degree to which they face functional incentives to emulate it; these reactions then produce policy externalities for the dominant player. How the dominant regulator in turn reacts to these externalities helps explain the type of cooperation that ultimately occurs. The following figure illustrates Simmons' argument:[331]

	HIGH INCENTIVES TO EMULATE	**LOW INCENTIVES TO EMULATE**
	I	**II**
SIGNIFICANT NEGATIVE EXTERNALITIES	**Capital adequacy** Much "voluntary accession" to G-10 rules	**Anti-money laundering** U.S. unilateral political pressure through Kerry Amendment

329. Empirically, in the competition case the result could be multiple treaties on competition, each within a particular sphere—the European Union's or the United States'. I discuss this possibility further *infra*.

330. Simmons, *International Politics of Harmonization*, *supra* note 18, at 595 ("U.S. regulators can be thought of as *unconditional* first movers: financial regulatory innovation will be motivated by and respond to internal regulatory needs and politics.") (emphasis in original).

331. *Id.* at 603.

	BIS as a facilitative institution (technical expertise) Euro-centric membership, extensive cooperative relations with regional organization of bank regulators IMF as monitor in crisis cases	U.S. pressure on G-10 FATF monitors and sanctions by publicizing lax policies FATF limits on membership to OECD but sanctions nonmembers Opposition even in the OECD to U.S.-style reporting
	III	**IV**
INSIGNIFICANT NEGATIVE EXTERNALITIES	**Accounting standards for public offerings** Much voluntary adoption of standards at the firm level (USGAAP or IAS) IASC legitimates a "focal point" close to USGAAP IASC provides information and technical assistance to bring accounting rules in line with international standards	**Information sharing among securities regulators** Minimal role for IOSCO (encourages bilateralism through model MOUs) Harmonization through series of bilateral agreements Reluctance of some major jurisdictions to cooperate Recent move toward multilateral information-sharing agreements

Simmons' framework is broadly consistent with the approach in this article. Differing cooperative situations provide differing incentives for regulators. In those situations falling within Quadrant I, networks become a vehicle for cooperation alongside some weak forms of liberal internationalism by facilitating information flow and technical assistance among jurisdictions. In Quadrant II, however, networks are less likely to be important sources of substantive rules because treaty-like institutions exist. The need for overt political pressure to stem the incentives of weaker jurisdictions to reject the dominant jurisdiction's regulatory choice leads, in these situations, to the creation of relatively formal multilateral institutions—in other words, to liberal internationalism. The chief example here is money laundering. In Quadrant III networks play a subsidiary role in propelling what is

largely a market driven process. Liberal internationalism is unlikely to flourish because private actors are the engines of ordering. Accounting rules are the main example: firms eager to be listed on U.S. exchanges will adopt U.S. accounting practices on their own without government intervention, and governments will eventually ratify this private ordering. However, networks can provide political cover for harmonization by masking the emulation of U.S. rules in an ostensibly consensual framework (here, that of IOSCO).[332]

Quadrant IV is where networks are most likely to be significant. While Simmons' framework predicts a minimal role for multilateral institutions *and* no policy harmonization, she, in fact, finds this area is the "most uncomfortable fit" for her model.[333] In her words,

> The framework suggest[s] little harmonization and a minimal role for multilateral institutions. The first part of this expectation is not quite met here: the issue-area is in fact characterized by a series of bilateral agreements that represent a segmented form of harmonization. The prediction for the role of multilateral institutions does hold up. The relevant institution in this case is [IOSCO], a relatively passive organization whose primary role has been to encourage regulators to negotiate and fulfill bilateral information-sharing agreements. It also provides technical advice where necessary and offers "model agreements" to interested parties. . .[334]

Moreover, Simmons finds "moderate externalities associated with the prosecutorial practices in other jurisdictions. . .the key point here is that. . .it makes sense in this case to negotiate agreements that constitute bilateral 'club goods' that provide benefits (mutual access to information) for members only."[335] In other words, in situations where the incentives to create traditional international institutions are very low, Simmons' schema initially predicted little cooperation. Yet empirically she finds a fairly high level of informal cooperation, embodied in IOSCO and in bilateral arrangements between regulators. Hence, in practice the chosen cooperative response in securities law is a moderate degree of transgovernmental cooperation, broadly guided by IOSCO, and organized around technical assistance and bilateral MOUs that structure information sharing and enforcement cooperation. Networks,

332. *Id*. at 611.
333. *Id*. at 616.
334. *Id*. at 613-14.
335. *Id*.

in short, fill what would otherwise be a gap in cooperation.

Put differently, where the incentives for liberal internationalist solutions are weak because regulatory power is concentrated, networks are an attractive alternative. Under different conditions, such as when regulatory power is diffuse, networks do not fill gaps in cooperation; they operate alongside pre-existing treaties and organizations and are likely to strengthen compliance with those treaties. The critical point is that while networks promote regulatory convergence across the spectrum of regulatory power, their implications vary across issue areas because the presence of liberal internationalism itself varies.

B. Transgovernmentalism and Treaty Compliance

Treaties are the foundation for liberal internationalist cooperation, and hence an important site for consideration of the influence of networks. Compliance is one of the primary weaknesses of the international legal system, a system that by definition lacks a centralized enforcement mechanism.[336] Some scholars claim that compliance with international law is far more prevalent than commonly believed; others concur but suggest this has less significance than meets the eye.[337] Nearly all analysts agree that compliance is a critical aspect of international cooperation.[338]

There are many theories of compliance with treaties. An analysis of the influence of networks depends partly upon the particular theory of compliance one embraces. I will discuss the four leading theories of compliance and illustrate that three imply that networks should bolster

336. Kal Raustiala & Anne-Marie Slaughter, *Compliance, International Law, and International Relations*, *in* HANDBOOK OF INTERNATIONAL RELATIONS, *supra* note 40. Scholars of international law and of international relations increasingly focus on compliance as a central issue in international law. *See, e.g.*, John Norton Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, 39 VA. J. INT'L L. 881, 884 (1999) ("I believe that the greatest challenge for the future of the rule of law internationally is to enhance rates of compliance.").

337. *Compare* Chayes & Chayes, *infra* note 342, *with* Downs et al., *infra* note 341.

338. *See, e.g.*, David Kennedy, *The International Style in Postwar Law and Policy,* 1994 UTAH L. REV. 7, 70 (1994) ("[T]he problem of 'compliance' with international norms and the importance of dispute resolution mechanisms in the process of rule implementation has become a central preoccupation of the public international law field."). In previous work I have been critical of the prevailing focus in international law scholarship on compliance; *see* Raustiala & Victor, *Conclusions*, *in* INTERNATIONAL ENVIRONMENTAL COMMITMENTS, *supra* note 24; Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, *supra* note 24. As I discuss below, the major problems with compliance as a normative concept are less present in the context of this article. Moreover, compliance is empirically of great concern to the international legal community, and hence an analysis of the impact of networks on compliance is a necessary topic.

treaty compliance.[339] Moreover, those theories supporting a claim of synergy between networks and treaties have the greatest empirical support. The same considerations that indicate improved compliance imply that networks will also improve treaty effectiveness, a closely related but often much more important issue.[340]

The impact of networks on treaties is obviously dependent on the presence of treaties. Where regulatory power is concentrated, the lack of treaties obviates these synergies. Without treaty rules, there can be no treaty compliance. Unlike environmental regulation, in both securities and competition law there are currently no major multilateral treaties. Consequently, the regulatory networks in these two areas cannot enhance treaty compliance. (Though as I will argue below, networks may facilitate treaty negotiations in cases that have only moderately asymmetric regulatory power, such as competition). Conversely, when regulatory power is diffused, however, as in environmental regulation, treaties are often plentiful. Of the cases discussed in this article, networks seem most likely to bolster treaty compliance in the environment arena and least likely in the securities arena.

1. Realism

The traditional realist (or economist) baseline is that states comply with treaties only when compliance is in their interest. In this view law per se has little or no influence. Observed compliance may reflect the interest the state has in the particular act(s) required by a treaty, or may reflect the costs inflicted by enforcement measures. As the level of enforcement rises, realists believe, non-compliance will be deterred.[341] States are understood in this approach as cost-benefit calculators. This rationalist orientation also implies some compliance-enhancing role for

339. A comprehensive overview of compliance theory can be found in Raustiala & Slaughter, *supra* note 336.

340. Compliance generally refers to a state of conformity or identity between an actor's behavior and a specified rule. While most common-sense notions of effectiveness relate to "solving the underlying problem," the factors that may influence the solution of a complex international problem are myriad. In many cases disentangling them is impossible. Hence many analysts define and assess effectiveness in more modest terms: as observable, desired changes in behavior. Compliance is neither necessary nor sufficient for effectiveness. However, in general, and *ceteris paribus*, more compliance yields more effectiveness—particularly when high compliance is not the result of a change in the legal standard but rather results from actual behavioral change aimed at meeting that standard or that results in meeting that standard. For more on these distinctions, *see generally* Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, *supra* note 24.

341. *See, e.g.*, George W. Downs et al., *Is the Good News about Compliance Good News about Cooperation?*, 50 INT'L ORG. 379 (1996).

networks. One consequence of networks, I have argued, is that they build domestic regulatory capacity in their members, improving the state's ability to regulate effectively. If at least some of this capacity is applicable to the implementation of treaty commitments, compliance will be relatively easier and cheaper. Enforcement theory suggests that this should render compliance more likely. In other words, networks may improve treaty compliance by improving domestic regulatory capacity; improved capacity should often lower the domestic costs of compliance.

This argument assumes some affinity between the general regulatory capacity of the state—capacity that frequently is augmented by networks—and the regulatory demands of treaties. This affinity is likely to hold in many cases, though not all and not for all states. The important point, however, is that under a reasonable set of circumstances realist or enforcement theories of compliance suggest some positive role for networks in enhancing compliance.

2. Managerialism

Some scholars of compliance reject the enforcement approach and assert that states actually have a propensity to comply with their international commitments.[342] Managerialism, an approach to compliance most often associated with the work of Abram and Antonia Handler Chayes, argues that the primary drivers of non-compliance are actually rule ambiguity and, especially, lack of domestic regulatory capacity. Consequently, managerialists claim that compliance is best promoted through assistance and encouragement, not deterrence and punishment. When such assistance fails, states can be coaxed back into compliance through an interactive, facilitative process.[343]

Because bureaucratic capacity is directly identified as a key variable, this approach is even more sanguine about the role of networks in promoting compliance. If indeed, as managerialists argue, the most effective methods to improve treaty compliance are facilitative, interactive, and discursive, then networks should often improve treaty compliance—especially when they involve technical assistance that improves existing regulatory practices at the domestic level. Much of

342. *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175 (1993); Ronald Mitchell, *Compliance Theory: An Overview*, *in* IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW (James Cameron et al. eds., 1996).

343. Chayes & Chayes, *On Compliance*, *supra* note 342; Mitchell, *supra* note 342.

the managerialists' proposed process for managing non-compliance is aimed at rectifying domestic shortcomings. In particular, they focus on the frequent lack of administrative resources and information. Both of these factors seem far more likely to be promoted than inhibited by networks. Moreover, a successful compliance management process is explicitly cooperative and interactive. If networks serve to bring officials together on a regular basis, and to foster harmonization as regulators adopt rules, techniques and methods pioneered elsewhere, then networks may perform—or facilitate—much of the what passes for non-compliance management without necessarily intending to do so.[344] Preemptive or "preventative management" of this sort—propelled by networks, but not necessarily intended to influence treaty compliance per se—may successfully forestall many treaty violations.

For example, NAFTA and its side agreement contain a number of provisions aimed at maintaining high domestic environmental standards and ensuring that those standards are adequately enforced.[345] Subject to certain qualifications, for example, a "persistent failure to enforce" domestic environmental law constitutes non-compliance with NAFTA.[346] The primary political reason for this legal standard was the belief that Mexico's environmental laws, while nominally strong, were inadequately enforced, sometimes dramatically so.[347] Any improvement in the regulatory capabilities of a NAFTA party, such as Mexico, will, *ceteris paribus*, reduce the likelihood that persistent enforcement failures will occur and therefore reduce the likelihood of violation of NAFTA.

As I have shown, there is at least some evidence that the cooperative and capacity building activities of the North American network and of INECE have induced positive changes in Mexican environmental regulation.[348] If managerial theory is correct, these changes should

344. Abram and Antonia Chayes discuss three core tasks of compliance management: 1) reviewing and assessing the performance of parties and discrimination between intentional and inadvertent violations; 2) ensuring that appropriate responses to non-compliance produce and maintain an acceptable overall compliance level; and 3) adjusting the rules of a regime to improve regime performance. Capacity building, which is central to their approach, and most closely tied to the activities of networks, need not take place only in the wake of a compliance failure; it can, as they indeed discuss, occur in a preventative fashion or have a preventative effect. CHAYES & CHAYES, THE NEW SOVEREIGNTY, *supra* note 342.

345. *See* JOHN KNOX, A NEW APPROACH TO COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW, 28 ECOLOGY L.Q. 1 (2001).

346. *See* NAAEC *at* http://www.cec.org (last visited Oct. 5, 2002).

347. Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords*, 25 ENVTL. L. 31, 34-35 (1995).

348. Steinberg, *supra* note 229.

create the preconditions for greater Mexican compliance with NAFTA. This link between networks and treaties is particularly strong because of the structure of the NAAEC's obligations. Because those obligations are based upon a standard of effective (domestic) enforcement, a network will likely increase compliance with that standard.[349] It seems plausible that a positive link exists in other setting as well. In short, managerial theory and transgovernmental cooperation exhibit a strong affinity.[350]

3. Transnational Legal Process

Other compliance theories stress the role of norms (though the role of norms is present in managerial theory as well). A prominent example is the theory of "transnational legal process," which stresses the interface between international norms and domestic legal processes.[351] Developed primarily by Harold Koh, the theory focuses on the incorporation of international norms in domestic legal systems.[352] Transnational legal process has three components: interaction, interpretation, and internalization. States comply with international rules because of variations in this process of "vertical internalization"—vertical because rules that are articulated at the international level are incorporated and internalized at the national level. Full domestic incorporation of these rules produces "obedience" rather than simple compliance.[353] "Norm entrepreneurs" and "issue-networks" catalyze this process.[354] Norm

349. Fulton and Sperling characterize the network explicitly as an enforcement network, and that is also the focus of INECE. *See* Fulton & Sperling, *supra* note 9; INECE webpage, *supra*. EPA officials are aware of the links between the network's activities and NAFTA and NAAEC norms, though they are hesitant to denote this linkage an explicit strategy. This hesitancy is politically-motivated; the more this activity is implicit rather than explicit, the less it should raise the sovereignty concerns that often plague U.S.-Mexican relations.

350. This interaction, moreover, is not subject to the selection bias critique leveled by social scientists who have argued that the high observed rates of compliance that managerialists rely on are due to the setting of low, easily-met standards. *See* Downs et al., *supra* note 342.

351. *See, e.g.*, Harold H. Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 628 (1998); *see also* Harold H. Koh, *Why Do Nations Obey International Law?* 106 YALE J. INT'L L. 2599 (1997)

352. While these rules and norms may be articulated in an international treaty, they need not be.

353. Much of the inspiration for the theory, and many of the examples, derive from the arena of international human rights law. *See, e.g.*, Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996). In addition, while the theory applies to treaty rules, its scope includes international norms, such as customary norms, that are not codified in a treaty. The relevant norms may be customary law norms, or may even be norms that have not yet attained customary status. The role of transnational legal process and customary international law norms is discussed in passing in Harold Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

354. KECK & SIKKINK, *supra* note 70.

entrepreneurs seek to mobilize issue networks—networks of advocacy groups and other interested actors—to promote the adoption and diffusion of new norms. These transnational actors require stages upon which to interact—what Koh calls "law-declaring fora"—and it is in these courts, legislatures, and international organizations that an "interpretive community" develops. This interpretive community has some surface similarities to a network. Once such an interpretive community construes a norm, and collectively comes to view a state to be in violation of the norm, "a complex process occurs, whereby international legal norms seep into, are internalized, and become embedded in domestic legal and political processes."[355]

The theory contends that treaty compliance is driven by the efficacy of domestic law and the degree to which international norms embed in this law. This argument too suggests a positive role for networks. Interaction is a central attribute of networks and a central part of Koh's theory. More, and more active, transgovernmental networks should provide increased opportunity for transnational legal processes to occur. Moreover, because a key part of transnational legal processes is socialization—the engagement of governmental actors, on a regular basis, in the articulation, interpretation, and promotion of norms and rules—it is plausible and even likely that networks will strengthen that process. A world with many active transgovernmental networks is one in which "law declaring fora" are common and "norm entrepreneurs" (at least those within government agencies) are able to work more readily. Koh's theory thus also implies that treaties should exhibit somewhat higher compliance the more networks flourish, because networks should generally strengthen transnational legal processes.[356]

4. Legitimacy Theory

To be sure, the network-treaty connection is not simple or always positive. Indeed, one prominent norm-driven theory suggests little role for networks in compliance-promotion. "Legitimacy theory" emphasizes the qualities of legal rules.[357] The core idea is that rule

355. Koh, *Transnational Legal Process, supra* note 353.

356. Many of the examples employed by legal process proponents, such as the incorporation of human rights norms, rely heavily on the actions of norm entrepreneurs in NGOs. To the degree that networks exclude these private actors, and render intergovernmental policymaking opaque, transnational legal processes may be inhibited rather than fostered.

357. *See generally* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988) (emphasizing that legitimacy is crucial in the capacity of any rule to secure compliance, particularly in the international system).

qualities (such as pedigree and determinacy), in conjunction with the process by which states arrive at the rules, determine compliance levels. Rule qualities and "right processes" create legitimacy, which then creates a "compliance pull" for states.[358] Each legal rule has "an inherent pull power that is independent of the circumstances in which it is exerted, and that varies from rule to rule."[359] Thus legitimacy theory argues that states comply more with treaty rules that are legitimate and exhibit right process, less with rules that lack these qualities. While empirical support for legitimacy theory is slim, it has received extensive attention from international lawyers and thus I consider it here.

One implication of legitimacy theory is that the key characteristics that create compliance pull cannot readily be altered *ex post* without creating a new agreement or rule. The process of creating a rule either did or did not exhibit "right process." Similarly, once a rule is developed, it basically either does or does not exhibit the requisite qualities that create compliance pull. *Ex post*, that process or rule, by definition, cannot be changed except to create a new rule through a new process. This line of argument implies that networks are unlikely to effect treaty compliance, because they cannot directly effect the variables the theory identifies as critical. Nor would the regulatory export that networks promote be relevant for treaty compliance. Legitimacy theory focuses not on regulatory capacity but on the "right process" by which the treaty rules in question were formed.[360] In general, the formal, procedural, and normative thrust of legitimacy theory is deeply in tension with the nature of cooperation embodied in transgovernmentalism.

In sum, several leading theories of compliance imply a positive role for networks in promoting treaty compliance. Moreover, those theories that have the most empirical support—managerial, enforcement, and transnational legal process theory—all suggest synergies between treaties and networks. Networks cannot improve treaty compliance where treaties have never arisen. But where treaties are common, there is scope for positive interaction between networks and treaties. At times, as in the North American environmental context, the interaction between networks and treaties is likely to be significant.

358. *Id*.

359. Franck, *Legitimacy in the International System*, *supra* note 357, at 712.

360. Moreover, legitimacy theory casts doubt on the likelihood that MOUs, and transgovernmental cooperation in general, will exhibit high compliance. MOUs, because they are flexible and often vague, frequently lack the indicia of determinancy, coherence and so forth that legitimacy theory identifies as important. Because many of the "obligations" that exist in networks are avowedly non-legal, it may be a category mistake to apply legitimacy theory at all.

At a deeper level, the impact of networks on domestic regulatory capacity raises important questions about the fundamental drivers of treaty compliance. As Downs, Rocke, and Barsoom note, "[o]ne of the points too rarely made by either the managerial or [enforcement] school is that changes in technology, relative prices, domestic transitions, and ideas have inspired more international cooperation and regulatory compliance than have all efforts at dispute resolution and enforcement combined."[361] Networks, by facilitating the export of ideas, technologies, and procedures, would clearly seem to further these extra-legal cooperative forces.

C. Transgovernmentalism and Liberal Internationalism: Six Hypotheses

While liberal internationalism remains the dominant mode of cooperation today, networks appear poised to play a progressively more prominent role. Throughout the 20th century liberal internationalism expanded rapidly. The number of formal international organizations rose from a minimal number in the 19th century, to 123 in 1951, and to 251 in 1999.[362] In the area of environmental protection alone, the number of multilateral treaties (typically with accompanying international organizations) grew from a handful in the pre-World War II period to several hundred today.[363] In short, the post-war period has been the golden age of the liberal internationalism. The robustness of its future, however, is increasingly subject to doubt.[364]

Below I advance six plausible ways in which transgovernmentalism and liberal internationalism may interact in the coming decades. Each goes beyond the critically important but conceptually narrow issue of treaty compliance discussed above. Much like that discussion, I present hypotheses or conjectures rather than claims, drawn both from the premises of transgovernmental theory and from the cases in this article. I first consider hypotheses that suggest positive synergies between networks and treaties, and then consider those that suggest possible

361. Downs et al., *supra* note 341, at 397-98.

362. Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489 (2001).

363. The precise number of environmental treaties is unclear largely for definitional reasons. The UN Environment Programme and the International Institute for Sustainable Development use the figure of "200 or so." U.N. ENVIRONMENT PROGRAMME & INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, ENVIRONMENT AND TRADE: A HANDBOOK 60 (2002), *available at* http://iisd1.iisd.ca/trade/handbook/5_10.htm (last visited Oct. 5, 2002).

364. *E.g.*, Mathews, *supra* note 5; Slaughter, *Real New World Order, supra* note 7; Picciotto, *supra* note 8.

conflicts. My aim is to generate reasonable predictions about the future path of international cooperation that can guide the emerging debate over transgovernmentalism. While a comprehensive normative evaluation of transgovernmental cooperation has yet to be written, that evaluation must rest on a positive foundation. Where empirical evidence is scarce, as is the case here, plausible inferences are a necessary element.

1. Positive Synergies

The first hypothesis, which draws on the preceding discussion of treaty compliance, is that networks will gradually make treaties more effective at reaching their goals. I have argued that most theories of compliance imply that transgovernmental cooperation will improve treaty compliance. Ultimately, this improvement should also increase treaty effectiveness. More compliance does not necessarily equal greater effectiveness, if effectiveness is understood in terms of desired changes in state behavior. That relationship depends critically on the legal standard in question. If treaty commitments are merely tuned to pre-existing behavior, as is often the case, then compliance on its own terms means little.[365] By contrast, improved compliance produced by more thorough implementation and enhanced regulatory capacity will in fact produce a more effective treaty.[366] Compliance is improved not by tuning the legal standard to behavior but by directly altering behavior. In other words, networks can strengthen treaty effectiveness by making states more effective at regulating: by improving capacity and providing more information to regulators.

While this dynamic is a potentially significant outcome in its own right, it has impacts beyond compliance and effectiveness. If effectiveness is what states seek from international treaties—that is, if treaties are purposive solutions to international problems—*ceteris paribus*, treaties should be a more attractive option the more effective they are in practice. This should, at the margin, encourage further creation of treaties. In other words, if networks enhance the operation of treaties, making them more effective, it is reasonable to assume increased demand for treaties. Thus transgovernmentalism may feed liberal internationalism rather than undermine it.

365. On these distinctions *see* Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, *supra* note 24.

366. Compliance per se does not improve effectiveness, because compliance has many potential causes. But compliance produced by better implementation and enforcement should improve effectiveness as conventionally understood.

To be sure, the incentives that drive states to negotiate and ratify treaties vary and, in some cases, as in human rights treaties, the aims are expressive as well as regulatory. But in most situations states negotiate treaties to solve problems.[367] If networks actually strengthen the effectiveness of treaties, that should, on average, make treaties more desirable. There are at least two countervailing considerations, however. One, the hypothesis implicitly assumes that the actual influence of treaties will influence demand for them. If treaties are largely symbolic and their impact on state behavior secondary, then more effective treaties may not spur demand for new treaties. Second, treaty effectiveness may be entirely endogenous and optimally chosen by states. That is to say, states may negotiate treaties to be optimally effective from the standpoint of their collective political incentives. A treaty rendered more successful than anticipated (at the moment of negotiation) by more effective implementation at the domestic level may overshoot what is politically desirable.[368]

The second hypothesis is that networks may smooth the negotiation of new treaties. I have already argued that networks, by improving the effectiveness of treaties, may encourage states to negotiate more treaties. But networks may also drive treatymaking by narrowing the substantive differences that currently preclude the negotiation of treaties. A potential example is competition law. Multilateral competition treaties have not been successfully negotiated to date. The EU prefers that the member states of the WTO negotiate a binding competition code. The U.S. prefers increased bilateral cooperation between national competition authorities.[369] Yet many states have, as Spencer Weber Waller argues, "look[ed] to the United States as one of the most important sources of learning about competition law,"[370] and some states have even changed their laws in response.[371] This is equally, if not more, true of the EU. If so, these states should, over time, be more likely to embrace a treaty that substantively reflects U.S. (or EU) norms and practice than they would had they not modified their domestic regulatory regime in line with U.S. (or EU)-style competition law. Should the U.S. opposition to a multilateral treaty change, such a treaty should be correspondingly easier to negotiate and implement. Such a

367. Indeed, this is the underlying logic of the dominant school of international relations, neo-liberal institutionalism.

368. The endogeneity problem is a core one in treaty design. *See* Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, *supra* note 24.

369. Tarullo, *supra* note 42, at 478.

370. Waller, *Internationalization of Antitrust Enforcement*, *supra* note 8.

371. *Id*.; DEVTECH REPORT, *supra* note 182.

treaty should also, all else being equal, exhibit higher levels of compliance.[372] Even without the explicit importation of U.S. law, if EU-US transgovernmental cooperation continues to grow it may create more trust and more understanding across the Atlantic.[373] This process may, at the margin, make a truly multilateral competition agreement more likely. Networks, in short, may smooth the negotiation of a treaty by creating convergence in worldviews, policies, and rules.

This hypothesis echoes more general claims about soft law agreements in international law literature. Soft law is often seen as a stepping-stone to hard (treaty) law, permitting states to begin cooperation informally when they fear the impact of a fully legally binding commitment.[374] Networks, which often are built on non-binding MOUs, may act as a stepping-stone to treaty negotiations in a similar manner.

A third hypothesis is that networks will promote treaty negotiation but on a regional, rather than global, basis.[375] This is most likely in areas of moderately concentrated regulatory power, such as competition. Some analysts, such as Andrew Guzman, have argued that there is little prospect of a global competition treaty because the dominant players, in particular the U.S., would gain little and yet inevitably be forced to compromise their policies.[376] Network effects may bolster this resistance to a global treaty. As the respective domestic regulatory standards of the EU and U.S. are extended to more jurisdictions, and grow more entrenched, the costs of regulatory change in those states will grow even higher. The result would be greater resistance, rather than greater receptivity, to a wide membership multilateral treaty regime. Rather than agree on a global standard, competing standard-setting states may simply opt for a "minilateral" solution, maintaining their respective spheres of regulatory influence.[377]

These spheres are likely to be regional. Regionalization is a widespread phenomenon in international relations and, in particular, in

372. The more a treaty maps onto preexisting state practice, the higher compliance is likely to be. *See* Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, *supra* note 24.

373. *See, e.g.*, Devuyst, *supra* note 200, on the current extent of transatlantic cooperation.

374. The stepping-stone argument is conventional wisdom, though soft law agreements may do much more. *See, e.g.*, Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 499 (1999). As Hillgenberg notes, "[s]oft law may sometimes be '*pré-droit*' in the sense that it leads to treaty obligations. This is, however, generally far from being its purpose." *Id*. at 502.

375. Similar arguments are made by Tarullo, *supra* note 42, in the competition context.

376. Guzman, *supra* note 18.

377. On regulatory competition *see generally* REGULATORY COMPETITION AND ECONOMIC INTEGRATION, *supra* note 10.

international trade. If regulatory interdependence and the corresponding growth of networks is linked to depth of trade ties, the result may be regionalized diffusion of specific models of regulation, drawn from and reflective of the dominant regional power. The EU's success in spreading its competition model in Eastern Europe—which is clearly linked to its desiderata for the admission of new states—is emblematic of the potential for regional standardization. Some regional trade treaties also contain specific language about policy harmonization; for example, NAFTA contains several articles addressing competition policy.[378] These provisions reinforce the regional standard-setting dynamic I have described. In sum, many more regional or minilateral treaties may be one outcome of the expansion of transgovernmentalism.

Fourth, liberal internationalism may itself promote transgovernmentalism. The presence of treaties and international organization may both spur network development by raising the incentives for regulators to cooperate and institutionally facilitate the creation of a network. For example, the NAFTA-environment network might have arisen without NAFTA's passage, but it is clear that NAFTA gave it a substantial impetus. The NAFTA context promoted—and continues to promote—a wide array of regulator-to-regulator ties in North America.[379] The same is true for the EU, which has promoted extensive networking among both its member states and with prospective member states.[380]

This dynamic has both political and institutional elements. Politically, pre-existing treaties and organizations raise the salience of cooperation and may provide for more overt political support to networks. Institutionally, the growth of networks may be facilitated by the international organizations that characterize liberal internationalism. The EU, for example, has promoted transgovernmental ties and provided a wide array of institutions and committees through which national actors can forge contacts with their functional counterparts in other states.[381] In so doing, the various intra-EU networks have been strengthened and have expanded as regulators interact more and more

378. NAFTA parties must, *inter alia*, "adopt or maintain measures to proscribe anti-competitive business conduct" and must "cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation, and exchange of information relating to the enforcement of competition laws in the free trade area." ICPAC Report, Annex 1-C, *supra* note 82, at xi.

379. Fulton & Sperling, *supra* note 8; *see also* Alvarez, *supra* note 8, at 211-13, for a similar kind of argument.

380. *See* in particular Dehousse, *supra* note 8.

381. *Id*.

frequently. In sum, treaties and international organizations can provide a foundation upon which networks arise and flourish.

2. Possible Conflicts

The fifth hypothesis is that liberal internationalism may remain the primary form of global cooperation in the 21st century, but the rise of transgovernmentalism will reduce the growth rate of treaties. In other words, the number of treaties and formal international organizations may continue to grow, but at a slower pace, as the proliferation of networks reduces the need for future treaties and organizations. By encouraging convergence in domestic regulatory structures and practices and providing an alternative means of cooperation, these networks could decrease incentives for the creation of new treaties. If policy goals can be met through decentralized processes, then centralized solutions will not be created, for it is costly to do so. In this scenario, liberal internationalism and transgovernmentalism exist in conjunction, though liberal internationalism is of decreasing importance as a *share* of overall international cooperation. Transgovernmentalism, by contrast, would claim a growing share in a largely gap filling role.

The gap filling dynamic reflects that networks are most prevalent in those areas in which liberal internationalism is politically infeasible. Some issue-areas are marked by deadlock among states (where no agreement is possible because of oppositional preferences); others by highly asymmetric regulatory power.[382] Securities law is an example of the latter situation; competition policy of the former. Under these conditions, networks may thrive where liberal internationalist institutions cannot. Rather than low or no cooperation, the rise of networks provides an alternative form of cooperation that governments—or specific administrative agencies—face incentives to embrace.[383] This does not imply any quantum leap in the role of networks in the future. Rather, as globalization knits states together more closely, and as domestic regulatory issues increasingly take on international implications, networks should play an important and growing role in international cooperation.

A sixth hypothesis is that networks will increasingly substitute for treaties in those areas in which treaties are at least a feasible option. Cooperation is driven by the need to collectively solve problems. If

382. These two descriptors are distinct but not mutually exclusive; deadlock may be the result of power asymmetry or may result under perfect symmetry.

383. *See supra* Part IV.

underlying international problems are solved or at least reasonably addressed through transgovernmental cooperation—which is, as proponents note, more flexible and agile than liberal internationalism—then states may eschew the treaties that otherwise would have been negotiated. Treaty negotiations are time-consuming processes that consume both real resources and political capital. If treaties can be avoided because a stopgap solution exists—through networks—governments may prefer to do so. Substitution seems most probable in those situations where treaties are possible but not necessary for effective regulation. True global commons issues cannot be effectively solved transgovernmentally, and thus substitution is unlikely. But many issues can be effectively tackled by network or by treaty. If so, increased reliance on networks could crowd out new treaties.

D. Summary

The preceding six hypotheses, as well as the discussion of treaty compliance, present some plausible ways that transgovernmentalism and liberal internationalism may interact in coming decades. This interaction is likely to be complex. Some of the hypotheses, such as gap filling and substitution, support the claim of transgovernmentalists that networks rather than treaties will increasingly dominate future international cooperation.[384] Others indicate synergy. The clearest limitation to a prediction of synergy is that treaties are sometimes absent: liberal internationalism is sparse when regulatory power is highly concentrated. Where liberal internationalism is precluded, networks and treaties are, by definition, not synergistic. Networks may also undermine treaties by providing an alternative mode of cooperation; this is most likely in situations where regulatory power is moderately concentrated.

But in many cases synergy appears likely. The more treaty commitments require complex domestic implementation, the more the capacity building and socialization processes networks promote will improve treaty compliance. The more effective treaties become, the more states may demand new treaties. The more networks promote policy convergence and the replication of regulatory structures in various jurisdictions, the more likely the negotiation of some otherwise politically precluded treaties becomes. To some degree these varied hypotheses can be viewed collectively, as part of a broader linked pattern. For example, gap filling efforts may increase policy

384. *E.g.*, Slaughter, *Real New World Order*, *supra* note 7.

convergence, which over time smoothes the path to a treaty, which in turn is strengthened and made more effective through domestic capacity building. While I have presented these as discrete hypotheses, there are clearly important connections.[385]

While this article has not addressed the many normative concerns that networks raise,[386] its aim is to provide a start toward a positive basis on which to rest future normative evaluations. In all, the varied claims made above point toward a complex future for international cooperation. On balance, the most plausible prediction about the future is that networks will strengthen the traditional tools of international law and organization. Interaction between the different cooperative architectures will likely be commonplace. Given this complexity, the many supporters of liberal internationalism should not reflexively oppose transgovernmentalism as a dangerous and unwelcome development. As networks proliferate and deepen, as they appear likely to do, treaties and international organizations may prove more important—in the sense of more effective—than ever before.

VI. CONCLUSION: TRANSGOVERNMENTALISM AND THE EVOLUTION OF INTERNATIONAL LAW

Will the cooperation of the future look like that of the past? The cooperation of the 20th century was dominated by international organizations created by formally negotiated and legally binding treaties. In recent years, however, the development of linkages among government officials from diverse jurisdictions—peer-to-peer, using informal, often non-binding agreements, and with limited oversight by foreign ministers—has been increasingly recognized as an important component of contemporary cooperation. The rise of these transgovernmental networks is demonstrative of the resilience of the state in an evolving international order. Moreover, the chief underlying factors driving the move to networks—globalization, regulatory expansion, and technological change—show little sign of abatement. Consequently, whether networks are truly "the blueprint for the international architecture of the 21st century"[387] or merely a sidelight phenomenon confined to a small number of technocratic areas is a critical question for both the theory and practice of international

385. I thank Harold Koh for emphasizing this point.

386. *See, e.g.*, Howse, *supra* note 13; Slaughter, *Agencies on the Loose?*, *supra* note 8; Philip Alston, *supra* note 13; *see also* Alvarez, *supra* note 8.

387. Slaughter, *Real New World Order*, *supra* note 7, at 197.

cooperation. While it is too soon to answer this question conclusively, there is much suggestive evidence already.

A central facet of this inquiry is the role of networks in both facilitating cooperation among regulators and shaping domestic regulation around the world. Contemporary international affairs are marked by a tremendous intersection with traditionally domestic areas of law and policy. Domestic policy differences increasingly cause economic and political frictions. Transgovernmental networks enable national regulators to better fulfill their domestic mandates, but they also facilitate the convergence of domestic regulation, helping to provide uniformity without centralization. This uniformity, however, is likely to be in line with the preferences of the dominant economic powers. Consequently, networks are clearly tools for the exercise of power—largely soft power—even as they may foster welfare-enhancing cooperation overall.

The impact of transgovernmentalism on broader issues of international law, while unclear today, should be marked in years to come. Critics have contended that transgovernmentalism "actually relies rather heavily on the marginalization of traditional multilateral organizations. It also seems to leave increasingly little significant or relevant space for international law…."[388] I have argued that this pessimism about the impact of networks on the traditional tools of international law is unwarranted; there are good reasons to believe that transgovernmentalism and liberal internationalism will interact synergistically and supportively. Most notably, by promoting capacity building at the domestic level networks can enhance compliance with, and the effectiveness of, existing treaties.

Transgovernmental networks should also continue to fill gaps in the international regulatory system, permitting cooperation in situations of asymmetric regulatory power, such as securities regulation, where liberal internationalism cannot flourish or is unlikely to provide a lasting solution. Networks may also smooth the negotiations of new treaties by fostering convergence in ideas, policies, and institutions. To be sure, networks may instead substitute for treaties if they provide government actors with a sufficient level of cooperation. The impact of networks on the negotiation of future treaties—whether there will be more or fewer treaties as a result of networks—thus remains indeterminate. But like soft law, transgovernmentalism presents an alternative and largely extra-legal mode of cooperation that state actors are increasingly

388. *See* Alston, *supra* note 13, at 446.

employing; as such, it deserves much more scholarly attention.

Transgovernmental cooperation is a significant development in international law, one more likely to supplement liberal internationalism than supplant it. In their prescient article 25 years ago, Keohane and Nye sought to demonstrate—against those who saw the early rise of transgovernmentalism as the death of the international institution—the significance of international organizations as arenas for and members of transgovernmental coalitions.[389] This article argues that the obverse is also true. A dynamic transgovernmentalism is significant, not only in its own right, but for the efficacy and evolution of international law and institutions.

389. Keohane & Nye, *Transgovernmental Relations and International Organizations*, *supra* note 8; *cf*. Huntington, *supra* note 66.