Oñati International Institute for the Sociology of Law
Instituto Internacional de Sociología Jurídica de Oñati
Oñati Socio-Legal Series
ISSN: 2079-5971

Oñati Socio-Legal Series, v. 3, n. 4 (2013) – Law, contestation and power in the global political economy
ISSN: 2079-5971

Legal Pluralism, Private Power, and the Impact of the Financial Crisis on the Global Political Economy

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Cohen, E.S., 2013. Legal Pluralism, Private Power, and the Impact of the Financial Crisis on the Global Political Economy. *Oñati Socio-legal Series* [online], 3 (4), 679-701. Available from: http://ssrn.com/abstract=2269667

Abstract

Private corporate actors have played a central role in the construction of the legal rules of globalized capitalism over the past four decades. In no sector has this been more true than in global finance, where private agents have reshaped the norms and practices of credit creation and allocation. The global financial crisis, however, has led many states to challenge aspects of this power and raised broader questions about the legitimacy and future of private power in the global legal order(s). In this paper, I argue that – while state actors have clawed back significant power in global finance – the specific powers of credit creation and allocation combined with the structural pull of transnational legal pluralism will enable major private financial institutions to retain substantial power in the face of these challenges and questions. In the process, I present some broad suggestions about how we can think about private power in the making of global commercial law.

Key words

Legal pluralism; private power; finance; financial crisis

Resumen

Durante las últimas cuatro décadas, actores corporativos privados han desempeñado un papel decisivo en la construcción de las normas legales del capitalismo globalizado. En ningún sector ha sido esto más cierto que en las finanzas globales, donde los agentes privados han reformado las normas y prácticas de la creación de crédito y asignación. La crisis financiera global, sin embargo, ha llevado a muchos estados a cuestionar aspectos de este poder y planteado cuestiones más amplias acerca de la legitimidad y el futuro del poder privado en el/los ordenamiento/s jurídico/s global/es. En este trabajo se sostiene que – mientras que los actores estatales han recuperado un poder significativo en las finanzas globales– los poderes específicos de la creación de crédito y asignación combinados con la fuerza estructural del pluralismo jurídico transnacional

Article resulting from the paper presented at the workshop *Law, Contestation, and Power in the Global Political Economy* held in the International Institute for the Sociology of Law, Oñati, Spain, 7-8 June 2012, and *coordinated* by Edward S. Cohen (Westminster College) and A. Claire Cutler (University of Victoria).

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permitirán a las principales instituciones financieras privadas retener poder sustancial ante estos retos y preguntas. En el proceso, se presentan diversas sugerencias generales sobre cómo se puede pensar el poder privado en el desarrollo del derecho comercial mundial.

Palabras clave

Pluralismo jurídico; poder privado; economía; crisis financiera

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1. Introduction

This paper examines the impacts of the global financial crisis in order to analyze the interactions between the construction of private and public power and legal pluralism in the global political economy. The arena of global finance provides a particularly important place in which to explore the dynamics of law and power. For the three decades beginning in the 1970s, key public and private actors constructed a legal and regulatory regime for the opening up and integration of financial flows within and across national borders. As these regimes became more plural in structure, every important site for the legal regulation of finance – international institutions, clubs of regulators, national states and their regulatory agencies, central banks, and key private and professional associations – was enrolled in a project to increase the scope of action and opportunity for private financial actors and institutions. While these regimes and sites were characterized by much intertwining and interdependence between the "public" and the "private," a key dimension of their work was the empowerment of private agents to create and diffuse innovative forms of credit, and this relationship was embodied in rules and practices that gave these agents the initiative in setting the terms by which finance operated. This process allowed private agents to increasingly set the basic terms of the legal regulation of their own fields of action. In the view of some observers, the financial crisis that began in 2007 is likely to undermine the position of private power in the governance of global finance and in the broader political economy. In this paper, I argue that the reaction to the crisis has indeed led to a re-balancing of power over financial law, in which public actors are clawing back substantial control over the regulation of global finance. I also suggest, however, that this situation is more complex that it may appear, and that we will continue to see close links and mutual dependencies between public and public actors in the global political economy, though perhaps in a different form than had been the case.

The analytical focus of the paper is the sources of continued private power in global finance, in the context of the dynamic interactions between public and private actors. I argue that this power is based in two crucial dimensions of the structure of contemporary global finance – the powers of credit creation and allocation delegated to major private financial institutions and the impact of a pluralist system of financial law and regulation. The creation and management of credit is an essential tool of economic power in modern capitalism, and its concentration in the hands of large private institutions gives the latter crucial advantages in setting the terms of financial law and practice, particularly through the dependence of states on these institutions for economic growth. The system of legal and regulatory pluralism in global finance advances private power in two ways. First, it has enabled the embedding of norms and practices that advance the participation and voice of powerful corporate actors in the variety of sites or nodes of law-making, interpretation, and implementation. Attempts to dislodge these norms and practices will be resisted across these sites/nodes, making it extremely difficult for public agents to fully shift the balance of power with private agents. Having done much to shape the transnational legal order in the first place, private corporate agents now have the resources in place to use strategies such as forum-shifting to effectively limit or "veto" challenges to their power. Second, the structure of transnational pluralism depends on the participation of non-state actors in the making of law and regulation. The integration of private and public power is a foundational aspect of the system as it operates in the context of contemporary global capitalism. There is always a tension between public and private power in this structure, but the system relies on cooperation between these two agencies, moderated by strong networks of actors that cross this boundary. In each of these ways, the field of transnational financial law is structured to empower resource-rich private actors. Public actors are re-claiming some power relative to private actors, but these structural dimensions of the transnational legal order make it likely that private agents will remain crucial players in setting and enforcing the rules of global commerce.

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I pursue this argument in three steps. The paper begins with an analysis of the dynamics of public and private power in the context of transnational legal and regulatory pluralism, turns to an overview of the specific form this structure took in global finance before the crisis, and then uses a discussion of the impact of the crisis to evaluate the future relationships of public and private power in the making of transnational commercial law[1].

2. Power, law, and pluralism in the global political economy

An essential feature of the global or transnational political economy that has emerged over the past four decades has been the close intertwining of public and private agents, institutions, and processes in the governing of its operation. This is particularly important in the areas of commercial law and regulation. By multiplying and dispersing the sources and sites of power and authority, the transnational political economy has left crucial power resources spread across both public and private contexts, requiring that successful legal and regulatory projects combine public and private actors and resources. Successful projects that define the key legal rules and principles for a given sector of the political economy, then, depend on networks of public and private actors working with a degree of cohesion to limit and direct the diversity of legal constructions and practices that could be generated in this kind of context. They require, in other words, the kinds of resources that only the most powerful actors in the global political economy are usually able to mobilize (Benvenisti and Downs 2007). In the areas of commercial law, the major resource-rich actors are states and corporations, along with key individuals and networks that control legal and business expertise. Indeed, to a great degree contestations over legal constructions play out through the enrollment and control of legal expertise by states and corporate agents. Successful coalitions usually link state, corporate, and expert agents unified around a clear project for the governance of a given area of commerce.

There is an important tension or dialectic inherent in these coalitions and projects, which centers on the relationship of public and private power[2]. Both are needed to mobilize effective legal projects but each has resources the other needs, and at any given time the weight of power tends to lean on one side or the other. Despite the proliferation of private sources and sites of legal creation and enforcement, the ultimate legitimacy and enforcement of legal rules/norms still depends to a great degree on states (acting alone or through international institutions), a fact of which private agents are constantly aware. Private corporate actors, on the other hand, control key economic resources – capital in its many forms, including credit – on which states rely for their own goals. Moreover, corporate actors – through their own initiative and ahead of states – often create markets and the legal practices that define them, which then set the contours of the opportunities and problems states respond to and the options available to them. In the process, corporate actors often enroll the most important forms of legal and commercial expertise which further deepens the constraints they can place on states. In any given sector at a given time, the balance of initiative and control will lie with public or private actors, depending on a variety of circumstances. But this balance can be disrupted by emergent trends within a sector and/or by crises which open up opportunities for

[1] For the most part, in this paper I approach law from an "instrumentalist" perspective, asking who makes it, how, and why, with an emphasis on law as an arena for contestations over power. An alternative, "constitutive" perspective focuses on law's role in constituting and structuring relations of power through law's unique normative and institutional dynamics. These are not mutually exclusive; indeed, the instrumentalist approach is important only because of the significance of law's constitutive role in shaping power dynamics in the global political economy. With some exceptions, however, my analysis in this paper focuses on the former dimension of law's connections with power.

[2] In this paper, I am using the concept of "public actors" and "public power" to refer to states, acting alone or through international institutions. There are of course good reasons to question this equation of the "public" with the "state," but I will generally leave these aside for current purposes.

actors to reconfigure their relationships while providing access to previously excluded interests.

One *caveat* is necessary in this context. While corporate agents generally control important resources on which states rely, the nature and value of these resources vary by sector and industry, and within sectors at given times. Factors such as the flexibility of particular forms of capital, the importance of a given form of capital to specific state projects, and the degree of cohesion/division among capital holders in different national and regional settings to unite around common projects (among others) will shape the balance of power between private and state actors. The ability of private corporate actors to shape the direction of law and regulation, then, will depend on the particular structure and legitimacy of the resources they do hold. We can expect that these will differ significantly across political-economic sectors.

Since the 1970s, the overall trend in commercial law has been to empower private corporate actors (and expertise) in the legal regulation of global commerce. This has been the product of a combination of chance and design. On the one hand, the contemporary global economy was created through the breaking down of barriers to the movement of goods and capital within and across national boundaries, and the opening up of whole new industries and spaces for transnational commerce. Private corporations and experts created new legal and regulatory regimes for these spaces on their own, taking advantage of the absence of much state-based rules. New contractual regimes and practices, industry codes and standards, and private arbitration systems were all generated, in which private agents themselves defined the acceptable terms by which business would be done and disputes resolved (Flood 2001, Haufler 2001). States were not absent from these developments, and much of the legal creation for global commerce employed models and norms derived from national legal systems.[3] But the directions and terms in which these legal models were employed were greatly shaped by the choices and strategies of private corporate agents. The resulting complex structures of commercial legal practice were central to the construction of private power in the fields of transnational commercial law.

On the other hand, the empowerment of private agents was part of a clear strategy on the part of states to delegate responsibility for commercial governance to private corporate agents. In this sense, the enhanced power of private corporate agents has been an adaptation of public and private agents to the challenges of governing new economic spaces and flows in the context of the complex and often overlapping sources of power and authority. This strategy is part of the influential "governance" model of the role of the state in a globalizing and market-oriented world[4], and has four key dimensions:

1. An emphasis on a collaborative approach, in which market actors are directly engaged in the process of developing and implementing (including private contracting) the legal rules that shape a given field of economic action. The notion here is that bringing the regulated into the process will help generate rules that are more conducive to advancing market creation and expansion (Roberts 2010). In practice, this means a heavy reliance on private agents in shaping the governance process.
2. In particular and where possible, a preference for forms of self-regulation on the part of industries and market actors (Haufler 2001). While perhaps a version of the previous point, the emphasis on self-regulation is worth highlighting as it specifically delegates much of the definition of regulatory goals and the choice of enforcement means to private agents themselves. Of

[3] This is the case in many international contractual practices, in which choice of law, choice of forum, and arbitration rules specified specific national legal regimes as the basis for contractual interpretation and enforcement.

[4] See Pierre (2000) and Pierre and Peters (2000) for good reviews of the governance paradigm for thinking about the role of the state.

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course, in most cases self-regulatory arrangements are ultimately backed by the state or other public agents themselves; the area of private international commercial arbitration is a good example of this relationship.

3. A commitment to regulatory competition as a key mechanism for the development of market-friendly legal and regulatory regimes. The argument here is that having a variety of sites competing to offer legal rules for a given area of commerce allows private market agents – via strategies such as forum-shifting and ratcheting – to migrate towards those regimes that promote the greatest amount of flexibility and market-deepening. Often inspired by the example of legal and regulatory federalism in US corporate governance, this principle is explicitly advanced in the transnational context as well[5].
4. A preference for and reliance upon private or non-state controlled expertise in legal and technical analysis and rule development. This principle grew out of a general suspicion of the ability of states to understand and properly govern markets, but ended up creating a widespread reliance on privately-mobilized expertise throughout the law-making process.

Together, these principles constitute a distinctive system or "technology" of governance which centers on delegating power and authority for much of the making and enforcing of rules for global commerce in the hands of private corporate agents, subject to the ultimate oversight by states. It amounted to an adaptation to the emerging plurality of legal regimes and sites of legal construction, one which engaged the resources and expertise of private agents in the active constitution of a legal-regulatory framework for deepening global economic interdependence. Analysts of the "regulatory capitalism" school have tended to push back against this kind of perspective, arguing that the practices of contemporary governance have in fact given us a proliferation of new forms of state regulation – particularly legal regulation – that structure capitalism nationally and globally (Vogel 1996, Moran 2003, Levi-Faur 2005). But more legal rules and regulation do not necessarily imply greater public power. These new regulatory bodies and legal regimes are embedded in a system that depends on much intertwining between public and private agents in the development and implementation of legal governance, as regulatory capitalism analysts often note. This new technology presents a structure of law and regulation within which private and public actors struggle for power *as* they cooperate to govern commercial practice. It does not seem to be a stretch to suggest that, for the most part, private agents have been able to dominate the substance of the resulting regimes for the legal regulation of commerce.

2.1. Public and private power in transnational legal pluralism

The empowerment of private agents in this technology of governance is also closely linked to the fundamental pluralism that now characterizes the transnational legal regulation of commerce[6]. A basic definition of legal pluralism characterizes it as "…legal systems, networks, or orders coexisting in the same geographical space" (Twining 2000, p. 83). In contrast to Weberian images of hierarchies of legal action and authority, legality in the global political economy has meant the emergence of a variety of legal regimes attempting to govern transnational economic relationships. There are many types of regimes: general and sector specific, public and private, cooperative and competitive, local, regional, and global. The legal work necessary to structure global capitalism goes on continuously in all these regimes, and is carried on by a plurality of actors – states, international organizations,

[5] It should be noted that the degree of commitment to this principle varies across states and sectors. In particular, the major states and state actors involved in the regulation of global finance have tended to prefer the coordination of their legal and regulatory efforts.

[6] Although I do not agree with all of his claims, Cerny (2010, chapter 7) provides an especially suggestive analysis of these aspects of transnational pluralism.

business organizations, corporations, legal (and other) professionals, and (sometimes) NGO's and social movements. These various legal regimes, though, are not autonomous from one another. The actors involved in law-making pursue legal projects simultaneously in different regimes, and actors are often subject to multiple legal regimes at the same time. As a result, there is a constant interaction between norms, agents, and projects between regimes, and the development of each occurs in constant dialogue with the others. Santos (2002) refers to this fundamental feature of legal pluralism as "interlegality".

The structure of transnational legal pluralism is an emergent property of the process of political economic globalization that has occurred over the past thirty years. For my purposes, the best account of this relationship has been presented in the work of Saskia Sassen (2001, 2006). Three themes in Sassen's account of the construction of governance for the new global political economy deserve special emphasis. First, the development of rules and institutions able to effectively govern transnational spaces required a combination of reform of existing governance sites and the creation of new ones, at both the private and public levels. Second, and as a result, the structure and governance of transnational capitalism is characterized by an essential plurality, as the constant emergence and transformation of actors, markets, and state capacities generates multiple sources of legal and regulatory agency. The plurality of the transnational legal order is thus a part of the more fundamental plural nature of power and authority in the broader political economy (Brutsch and Lehmkuhl 2007, Cerny 2010). Third, the work of reconstructing global economic governance has unsettled formerly clear boundaries between the "national" and the "international"; thus the emphasis on the "trans-national" nature of the current order. This does not eliminate the importance of states, but immerses their actions in networks of institutions and actors that cross national boundaries. The emergence of the transnational political economy transforms and complicates the relationships between the various levels and sites of governance, without necessarily privileging one level over others.

There is a clear emergent structure in the transnational legal field, but it differs from classic views of national legal orders. The transnational legal field is structured around a series of key "sites" which are the focal points for the work of law making, interpretation, and enforcement. As Francis Snyder puts it, in discussing the role of law in the globalized economy, "… it is governed by the totality of strategically determined, situationally specific and often episodic conjunctions of a multiplicity of sites throughout the world. These sites have institutional, normative and process characteristics. The totality of these sites represents a new global form of legal pluralism" (Snyder 2002, p. 65). In an elaboration of the same point, Santos contends that "…legal plurality is not discourses tautologically defined in terms of the use of the legal/illegal code, but discourses coupled with practices in which sanctions, rules, and social functions such as social control and dispute resolution play a key role" (Snyder 2002, p. 95). Snyder's "sites" are the specific places where these practices are instantiated and developed; as such, they are equivalent to what Burris *et al*. (2004) call the "nodes" central to any system of governance[7]. In their account, these "nodes" have four fundamental dimensions:

- A way of thinking ("mentalities") about the matters that the node has emerged to govern;
- A set of methods ("technologies") for exerting influence over the course of events at issue;
- "Resources" to support the operation of the node and the exertion of influence;

[7] For the purposes of this paper, the concepts of "sites" and "nodes" are similar enough to be used interchangeably. The reader should be aware, however, that they come from different theoretical traditions and are not exactly equivalent.

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– A structure that enables the directed mobilization of resources, mentalities and technologies over time ("institutions") (Burris *et al*. 2004, p. 12).

Key "sites" or "nodes" in the transnational legal field include the legal and regulatory systems of states (and sometimes sub-state entities), regional and international institutions and courts, "private" business organizations and institutions for dispute resolution, and organizations of legal professionals. The work of and at these sites, in turn, is driven by the mobilization of political, economic, and normative power to "enroll" them in projects of legal construction (Braithwaite and Drahos 2000). It is important to note that the legal work occurring continuously at each node, combined with the inherent ambiguity and flexibility of most legal regimes, means that control over the general direction of commercial law in any given sector/area is always difficult and often fragile. The recursivity between legal rules and legal practice (Halliday and Carruthers 2009), the creativity of business lawyers (Flood 2001, 2007, McBarnet 2002), and the interactions between legal sites/nodes continually creates spaces in established legal regimes through which actors can challenge dominant understandings and practices. Successful enrollment of the major sites in any give sector is essential for establishing the dominance of any particular set of legal norms, principles, and practices.

The final piece necessary to the analysis of the political economy of transnational legal pluralism, then, is the analysis of the role of transnational coalitions of legal actors in mobilizing this structure for legal construction. Legal action and change is driven by networks of private and public actors who develop strategies and form coalitions to "work" these sites/nodes to generate legal regimes they support and frustrate regimes they oppose. The role of such coalitions has been noted in many areas of transnational action (i.e. Keck and Sikkink 1998), which share the characteristics of multiple, overlapping, and competing sites of power, authority, and legitimacy. They have been especially central to transnational legal action, where the construction and enforcement of legal norms requires the simultaneous mobilization of sites at different levels of the legal order – states, courts, lawyers and legal associations, police, private corporations, etc. The work of Drahos (2004) and Sell (2010) in the area of intellectual property law, employing the nodal governance framework, has been especially insightful in showing how coalitions of actors enroll sites/nodes to construct and enforce legal regimes at the local, national, and transnational levels simultaneously. Drawing on the earlier work of Braithwaite and Drahos (2000), these analyses emphasize the role of key strategies – in particular "forum-shifting" and "ratcheting"[8] – as central to the ability of agents to successfully constitute legal regimes that can advance and secure common norms in a transnational environment. This framework has already been advanced and applied to the analysis of the ways in which private commercial law has been mobilized to advance key agendas in the structure of transnational commerce (Cohen 2007, 2008).

The system of transnational pluralism, then, is intricately connected to the role of private power – and its relationship to public power – in the legal construction and regulation of global commerce. The ways in which legal pluralism has emerged in the transnational context has placed much power in the hands of well-resourced private agents who can create their own sites or nodes of legal practice, shape the choices of public sites of legal action, and exert great influence over the understandings and choices of public-private networks of legal agents. It has proven a crucial mechanism through which private power is embodied in the regulation of the global political economy. As importantly, once these private

[8] Forum-shifting is the strategy of advancing a legal project at different sites in the transnational system, searching for those sites most amenable to a given project. Ratcheting is the strategy of working at different "levels" of legal enforcement – international, national, local, public and private – to secure the implementation of legal rules when they may be blocked or ignored at a given level (Sell 2010).

actors, priorities, and understandings are embedded in the various sites of commercial legal practice, the plural structure itself enables their protection and defense in the face of challenges from public actors and political agents excluded from existing sites/nodes. Strategies of forum-shifting and ratcheting, the control of crucial embedded legal and commercial expertise, and deep ties with public agents allow private power to effectively resist – or at least redirect – challenges from within and outside of existing networks. The structure of legal pluralism as it has emerged does not insulate private power in the global political economy from all challenge, but it tends to reinforce the resources private agents already possess in the ongoing contestations over the rules and priorities of global commerce.

3. Legal pluralism and private power in global finance *avant la crise*

In no sector of the global political economy were these dynamics in the relationship of public and private power better embodied than in global finance until the crisis that began in 2007. The main features of this sector were the product of a number of key political, economic, and technological changes that began in the 1970s[9]. The collapse of the classic Bretton Woods system, the "Big Bang" that opened up the City of London as a source of global financial innovation, and the gradual process of reforms that led to the demise of the New Deal system of financial regulation in the US all created a context in which capital could flow much more freely across borders, financial institutions could develop new international structures of operation, and limits on the types of financial products these institutions could offer were lifted. Economically, the (re-)emergence of London and New York as centers of unmatched financial resources, expertise, and power – able to operate and generate significant profits increasingly independently from the "national" economies to which they were ostensibly tied – allowed the new banking and investment powerhouses to create, extend, and transform markets of transnational reach and coordination (Sassen 2001). Technologically, the combination of advanced and globally-linked computer networking, new "sciences" of financial and risk analysis, and new legal techniques enabled global financial institutions to rapidly invent and disperse financial innovations, create new markets and institutions, and generate new sources of profit while promising the ability to carefully monitor and control the potential risk of the new markets.

On the basis of these developments, key private agents in global finance constructed their own regimes of legal rules, practices, and understandings which created structured spaces of rights and power well in advance of any systematic state responses[10]. Much of this legal construction took place through the use of contract practices that relied upon the law of the key jurisdictions of London and New York State, and the development of industry-wide standard practices. But these practices also generated continuing legal innovation (to match financial innovation) which resulted in a plurality of contracting forms and legal norms that facilitated the flexibility of powerful corporate agents. These regimes were backed by an increasingly wealthy and powerful global financial industry, whose ability to create and allocate credit generated substantial claims on state power both in terms of property rights and in regard to the centrality of financial institutions for allocating investment and shaping economic growth[11]. In this sense, financial institutions developed and exercised especially powerful resources in the form of control over the creation and allocation of credit. As Duncan Wigan (2010) has argued, these resources provided an "exorbitant privilege" for financial institutions

[9] The following general account is based on Helleiner, *et al*. (2010) and Porter (2005).
[10] In the context of global finance, the "key private agents" that are the focus of this paper are the major national and international commercial and investment banks based in the US and Europe. Additional important private actors in this context are the major stock exchanges, the three major credit rating agencies, and the large, multinational legal and accounting firms that service the major banks.
[11] See Piccotto (2011, chapter 7) for a good overview of these developments.

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and markets, which put (and continues to put) state actors at a particular disadvantage in responding to the private power in global finance.

From the perspective of states, these developments presented two major problems or challenges. The first was an imbalance of knowledge, expertise, and technologies to match those of private financial actors. The innovation unleashed by the new worlds of global finance created all sorts of markets, institutions, and products for which regulators had no established rules or tools that were adequate for exerting some control, and states quickly began to fall behind markets in their ability to match the technical analysis and capacities of private actors in these new practices. These limitations became especially important as the propensity of this system to generate regular and significant financial crises – the Third World debt crisis, the S & L crisis in the US, the near collapse of Long Term Capital Management, the Asian financial meltdown of 1997-98, the dot-com boom and bust, the Enron and related collapses – became clear. The second major challenge was the existing national and international structures for governing finance. In the US, the division of authority over financial markets inhibited cohesive regulatory responses. Internationally, the existing IMF structure proved inadequate as a vehicle to govern these new markets, but the creation of new coordinating institutions was hampered by differences in national interests and regulatory style and ideology among the major states. To complicate matters, global finance became increasingly central to political economic power in the US and UK, and supported a growing emphasis on "free markets" and "self-regulation" in both states as tools to advance the interests of this industry. The construction of a regulatory framework for global finance would require ways to overcome the tensions between the promotion of finance and the management of risk, competing national interests, and the limits of existing state and international capacity[12].

A cohesive but plural set of regimes for governing global finance did emerge by the 1990s, and they were based on three fundamental elements, all characteristic of and adapted to transnational pluralism[13]. The first was the construction of a set of formal and informal transnational networks and institutions that brought together public and private actors from key parts of the North Atlantic financial world (Slaughter 2004). These began primarily as inter-governmental organizations of regulatory officials – including the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO) – and central bankers – i.e. the Bank for International Settlements (BIS) – along with more informal regulatory cooperation (Buthe and Mattli 2011). By the later 1990s, the establishment of the Financial Stability Forum under the aegis of the G-7[14], working along with the International Monetary Fund (IMF), added an additional supervisory or coordinating layer to this structure. But this set of regimes also came to develop and work through extensive coordination with networks of key private actors – large financial institutions, key financial industry organizations (the Institute of International Finance (IIF), the International Swaps and Derivatives Association (ISDA), and formal (i.e. the Group of Thirty) and informal groups of academic and professional experts. Together, this "transnational policy network" (Tsingou 2010) was characterized by significant cooperation among, and movement between, the public and private sectors, participation restricted to only the most

[12] In this area, then, the arguments for "regulatory competition" as a principle of transnational regulation turned out to be less persuasive than in some other parts of the global political economy. Regulators and central bankers early on came to see cooperation as a necessary part of grappling with the interconnections of global finance. There are exceptions, the most significant being the treatment of "offshore" finance and the problems of tax havens; but even here cooperation began to grow in the 2000s (Palan 2003).

[13] A number of these institutions existed well before the 1990s, but I emphasize the growing cohesion in their regulatory efforts that emerged during this decade.

[14] The FSF was replaced (and its capacities strengthened) with the creation of the Financial Stability Board (FSB) in 2009 as part of the creation of the G-20. For an early evaluation of the FSB, see Helleiner (2010).

influential industry actors and public sector regulators, and little oversight from public authorities – nationally or internationally – outside of the complex and opaque world of finance.

The second key element was the increasing role of industry self-regulation as a guidepost for financial governance. This came in two related forms. One was the incorporation of industry-developed standards – and in some cases the solicitation of such standards – as the basis of standards regulators would promote and enforce in the particular sector. The best known example of this is the provision in the "Basel II" agreements, developed by the BCBS in 2004, which placed substantial reliance on the internal risk-assessment models of the wealthiest and most "sophisticated" global banks as defining the standards that all banks should follow to ensure financial soundness (Porter 2010). But there are other cases of this as well, such as the standards developed by the private International Auditing and Assurance Standards Board (IAASB) for the auditing of public forms, which were promoted as global standards by the G7 beginning in the late 1990s (Helleiner and Pagliari 2010). The other form of the emphasis on self-regulation was more or less direct – the delegation of responsibility for the development and enforcement of standards to a private sector institution. Most important in this area has been the role of ISDA in developing the standard form contracts – especially the ISDA "Master Agreement" model contract – that have governed the creation and trade in derivatives since the late 1990s (Morgan 2008). This emphasis on self-regulation had three major effects: it deepened the role and increased the weight of private actors in the increasingly intertwined public-private networks already described, allowed these actors to gain further initiative in creating structures of property rights and claims, and ensured that the substance of the standards and rules reflected the aims and understandings of the financial industry itself. Together, the proliferation of forms and sites of national governance, international regulatory collaboration, and private self-regulation constituted a distinctively plural field of global financial governance.

The third and final element of these regimes was the unique role played by financial expertise, much of it located outside of public institutions. By the late 1990s, it had become clear that the explosion of financial innovation among private firms was quickly outstripping the ability of most policy-makers to understand what was going on in the various markets. In addition, a good deal of this innovation was reliant on fast-developing academic and private theory in the area of finance, which was closely monitored by and quickly integrated into the strategies of banking and investment firms[15]. This expertise promised at the same time to identify heretofore unknown profit opportunities, while ensuring that risk was distributed throughout the system to those institutions most able to understand and manage it. Increased reliance on this form of knowledge brought key experts into the relatively small and tight-knit networks of those public and private actors with the ability to understand and recognize their importance. The inevitable effect, though, was to further shift the balance of power in the direction of the private agents in these networks, and support the growing inclination of regulators to defer to the judgments of these agents in determining what kinds of strategies best promoted stability and growth in the global financial order.

For state actors, facing the challenges of an innovative and quickly changing global financial system, this set of regimes provided a seemingly reasonable approach to ensuring stability and growth (Pauly 2002). Public authorities at the national level seemed unable to match the expertise of private agents and to be missing the tools to respond to the flood of new financial inventions, markets, and strategies, and needed to develop some framework for stabilizing the increasingly risky and interconnected global financial markets. At the same time, they were increasingly reliant on these markets to provide the financing necessary to sustain investment

[15] See Cassidy (2009) and Smith (2010) for good accounts of this aspect of the financial order.

and economic growth. In response, the construction of a plurality of formal and informal transnational policy networks – working in close collaboration with the key financial institutions that generated new markets and would best understand their operation – provided a workable approach to governance. The inevitable result of these kinds of arrangements was the increasing centrality of the interests, power, and understandings of private actors (Picciotto and Haines 1999). But this proved to be an advantage as well. Increasing deference and delegation to private agents fit well with the broad emphasis on "self-regulation" and "collaborative" regulation that dominated the ruling understandings of the role of the state during this era. As importantly, these regimes relied on the active promotion of models of financial practice and regulatory governance that reflected the norms and interests of the two states most central to this system – the US and UK. In turn, these models received the imprimatur of the leading financial "experts" who were at the same time key to the construction of these markets and practices.

In some accounts, this close intertwining of public and private actors and purposes has been portrayed as a type of "regulatory capture" often found in the relationships between industries and their regulators in modern capitalism. As Kevin L. Young (2012) has noted in his study of the BCBS, a good deal of the critical writing on this period often suggests that the work of banking regulators was dominated by the interests and outlooks of the global financial industry, which exercised is power through lobbying and forms of "cognitive capture." Young is rightly critical of the more simplistic interpretations along these lines, and provides convincing evidence that there were continuing tensions between regulators and finance and that the former were often able to impose their own views on the latter[16]. As the account here suggests, however, I don't believe that an emphasis on the common goal of empowering private financial agents to determine the terms of their practices is best understood through a capture analysis which measures private power simply in terms of the victory of private preferences in direct conflicts with public agents. Rather, private and public agents together came to accept and advance a model of global financial governance that advanced a generally common set of preferences based on private sector-led economic growth, a form of regulatory governance that relied on the active engagement of private agents, and an acceptance of the efficiency of private capital markets. The operation of this system, in turn, depended on delicate patterns of cooperation and conflict within a larger system of collaboration of public and private actors. This public-private interaction and interdependence is a structural feature of contemporary global finance, even though its terms are always contested in some degree.

There is little doubt, though, that this model of governance worked effectively to embed private power in ways consonant with the model of transnational legal pluralism. By the early 2000s legal and regulatory authority was dispersed into various public and private (and borderline) sites or nodes, and private agents played a central role in the transnational policy networks that made these work. The most powerful corporate agents had the ability to enroll all of the major sites to advance their common views and interests in financial governance, while the plurality of the system created both opportunities for creative legal construction and the ability to arbitrage regulatory regimes to "choose" the legal regimes most conducive to their institutional interests[17]. Moreover, as the case of the regulation of the derivatives markets shows, it allowed private agents to mobilize

[16] As Pagliari (2012) notes, though, one of the major attractions – and difficulties – of the idea of "capture" is that it is used in so many different ways and refers to so many (related but) distinct phenomena that analysts debating the topic are often talking past one another.

[17] This process of arbitrage and choice took a variety of forms, including contractual choice of law for financial products, the choice of which stock markets on which to list particular organizations, and the choice of jurisdictions (i.e. London vs. New York) in which to locate institutions practicing certain kinds of financial innovation. In each case the driving force was generally the desire to find a governing legal regime most conducive to protection of the activities undertaken by the particular institution or contracting agents.

overwhelming institutional resources to resist challenges to their power and preferences regarding the financial order. This plural transnational order reinforced the already existing control over credit creation to shift the balance of legal and regulatory power into the hands of private agents as opposed to state actors. But this system also depended on its pragmatic ability to ensure both growth and stability; the degree to which regulators embraced this form of governance and regulation was based on the ability of the system to secure these ends. It remained to be seen whether private agents could preserve their power in the context of a systemic failure in global finance.

4. The financial crisis and its implications for the governance of global finance

The outlines of the financial crisis are now well known[18]. Over the course of the 2000s, massive financial imbalances had developed between the major surplus (China, Germany, Oil exporters, etc.) and the major deficit (US, UK, Spain, Ireland, etc.) economies, which led to large influxes of capital into the latter states. In the particular context of the decade, these influxes led to the emergence of real estate "bubbles" in all of these states, which began to burst in 2007. However, during the same period a wave of financial innovation – based largely in the US financial markets and institutions – had generated massive investment in arcane forms of derivatives ultimately based on values in the US housing market. The spread of these investment vehicles throughout the global financial system linked much of the system to housing values in the US. When the latter began to crash, it destroyed balance sheets at financial institutions throughout the "West," turning the bursting of a housing bubble into the worst financial and economic crisis since the 1930s. By the end of 2008 many of the largest global financial institutions were effectively insolvent, and the fear that counter-parties could not meet their obligations led to a freezing up of business and consumer credit markets in the US and Europe. Only massive infusions of capital into financial institutions and markets by central banks and governments saved the global economy from a full scale collapse.

The ongoing crisis has posed a major challenge to the pre-existing system of governance in global finance. This structure, based on the central role of private power and self-regulation, reflected two fundamental beliefs – that it was the best system to limit financial risk and thus provide financial stability and fuel economic growth, and that private agents had the expertise unavailable to public actors and necessary to manage financial complexity. Both of these beliefs seemed to be undermined by the crisis and the processes behind it, and it did not take long for state actors and public officials to declare the era of "self-regulation" and beliefs in market efficiency to be over[19]. These general declarations reflected developments in the actual practice of financial governance. In the immediate aftermath of the crisis, states reasserted their power over the global financial system – nationalizing key institutions, taking controlling interests in others, embarking on the development of new legal and regulatory frameworks limiting the practices of financial institutions, and establishing new international standards and practices for the control of transnational finance. The same private financial agents that had dominated the system before the crisis were now clearly on the defensive in relationship to state actors[20].

[18] For excellent if varying accounts, see Cassidy (2009), Rajan (2010), and Smith (2010).

[19] For example, in September, 2008 Christopher Cox, at the time the Chairman of the US Securities and Exchange Commission (SEC), stated that "(T)he last six months have made it abundantly clear that voluntary regulation does not work" (Labaton 2008). He was referring to a voluntary oversight program designed to monitor the activities of the large Wall Street investment banks.

[20] The immediate response to the crisis, then, illustrated the limits of the regulatory capture thesis. All of the major national and international financial regulators took some decisive, independent action towards financial markets and institutions that could not be easily accommodated by pre-crisis capture arguments.

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ISSN: 2079-5971

How can we evaluate the changes in financial law-making and governance to this point? Has the relationship of public and private power undergone significant change, and if so what implications does this have for the analysis of the dynamics of power and plurality in contemporary global capitalism? I pursue these questions in two related discussions – an analysis of financial governance in the established centers of the global economy, and a consideration of the impact of emerging financial powers on the future of financial governance. My analysis suggests that we are in the process of a re-balancing, in which states are "clawing back" significant power from private actors, but that the resources of major private financial institutions as providers of credit and the structure of transnational legal pluralism will continue to sustain substantial private power in the governance of global finance.

4.1. Policy networks in the center of global finance

Two recent analyses of the financial crisis suggest that it has had surprisingly little impact on the power of private corporate actors from the "global north" in governing global finance[21]. Reviewing existing legal, policy, and regulatory changes, Colin Crouch (2011) is struck by the absence of much significant challenge to the role of private corporations in the making of policy for the financial sector[22]. Eleni Tsingou's (2010) more detailed analysis concludes that the transnational policy networks that dominated finance have been stressed by the crisis, but have ultimately survived in ways that sustain the crucial role of private corporate actors and experts. In her view, the entrenchment of these agents in established legal and regulatory structures is central to this process.

There is much evidence to support these conclusions, though it can be interpreted in different ways. First, while public actors in the US, UK, and EU have begun reconstructing the regulatory framework for banking and finance, the emerging rules do more to oversee and limit the freedom of market actors and institutions, but in relatively incremental ways. There will be more publicity and regulation for derivatives markets, closer oversight of depository and investment bank activities including some limits on speculation strategies, the powers of key regulatory bodies over financial markets are strengthened, and there will be somewhat tighter controls to protect consumer interests (Acharya *et al*. 2011). To this point, however, fundamental challenges to the financialization of contemporary capitalism, and its impact on the power of financial actors, seem unlikely. In substantive terms, then, the emphasis of financial reform has been to try to curb the most extreme abuses and forms of risky action without challenging the basic role and structure of finance in the political economy.

Second, the same pattern has been evident in the various multi-lateral attempts of key states to address the transnational dimensions of the financial crisis. After a significant initial effort to re-think some elements of the financial order, the G-20 process has stagnated and accomplished little. The IMF has reasserted some of its role in stabilizing currencies and public finances, but has been most effective in a reactive mode, particularly in the European financial crises. The most important and significant multilateral regulatory efforts so far have been the attempts of the Basle Committee on Banking Supervision to reform the Basel II rules to strengthen the balance sheets of major international banks. The new Basel III rules force these banks to raise the level of their reserves and limit the use of highly risky investment strategies. But stronger measures in both of these areas, which had been initially advocated by some regulators and policy-makers, have been rejected

[21] I draw the term "global north" from Halliday and Carruthers (2009), who use it to refer to the most powerful states/economies in the global political economy around which most global flows of capital and resources focus – North America, Europe, Japan, and various additional states such as Australia.

[22] Crouch's argument is actually broader than this, tracing the continuing power of corporations in the political economy more generally despite the depth of the crisis. Here, I focus on the implications for global finance.

and the rules themselves will not begin to take effect until 2014 (Blundell-Wignall and Atkinson 2010). Once again, the emphasis has been on patching holes and eliminating the worst dangers, while getting the existing financial order back on its feet as quickly as possible.

Finally, it seems to this point that the major private corporate and expert actors, while initially put in a defensive position, have successfully adopted a new strategy of being "positive" participants in the reform process, offering ideas that protected the basic autonomy and structure of the global financial industry and effectively derailing much of the more radical proposals. Indeed, the restructuring of financial institutions resulting from the crisis left the industry more concentrated, dominated by even more powerful corporations that seem even more fundamental to the stability of the global economy as a whole. At the time of writing, these actors have focused their efforts on ensuring that the actual implementation of financial reform – the detailed legal rule-writing and enforcement decisions that still have to be worked out nationally and internationally – proceeds in a way that limits any serious challenge to the power of the industry[23].

While this argument is persuasive as far as it goes, however, it is not the only way to read the response to the crisis. We can also see the developing responses to the financial crisis as embodying a reassertion of public agents and power that has the potential to shift the balances between public and private agents by opening up new options for states to more assertively drive private actors to advance public goals. Some steps in this direction had already been taken in the 2000s, as US and European states began often successful campaigns to crack down on the use of the global financial system to finance terrorist and other criminal activities, as well as on various forms of tax evasion (Picciotto 2011, chapter 6). The post-2008 efforts to publicize and regulate the trading of various financial products, to limit the ability of banks to engage in opaque financial innovation, more closely control the activities of credit rating and auditing agencies, and to enforce (nationally and through the Basel institutions) stricter standards of financial stability amount to real constraints on the previous autonomy of financial institutions. Institutionally, while the general G-20 process may have floundered the creation of the FSB has resulted in a supervisory institution that has greater resources, substantial expertise, and has been quite assertive in advancing regulatory goals while resisting the attempts of private actors to limit its impact[24]. The often intense resistance to these proposals by banks can be seen as evidence of their "bite," and the willingness of regulators to persist in the face of some of these challenges (i.e. the new Basel capital adequacy standards) point to a shifting balance of power in favor of established public actors even in the context of continuing private power and influence[25]. At the same time, increasing state assertiveness opens the door to more divergence in regulation and competition between states, which can weaken the trend towards harmonization around US and UK models of finance that was central to the transnational policy network.

These two interpretations need not be incompatible, but the former does seem to minimize the quite impressive assertions of state power that have been characteristic of the past few years in financial governance. This record of state action, then, can be understood in terms of the work of scholars who emphasized that the system of private power and autonomy in financial governance was always dependent upon the tolerance and encouragement of public actors, who retained the ability to tighten the scope of private power when necessary. For reasons I discuss below, I don't think we should go that far; indeed we are seeing a

[23] For an example of these efforts, see Institute of International Finance (2011).
[24] I want to thank one of the reviewers of this paper for emphasizing the importance of the FSB.
[25] See, for example, the analysis of Basel Committee experts in Macroeconomic Assessment Group (2011), which presents and counters banking industry arguments against the new capital adequacy standards.

Oñati Socio-Legal Series, v. 3, n. 4 (2013), 679-701
ISSN: 2079-5971

continuing contestation between and among public and private agents to dominate and shape the new structures of financial governance, and the power of private agents in global financial remains formidable. But the evidence does suggest room for different patterns of public and private power within a system of transnational legal and regulatory pluralism.

4.2. The emergence of new centers of financial power

The other major trend to consider in evaluating the impact of the crisis is the spread of political-economic power to sites/nodes and networks beyond the high income countries of the "West". As industrializing states such as China, India, and Brazil – and the sovereign wealth capacities of resource-exporting states – become increasingly prominent, key actors and institutions from these regions are generating new sites/nodes of power while at the same time becoming involved in the networks and nodes already established in transnational economic spaces. As a result, these political, economic, and expert actors will increasingly have the ability to shape the dominant agendas in the legal regulation of commerce, becoming rule-makers instead of rule-takers. To this point, there is little evidence of any major attempts to use this power to re-shape the global political economy (Walter 2010). But the potential is there, and it leads to a key question. The plural transnational structure of governance based on a heavy reliance on private power and expertise was created and sustained by actor-networks based in North American and Europe. Many of the emerging actors and sites, however, are embedded in forms of capitalist development that have placed more restraints on private power and have emphasized a more substantial public/state role in defining and directing economic activity. In light of the failures illustrated in the global financial crisis, it is likely that these actors will retain their skepticism of delegating too much power to private corporate actors. Where would this skepticism take us? Would this amount to an extension of pluralism beyond the capacities of any coalition to control?

No one really knows the answer, but it is useful to play out one emerging scenario. Here, a combination of East Asian (especially China), Southeast Asian, and oil exporting states and networks use their influence in markets and institutions to advance norms that deviate from the dominant patterns of trade, investment, and financial law and regulation built up since the 1970s (Mosley 2009, Helleiner 2009). What impact would this have on the system of transnational legal pluralism and in particular the power of private agents? One clear possibility is a transnational system in which there is much emphasis on the creation of more space for state priorities in governing the global economy and therefore more constraints on, and less room for, the power of private corporate agents. In this scenario, the preferences of newer public actors would converge with the patterns of more assertiveness on the part of state actors in the global north. At the national level, states would be pressing private agents from all directions, and the trends to harmonization in global financial regulation would be replaced with competing national models and practices. Whatever multilateral initiatives survived would focus on reconstructing global financial governance would reinforce these pressures. The balance between public and private power would be reset to benefit the interests of states in providing more stability and control in finance, with much less transnational cohesion in financial law and regulation.

But I think this conclusion is too hasty and not inevitable. For a number of reasons, the emergence of these new sites/nodes of power in the governance of global finance may in fact be compatible with the continuing strength of private corporate agents. The key factor here is the continued importance of the sites/nodes of private power and the resources these provide to private corporate agents to take advantage of even a more deepened pluralism. Even if the dispersal of power in global financial governance does indeed create a deeper plurality of models and practices of law-making, some of which may indeed be hostile to the role of private power, private agents may well retain the ability to "veto" or modify state projects

that threaten to weaken their entrenched power. In particular, private corporate actors remain especially well placed to take advantage of a plurality of sites of power to pursue forum-shifting strategies by enrolling state actors on an *ad hoc* basis. In this scenario, a more fragmented legal and regulatory order may limit the ability of private agents to dominate the system of financial law and regulation as a whole, but open up new opportunities to engage in legal and regulatory arbitrage to preserve and advance their own role in shaping the rules and practices of global finance.

But there is no guarantee that the power and involvement of new state actors will necessarily generate a greater diversity of practices for the organization of power in global finance. This line of argument begins with the reality that the emergence of new sites/nodes and networks of power in global finance will not displace existing ones. The major New York and London based financial institutions, markets, and networks – and the state actors central to their regulation – will remain central players in global finance, and the models of public-private relationships they enact will continue to powerfully shape the governance of global finance. The new actors will have increased power to shape rules and institutions, and this may constrain the dominant actors in the global north, but it will not necessarily lead to a full scale reversal of power relationships. Indeed, we can hypothesize that some or many of the new agents of power in global finance are already so closely tied to the established center and so well-socialized to the norms and practices of the center that the ultimate result is the extension of the practices of empowering private actors in global finance[26]. Any such processes, in turn, would be based in a deeper set of political-economic realities in global capitalism. Many if not most of the emerging states, despite their general emphasis on having state interests guide the political economy, attempt to work with and not displace existing sources of private power. As the Chinese example seems to indicate, these states may impose stricter limits on private actors while also relying on them to undertake key tasks necessary for economic development – finance, information technology, industrial production, etc. Rather than replacing private power and established networks linking public and private actors, in most cases the dominant approach is to try to create networks which use the same tools to advance a different set of legal norms and principles. At the root of this relationship is the continuing power and expertise of the major private corporate actors in the creation and allocation of credit, the demand for which is especially crucial in the emerging market states. This underlying power would then work to support and extend the norms and practices of private participation in global financial governance even in the context of the increasing plurality and complexity of the financial order[27].

In either of these scenarios, then, the embedded structures and practices of financial law and governance – the central role of private agents, the practices of delegation of public power, the strategies of forum-shifting and legal/regulatory arbitrage – combined with the fundamental power of (and expertise in) credit-mobilization and allocation suggest that private corporate power is likely to survive the financial crisis to remain central to the governance of global finance. The balance between public and private actors may shift, but there is good reason to think that there will be no major disruption in the fundamental practices through which power in global finance is constituted or mobilized.

[26] For a similar analysis in the context of the transnationalization of legal fields, see Dezalay and Garth (2002).

[27] In the context of Walter's (2010) argument, then, states like China may not in the end be norm-takers but would work to further deepen the dominant norms of global finance, even in a modified form. Such an argument is suggested in Kahler (2010).

5. Conclusion: conceptualizing public and private power in transnational pluralism

The very tentative account that I have outlined raises a crucial question – what factors determine the relationship between private and public power in a structure of transnational legal pluralism? In this final section, I present even more tentative suggestions regarding how to begin to think about the answers this question in the context of global finance. My analysis begins with the contention that the plural transnational legal order privileges resource-rich agents – primarily corporations and states – who can entrench their power and projects within key sites/nodes of power/authority, and then use forum shifting and veto strategies to resist challenges to their power. In the process, as Tsingou (2010) points out, we see the formation of dense networks linking private and public agents across sites/nodes as the key drivers of legal and regulatory construction in given sectors. But we need to carefully consider the different kinds of resources private and public agents bring to this process. Private actors bring economic resources crucial to investment and growth, and expertise in the intricacies of particular industries, markets, and legal fields. As such, they can be essential to state actors pursuing strategies of economic growth, national power, and competitive success. State actors, on the other hand, bring the coercive power and authority necessary to support and legitimate any exercise of power and secure any given distribution of rights claims. In contemporary global capitalism, it would seem that the resources and expertise of major corporate actors tends to generate much dependency and deference on the part of state agents, at least in relatively stable periods. As long as corporate agents are able to provide the economic results that states are looking for, their power seems to have a "pragmatic legitimacy" in the eyes of states, which are willing to provide the authority and sanction of law to protect this power. A crisis in any given sector – defined as a sudden (perceived) failure of private actors to provide these results – undermines this pragmatic legitimacy, and opens the door for state actors to use their resources to re-arrange the terms of cooperation, and the limits within which private agents are allowed to use their power. But this is not the end of the story. The crisis only begins a process whereby public and private agents compete to define the interpretation of the crisis and articulate potential solutions, a process in which private agents continue to have substantial resources with which to advance interpretations that protect acquired rights and powers[28].

Something like this seems to account for recent developments in global finance, but with complications unique to the area of money and credit. In contemporary capitalism, the key power of financial institutions is the ability to create and allocate credit, which is the crucial resource on which all economic activity depends. But credit is money, and the authority to create and establish a value for money resides in the sovereign state, and in this sense financial institutions are always partial agents of the state. In particular, in creating credit financial institutions are acting with the imprimatur of the state, and require the backing of state legal systems to ensure the existence and value of the very money that forms the essence of their power. This would seem to make private financial actors particularly vulnerable to state action, but the relationship often works in reverse – because they depend on financial institutions to create, manage, and allocate the supply of credit, state actors are perpetually dependent on private actors for the very safety and value of one of the state's key assets, a dependence heightened by the complexity of modern finance about which private actors usually control much more expertise than states. As a result, financial institutions can and do create their own forms of property rights and legal claims through the use of credit, and are uniquely able to imprint these in the key private and public sites/nodes of legal creation in the plural order. In this paradoxical way, as Wigan (2009, 2010) has shown, the foundation of

[28] I do not mean to claim that this type of "punctuated equilibrium" model is always the best way to explain change in transnational political economy, only that it seems to fit the patterns of the current financial crisis.

private power in global finance is control over the very public resource of credit – which cannot exist without the support of the state – while public power remains unusually dependent on private agents to enact the projects of state power.

These considerations can, I hope, help us make more sense out of the way the financial crisis is playing out in relation to the governance of global finance. The failure of the pre-2007 financial order to provide financial stability and ultimately credit itself threatened an essential function of the modern state and thus the legitimacy of the legal order for global commerce. States in the global north reacted by attempting to reconfigure the rules of finance, and with it the role and limits of private financial power, in order to revive and protect the stability and value of the modern credit system, while emerging states saw the crisis as a warning to take close care of their own credit systems and to advance models of global finance more constraining of private financial power. But private financial institutions retain crucial resources to resist and limit these constraints. Their intrinsic power to create, mobilize, and allocate credit continues to appeal to states (of all types) who depend on credit and investment for their political-economic project. Private financial institutions in this way remain central to the legitimacy of states and their legal systems, which would be undermined by the collapse of the credit system. As a result, private agents have been able to present themselves as necessary (but not always chastened) parts of the solution to the crisis, and have used the dynamics of plural governance effectively to deflect the most radical of the challenges to their power. In the absence of any major and coordinated attempt to reshape the way credit is constituted in the contemporary political economy – and there is little evidence of this at the moment – private actors will remain very much at the table in the making of financial law and policy. The seating arrangement may be different, and significantly so, but the close ties and mutual dependence of public and private actors will continue to define the way the global financial order is governed and legitimated.

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