The Practices of Private Global Norm Production and Intellectual Property Epistemic Communities

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ABSTRACT

This article considers the formation of private global norm production through technical standardization and e-commerce. The article frames these norm-generation developments through the lens of epistemic communities and the influence they have as private actors over their economic self-interests in the global legal system. The epistemic generation of norms are acute in many areas and sub-areas of the law; hence the discussion in this article focuses on technical standardization, e-commerce, and to some extent, online dispute resolution. The discussion also, implicitly and explicitly, relates to their relationship to intellectual property rights. These discussions can offer insight into how certain international legal norms emerge relating to internet governance. Thus, the article considers arguments from an international law perspective and then frames the discussion around the notion of epistemic communities. This article's assertions partially represent the different epistemes in technical standardization and e-commerce and, therefore, makes two main arguments. The first argument is that technical standardization, as a result of private norms, represents how epistemic communities engage in the production of private global norms. The second argument is that the practices of certain epistemic communities in e-commerce, where intellectual property rights are relevant, further add to the legal construction of global private norms. The observations in this article are only meant to show the power of epistemes that are or have been active in internet governance, e-commerce, and frame their role in a contextual analysis based on international law or the evolution towards the privatization of international law that has been evolving. In that regard, the discussions are beneficial to the normative aspects of global norm production, especially when the legal effect of norms and rules developed through practice is relevant to how we understand some of the developments in the international legal order.

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I. INTRODUCTION

This article deals with the global nature of norm production by developing a narrow understanding of two sets of private actors from the perspective of epistemic communities.[1] Focusing on those involved in technical standardization and matters relating to e-commerce, from a dispute resolution and legal point of view, demonstrates the importance of these epistemes for internet governance. The discussion, however, is not about setting out at length the legal nuances of either group as epistemic communities.[2] Rather, I briefly frame the discussion against the backdrop of international law, then introduce epistemic communities as a legal concept. Therefore, at times, the discussion relates to the epistemic communities in global intellectual property norm-generation, which affect contemporary internet governance and the core issues of technical standardization and e-commerce. These discussions are only snippets of a broader framework of private actors as epistemic communities and the creation of private norm production within the international legal system. The epistemic communities this article discusses give us a unique understanding of how the norms that shape global rules for particular areas in internet governance, and the spillover these norms have on intellectual property rights for questions relating to settling online disputes for intellectual property infringement. This exploration is especially important for understanding how, in other sectors, epistemic communities shape the globalization of law, thereby

1. Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992) (defining epistemic communities as: "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area.") With this starting point, I also seek to extend the conception of the term in this article to cover related areas or use the term interchangeably. Hence, the reader may sometimes encounter "non-state actors"; "private actors"; and pointedly, "technical standard setters" for the internet, or other professional networks in relation to e-commerce. All these describe the same set of professional networks and private actors or *epistemes* for purposes of discussion in this article.

2. *See, e.g.*, JEAN D'ASPREMONT, INTERNATIONAL LAW AS A BELIEF SYSTEM (2017); S.I. Strong, *Clash of Cultures: Epistemic Communities, Negotiation Theory, and International Lawmaking*, 50 AKRON L. REV. 495 (2017); Stéphane Enguéléguélé, *Penal Epistemic Communities and the Making of Criminal Law Norms*, 40 DROIT ET SOCIÉTÉ 563 (1998); Lisa Toohey, *Accession as Dialogue: Epistemic Communities and the World Trade Organization*, 27 LEIDEN J. INT'L L. 397 (2014); Timothy L. Meyer, *Epistemic Institutions and Epistemic Cooperation in International Environmental Governance*, 2 TRANSNAT'L ENV. L. (2013); Charlotte Ku, *The ASIL as an Epistemic Community*, 90 AM. SOC'Y INT'L L. PROC. 584 (1996); Jan Klabbers, *On Epistemic Universalism and the Melancholy of International Law*, 29 EUR. J. INT'L L. 1057 (2018).

influencing how states eventually sign treaties in the international economic system.[3] In this regard, epistemic communities validate the functions and rules of public international law—not the interests of the state, per se. I posit that this occurs in the interest of the private governance mechanisms that drive globalization and thereby privatize public international law through the process of global norm production.[4]

In such light, epistemic communities should be partly seen as private governance mechanisms, similar to what Gunther Teubner describes as an explosion "of *lex mercatoria* and other practices of 'private' global norm production."[5] This article investigates how the production of global norms emerge in certain sectors using private governance mechanisms as the context. Thus, this article partly considers the technical standardization process used by the various coalitions of epistemic communities, and the new *corpus of economic merchants* and their legal interest organizations within global (online) commerce and governance.[6]

The adoption of certain treaties by states, where epistemic communities have been heavily involved, such as the Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application

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3. *See, e.g.*, TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE GLOBAL ECONOMY (2011); DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY (2018).

4. *See* P. Sean Morris, *From Territorial to Universal–The Extraterritoriality of Trademark Law and the Privatizing of International Law*, 37 CARDOZO ARTS & ENT. L.J. 33 (2019) (although at the time of this article, I am still pursuing aspects of this argument in a more elaborate form, I've earlier discussed parts of the privatization paradigm using intellectual property rights). *See, e.g.*, A. CLAIRE CUTLER, PRIVATE POWER, AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY (2003); POWER IN GLOBAL GOVERNANCE (Michael Barnett & Raymond Duvall eds., 2004); MARIE-LAURE DJELIC & SIGRID QUAK, TRANSNATIONAL COMMUNITIES: SHAPING GLOBAL ECONOMIC GOVERNANCE (2012); TRANSNATIONAL GOVERNANCE: INSTITUTIONAL DYNAMICS OF REGULATION (Marie-Laure Djelic & Kerstin Shalin-Andersson eds., 2006); Miles Kahler & David A. Lake, *Governance in a Global Economy: Political Authority in Transition*, 37 PS: POL. SCI. & POL. 409 (July 2004); THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002) (relating to private governance and globalization).

5. GLOBAL LAW WITHOUT A STATE XIV (Gunther Teubner ed., 1997) (the book in general looks at legal pluralism in the context of globalization and in particular the phenomenon of "*lex mercatoria*, the transnational law of economic transactions" as "the most successful example of global law without a state"). *Id.* at 3.

6. *See, e.g.*, MILTON L. MUELLER, NETWORKS AND STATES: THE GLOBAL POLITICS OF INTERNET GOVERNANCE (2010); Neha Mishra, *Building Bridges: International Trade Law, Internet Governance, and the Regulation of Data Flows*, 52 VAND. J. TRANSNAT'L L. 463 (2018); Shamel Azmeh et al., *The International Trade Regime and the Quest for Free Digital Trade*, 22 INT'L STUD. REV. 671 (2020).

of Sanitary and Phytosanitary Measures (SPS),[7] suggests the endorsement of the lawmaking activities that epistemic communities are engaged in. The SPS and TBT Agreements in the World Trade Organization (WTO), for example, are based on certain technical standards and represent and promote the private economic interests of non-state actors.[8] Arguably in that regard, states are effectively promoters of the private rules of economic merchants in public international law; it thereby shifts the center of gravity of international rule-making away from states.[9] Epistemic communities are specialists' global networks that, to quote Teubner, form "the new living law of the world" and as such are "global networks of an economic, cultural, academic or technological nature."[10] I interpret Teubner's formulation of *living law* to partially include the role of epistemic communities in global lawmaking. That role includes the generation of international norms, private production of global treaty norms in technical standardization, and allied rules on intellectual property relating to e-commerce.[11] These

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7. *See, e.g.*, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement]; Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement]; Agreement on Technical Barriers to Trade, June 1, 1995, WTO Agreement, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

8. Appellate Body Report, *Eur. Cmtys. – Measures Prohibiting the Imp. and Mktg. of Seal Prods.*, ¶ 5.1.3., WTO Doc. WT/DS400/AB/R (adopted May 22, 2014) [hereinafter EC–Seals] (discussing the framing of technical standards under the TBT Agreement). *See also* Steven Bernstein & Erin Hannah, *Non-State Global Standard-Setting and the WTO: Legitimacy and the Need for Regulatory Space*, 11 J. INT'L ECON. L. 575 (July 2008); Eva van der Zee, *Disciplining Private Standards Under the SPS and TBT Agreement: A Plea for Market-State Procedural Guidelines*, 52 J. WORLD TRADE 393 (2018); Michael M. Du, *The Regulation of Private Standards in the World Trade Organization*, 73 FOOD & DRUG L.J. 432 (2018) (all discussing the relation to the private standards under the TBT and SPS Agreements).

9. *See also* Buthe & Mattli, *supra* note 3; *see generally* Kevin Davis et al., *Indicators as a Technology of Global Governance*, 46 L. & SOC'Y REV. 71, 83 (2012) (discussing standard-setting in general).

10. Teubner, *supra* note 5, at 7. (Teubner himself never used the phrase epistemic communities, but there is no doubt that his formulations of global networks are not far from this term. In any event, one of the phenomena that Teubner identified as having epistemic communities' characteristics is "the boundaries of global law" by "invisible colleges," "invisible markets and branches," "invisible professional communities," "invisible social networks" that transcend territorial boundaries). *Id.* at 7-8. *See also* Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. (1992). (This latter formulation of epistemic communities by Haas is widely discussed in the social sciences literature and is the basis for the conception of epistemic communities discussed in this article).

11. Data and privacy protection are sample allied areas that interact with intellectual property rights from an online perspective, for general discussions; *see* SERGE GUTWIRTH,

developments are often due to the role of private economic merchants who often formulate and direct the agenda of global rulemaking.[12] Historically, the role of private economic merchants in the intellectual property sphere may be traced to the 1870s and 1880s, especially in the emergence of the Berne and Paris Conventions.[13]

Generally, one appeal of intellectual property rules to the system of public international law is that intellectual property law, as part of the broader corpus of private law, are *refined rules* of legality and as such are useful to interpret the ambiguities in international law that pertain to global economic transactions.[14] What is clearly observable from an *inter-systemic* dance of intellectual property rules and their public international law character is that international law's narrative has created a new language that is accented by the *fineness* of private law and the *elegance* of economic merchants' norms.[15] Therefore, if private law rules are present in public international law's construction of intellectual property then there are grounds to demonstrate how, within certain areas, the finesse of such private law rules is a result of epistemic communities incorporating private law norms into the international legal system.[16]

RONALD LEENES, AND PAUL DE HERT, DATA PROTECTION ON THE MOVE: CURRENT DEVELOPMENTS IN ICT AND PRIVACY/DATA PROTECTION (2016); Daniel Gervais, *Exploring the Interfaces Between Big Data and Intellectual Property Law*, 10 J. INTELL. PROP. INFO. TECH & ELEC. COM. L. 3 (2019).

12. *See* Buthe & Mattli, *supra* note 3.

13. For an overview of arguments discussing the strong developments of intellectual property protection in recent years. *See, e.g.*, Julien Chaisse & Xinjie Luan, *Revisiting the Intellectual Property Dilemma: How Did We Get a Strong WTO IPR Regime?*, 34 SANTA CLARA HIGH TECH. L.J. 153 (2018); Andreas Wechsler, *WIPO and the Public-Private Web of Global Intellectual Property Governance*, 4 EUR. Y.B. INT'L ECON. L. 413 (2013); Paris Convention for the Protection of Industrial Property, 20 March 1883, 828 U.N.T.S. 305 [hereinafter Paris Convention]; Berne Convention for the Protection of Literary and Artistic Works, 24 July 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention].

14. Discussing private law in an international law context is, of course, a delicate matter, but for the gist of what I am getting at with my link of private law and international law as refined rules, *see, e.g.*, Richard Epstein, *The Natural Law Bridge Between Private Law and Public International Law*, 13 CHI. J. INT'L L. 47 (2013). For a more extreme argument, where the assertion is that many public international lawyers hide their rhetoric in private law rules, *see* Ralf Michaels, *Private Lawyer in Disguise: On the Absence of Private Law and Private International Law in Martti Koskenniemi's Work*, 27 TEMP. INT'L & COMP. L.J. 499 (2013).

15. *See also* Benedetta Ubertazzi, *Intellectual Property Rights and Exclusive Jurisdiction (by Reason of Matter): Between Private International Law and Public International Law*, 10 ANNUARIO ESPANOL DER. INT'L PRIV. 183 (2010); Sung Pil Park, *The Coordinating Role of Public International Law: Observations in the Field of Intellectual Property*, 9 J.E. ASIA & INT'L L. 321 (2016).

16. *But see* Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (1927); Valentina Vadi, *Through the Looking-Glass: International Investment Law Through the Lens of a Property Theory*, 8

But perhaps the most important observation is that international legal literature has not explored the inter-systemic relationship between intellectual property rules and public international law through a theory that recognizes the *global norm production* of economic merchants and epistemic communities in intellectual property.[17] States alone are no longer the supreme actors and initiators of international law. Epistemic communities have been active participants in international law-making, to the point where they design and control all the formalities of modern international law.[18]

MANCHESTER J. INT'L L. 22 (2011); Christopher May, *Cosmopolitan Legalism Meets Thin Community: Problems in the Global Governance of Intellectual Property*, 39 GOV'T & OPPOSITION 393 (2004). *See also*, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 ICJ, p. 178 (Apr. 11) (confirming the role of non-state actors in international law).

17. The international political economy literature on intellectual property has, to some extent, covered this relationship, but not necessarily from a legal point of view, or, at least invoke rational-legal arguments that justify the evolution of international intellectual property law. For some of the discussions in the international political economy literature, *see, e.g.*, CLAIRE CUTLER, VIRGINIA HAUFLER & TONY PORTER, PRIVATE AUTHORITY IN INTERNATIONAL AFFAIRS (1999); Claire Cutler, PRIVATE POWER, AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY (2003); SUSAL SELL, PRIVATE POWER PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS (2003). Some of the early general literature offering a critical analysis of intellectual property in the global economic system include, GAIL EVENS, LAWMAKING UNDER THE TRADE CONSTITUTION: A STUDY IN LEGISLATING BY THE WORLD TRADE ORGANIZATION (2000); KEITH MASKUS, PRIVATE RIGHTS AND PUBLIC PROBLEMS: THE GLOBAL ECONOMICS OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY (2012); DUNCAN MATTHEWS, GLOBALISING INTELLECTUAL PROPERTY RIGHTS: THE TRIPS AGREEMENT (2002); CHRISTOPHER MAY, A GLOBAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS: THE NEW ENCLOSURES? (2005); PETER DRAHOS & RUTH MAYNE, GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT (2002); DONALD RICHARDS, INTELLECTUAL PROPERTY RIGHTS, AND GLOBAL CAPITALISM: THE POLITICAL ECONOMY OF THE TRIPS AGREEMENT (2003); PETER YU, INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE (2007). More recent works include, THOMAS DIETZ, GLOBAL ORDER BEYOND LAW: HOW INFORMATION AND COMMUNICATIONS TECHNOLOGIES FACILITATE RELATIONAL CONTRACTING IN INTERNATIONAL TRADE (2014); MONICA HORTEN, THE CLOSING OF THE NET (2016); NATASHA TUSIKOV, CHOKEPOINTS: PRIVATE REGULATION ON THE INTERNET (2017); HANNS ULLRICH, PETER DRAHOS & GUSTAVO GHIDINI, KRITIKA: ESSAYS ON INTELLECTUAL PROPERTY (2018); ROCHELLE DREYFUSS AND ELIZABETH SIEW-KUAN NG, FRAMING INTELLECTUAL PROPERTY IN THE 21ST CENTURY: INTEGRATING INCENTIVES, TRADE, DEVELOPMENT, CULTURE AND HUMAN RIGHTS (2018); ROCHELLE DREYFUSS & JUSTINE PILA, THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW (2018).

18. *See* Buthe and Mattli, *supra* note 3, at 5. The TRIPS Agreement on Trade-Related Aspects of Intellectual Property Rights (Apr. 15, 1994); Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1869 UNTS 299, is often said to be largely due to how epistemic communities such as the Intellectual Property Committee (IPC) a loose gathering of business titans and corporations that was formed to influence the negotiation of the TRIPS Agreement influenced its outcome; *see also* SUSAN

By all accounts, as the Preamble of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement)[19] acknowledges that intellectual property rights are private rights (of economic merchants) that require public international law to play a role as it recognizes "that intellectual property rights are private rights."[20] The successful implementation of the TRIPS Agreement is one example of where epistemic communities influenced the international lawmaking process by *coercing* states to privatize public international law.[21] In other words, the protection of private intellectual property rights, under public international law, facilitates the formation of global rules, thereby increasingly shifting the focus of public international law to matters of private law (commercial). I have discussed elsewhere some of the arguments that relate to the privatization of international law from an intellectual property perspective.[22]

SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS (2003); Duncan Matthews, *The Role of International NGOs in the Intellectual Property Policy-Making and Norm-Setting Activities of Multilateral Institutions*, 82 CHI.-KENT L. REV. 1369 (2007); Baogang He & Hannah Murphy, *Global Social Justice at the WTO? The Role of NGOs in Constructing Global Social Contracts*, 83 INT'L AFF. 707 (2007); Erin Hannah, *NGOs and the European Union: Examining the Power of Epistemes in the EC's TRIPS and Access to Medicines Negotiations*, 7 J. CIV. SOC. 179 (2011); CAROLYN DEERE, THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES (2009); Steve Charnovitz, *Opening the WTO to Non-Governmental Interests*, 18 FORDHAM INT'L L.J. 173 (2000); JAYA WATAL & ANTHONY TAUBMAN, THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS (2015).

19. Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1869 UNTS 299.

20. Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1869 UNTS 299. Preamble (4th recital) ("intellectual property rights are private rights"). *See* China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights (WT/DS362/R), 26 January 2009, para. 7.247 (where the panel confirmed that provisions of the TRIPS Agreement reflects private rights: "This is consistent with the nature of intellectual property rights as private rights, as recognized in the fourth recital of the preamble of the TRIPS Agreement").

21. *See generally*, Deere, *supra* note 18 (discussing how developing countries were essentially coerced to implement the TRIPS Agreement); Christopher May, *Learning to Love Patents: Capacity Building, Intellectual Property and the (Re)production of Governance Norms in the 'Developing World' in* REGULATING DEVELOPMENT: EVIDENCE FROM AFRICA AND LATIN AMERICA (Edmund Amann ed. 2006) 65-98.

22. *See also*, Morris, *supra* note 4; P. Sean Morris, *To What Extent Do Intellectual Property Rights Drive the Nature of Private International Law in the Era of Globalism?*, 28 IOWA TRANSNAT'L L. & CONTEMP. PROBS. 421 (2019); P. Sean Morris, *Private Intellectual Property Regulation in Public International Law*, 26 U.C. DAVIS J. INT'L L. & POL. 147; Annabelle Bennett & Sam Granata, *When Private International Law Meets Intellectual Property Law – A Guide for Judges in* THE HAGUE: HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW; GENEVA: WORLD INTELLECTUAL PROPERTY ORGANIZATION (2019)

This process of globalization, driven by private economic power, affects *how* laws and treaties are created in the global economy.[23] One reason for the importance and influence of these private economic actors, seen through the lens of epistemic communities, is their influence beyond the formal control of the nation-state. My focus is to demonstrate how the law and legal certainty account for the emergence of technical standards and intellectual property concerns in e-commerce and to give some insights into the legal effect[24] of "privatized norm-making."[25]

II. INTERNATIONAL LAW: A RATIONAL COORDINATION

The use of international law in private law matters is undoubtedly a complex issue. However, international law is required to evaluate and solve complex questions that relate to jurisdiction and private law norms that are presented in international disputes.[26] The precise rules and treaties in international law may vary depending on the complexity of the

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(these works sets out different paradigms of the privatization phenomenon of international law from intellectual property perspectives).

23. There is a growing body of work that examines the process of economic globalization from constitutionalization methodological perspectives. What separates my work from theirs is my focus on the *process* and *design* of the international rules that relate to private rights in the intellectual property field, and the subsequent *coercion by epistemic communities* of states to sign international treaties and lawmaking procedures. *See generally* Kennedy, *supra* note 3; EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE (2014); BRYAN MERCURIO & KUEI-JUNG JI, SCIENCE, AND TECHNOLOGY IN INTERNATIONAL ECONOMIC LAW: BALANCING COMPETING INTERESTS (2013); JONATHAN NITZAN & SHIMSHON BICHLER, CAPITAL AS POWER: A STUDY OF ORDER AND CREORDER (2009); DANIEL WOODLEY, GLOBALIZATION AND CAPITALIST GEOPOLITICS: SOVEREIGNTY AND STATE POWER IN A MULTIPOLAR WORLD (2015). For a discussion on the constitutionalization debate *see, e.g.*, JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009); GAVIN ANDERSON, CONSTITUTIONAL RIGHTS AFTER GLOBALIZATION (2005); DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE (2008); LINDA YUEH, THE LAW, AND ECONOMICS OF GLOBALIZATION: NEW CHALLENGES FOR A WORLD IN FLUX (2009); MARCELLO VARAELLA, INTERNATIONALIZATION OF LAW: GLOBALIZATION, INTERNATIONAL LAW AND COMPLEXITY (2014); JEAN-BERNARD AUBY, GLOBALIZATION, LAW AND THE STATE (2017); WILLIAM COLEMAN, PROPERTY, TERRITORY, GLOBALIZATION: STRUGGLES OVER AUTONOMY (2011).

24. *See, e.g.*, CHRISTOPHER MAY, THE RULE OF LAW: THE COMMON SENSE OF GLOBAL POLITICS (2014); *see also* STEPHEN GILL & CLAIRE CUTLER, NEW CONSTITUTIONALISM AND WORLD ORDER (2014).

25. On this terminology *see* Saskia Sassen, *The State and Economic Globalization: Any Implications for International Law*?, 1 CHI. J. INT'L L. 109, 115 (2000).

26. *See, e.g.*, Barcelona Traction, Light & Power Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 3 (Feb. 5); Barcelona Traction, Light & Power Ltd. (Belg. v. Spain), Judgment, 1964 I.C.J. 6 (July 24).

case, the territory of concern, the private law matter—such as an intellectual property issue—and the role of the internet.[27] Not all rules of international law may apply to a particular case, but international law is often a significant factor that contributes to the outcome of complex cases relating to private law.[28] Apparent *conflicts* in the law demonstrate how domestic private law norms have been transposed onto international law and lend credence to the argument that private law norms are an important aspect of modern international law.[29] International law is even more significant to laws that relate to economic transactions over the internet and how private norms end up in international treaties.[30]

International law's contemporary thinkers often embrace *old approaches* to the legal field, such as legal realism,[31] and in doing so keep

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27. From the perspective of this article, the latter example of the internet, is how some intellectual property-related treaties are handled in different cases where the internet infringement of property rights are the core concerns, which oftentimes raises questions about territoriality and jurisdiction, *see, e.g.*, Google Inc. v. Equustek Solutions Inc. (2017) 1 S.C.R. 824 (Canada). For general discussions *see also*, Morris, *supra* note 22; Elisabeth Fiordalisi, *The Tangled Web: Cross-Border Conflicts of Copyright Law in the Age of Internet Sharing*, 12 LOY. U. CHI. INT'L L. REV. 197 (2015).

28. *See, e.g.*, Barcelona Traction, *supra* note 26. Internet jurisdiction cases that involve intellectual property rights, in the long run, will be a concern for privacy international law, not necessarily international law. This idea is further complicated where the TRIPs Agreement referenced the domestic privacy laws of states to enforce intellectual property rules; this means states must also consider the "differences in national legal systems."

29. *See, e.g.*, Annelise Riles, *The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State*, 56 AM. J. COMP. L. 605, 618 (2008) (arguing that the global private law regime is "persuasive among those who critique the delegation of state power to global private authorities"). *See also* VALENTINA VADI, ANALOGIES IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 3 (2015) (highlighting the need to use "public international law sources" over "private law sources" for investment arbitration).

30. For example, a request for consultation by Qatar to the WTO where intellectual property rights, e-commerce, and blocking website forms general claims is only a view into the complex arena of international law and e-commerce, or in contemporary language, "digital trade." *See* United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, Request for Consultations by Qatar, WT/DS526/11, 04 Aug. 2017. *But see* Google Inc. v. Equustek Solutions Inc. (2017) 1 S.C.R. 824 (Canada); *see also* Mishra, *supra* note 6; Milton Mueller, John Mathiason, & Hans Klein, *The Internet and Global Governance: Principles and Norms for a New Regime*, 13 GLOBAL GOVERNANCE 237 (2007); Yves Schemeil, *Global Governance: Evolution and Innovation in International Relations in* GOVERNANCE, REGULATION, AND POWERS ON THE INTERNET (Eric Brousseau, Meryem Marzouki, & Cecile Meadel eds., 2012); Susan A. Aaronson and Patrick Leblond, *Another Digital Divide: The Rise of Data Realms and its Implications for the WTO*, 2 INT'L ECON. L. 1 (2018).

31. *See, e.g.*, BENJAMIN COATES, LEGALIST EMPIRE: INTERNATIONAL LAW AND AMERICAN FOREIGN RELATIONS IN THE EARLY TWENTIETH CENTURY (2016); *see also* Brian Leiter, *Legal Realism, Old and New*, 47 VAL. L. REV. 949 (2013); Harry Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799 (1961).

the boat steady. However, often there are new approaches to international law that not only rock the boat but also drive the currents further onto the high seas of world politics.[32] Scholars, trained both in international and private law, may find solace in discourses on international law that speak of "law and economics,"[33] "private law analogies in international law,"[34] "global administrative law,"[35] or "transnational law".[36] Yet, these divergent approaches to the discourse of international law indicate that there is a missing link that could hold together the fragmented doctrinal discourses of international law in a rational and coordinated fashion.[37]

I am merely giving an account of the justifications of private law practices and private norms in public international law from the epistemic communities' perspective, not advocating for a new approach to international law. This is, in part, the privatization paradigm.[38] Thus, it is useful to examine briefly the role of rationalism[39] in international legal order to help better explain the *dialectical necessity* of private law and norms in public international law. In short, my argument is that the privatization of international law is a special case and international legal

32. *See, e.g.*, Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81 (1991); B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES (2d ed. 2017).

33. For works that generally speak of law and economics as such, *see* John R. Commons, *Law and Economics*, 34 YALE L.J. 371 (1924); Richard H. Coase, *Law and Economics at Chicago*, 36 J.L. & ECON. 239 (1993). Recent works addressing a law and economics approach in the context of international law include: Ronald A. Cass, *Economics and International Law*, 29 N.Y.U. J. INT'L L. & POL. 473 (1996); Joel P. Trachtman, *The Methodology of Law and Economics in International Law*, 6 INT'L L.F. 47 (2004); Anne van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT'L L.J. 421 (2014).

34. *See* Lautherpacht, *supra* note 16.

35. *See* Benedict Kingsbury, *The Concept of Law in Global Administrative Law*, 20 EUR. J. INT'L L. 23 (2009).

36. *See generally* Harold H. Koh, *Why Transnational Law Matters*, 24 PENN ST. INT'L L. REV. 745 (2006); Roger Cotterrell, *What is Transnational Law*, 37 L. & SOC. INQUIRY 500 (2012).

37. The rational choice theory is possibly an indication of how to gauge the behavior of states or complex systems. *See also* Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. R. 641; John Ferejohn & Debra Satz, *Unification, Universalism, and Rational Choice Theory*, 9 CRITICAL REV. 71 (1995); Alexander Thompson, *Applying Rational Choice Theory to International Law: The Promises and Pitfalls*, 31 J. LEG. STUD. 285 (2002). For some provocative discussions on the state-centric nature of international law that does not focus on international economic law, *see* IAN HURD, HOW TO DO THINGS WITH INTERNATIONAL LAW (2017).

38. *See also* Morris, *supra* note 11.

39. ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2008); Eric Posner & Jack Goldsmith, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective in* JOHN OLIN WORKING PAPER SERIES 108 (2000).

scholars must rationally apply the private law norms and principles that offer a rational solution to legal questions and can keep international law intact.[40]

One scholar has developed an innovative and appealing structure of rationality, which among other things, creates a *justification nexus* for actions, beliefs, and desires based on a philosophical construction of a "coherence theory."[41] The coherence theory applies to developments in international law as one way of justifying new developments or to explain the rationality of new arguments.[42] Hence, the interaction of private law norms in public international law can be partially justified through the coherence theory as it relates to how epistemic communities, as a belief system, exist in international law.[43] Robert Audi's work[44] is a reflection of the different approaches to international law: practical applications and theoretical propositions. However, it appears that the theoretical propositions in international law outweigh any of its practical applications and beg the question of whether international law is even law at all or useful as a matter of fact.[45]

In recent times, influential works that divide international law into theoretical testing grounds, such as *International Law as Belief System*[46]

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40. *See also* Thompson, *supra* note 32; Vadi, *supra* note 28; Kerry A. Chase, *Economic Interests and Regional Trading Agreements, The Case of NAFTA*, 57 INT'L ORG. 137; Lauge Poulsen and Emma Aisbett, *When the Claims Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65 WORLD POL. 273 (2013); *but see* Benedict Kingsbury, *The Concept of Law in Global Administrative Law*, 20 EUR. J. INT'L L. 23 (2009).

41. ROBERT AUDI, THE ARCHITECTURE OF REASON: THE STRUCTURE AND SUBSTANCE OF RATIONALITY 24, 46-48 (2001). Audi, for instance, explains that "coherence" relates in part to "the acquisition of concepts and their operation." *Id.* at 28. Audi notes: "Certain kinds of coherence among beliefs maybe even more than an often reliable sign of justification...coherence *is* in a way basic for justification..." *Id.* at 47.

42. *But see* Avery Katz, *Taking Private Ordering Seriously*, 144 U. OF PA. L. REV. 1745 (1996); Christoph Engel and Michael Kurschilgen, *The Coevolution of Behaviour and Normative Expectations: An Experiment*, 15 AM. L. ECON. R. 578 (2013); NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW (Rainer Hoffman ed., 1999).

43. *See also* JEAN D'ASPREMONT, INTERNATIONAL LAW AS A BELIEF SYSTEM (2017); HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (1933); Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. INT'L L. & POL. 1 (2007).

44. Audi, *supra* note 41.

45. For some critical discussions, *see* Anthea Roberts, Paul Stephan, Pierre-Hugues Verdier & Mila Versteeg, *Comparative International Law: Framing the Field,* 109 AM. J. INT'L L. 467 (2015).

46. *See generally* JEAN D'ASPREMONT, INTERNATIONAL LAW AS A BELIEF SYSTEM (2017).

and the classic *From Apology to Utopia*,[47] have maintained or gained ground as the default mode for cataloging the relevance of international law.[48] The theoretical propositions these works contain are hardly applicable or useful for the practical day-to-day application of international law that occurs through treaty interpretation, adjudications in international tribunals, and the more complex forums where private law collides with public international law. Yet the tragic irony is that the writings of professors of international law, esteemed legal commentators, or what the International Court of Justice (ICJ) Statute describes as "the teachings of the most highly qualified publicists" are a source of international law.[49] Therefore, from my perspective, this creates what I might call a *reverse syndrome*: on the one hand, publicists set the tone of international law; on the other hand, they practice international law through their participation in international adjudication.[50]

Perhaps Jean d'Aspremont is right to argue that international law is a belief system. In all likelihood, international law may be a belief system because beliefs are based on what we experience. Preeminent international legal scholars often experience international law through their gilded ivory towers; this may practically occur through the practices of Western-based tribunals and academic institutions. As a result, these international legal scholars have little contact with the realities of how international law is applied from a rational perspective—that is, how international law affects the underlying politics of a country that may, say, cause civil wars. Naturally, for an international legal scholar based in a location where a civil war is taking place, they may view the rational coordination of international law as a utopian engagement. The critic in me however cannot pursue these arguments here; suffice to say that, in the context of this article, international legal scholars are often engaged with the efforts of private actors to frame norms for the global legal system.[51] There are also good reasons to despise the applicability of

47. *See generally* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2006).

48. *See generally* Akbar Rasulov, *From Apology to Utopia and the Inner Life of International Law*, 29 LEIDEN J. INT'L L. 641 (2016); Tarik Kochi, *Dreams and Nightmares of Liberal International Law: Capitalist Accumulation, Natural Rights and State Hegemony*, 28 L. & CRITIQUE 23 (2017); ANDREA BIANCHI, INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING (2016).

49. STAT. OF I.C.J. art. 38 ¶ 1(d) (2013).

50. *See also* Gillian Triggs, *The Public International Lawyer and the Practice of International Law*, 24 AUSTL. Y. INT'L L. 201 (2005).

51. Academic international lawyers often act as advisers to NGOs or in the creation of new procedures for international organizations. However, in most cases, the academic international lawyer generally approaches their role in a top-down fashion; that is, they are

international law when multinational corporations can hide behind the veil of international law to deny alleged expropriation of their patented drugs to treat HIV patients in developing countries.[52] In this example, it is a rational choice for the patent holder to reject the expropriation of his patents because he will end up without economic compensation. Under international law, the patent holder's decision to reject appropriation of their patent is justifiable because international law reflects the current state of play in the world legal order. In this scenario, the patent holder is protected by the WTO's TRIPS Agreement and other applicable instruments under international law.[53]

There needs to be a compromise to achieve a desirable outcome for private patent holders in state systems that desperately seek many patented medications at lower prices to assist those who have contracted illnesses like HIV.[54] Compromises can be achieved when a coordinated outcome, desirable to private rightsholders of the patent and the state, is reached, or by *amending international law* to better suit the state, including benefits for those suffering from communicable diseases. Such developments would give rise to a "practice-dependent" formula where rational coordination between the law and politics of private law rights in public international law can be established through "laws and policies whose authority is underwritten by some kind of reasoned argument."[55]

The benefit of the *reasoned argument* perspective to approach critical situations in international law, where the private law rights of economic entities are at risk, is that it can help create a *principle of reasonableness*. I posit that it would be dependent on the holder of the economic rights to allow compulsory licensing of his patented drug.

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primarily connected to the major global organizations, tribunals, and Western academic institutions, where they are able to exert their influence; *see also* Sondre Helmersen, *Finding 'the Most Highly Qualified Publicists': Lessons from the International Court of Justice*, 30 EJIL 509 (2011).

52. For a general discussion on the relationship between AIDS and compulsory licensing of patents as a result of the AIDS crisis in South Africa, *see* Florence Shu-Acquaye, *The Legal Implications of Living with HIV/AIDS in a Developing Country: The African Story*, 32 SYRACUSE J. INT'L L. & COM. 51 (2004).

53. *See* Trade-Related Aspects of International Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 319.

54. *See generally* Solomon F. Sacco, *A Comparative Study of the Implementation in Zimbabwe and South Africa of the International Law Rules that Allow Compulsory Licensing and Parallel Importation for HIV/AIDS Drugs*, 5 AFR. HUM. RTS. L.J. 105 (2005) (governments of Zimbabwe and South Africa should utilize the TRIPS agreements to further citizenry access to cheap anti-retroviral drugs).

55. *See* Peter Steinberger, *Rationalism in Politics*, 109 AM. POL. SCI. REV. 750, 758 (2015).

Under this approach, the *evil rigidity* of international law that helps protect a patented drug would be diluted. The second benefit of the reasoned argument approach is that it helps develop a dialectical necessity narrative that justifies the structure of private law rights in public international law. In both cases international law as a belief system and from a rational coordination perspective ends up being the winner, given that both approaches allow for the different parameters of international law to remain intact without shifting theoretical boundaries.

This perplexing situation, nevertheless, is "Audian,"[56] as it reflects structural rationality to justify the existence of private law rights in international law.[57] Furthermore, the situation allows international law to be applied as an instrument to protect the private rights of economic entities faced with situations that expropriate their investments and property. It is quite logical, after all, that international instruments dealing with the protection of intellectual property can be perplexing at times, and that the legal adjustments that states initiate from their rational perspectives to respond to potential global health crises can end up "undermining . . . interpretation as a rule-governed activity."[58]

For some notable scholars like Jan Klabbers,[59] it is evident that in international law there is a certain amount of *political obviousness*.[60] In that regard, it is difficult to mask whether any approach such as *old* legal realism; law and economics, rationalism, critical legal studies, etc., can bring about any practical changes. However, some victory can be claimed from using a long lens to examine the rationality of international law; if treaties, the core structure of contemporary international law, are interpreted in a rule-governed fashion, then this approach will mostly benefit private law rights that have permeated the treaty structure of public international law.[61]

The structure of contemporary global economic legal relations is highly dependent on treaties, as these contemporary treaties are often related to economic matters. As a result, most treaties contain provisions that have some function in how private law rights are interpreted, or how

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56. *See* AUDI, *supra* note 36.

57. *See id.* at 204-05 (discussing "global rationality," which implies separating truths and beliefs).

58. Jan Klabbers, *On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization*, 74 NORDIC J. INT'L LAW 405, 418 (2005) (discussing how international law is nothing more than political tools for states to deploy).

59. *Id.*

60. In general, I am thinking of the "Helsinki School"; *see, e.g.*, Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4 (1990).

61. *See, e.g.*, TRIPS Agreement, *supra* note 20, at 4th recital.

tribunals tend to acknowledge the existence of such private law rights.[62] Thus, rather than resorting to political rhetoric to justify international economic treaties, it is important for the practice of international law, with the support of tribunals, to explore creative and innovative ways to rationally interpret treaties. Moreover, the interpretation, function, and structure of the international legal system are generally framed in novel and innovative ways. This helps when searching for a legal solution. One could therefore argue that global economic legal relations are often accelerated because of the intersection of private law rights for economic entities in public international law. In this respect, private law norms in the international rules-based system of economic governance have given credence to Martti Koskenniemi's concept of culture of formalism, which I have rechristened as *the culture of privatization.*[63] For my purposes, one particular group of actors—epistemic communities—are crucial in this emerging culture of privatization.

III. FRAMING THE EMERGENCE OF EPISTEMIC COMMUNITIES: A PRIMER

Throughout the history of international law, specialized networks that are responsible for the economic interests of their merchant clients have helped shape how states participate in the field's development.[64] The theoretical development and doctrinal structure of epistemic communities should be understood as what Peter Haas describes as "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant

62. *See* DANIEL PEAT, COMPARATIVE REASONING IN INTERNATIONAL COURTS AND TRIBUNALS (2019).

63. MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 503 (Cambridge Univ. Press, 2001) (discussing the culture of formalism).

64. For instance, the then-powerful East India Company has had its hands in many of the treaties the British signed during the height of colonialism. The East India Company, with the blessings of the British, would become a party to international treaties like the Treaty of Commerce between the East India Company and the Government of Nepal, E. India Co.-Nepal, Mar. 1, 1792. *See also*, Michael Mulligan, *The East India Company: Non-State Actor as Treaty-Maker in* NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS: CREATION, EVOLUTION AND ENFORCEMENT 39, 39-59 (2018). In the formation of recent treaties modern networks, such as various environmental activism professionals, have been influential participants during the development of certain international environmental treaties such as the, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243.

knowledge within that domain or issue area."[65] The networks that the Haasian version of epistemic communities relate to—taking into account, what Teubner describes as "global norm production"[66]—suggest that epistemic communities engage in the international coordination and development of international rules beyond the paradigms of the typical state. This occurs because international law is a broad construct with various sub-fields that represent different interests within the global community. Moreover, various hierarchies in the international lawmaking system can exert greater influence than others. Although Haas' all-encompassing description of epistemic communities covers various global level fields, for this article the description is adopted solely for developments in the world of e-commerce, online dispute resolution, and internet governance. Yet, it is still fitting to frame epistemic communities in the context of the process of international law development and as a theoretical construct to appreciate its full functional value.

From the late 19th century to the present, when economic matters became a focus of international law various non-state actors have been responsible for generating and designing the norms and subsequent treaties that states have signed, and have been responsible for creating other international rules, especially in intellectual property.[67] These non-

65. *See, generally,* Haas, *supra* note 4, at 74. Beyond Haas, the theory and definition of epistemic communities have caught the imagination of the academic community in various disciplines. Sometimes, the narratives on epistemic communities are framed under different linguistic guises such as transnational regulatory networks or private power authority, amongst many others. Some of the literature that address different policy or regulatory focus from a Haasian version of epistemic community include: MARGARET KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1st ed. 1998); DAVID HORNSBY, RISK REGULATION, SCIENCE, AND INTERESTS IN TRANSATLANTIC TRADE CONFLICTS (2013); PAUILIUS JURCYS, POUL KJAER, & REN YATSUNAMI, REGULATORY HYBRIDIZATION IN THE TRANSNATIONAL SPHERE (2013); SARA KUTHCHESFAHNI, POLITICS AND THE BOMB: THE ROLE OF EXPERTS IN THE CREATION OF COOPERATIVE NUCLEAR NON PROLIFERATION AGREEMENTS (2014); ARMIN VON BOGANDY & INGO VENZKE, IN WHOSE NAME? A PUBLIC LAW THEORY ON INTERNATIONAL ADJUDICATION (2014); YVES DEZALAY & BRYANT GARTH, LAWYERS AND THE CONSTRUCTION OF TRANSNATIONAL JUSTICE (2012); ELIES SLIEDREGT & SERGEY VASILIEV, PLURALISM IN INTERNATIONAL CRIMINAL LAW (2014); KATHERINE LYNCH, THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION 77-124 (2003); Michael Wailbel, *Interpretive Communities in International Law in* INTERPRETATION IN INTERNATIONAL LAW (2015).

66. *See* Teubner, *supra* note 5.

67. Most of the non-state actors that later contributed to the process of international rule-making began their efforts at a number of world fairs and international exhibitions held in places like Paris in the nineteenth century. An example was the Paris International Exposition of 1867 or 1899. A concern for many innovators and inventors at these exhibitions was how

state actors, I posit, fall into three categories that similarly make up the networks previously described by Haas.

The first category is the *invisible* college of international law.[68] This group is primarily composed of international legal academics that fall under certain umbrella groupings such as the *defunct* Russian Society of International Law,[69] and the International Law Institute (*Institute de Droit International*) that began in 1873 and is still functioning today.[70] Additionally, societies such as the American Society of International Law (founded in 1906)[71] and the Commission of Jurists that considered the laws of war set up in the wake of the 1897–1907 Hague Conventions are important[72] because they have contributed to international lawmaking as epistemic communities.

The second category of early epistemic communities are semi-private international networks. These networks are the non-governmental organizations (NGOs) of international legal relations; an example of an NGO is the *defunct* International Tin Council (ITC) (1956) that championed the International Tin Agreement of 1954.[73] This

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to guard their patents and copyrights displayed in the exhibits. During the ensuing years, various inventors pushed for international treaties that resulted in the Paris and Berne Conventions of 1883 and 1886 respectively as an example. For discussions on the exhibitions *see, e.g.*, Susanne Berthier-Foglar, *The 1889 World Exhibition in Paris: The French, the Age of Machines, and the Wild West*, 31 NINETEENTH-CENTURY CONTEXTS 129, 129-42 (2009); PAUL GREENHALGH, FAIR WORLD: A HISTORY OF WORLD'S FAIRS AND EXPOSITIONS FROM LONDON TO SHANGHAI 1851–2010 (2011); PAUL GREENHALGH, EPHEMERAL VISTAS: THE EXPOSITIONS UNIVERSELLES, GREAT EXHIBITIONS AND WORLD'S FAIRS: 1851–1939 (1988). During the latter years of the nineteenth century, two influential intellectual property non-state actors, AIPPI and Association Litteraire et Artistique Internationale (ALAI) emerged as guardians of the Paris and Bern Conventions.

68. The most resounding observation is that of Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217, 217-26 (1997).

69. *See* W.E. Butler & V.S. Ivanenko, *On the Russian Society of International Law (1880)*, 2 JUS GENTIUM US: J. INT'L HIST. 189, 189-99 (2017). The Russian Society of International Law founded in 1880 has no relations with the modern Russian Association of International Law.

70. *See* Thomas Barclay, *Institute of International Law*, 10 L. Q. REV. 348 (1894); James Brown-Scott, *The Institute of International Law*, 21 AJIL 716 (1927); Peter Macalister-Smith, *Institut de Droit International*, MAX PLANK ENCYCLOPAEDIA OF INT'L L. (2011).

71. Frederic Kirgis, *The Formative Years of the American Society of International Law*, 90 AJIL 559, 589 (1996).

72. *See, e.g., Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, General Report*, 32 AJIL 1 (1938).

73. *See also* Sandhya Chandrasekhar, *Cartel in a Can: The Financial Collapse of the International Tin Council*, 10 NW. J. INT'L L. & BUS. 309 (1989); Roman Sadurska & Christine Chinkin, *The Collapse of the International Tin Council: A Case of State Responsibility*, 30 VA. J. INT'L L. 845 (1990).

example shows how epistemic community engagement in the international rulemaking system results in the development of an international treaty. This result also shows the significance of realizing that international coordination is sometimes a matter of public-private coordination, because private activities for the state's interests can be promoted by non-state actors.[74] What is interesting about these types of non-state actors, however, is how they derive authority and how that authority fits within the international instruments of policymaking.[75]

The third cohort of epistemic communities are those that represent the private economic activities of merchants in the modern global world. These are the various networks and international non-governmental organizations that are used for international policy coordination and participate in the informal process of rulemaking on the international plane. This type of epistemic community has been prominent in areas like intellectual property rulemaking. Historically, various non-state actors have been active in different interactions with the state and how private interests have driven states' obligations in the legal order.[76] The situation was no different with international intellectual property laws, shaping how they evolved from the mid-19th century to the present day.[77] Beginning with various expos, private networks, such as industrial property forerunners to the ALAI, would gather at 19th century world fairs like the Paris expositions, which lead up to the formation of the Paris and Berne Conventions.[78] In this regard, the most prominent examples of epistemic communities are those that influenced the formation of international intellectual property laws and other forms of "industrial property".[79] These epistemic communities are now recognized as the International Association for the Protection of Intellectual Property (AIPPI),[80] the *Association Litteraire et Artistique Internationale* (International Literary and Artistic Association, or ALAI), and more recently the Intellectual Property Committee (IPC) that championed the

74. *See also* FE Koch, *Cartels as Instruments of International Economic Organization: Public and Private Legal Aspects of International Cartels*, 8 MOD. L. REV. 130 (1945).

75. *See also* NILS JANSEN, THE MAKING OF LEGAL AUTHORITY: NON-LEGISLATIVE CODIFICATION IN HISTORICAL CONTEXTS AND COMPARATIVE PERSPECTIVE (2010).

76. *See, e.g., supra* note 64.

77. *See also* Susan Sell & Christopher May, *Moments in Law: Contestation and Settlement in the History of Intellectual Property*, 6 REV. INT'L POL. ECON. 467, 484 (2001).

78. *See* Berne Convention for the Protection of Literary and Artistic Works (July 24, 1971), 828 U.N.T.S. 221; Paris Convention for the Protection of Industrial Property (Mar. 20, 1883), 828 U.N.T.S. 305.

79. Sell & May, *supra* note 77, at 484 (discussing industrial property).

80. *See also* H.A. GILL, *Objects of the AIPPI and its Influence on the Drafting and Amendment of the International Convention*, 44 TRADEMARK REP. 244 (1954).

TRIPs Agreement. These epistemic communities were integral to and are flexible for private property rightsholders, making them effective for legislative developments in international intellectual property law.

As knowledge elites, epistemic communities have managed to make international law accessible and dynamic by removing it from the static clutches of the state.[81] For the state, international law is only a policy initiative that can aid in (a) concluding treaties with other states, or (b) serving as a tool that offers concise diplomatic language during state inter-relations such as negotiations or crisis conferences. Beyond these paradigms, international law is not useful for the everyday operation of state functions because states will choose to resort to their *sovereign* domestic laws to solve conflicts.

In this regard, however, epistemic communities translate international law's language into the vocabulary of the state's main governing organs, such as the foreign or educational ministries that exist under the auspices of the state. Most importantly, epistemic communities also break the language of international law down into adverse components that threaten their survival, and as such may often face backlash due to their power and influence on the global stage. However, that is not the argument that I am pursuing in this article; rather, my argument is about the role epistemic communities play in the broader legal context and how they shape legal content and processes of global norm production.

Nevertheless, because the vocabulary of international law is highly specialized, it can be detrimental to epistemic communities whose interests may not necessarily align with those of the state. In this regard, the design, conclusion, and execution of a treaty by a state may be beneficial for the state–but at the other end, the industries and other private economic interests that an epistemic community represents may suffer adverse economic effects of such treaty outcomes.

Initiating an engagement that uses the vocabulary of international law's epistemic communities, such as an industry association or the national society of international law, may *decompartmentalize* any adverse components of international law to create mutually beneficial outcomes. The net contribution of these epistemic communities to international legal relations is that they help bring legislative developments to international law. Furthermore, they also provide powerful and innovative channels for normative mechanisms that support a specific economic ideology of the contemporary global state.

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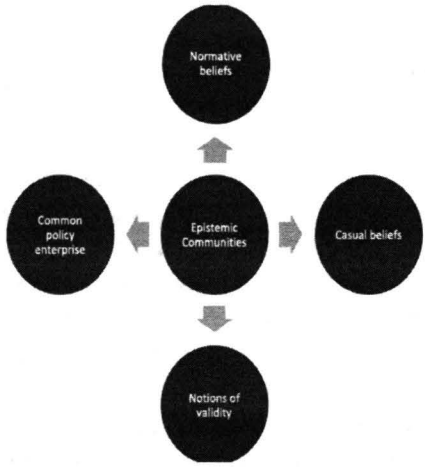
81. *See generally* INFORMAL INTERNATIONAL LAW-MAKING (Joost Pauwelyn, Ramses Wessel & Jan Wouters eds., 2012).

However, perhaps the main role of epistemic communities is that they challenge the state's hold on international law, and by challenging the state they develop their own power structure as the guardians of *their* realm in international law. This is only possible when epistemic communities can exploit their positions as powerful non-state actors in international legal relations, or when they command a specific role in international rulemaking and governance and they are able to initiate and design the content and structure of international legal instruments.

The power epistemic communities can build up and deploy in international legal relations is derived primarily from a set of characteristics[82] that allows them to coordinate international legal policy with successful outcomes. Considering such characteristics, epistemic communities can be selected by states[83] for the negotiation process of an international treaty (or, at least, drive the negotiation process using state representatives) that corresponds to their *shared normative and principled beliefs*.

Figure 1 illustrating the characteristics of an epistemic community per Haas



The Haasian characteristics of epistemic communities presuppose that the communities will engage in international policy coordination to

82. Haas, *supra* note 1, at 3 (identifying four characteristics: (1) shared normative and principled beliefs; (2) shared casual beliefs; (3) shared notions of validity; and (4) a common policy enterprise).

83. On similar arguments, *see generally* MATHIAS KEONING-ARCHIBUGI & MICHAEL ZURN, NEW MODES OF GOVERNANCE IN THE GLOBAL SYSTEM: EXPLORING PUBLICNESS, DELEGATION, AND INCLUSIVENESS (PALGRAVE, 2005).

exert their influence over state policies.[84] However, these characteristics exclude the relevance of other axiological traits that are ever-changing due to the shifting priorities of global governance. They also exclude possible negative economic factors that shape how much and to what extent states are willing to cede international policy coordination to epistemic communities.

Nevertheless, as Haas rightly argues, "members of transnational epistemic communities can influence state interests either by directly identifying them for decision-makers or by illuminating the salient dimensions of an issue from which the decision-makers may then deduce their interests."[85] Generally, most epistemic communities seek to influence state interests. Thus, the level of access they acquire to directly or indirectly convince states to back their common policy enterprise is crucial.

Although Haas's depiction of epistemic communities is still reverberating in academic literature, there are significant ways to depart from Haas's rationale for the existence of epistemic communities. For instance, Haas identifies the complexity test as one of the reasons for the state's increasing reliance on epistemic communities: "decision-makers have turned to specialists to ameliorate the uncertainties and help them understand the current issues and anticipate future trends."[86] Hence, the complex nature of issues, as per Haas, opens up various prospects for uncertainty and as such leads to the breakdown of operating procedures or a power vacuum.[87] Faced with these prospects, Haas argues that decision-makers turn to epistemic communities to (1) "provide advice about the likely results of various courses of action;" (2) "shed light on the nature of the complex interlinkages;" (3) "define the self-interests of a state;" and (4) "formulate policies."[88]

While acknowledging that Haas made some valid points, I contend that there is an alternative way to look at epistemic communities, especially from the perspective of public international law. My alternate argument is that epistemic communities privatized international law—that is, removed the state from the design and structure of international legal negotiations. In this light, such privatization is based on shared

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84. *Id.* at 3 (Haas discusses three dynamics of epistemic communities as a basis for their "casual logic": (1) uncertainty, (2) interpretation, and (3) institutionalization").

85. Haas, *supra* note 4, at 4.

86. *Id.* at 13.

87. *Id.* at 14. For example, Haas made the following observation regarding the power vacuum: "In the face of uncertainty...many of the conditions facilitating a focus on power are absent."

88. *Id.* at 15.

beliefs over or principled stances on an issue.[89] In this regard the state only functions as an agent of the epistemic communities, rather than as the views expressed by Haas.

IV. BETWEEN AUTHORITY AND LAWMAKING: AN EPISTEMIC COMMUNITY INTELLECTUAL PROPERTY ANALYSIS OF INTERNATIONAL LAW

Let me briefly set out an analysis of intellectual property under international law from the perspective of epistemic communities. I will use the term epistemic communities to broadly refer to a large coalition of non-state actors, such as a network of experts in academia or those who work through specialized organizations at the behest of private intellectual property rightsholders.

One advantage for private rightsholders who take part in the international intellectual property system is that they are able to gain an advantage over the international legislative process; this advantage includes when they participate as amicus curiae in international adjudications, or as protagonists or antagonists in investment claims involving intellectual property.[90] But any advantage gained by epistemic communities in either international rulemaking or international adjudication also creates divisions where ideological rifts are laid bare.

Although states may benefit from the input of epistemic communities during the international rulemaking process, states may also be at a disadvantage if different epistemic communities do not cooperate and find common ground on issues that are relevant to the international legal standing of the state. Nevertheless, if the legal consensus is that states use international law as political tools to further their own goals, then epistemic communities engage in the international process as channels for their economic self-interest. This is a win-win situation for both states and epistemic communities.

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89. *See, e.g.*, Peter Drahos, *Expanding Intellectual Property's Empire: The Role of the FTAs*, GRAIN (2003), *available at* https://www.grain.org/article/entries/3614-expanding-intellectual-property-s-empire-the-role-of-ftas (last visited Dec. 20, 2020) ((discussing the Advisory Committee on Trade Negotiations (ACTN) as a node in interlinked networks. The ACTN itself was a quasi-government body created by the United States Congress in 1974, however, the ACTN would later create the Intellectual Property Committee (IPC) in 1986 where its members were only private institutions (the major US corporations) that would, in turn, sit in the driver's seat during the Uruguay Round of the TRIPs negotiations)).

90. *See* Eli Lilly & Company v. The Government of Canada, ICSID Case No. UNCT/14/2, Final Award (16 March 2017) (where a number of intellectual property scholars were involved).

For the international intellectual property legal system, epistemic community approaches reflect their status as knowledge elites–they are innovative and sometimes bold meaning they can breakdown complex legal structures often misinterpreted by critics of the international intellectual property system. For example, while not all critics may understand the relevance of the utility doctrine and its application in international patent law, a non-state actor providing impartial expertise may dissect utility application as a function common to all domestic legal systems that have patent laws.[91] Although it is not uncommon to formally use the term "epistemic communities" as a broad description of non-state actors in the international legal system, at least one use of the term in this article relates to the formulation by Haas as a model of "network" with "authoritative claim"[92] to international norm production. Taking into account the Haasian version of epistemic communities, as briefly mentioned earlier and recapped here, it is important to further delineate these types of epistemic communities.

For purposes of the discussions here, there are three types of epistemic communities to consider. The first is specialized international non-governmental organizations (INGOs) that advocate policy issues for intellectual property rightsholders. The second type are those with a global reach, which are set up specifically to respond to and act as a check and balance system to international intellectual property treaties such as the Paris and Berne Conventions. For example, the AIPPI and its role as private gatekeeper of the Paris Convention, and conversely, the ALAI in a similar role for the Berne Convention demonstrate this point. Finally, the third type are academic experts who use their position to take part in various aspects of intellectual property rulemaking, adjudication, and advocacy in both domestic and international settings.[93] The common theme found among all three types of epistemic communities here is that they are influenced by the existence of intellectual property law and rights and, as such, create a set of relations interlinked with private rightsholders and the state.

One particular distinction that must be made between the epistemic communities I set out here and their interlinkage with the state is that the state has no obligation toward them, as they are not state-sponsored

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91. In some jurisdictions, the patent utility doctrine only stipulates that a patent must be useful. *See* AstraZeneca Canada Inc. v. Apotex, [2017] S.C.R. 943 (Can.); *see generally* Jay Erstling, Amay Salmela & Justin Woo, *Usefulness Varies by Country: The Utility Requirement of Patent Law in the United States, Europe, and Canada*, 3 CYBARIS (2012) (giving a comparative discussion of the utility doctrine).

92. Haas, *supra* note 4.

93. This was most visible in the Eli Lilly Arbitration.

institutions. Nevertheless, they do form a particular bond with the state. This is particularly true for the second type of epistemic community described above—those with a global reach, such as the AIPPI and the ALAI, whose task is to monitor specialized international intellectual property instruments. The second type of epistemic community has the power to reach into the realm of the state because it can organize diplomatic conferences to revise existing international intellectual property treaties that will ultimately be adopted by the state.[94]

The World Intellectual Property Organization Treaties of 1996 – in which a significant number of type one epistemic communities, specialized INGOs, participated – were able to influence and encourage downstream epistemic communities. This downstream relationship created information spillover, that is, the extent and reach of other epistemic communities that operate at a national level about the extent and reach of their power in global lawmaking.[95] This information spillover created relations not only with new epistemic communities but also signaled to private rightsholders that it is in their best interest to expand the family of epistemic communities they support. At the broader end of the spectrum, the knowledge and expertise created by epistemic communities in the international legal process form a system of knowledge, which reinforces the idea that knowledge is a belief, and in turn helps to shape the "belief system" of international law.[96]

The implications for the practice of international law when the theory of epistemic communities and their presence are included is that they generate a rich source of output conditionalities that intrigue academic scholars. These output conditionalities may range from inclusivity in international legal relations to legitimizing the process and outcome of international legislation. Seen from this perspective, epistemic communities are also state-like, due to the power and influence they wield in international legal relations (especially relations regarding intellectual property rights). Moreover, given that epistemic communities can organize diplomatic conferences to revise international

94. *See generally* Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, 2-20 December 1996, WIPO: Geneva. At the end of the Diplomatic Conference on 20 December 1996, the WIPO adopted two treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

95. *Id.*; *see also* Graeme Dinwoodie, *The Copyright Treaty: A Transition to the Future of International Copyright Lawmaking?*, 57 CASE W. RES. L. REV. 751, 753 (2007) ((noting how the 1996 Diplomatic Conference "was populated by a wide range of non-governmental organizations (NGOs) in numbers never before seen at international copyright events")).

96. *See* D'Aspremont, *supra* note 2.

treaties,[97] they effectively engage in a form of public power solely for the needs of private rightsholders.

The actions of epistemic communities in the international legal system are, to a certain extent, akin to corporations. However, are they both subjects of international law? In general, epistemic communities enjoy a certain amount of participation in the international legal process and have been involved in informal and formal lawmaking as a result. The latter is especially relevant in relation to epistemic communities convening diplomatic conferences for treaty revision. In that regard, they do enjoy the status of a state-like power in the contemporary global economy.[98] Therefore, the argument can be made that they are similar to corporations.

Perhaps the most chilling effect that intellectual property epistemic communities (types one, two, and three, above) have on the international legal system is their ability to help tribunals reach decisions that effectively draw up new rules for international intellectual property by participating in litigation efforts and their accompanying decisions. For instance, in the Eli Lilly[99] patent dispute, the tribunal dismissed patent obligation claims against Canada with the help of an expert amicus curiae who fell under the equivalence of the intellectual property epistemic community.[100] This particular submission drew on the comparative function method of utility application in patent law and argued that it precluded Canada from recognizing any international obligations. The significant point here is that when intellectual property epistemic communities participate in intellectual property litigation that occurs in different tribunals at the international level, they can systematically shape the jurisprudence of private law rights at the expense of public international law. This process not only favors epistemic communities and the private rightsholders they represent, but also creates the space for the privatization paradigm.

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97. *See, e.g.*, Diplomatic Conference, *supra* note 94.

98. *See* Jose Alvarez, *Are Corporations "Subjects" of International Law?*, 9 SANTA CLARA J. INT'L L.J. 1 (2011) (giving a general critique of multinational corporations in the international legal system).

99. Eli Lilly & Company v. Government of Canada, ICSID Case No. UNCT/14/2, Final Award (Mar. 16, 2017).

100. Eli Lilly, para. 442 (dismissing the claims).

A. "The New Living Law of the World": Epistemic Communities in Global Economic Lawmaking

In this section of the article, I explore developing epistemic communities as instruments of global lawmaking through the notion of "the new living law of the world." I develop my arguments through a normative account by using selected epistemic communities as examples in relation to internet governance. I intend to demonstrate that "the new living law of the world" is a contemporary natural phenomenon because it is evidence of various international legal developments in online commerce and intellectual property.[101] These regimes, amongst others, shape modern international economic laws and governance structures, and are initially actions resulting from private economic interests that do not have the formal capacity for lawmaking at the international level. In this regard, these regimes represent the new living law of the world as they directly affect the global population, through both the markets and the ability of less developed states to fully comprehend and comply with international legal instruments that were formed as a result of private economic interests.[102]

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101. *See* Laurence R. Helfer, *Nesting in the International Intellectual Property Regime, available at* https://www3.nd.edu/~ggoertz/rei/reidevon.dtBase2/Files.noindex/pdf/4/Helfer%20memo.pdf (last visited Nov. 16, 2020) ("intellectual property is now nested within many distinct international regimes, which together form a multi-modal, multi-venue "conglomerate regime" or a "regime complex", made up of multilateral, regional, and bilateral treaties, soft law resolutions and declarations, and competing networks of state and non-state actors"). *See also* Laurence Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L.J. 1 (2004); *see also* Laurence Helfer, *Regime Shifting in the International Intellectual Property System* 7, 39 (2009), *available at* https://core.ac.uk/download/pdf/206315311.pdf (last visited Nov. 16, 2020).

102. A recent work paints the picture of how international law-making in the global economic system is nothing but a source of immiseration and discontent for the world's non-developed states and their inhabitants. *See* JOHN LINARELLI ET AL., THE MISERY OF INTERNATIONAL LAW: CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY (2018) (arguing that the unhindered flow of foreign investments that are protected by international law is a major source of injustice). There is no doubt that the current global economic system that is driven by international law has been a failure. It is a failure, in part, because it does not properly integrate the pluralistic nature of the world or bring equal benefits to countries from the South. There are various works from different fields that offer criticisms of the current system. Criticism has been offered from historical, political, economic, developmental studies, international relations, and legal approaches. In the latter field, most of the criticisms of international law are often ideological or reinforce a particular hegemonic approach to international discourse. *See, e.g.*, Kennedy, *supra* note 3.

I embrace this new living law of the world to offer some innovative views on the arguments raised by previous parts of this article and the spillover repercussions for epistemic communities, which are the power behind the throne of global economic governance. My reliance on Teubner's concept of "the new living law of the world" can help illustrate the power and influence epistemic communities have in shaping the international law of global economic governance, and reinforces the Haasian conception of epistemic communities where law and regulation are constructed to match their interests and visions of that governance.

This approach is important because it reflects the extent to which epistemic communities are integral to global economic governance and is, arguably, what some scholars refer to as the constitutionalizing of international law.[103] The latter is the actual result of the global economic order that helps shape our legal understanding of global economic governance. As Michael Zurn suggests, global governance contains many normative principles and actors, and the only requirement is to take into consideration any principles that reinforce their egoism.[104]

Taking Zurn's construction into account, the wide degree of global governance allows several different epistemes to flourish. Those that survive are those which get to wield influence over international economic governance. For the purposes of discussion here, two such areas are important: technical standardization and e-commerce. This is because, as Zurn argues in his work, global governance systems consist of paradigms of authority, power, and legitimacy, and the epistemes of technical standardization and e-commerce exhibit some of these characteristics.[105]

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103. *See, e.g.*, Klabbers et al., *supra* note 23.

104. MICHAEL ZURN, A THEORY OF GLOBAL GOVERNANCE: AUTHORITY, LEGITIMACY, AND CONTESTATION 25 (2018).

105. The discussions on power, authority, and legitimacy in international law, are to some extent, an import from the international relations literature, or at least, the international law narrative relies on narrative international relations literature for descriptive purposes. It is not the intention of this article to revisit the international relations literature; however, the recent work of Zurn captures the theoretical developments in that area well. *Id.*; *see* MICHAEL ZUM, GLOBALIZING INTERESTS: PRESSURE GROUPS AND DENATIONALIZATION (Gregor Walter ed. 2005); Harry Eckstein, *Authority Patterns: A Structural Basis for Political Inquiry*, 67, AM. POL. SCI. REV. 1142 (1973); Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L ORG. 379 (1999); David A. Lake, *Rightful Rules: Authority, Order, and the Foundations of Global Governance*, 54 INT'L STUD. Q. 587 (2010); Emanuel Adler & Steven Bernstein, *Knowledge in Power: The Epistemic Construction of Global Governance in* MICHAEL BARNETT & RAYMOND DUVALL, POWER IN GLOBAL GOVERNANCE, 294–318 (2004); OLE JACOB SENDING, THE POLITICS OF EXPERTISE: COMPETING FOR AUTHORITY IN GLOBAL GOVERNANCE (2015); Thomas G. Weiss & Rorden Wilkinson, *Rethinking Global Governance? Complexity, Authority, Power, Change*, 58 INT'L STUD. Q. 207 (2014). Equally,

My focus here, however, will be on authority and legitimacy, in order to unravel some of their legal contents, match them to how international law operates, and determine their relevance in international economic governance, especially for the world of online commerce. Although the argument on power is helpful, it is not explored as such, for the purposes of the framing or the understanding of epistemic communities developed in this article.[106] Epistemic communities require an authoritative basis to delegate their power which then legitimizes their newfound influence in international economic governance.

As part of the informal law process in the global economic system, epistemic communities are integral to the process of how standards and rules evolve. Their importance can be compared with other participants in the system, such as states—where the right to regulate is equally inherent. Take the internet corporation for assigned names and numbers (ICANN) as an example, and more specifically how it administered the domain name system between 1999–2012.[107] During this period, ICANN's right to regulate was virtually unchallenged and state-sanctioned. But ICANN was not a sovereign state and did not represent one—rather, it acted in the private economic interest of trademark owners and internet service providers—the importance being that, with authority and power, an epistemic community such as ICANN legitimized its right to rule. An implication of this right to rule scenario is that an argument can be made that ICANN has contributed to the legalization of intellectual property norms and internet governance at the international

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the legal literature has its own version on the notion of authority in international law. *See, e.g.*, Samantha Besson, *The Authority of International Law: Lifting the State Veil*, 31 SYDNEY L. REV. 343, (2020); Ingo Venzke, *Between Power and Persuasion: On International Institutions' Authority in Making Law*, 4 TRANSNAT'L LEGAL THEORY 354, (2015); Nicole Roughan, *Mind the Gaps: Authority and Legality in International Law*, 27 EUR. J. INT'L LAW 329 (2016); Horatia Muir Watt, *Private International Law's Shadow Contribution to the Question of Informal Transnational Authority*, 25 IND. J. GLOBAL LEGAL STUD. 37 (2018); BASAK CALI, THE AUTHORITY OF INTERNATIONAL LAW: OBEDIENCE, RESPECT, AND REBUTTAL (2015).

106. For a wider discussion on power in international law, *see* Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64 (2006).

107. ICANN began *democrating* its system of assigning top-level domains in the fall of 2013, and hundreds of new top-level domains were added, displacing the *old dot com* era prior to 2012 with generic top-level domains (gTLDs) which comprised of 22. During the *ICANN reformation of 2012*, where organizations were asked to submit applications, to operate new gTLDs (a number of trademarks owners jumped at the initiatives), to turn their trademarks into gTLDs, example, Google, along with geographic terms such as London, and non-Latin scripts, often referred to as internationalized domain names (IDNs) were some of the new formations. For more discussions on the post-2012 reforms in the ICANN, *see, e.g.*, Daniela Michele Spencer, *Much Ado About Nothing: ICANN's New GTLDs*, 29 ANN. REV. L. & TECH. (2014).

level. We have seen similar manifestations in how some of the modern Free Trade Agreements (FTA) contain significant intellectual property provisions as a result of private actors advocating for their interests and for the right to recourse in investor-state dispute settlement (ISDS) mechanisms.[108]

B. The Authority of Private Economic Interests in the International Legal Order

In a symposium issue of the Indiana Journal of Global Studies,[109] the contributors concerned themselves with questions relating to the public-private divide, the role of law, and the status of authority in the globalizing economy. One of the themes that resonated in most papers was how private power, in the transnational sense, has become the living law of the world and that "the expressions of private authority in the global arena continue to take place outside formal legal discourse."[110] This is a powerful observation that links the relationship between private law and private economic interests, thereby making a connection to the notion of authority in the international legal system. This helps frame or align the notion of authority from the perspective of public international law or international relations with private legal relations.

The treatment of authority in public international law has many methodological elements, but the two most common methods are to treat authority in a philosophical context,[111] and using a narrative or descriptive approach (that often purports to be sociologically based).[112] These methodological approaches each have their main selling points, depending on the target audience, but what they seem to agree on is that

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108. *See, e.g.*, United States–Colombia Trade Promotion Agreement Implementation Act, Colom.-U.S., Oct. 21, 2011, 125 STAT. 462; The United States–Chile Free Trade Agreement Implementation Act, Chile-U.S., June 6, 2003, 42 I.L.M. 1026; *see generally* Elisa Walker Echenique, *Implementing the IP Chapter of the FTA Between Chile and the USA: Criticisms and Realities from a Developing Country Perspective*, 9 SCRIPTED 233 (2012).

109. 25 IND. J. GLOBAL STUD. (2018).

110. Watt, *supra* note 105, at 43.

111. Roughan, *supra* note 105; JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979).

112. Here, I am thinking in Weberian derivatives, as applied to law, that is, works that are based on the original conception and sociological approach developed in Weber's monograph. *See* MAX WEBER, ECONOMY AND SOCIETY (1978). For recent discussions in a more useful context, *see, e.g.*, RICHARD NEW LEBOW, MAX WEBER AND INTERNATIONAL RELATIONS (2017).

"authority is both the central power that law and its institutions claim to wield and is seemingly central to the very idea of legality."[113]

Here we can deduce that authority concerns law, power, institutions, epistemic communities, legalization, and legitimacy,[114] but there is a problematic take on this conception of authority in international law. Can it be reasonably assumed that all international lawyers, or those working with authority in the international field, can actually conclude that authority conveniently encompasses all attempts at legality? I would argue that for the concept of authority to be safely situated within the legality of international relations, different actors with authoritative influence are crucial to inform how we situate and discuss authority in international law. This is where private economic interest groups and their ability to influence lawmaking, especially at the global level, fit into the discussion. For the purposes of this section, however, the relevant questions concern the extent to which private economic interest groupings can be deemed authoritative, and how they fit the notion of authority that Nicole Roughan describes.[115]

The criteria of power and legality, as discussed by Roughan, in view is appealing to how epistemic communities in internet governance and e-commerce engage in rulemaking. Hence, the examples of technical standardization and e-commerce contain examples of how to ascertain or set out some of the parameters that relate to legality and power.[116] I chose technical standardization in internet matters as a case study because in some respects one could argue that the provision of standards is a public good, even if they are being supplied to satisfy private economic interests.[117] An additional reason for the e-commerce case study is the complex legal paradigms that are often evident in copyrights and trademarks and the problem jurisdiction poses as a result of e-commerce being conducted entirely over the internet.

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113. Roughan, *supra* note 105, at 329.

114. For some concerns on the latter, *see* Nicolas Suzor, *Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms*, 4 SOC. MEDIA & SOC'Y 1 (2018).

115. Roughan, *supra* note 113.

116. *See also* Mark Lemley, *Standardizing Government Standard-Setting Policy for Electronic Commerce*, 14 BERKELEY TECH. L.J. 745 (1999).

117. The public good argument is not new per se as it permeates most disciplinary fields. *See, e.g.*, Jennifer Gerbasi & Mildred Warner, *Privatization, Public Goods and the Ironic Challenge of Free Trade Agreements*, 39 ADMIN. & SOC. 127 (2007); Ellen Dannin, *Red Tape or Accountability: Privatization, Publicization, and Public Values*, 15 CORNELL J.L. & PUB. POL'Y 111 (2005).

The development of private regulation for standardization and e-commerce has been a prominent activity for some time. The link of standardization and e-commerce to both intellectual property and international law is evident: standardization is the effort to standardize patented technology and innovation;[118] e-commerce contains elements of patented technology, copyrights, and trademarks.[119] These different aspects of intellectual property pose jurisdictional problems in international law, and are problematic because some of these technological developments represent how the internet is operated or what operates over the internet. Thus, it is clear that intellectual property and jurisdiction are concerns for public international law.[120] Therefore,

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118. A proper definition of standardization includes "movements towards uniformity" or an "approach aiming to create a uniform process (standard) that can be applied across various premises" including common principles and procedures. *See*, Anne Marie Tasse, *A Legal Perspective on Harmonization, Standardization and Unification*, 7 STUD. ETHICS L. & TECH. 8 (2013). *See also*, Mark Patterson, *Inventions, Industry Standards, and Intellectual Property*, 17 BERKELEY TECH. L.J. 1043 (2002); Mark Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CALIF. L. REV. 1889 (2002); Henry Smith, *Intellectual Property, and the New Private Law*, 30 HARV. J.L. & TECH. 1, 3-4 (2017) ("standard-setting involves private parties generating an agreement or set of agreements that often look like . . . enforceable contracts"); Janet Freilich & Jay Kesan, *Towards Patent Standardization*, 30 HARV. J.L. TECH. 233, 234 (2017) ("standardization does not need to be mandated by formal rules, rather, it can arise through voluntary informal mechanism, which provides an easier goal than statutory or regulatory interventions do"). *See* Joseph Farrell and Garth Saloner, *Standardization, Compatibility, and Innovation*, 16 RAND J. ECON. 70 (1985); Naomi Roht-Arriaza, *Private Voluntary Standard-Setting, The International Organization for Standardization, and International Environmental Lawmaking*, 6 Y.B. INT'L ENV. L. 107 (1996).

119. It should be pointed out that intellectual property is at the heart of the internet, and e-commerce for that matter because it is intellectual property rights that "protect the computer code that forms the architecture of cyberspace, the text, images, and sound that comprise the bulk of online content and the symbols that guide consumers through the maze of e-businesses." *See* Laurence Helfer & Graeme Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141, 149-50 (2001). *See also* Herbert Hammond & Justin Cohen, *Intellectual Property Issues in E-commerce*, 18 TEX. WESLEYAN U. L. REV. 743 (2012); Corey Field, *Copyright Co-Ownership in Cyberspace: The Digital Merger of Content and Technology in Digital Rights Management and E-Commerce*, 19 ENT. & SPORTS L. REV. 3 (2001); Adrienne Garber, *E-Commerce: A Catalyst for Change in Intellectual Property Law*, 6 DUQ. BUS. L.J. 157 (2004).

120. *See, e.g.*, Keith Akoi, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293 (1996); Daniel Benoliel, *Cyberspace Technological Standardization: An Institutional Theory Retrospective*, 18 BERKELEY TECH. L.J. 1259 (2003); Graeme Dinwoodie, *Trademarks and Territoriality: Detaching Trademark Law from the Nation-State*, 41 HOUS. L. REV. 886 (2004); Thomas Schultz, *Carving Up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface*, 19 EUR. J. INT'L L. 799 (2008); Sung Park, *The Coordinating Role of Public International Law: Observations in the Field of Intellectual Property*, 9 J. EAST

the argument in this section of the article is not about the extent to which intellectual property intersects with public international law; rather, the argument demonstrates how power and legality, when pursued or used by private economic interests in the global legal order, are the twin elements of authority that contribute to the private production of global norms.

C. Authority as "Power" and Standardization

The standardization of technology and how it intersects with intellectual property has long been a focus of academic curiosity from an international legal standpoint.[121] This is because: (a) there is a complex relationship between intellectual property and standards; and (b) the standard setters for technology are, significantly, specialized knowledge elites in the global community. This is especially the situation with those organized under the auspice of the International Organization for Standardization (ISO).[122] Specialized knowledge elites have been successful in having their standards adopted in international legal instruments such as the TBT Agreement in the WTO[123] or the International Telecommunications Regulations (ITRs).[124] These results suggest that standard-setting entities operating at the global level exert a certain amount of power that enhances their capacity as private standardization entities to shape international legal policy. One advantage is that private standard-setting entities "can be much faster and more flexible than government standardization"[125] and thereby affect the speed and development of standardization internationally.

ASIA & INT'L L. 321 (2016); BENEDETTA UBERTAZZI, EXCLUSIVE JURISDICTION IN INTELLECTUAL PROPERTY (2012).

121. *See, e.g.*, KAI JAKOBS, INFORMATION TECHNOLOGY STANDARDS AND STANDARDIZATION: A GLOBAL PERSPECTIVE (1999); Christopher Gibson, *Globalization and the Technology Standards Game: Balancing Concerns of Protectionism and Intellectual Property in International Standards*, 22 BERKELEY TECH. L.J. 1403 (2007); TIMOTHY SCHOECHLET, STANDARDIZATION AND DIGITAL ENCLOSURE: THE PRIVATIZATION OF STANDARDS, KNOWLEDGE, AND POLICY IN THE AGE OF GLOBAL INFORMATION TECHNOLOGY (2009); Janelle Diller, *Private Standardization in Public International Lawmaking*, 33 MICH. J. INT'L L. 481 (2012).

122. *See, e.g.*, David Wirth, *The International Organization for Standardization: Private Voluntary Standards as Swords and Shields*, 36 B.C. ENV. AFF. L. REV. 79 (2009).

123. ANDREA VILLAREAL, INTERNATIONAL STANDARDIZATION AND THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE (2018).

124. *See* RICHARD HILL, THE NEW INTERNATIONAL TELECOMMUNICATION REGULATIONS AND THE INTERNET (2014).

125. Marcus Maher, *An Analysis of Internet Standardization*, 3 VA. J.L. TECH. 1, 8 (1998). *See also*, Stavros Gadinis, *Three Pathways to Global Standards: Private, Regulator, and Ministry Networks*, 109 AM. J. INT'L L. 1 (2015).

Another advantage that private standard organizations possess over government-backed standardization is that "standards organizations may be able to combine the expertise of many people to help overcome information problems."[126] This latter position reinforces how epistemic communities are singularly in charge of standards and norms that eventually mature into global rules. This is where the issue of private standard-setting organizations and authority, as Roughan describes, gets interesting. Private standard-setting organizations enjoy power as authoritative institutional experts. Part of that power lies in the realization of profits, economic benefits, or guarding technological progress such as standards-essential patents (SEPs).[127] Another part of the argument is that power must be viewed in the context of institutional governance structures that are driven by global pluralism, where conflicting and opposing standards are perpetuated by private economic interests. The former point about economic benefits is more aligned with the domestic nature of standards and domestic legal order, even though these standards are global.[128] However, it is the latter point that is relevant to the international legal context that I advance in this article. Pluralism, as such, can contribute to how we view standardization. This is because, whilst competing with other states for regulatory standards, some states are forced to incorporate and support the dominant standard setter.

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126. Maher, *supra* note 79.

127. *See, e.g.*, Apple, Inc v. Motorola Mobility, Inc., 2012 U.S. Dist., LEXIS 181854, (W.D. Wis. Nov. 2, 2012); Microsoft Corp. v Motorola, Inc., 795 F.3d 1024 (9th Cir. 2015). Another point worth mentioning regarding SEPs is that they can be construed as part of the process of *private ordering*, where intellectual property law in general, the domestic legal order, and other community norms drive how epistemic communities are also motivated by financial concerns. *But see,* Katherine Strandburg, *Evolving Innovation Paradigms and the Global Intellectual Property Regime*, 41 CONN. L. REV. 861, 885, 901–05 (2009); Richard Stern, *Who Should Own the Benefits of Standardization and the Value it Creates*, 18 MINN. J.L. SCI. & TECH. 107 (2018). There is another argument about standardization which is equally disheartening: that once a standard has been adopted, it then excludes other standards that are competitive alternatives, therefore, requiring the involvement of antitrust authorities. But that argument requires its own article, and it is excluded from the power dynamics I am attempting to establish in this section. *See* Björn Lundqvist, *Standardization for the Digital Economy: The Issue of Interoperability and Access Under Competition Law*, 62 ANTITRUST BULL. 710 (2017); Roger Brooks, *SSO Rules, Standardization, and SEP Licensing: Economic Questions from the Trenches*, 9 J. COMPETITION L. & ECON. 859 (2013); JORGE L. CONTRERAS, THE CAMBRIDGE HANDBOOK OF TECHNICAL STANDARDIZATION LAW: COMPETITION, ANTITRUST, AND PATENTS (2018).

128. For other cases where SEPs were at issue, *see, e.g.*, Fujitsu v. Tellabs, (N.D. Ill. 2012) concerning ITU G.692 and LSI v. Realtek, (N.D. Cal. 2014) concerning IEEE 802.11.

Because standards are ingrained in the structure of certain epistemes ((e.g., the standards association of the Institute of Electrical and Electronic Engineers (IEEE 802), for wireless and remote media access control;[129] the International Swaps and Derivatives Association (ISDA), for derivatives[130])) there are rivalries and social structures that hold those epistemes together. Hence, one could make the argument that pluralism, in the broadest sense, endorses various communities and diversity broadly. From an intellectual property law perspective, technology standards perform certain roles that organically build power through institutional governance, thereby giving rise to authority and legality.

The authority by standard setters and their capacity to generate legal norms encourages the state to support initiatives for global standardization and/or regulatory recommendations for legal instruments and treaties.[131]

This is important if we look at these types of developments from a position of justice, as it reveals that nation-states are obviously favoring one episteme over the other by allocating power to certain epistemes that are capable of driving industry standards necessary for economic advancement. In this context, standards could be seen as a form of property that is tied to the state and can be unevenly distributed. But there is also a need to make standardization more pluralistic as part of how global norms evolve and the situation of power and its relation to influencing regulatory developments. This is so given that technological standardization and intellectual property are a complex maze full of privileges, authorities, legalities, rights, and powers, wherein the realm of international law has made some attempts to recognize these dimensions.[132]

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129. *See also*, Christopher Gibson, *Globalization and the Technology Standard Game: Balancing Concerns of Protectionism and Intellectual Property in International Standards*, 22 BERKELEY TECH. L.J, 32 (2007).

130. *See, e.g.*, Maciej Borowicz, *Private Power, and International Law: The International Swaps and Derivatives Association*, 8 EURO. J.L. STUD. 46 (2015).

131. In formulating this argument, I am reminded of Hohfeld's jural relations relating to property rights. *See* Leslie Newcomb Hohfeld, *Fundamental Legal Conceptions of as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917). *But see* Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 FLA. L. REV. 136 (2004); Nestor Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1598 (2008); Henry Smith, *Property as Platform: Coordinating Standards for Technological Innovation*, 9 J. COMPETITION L. & ECON. 1057 (2013); Mark Perry, GLOBAL GOVERNANCE OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY: REFLECTING POLICY THROUGH CHANGE (2016).

132. Some of the literature that discusses standardization in an international legal context include, Diller, *supra* note 117; Pablo Marquez, *Standardization and Capture: The Rise of Standardization in International Industrial Regulation and Global Administrative*

Although there is a burgeoning body of literature that discusses other forms of standardization and their nexus in international law—for example, environmental standards or private certification systems[133]—they are, for the most part, not a concern here. Rather, the concern is the role of technological standards, intellectual property, and private actors in the global economic system.[134] However, it must be said that the traditional institutional standardization of other technological issues, via organizations such as the ISO, eco-labeling, and international financial reporting standards (IFRS) by the International Accounting Standards Board (IASB),[135] help to make the argument on technical standardization in relation to certain internet activities. In the same vein, they also helped to create a linkage factor in international law and the technological standardization paradigm of intellectual property where private norms are concerned in an international legal setting.[136] There is evidence in the academic debate that supports the argument that the private economic entities with the power to standardize technology form part of the social[137] fabric of epistemic communities. As such, the lure of standardizing and norm creation through international law is attractive for various private epistemes to develop rules that ultimately have a public function.

For epistemic communities, not only is international law attractive as a means for turning private norms into public rules – competing visions of an international legal order based on private norms are also standardized as a result of their inherent powers for developing public

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Law, 7 GLOB. JURIST 1 (2007); Janewa Oseitutu, *Value Divergence in Global Intellectual Property Law*, 87 IND. L.J. 1639 (2012); Katharina Pistor, *Standardization of Law and its Effect on Developing Countries*, 50 AM. J. COMP. L. 97 (2002); Yannick Radi, *Standardization: A Dynamic and Procedural Conceptualization of International Lawmaking*, 25 LEIDEN J. INT'L L. 283 (2012).

133. *See, e.g.*, Jason Morrison, *Private and Quasi-Private Standard-Setting in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Daniel Bodansky, Jutta Brunee, and Ellen Hey eds., 2008).

134. *See, e.g.*, Gibson, *supra* note 125. *But see*, Andrew Power & Oisin Tobin, *Soft Law for the Internet, Lessons from International Law*, 8 SCRIPTED 31 (2011).

135. *See* KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE NEW LEX MERCATORIA 41 (2d ed. 2010); Keith Bader, *The International Accounting Debate: Options in Standardization*, 8 J. INT'L BUS. & L. 99 (2009).

136. On other private norm matters *see, e.g.*, Carola Glinski, *Private Norms as International Standards? – Regime Collisions in Tuna-Dolphin II*, 3 EUR. J. RISK REG. 545 (2012); Naomi Roht-Arriaza, *The International Organization for Standardization and the Drafting of Private Environmental Standards*, 90 ASIL PROC. OF THE 90TH ANN. MEETING 178 (1996).

137. DAVID SINGH GREWAL, NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION (Yale University, 2008).

and private norms. Grewal argues that the powers wielded by epistemic communities should not be underestimated, as they "are the conduits through which common nodes of perception and reaction are channeled in the effort to resolve transnational problems."[138] This argument resonates with the epistemic networks responsible for technological standardization advanced in this section.

Not only are the epistemic networks for standardization attempting to resolve problems in areas where they feel that there is little or sub-standard government intervention, but they are also harnessing their powers to influence how the law reacts to their common nodes of perception at the global level. For example, Grewal illustrates how the open-source movement has been instrumental in setting technical standards and practices. But what Grewal found disheartening about the open-source movement was the tendency to use power in an undemocratic fashion, noting that "how best to counter the power that private actors have over technical standards remains the subject of a debate that reveals the technological utopianism of the open-source movement."[139] Although Grewal's arguments are a worthy critique to be acknowledged, some of his criticisms, like most of the critics of technology and intellectual property at the global level,[140] are often in opposition to my views. Instead of critiquing how dangerous or powerful private actors and their institutional sponsors are, we should attempt to understand how they come about in the first place, and what role international law – and increasingly, transnational law – plays in their ability to accumulate power.

Furthermore, a legitimate concern is whether the services and norm production by private actors at the international level is a form of public service to which international law must respond. The power standardization dynamics reflect these concerns primarily because private economic entities have consistently had their services and technological standardization validated at the international level through markets, norms, treaties, and good practices.

The arguments raised in this section that integrate power, in the Roughan sense, of authority,[141] and my attempts to link it to technological

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138. *Id.* at 284.

139. *Id.* at 215.

140. The discussions can be wide-ranging and not only legal but interdisciplinary. *See, e.g.*, Greg Distelhort, Richard Locke, Timea Pal, & Hiram Samel, *Production Goes Global, Compliance Stays Local: Private Regulation in the Global Electronics Industry*, 9 REG. & GOV. 224 (2015); *Compliance Stays Local: Private Regulation in the Global Electronics Industry*, 9 REG. & GOV. 224 (2015).

141. Zum, *supra* note 105.

standardization, especially technological developments with an intellectual property implication and the private economic interests behind them, has a major implication for international law. That implication is that these epistemic communities open up a new language route to interpret and engage in the dialogue of international law through the lens of private power and norm production.

Given that private actors, when engaged in the standardization of technical internet activities, are participants in the international legal system, they help shape the international legal outcome of treaties, norms, and other legalization processes that are relevant to their community.[142] However, their participation also confirms that their engagement in international lawmaking is an exercise of the concept of traditional power that has always been inherent to international law. In other words, the central element of international law has always been about power—no matter how that power was or is conceptualized or interpreted. It is in this context that I now turn to the element of authority articulated by Roughan: legality.[143] To situate it within the realm of intellectual property and international law, I will use a different case study—e-commerce, as a form of "practice,"[144] where problems of copyrights and trademarks create linkages to international law.[145]

Authority as "Legality" in E-Commerce and Online Dispute Resolution

The second element of authority that needs further discussion is legality—the power to use the law to control or settle disputes. For our purposes, the case study is e-commerce and the wild world of the internet, wherein trademark and copyright infringements are some of the more problematic areas for international law. The discussion, however, focuses on trademarks in the context of e-commerce, legality, and international law from private norm perspectives.

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142. *See also* Peter Gerhart, *Introduction: The Triangulation of International Intellectual Property Law: Cooperation, Power, and Normative Welfare*, 36 CASE W. RES. J. INT'L L. 1, (2004); *see also* Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT'L L. REV. 465, 466 (2005).

143. Nicole Roughan, *Mind the Gaps: Authority and Legality in International Law*, 27 EUR. J. INT'L LAW 329, 337 (2016). "The idea that law claims authority is an abstract idea, but it is made concrete by the practices in which official agents of the law, both individual and institutional, purport to bind subjects."

144. *Id.*

145. *See also* Thomas Schultz, *Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface*, 19 EUR. J. INT'L LAW 799, 836 (2008) (discussing emerging practices such as eBay in relation to jurisdictional practices and the relationship to international law).

One particular argument will focus on online dispute resolution (ODR), as this is a fascinating private system for settling inter-state online disputes. My discussion of legality—as a part of the authority paradigm set out earlier—is in the context of how intellectual property law functions within e-commerce, and how it shifts the internal dynamics of international law to those in favor of private enforcement of rules. Thus, if international law covers various regimes and rules, then intellectual property law covers different regimes, rules, and choices of law; e-commerce is a symptom of the intersection of international law and intellectual property law.[146] The internet is largely about e-commerce. The factors that drive the internet are a network of market-based institutions performing various trade functions that serve a variety of customers. A good example is Amazon.com, which was initially known for selling books and other items and has since grown into an institution with a variety of technical and cloud hosting services, arguably making it the backbone of the modern internet. In this web of services, several small and large vendors depend on Amazon services. The same is true for other major internet suppliers, ranging from Google.com to Yandex.ru and Yahoo.com. But there is a common node about e-commerce on the internet—online dispute resolution[147] mechanisms for intellectual

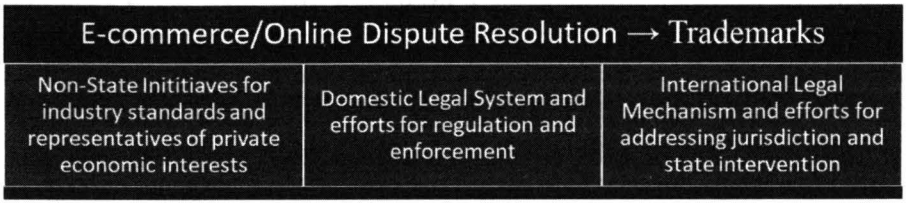
146. Because of the challenge of jurisdiction pose by the internet due to the domestic nature of contracts, or enforcement of applicable law, e-commerce, intellectual property, and international law often leads to regulatory competition among, state, international, and non-state actors, and therefore opens up fertile ground for academic exploration and legal questions. Not all issues can be answered in this discussion but for a sampling of the literature *see, e.g.*, Louis del Duca, Colin Rule, & Zbynek Loebl, *Facilitating Expansion of Cross-Border E-Commerce: Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems – Work of the United Nations Commission on International Trade Law)*, 1 PENN. ST. J.L. & INT'L AFF. 59 (2012); Marshall Leaffer, *The New World of International Trademark Law*, 2 MARQ. INTELL. PROP. L. REV. 1, (1998); Wade Estey, *The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality*, 21 HASTINGS INT'L & COMP. L. REV. 177 (1997); Stephan Wilske & Teresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet?*, 50 FED. COMM. L.J. 117 (1997); Tapio Puurunen, *The Legislative Jurisdiction of States over Transactions in International Electronic Commerce*, 18 J. MARSHALL J. COMP. & INFO. L. 689 (2000); Robert Wai, *Transnational Lift-off and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COL. J. TRANS. L. 209 (2002); Mohamed Wahab, *Globalization and ODR: Dynamics of Change in E-Commerce Dispute Settlement*, 12 COL. J. TRANS. L. 123, (2004); Gralf-Peter Calliess, *Online Dispute Resolution: Consumer Redress in a Global Market Place*, 7 GERMAN L.J. 647 (2006); Riika Koulu, *Disintegration of the State Monopoly on Dispute Resolution: How Should We Perceive State Sovereignty in the ODR Era?*, 1 INT'L J. ONLINE DISP. RESOL. 125 (2014).

147. The notion of online dispute resolution in this article refers to the various alternative dispute resolution methods available such as mediation, arbitration, negotiations, and whatever combinations that the use of internet technology may facilitate. For our

property infringement are purely non-state actor initiatives that impact the state, and thereby impact international law.[148] At the heart of this common node is the question of legality, or what the legal rules for intellectual property infringement are in e-commerce, and how those rules relate to domestic and international law.

To illustrate what I am focusing on in this section, consider the following diagram:

Figure 2



In Figure 2, there are three sets of normative relationships with regard to e-commerce and online dispute resolution. The industry's normative relationships developed by private economic interests as part of their self-regulation; the normative relationship developed at the governmental level that often makes agencies responsible for the enforcement of these relationships; and the implication of these

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purposes, one of the most visible has been the ICANN dispute resolution process for top-level domains in the *top-level dot com* era (pre-2012) for trademarks and still applies today as the Uniform Domain-Name Dispute Resolution Policy (UDRP). For early assessment of ICANN's UDRP, *see* Jeffrey Samuels & Linda Samuels, *Internet Domain Names: The Uniform Dispute Resolution Policy*, 40 AM. BUS. L.J. 885 (2003); Laurence Helfer, *International Dispute Settlement at the Trademark-Domain Name Interface*, 29 PEPP. L. REV. 87 (2001); Lisa Sharrok, *The Future of Domain Dispute Resolution: Crafting Practical International Legal Solutions form within the UDRP Framework*, 51 DUKE L.J. 817 (2002); Robert Badgley, *Internet Domain Names and ICANN Arbitration: The Emerging "Law" of Domain Name Custody Disputes*, 5 TEX. REV. L. & POL. 343 (2001); DAVID LINDSAY, INTERNATIONAL DOMAIN NAME LAW, ICANN AND THE UDRP (2009).

148. One of the concerns in the ICANN dispute resolution process has been the notion of *bad faith*, that is, when legitimate trademarks or domain names are hijacked or cybersquatted by entities or individuals seeking a financial windfall. *See, e.g.*, Peter Gey, *Bad Faith Under ICANN's Uniform Domain Name Dispute Resolution Policy*, 23 EUR. INTELL. PROP. REV. 507 (2001); *see also* Frederick Mostert & Gloria Wu, *The Importance of the Element of Bad Faith in International Trademark Law and its Relevance Under the New Chinese Trademark Law Provisions*, 12 J. INTELL. PROP. L. & PRAC. 650 (2017). Of course, the bad faith notion runs contrary to the principle of good faith in international law. *See generally* ANDREW MITCHELL, M. SORNARAJAH & TANIA VOON, GOOD FAITH AND INTERNATIONAL ECONOMIC LAW (2015) (provides a comprehensive analysis of good faith and its parameters).

normative relationships at the international level when questions of jurisdiction, state intervention, and international private law arise.

There are a few things I want to consider before getting into the full discussion on how e-commerce and legality interact within intellectual property in international law. The issue of online dispute settlement is paramount to the discussions and hence requires a broader explanation to support the skeletal references made earlier. The subject of online dispute settlement is broad and can affect anything from securities and tax to employment.[149] Although it is somewhat agreeable that e-commerce entails all forms of commercial transactions that take place over the internet,[150] its total composition may be elusive. One must accept, however, that given the involvement of the internet, e-commerce is a question of domestic and international law, as it traverses borders and touches upon issues of sovereignty.[151]

The OECD, for example, has given some guidance on how to define e-commerce, and notes:

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149. The literature is voluminous but some works include: JULIA HÖRNLE, CROSS-BORDER INTERNET DISPUTE RESOLUTION (2009); FAYE FANGFEI WANG, LAW OF ELECTRONIC COMMERCIAL TRANSACTIONS: CONTEMPORARY ISSUES IN THE EU, US, AND CHINA (2d ed. 2014); KATHERINE LYNCH, THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION (2003); Tapio Puurunen, *International Online Dispute Resolution – Caveats to Privatizing Justice*, 14 FINNISH Y.B. INT'L L. 233 (2003); Veijo Heiskanen, *Dispute Resolution in International Electronic Commerce*, 16 J. INT'L ARB. 29 (1999); Jagruti Chauhan, *Online Dispute Resolution Systems: Exploring E-Commerce and E-Securities*, 15 WINDSOR REV. LEGAL & SOC. ISSUES 99 (2003); COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, E-COMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS (2002); Rifat Azam, *The Political Feasibility of a Global E-Commerce Tax*, 43 U. MIAMI L. REV. 711 (2013); JOHN A. ROTHSCHILD, RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW (2016). A more recent work that also contextualizes some of the issues and presents a decent narrative is: RIIKKA KOULU, LAW, TECHNOLOGY AND DISPUTE RESOLUTION: THE PRIVATISATION OF COERCION (2018).

150. *See* Directive 2000/31, of the European Parliament and of the Council of 8 June 2000 on the certain legal aspects of information society services, in particular electronic commerce in the Internal Market (Directive on electronic commerce), 2000 O.J. (L 178) 1, 3.

151. *See also*, Koulu, *supra* note 146; Ethan Katsch, *Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace*, 21 INT'L REV. L. COMPUTERS & TECH. 97 (2007); Mary Martin, *Keep it Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce*, 20 B.U. INT'L L.J. 125 (2002); Brian Bieron & Usman Ahmed, *Regulating E-Commerce through International Policy: Understanding the International Trade Law Issues of E-Commerce*, 46 J.W.T. 545 (2012); Gavin Clarkson, Katherine Spilde, & Carma Claw, *Online Sovereignty: The Law and Economics of Tribal Electronic Commerce*, 19 VAND. J. ENT. & TECH. L. 1 (2016).

> Electronic commerce refers to generally all forms of transactions relating to commercial activities, involving both organizations and individuals that are based upon the processing and transmission of digitized data, including text, sound, and visual images. It also refers to the effects that the electronic exchange of commercial information may have on the institutions and processes that support and govern commercial activities.[152]

This soft definition of e-commerce from the OECD is widely endorsed, but it has not been given the force of law through either legislation or judicial holdings.

Moreover, because commercial activities over the internet cover such a wide field, the actual definition of e-commerce in most internet commercial transactions is set out in the contractual terms governing those specific commercial activities. Under this scenario, a few issues are likely to occur: the first is that e-commerce is a matter of domestic law; the second, that some contracts may contain provisions that change the applicable law from domestic law to the law of other jurisdictions. These conditions often lead to the organization of groups, private economic interests in different commercial areas, and networks of intellectual property rightsholders to combine their efforts for adjudicating online dispute resolution among other activities. Most major internet e-commerce sites operate online dispute resolution mechanisms privately,[153] which are generally self-contained and full service:

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152. OECD, *Electronic Commerce: Opportunities and Challenges for Government*, OECD DIGITAL ECONOMIC PAPERS, No. 29 (June 12, 1997) ("Sacher Report"), *available at* https://www.oecdilibrary.org/docserver/237058611046.pdf?expires=1601055780&id=id&accname=guest&checksum=C78B9CC73305138B9F4804D4FE2A4C5C (last visited Sept. 25, 2020).

153. *About Online Dispute Resolution Platform (ODR Platform)*, AMAZON (2020), *available at* https://www.amazon.co.uk/gp/help/customer/display.html?nodeId=G9NMDH46UFNMFNKN (last visited Dec. 18, 2020); Amazon operations in Europe adheres to the ODR platform set up by the European Commission, and although, major internet e-commerce sites prefer to have consumers contact them prior to the Commission's platform, this may not be the case all the time. Amazon UK Operations ODR; *see also Online Dispute Resolution*, EUR. COMM'N (2020), *available at* https://ec.europa.eu/consumers/odr/main/?event=main.home2.show (last visited Dec. 18, 2020). *See generally*, Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes, EUR-LEX (2013), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0524 (last visited Dec. 18, 2020).

> A self-contained ODR platform is designed to resolve disputes within a community, such as in an online marketplace like eBay, Amazon, or Etsy. Members of that community agree to be governed by the terms of service and associated agreements that regulate the community and dictate how and when that ODR platform is used.[154]

Through these terms and conditions and other contractual arrangements, set out in an e-commerce provider's terms of service, a dispute resolution mechanism will be automatically triggered for online infringement of intellectual property rights. To put it differently, one must ask themselves, under what conditions would an online e-commerce provider such as eBay be liable for trademark infringement?

In L'Oréal v. eBay, the Court of Justice of the European Union (CJEU) held that eBay was not liable for trademark infringements committed by third parties' users on its e-commerce platform.[155] Before the L'Oréal v. eBay decision in Europe many similar cases were litigated in other jurisdictions – most notably in the United States,[156] where online trademark infringement occurred at a more rapid rate than the law and its courts could keep up with. The challenge for trademark owners was how to balance their rights alongside how third-party users on the internet fairly use those trademarks. Trademark owners recognized these issues earlier as the internet took hold and attempts were made to counter cybersquatting and other bad faith uses of trademarks on the internet. For the established community of experts – epistemic communities, which

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154. Suzanne Van Arsdale, *User Protections in Online Dispute Resolution*, 21 HARV. NEGOT. L. REV. 107, 120 (2015). *See also* Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 CARDOZO J. CONFLICT RESOL. 717, 722 (2017) ("When not based on normative standards, dispute resolution is just another form of bureaucratic processing, the resolution of disagreements according to a set of tacit, often biased, intra-organizational, administrative norm (e.g., seller is always correct), that are defined by repeat players who "capture" the system and use it for their private ends").

155. The opinion by the Advocate General in Europe first warned that eBay was not liable for online trademark infringement by users on its platform prior to the actual ruling by the CJEU. *See* Case C-324/09, L'Oréal SA Lancôme parfums et beaute & Cie, Laboratoire Garnier & Cie, L'Oréal (UK) Ltd. v. eBay Int'l AG, eBay Europe SARL, eBay (UK) Ltd., 2011 E.C.R. I-6011. The dispute has had multiple rounds over various aspects with different rulings and has been one of the most visible cases regarding the liability for trademark infringement on e-commerce platforms. For a commentary *see generally*, CHRISTINE RIEFA, CONSUMER PROTECTION, AND ONLINE AUCTION PLATFORMS: TOWARDS A SAFER LEGAL FRAMEWORK (2016).

156. *See, e.g.*, Tiffany (NJ) Inc. v. eBay, Inc., 576 F. Supp. 2d 463 (S.D.N.Y. 2008); 1-800 Contacts, Inc. v. WhenU.com, Inc., 414 F.3d 400 (2d Cir. 2005); Rescuecom Corp. v. Google, Inc., 456 F. Supp. 2d 393 (N.D.N.Y. 2006); FragranceNet.com, Inc. v. FragranceX.com, Inc., 493 F. Supp. 2d 545 (E.D.N.Y. 2007).

guard and advance the private interests of their stakeholder's trademarks – their role in the e-commerce revolution and online trademark infringement remains crucial to how court decisions are handed down.

Some of the active epistemic communities in the global governance of intellectual property, specifically for trademarks, are the International Trademark Association (INTA);[157] the European Communities Trade Mark Association (ECTA); the Association of European Trade Mark Owners (MARQUES); the less notable Scotch Whisky Association;[158] and the more notable ones for marks, geographical indications (GIs),[159] such as the French Comite Interprofessionnel du Vin de Champagne.[160]

As an epistemic community INTA, for example, has been warning members about the collision of trademarks and international law because of the lack of questions relating to the jurisdiction of international law since the 1990s.[161] INTA rejected "a comprehensive domain name dispute policy" in favor of a "sui generis approach which would permit a workable procedural, rather than substantive, system for domain name

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157. *The Intersection of Trademarks and Domain Names: INTA "White Paper"*, 87 TRADEMARK REP. 668 (1997).

158. Tracing its origins to 1912, which among other things, "safeguard the Scotch Whisky category." On many occasions, the Scotch Whisky Association attempted to prevent other parties from using terms that suggest Scotland as the origin of certain whiskeys. *See* Case C-44/17, Scotch Whisky Association v. Klotz 2018 E.C.R. (where the SWA claimed that Gaelic term "glen" used by a German whisky producer infringed the GI "Scotch Whisky").

159. Article 22(1) of the TRIPs Agreement defines geographical indications as "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origins." For a discussion *see* Jose Cortez Martin, *TRIPS Agreement: Towards A Better Protection for Geographical Indications?*, 30 BROOK. J. INT'L L. 117 (2004); *see generally* DEV GANGJEE, RELOCATING THE LAW OF GEOGRAPHICAL INDICATIONS (2012).

160. The Champagne Committee, founded in 1941 operates under the mantra that "Champagne only comes from Champagne, France", and has been successful in a number of cases asserting these claims, such as the *Spanish Champagne Case, 1960* in London; the 1987 case against *Perrier Mineral* water in Germany; and in 2002 against Arla, which manufactured a yogurt that purportedly tasted like champagne. For this latter case, *see* Institut National des Appellations d'Origine v. Arla Foods AB (2002) re yogurt "Yoggi Original Champnesmak." The link of Geographical Indications to e-commerce, in short, emanates from the closeness or overlap of geographical indications to trademarks, and therefore when using online on e-commerce platforms, not only do infringements arise but the likelihood of confusion to consumers that requires hard legal questions to be addressed. *See generally*, Burkhart Goebel & Manuela Groeschl, *The Long Road to Resolving Conflicts Between Trademarks and Geographical Indications*, 104 TRADEMARK REP. 924 (2014); Deborah Kemp & Lynn Forsythe, *Trademarks and Geographical Indications: A Case of California Champagne*, 10 CHAP. L. REV. 257 (2007).

161. International Trademark Association, *supra* note 157, at 690.

registration and dispute."[162] INTA has traditionally favored trademark disputes being settled in courts or other tribunals, and since 1916 has been acting as a "friend of the court" (amicus curiae) through expert briefs and affidavits for litigations taking place all over the world. In Rosetta Stone v. Google,[163] which concerned online trademark infringements when using AdWords (advertising program online), INTA noted in an amicus curia that previous decisions in the case were legal errors.[164] Clearly, this is only an example of how different questions of legality arise when viewed from the perspective of epistemic communities and how they act in the international system, whether in adjudication or lawmaking for interests that represent their private needs rather than those of the state.

The above example of legality and others discussed earlier, such as norm production or lawmaking, relate to e-commerce and trademarks from the perspectives of online trademark infringements; most importantly, however, the role of epistemic communities and their authority is to set out the legal criteria or defend those criteria that are beneficial to their commercial clients. Their involvement in the litigation and advocacy systems made available by the global governance systems of e-commerce and internet commercial transactions helps to establish questions of hard legality. The legality of Google's AdWords program in the Rosetta Stone litigations reflects the extent to which hard legal questions drive trademark representations at both the domestic and global levels, and how those hard-legal questions are addressed by both domestic and international law.

From that perspective, epistemic communities are integral in shaping legal arguments because of their ability to offer concrete legal analysis by submitting amicus briefs during litigation. Other trademark epistemic communities, such as MARQUES and ECTA, have also been active in filing briefs on behalf of their commercial stakeholders, and in this regard have added to the debate on the intersection of trademarks and international law.[165] However, it is the epistemic community of French Champagne producers representing holders of GIs that have exposed some of the fault lines of e-commerce disputes concerning international law. What sparks the legality test in both international law and e-commerce is the designation of the word "Champagne". The French want this term to only refer to champagnes that are produced in the Champagne

162. *Id.* at 700.

163. Rosetta Stone Ltd. v. Google, Inc., 676 F.3d 144 (4th Cir. 2012).

164. Brief of International Trademark Association as Amicus Curiae, Rosetta Stone Ltd. v. Google, Inc., No. 10-2007 (4th Cir. 2012).

165. *See* Kemp & Lynn Forsythe, *supra* note 160.

region of France. Of course, the challenge posed by this champagne debacle is that Californian wine producers, for example, may not find this easy to digest because of their commercial interests.[166]

Thus, the degrees to which private economic actors and/or states support the legalization of names for variations of trademarks and geographical indications is, to some extent, also a reflection of how the law treats any similar infringement that may occur on the internet. Some epistemic communities (as used in the context of this section to refer to the private economic interests representing the holders of intellectual property rights) have taken steps to create a truce between e-commerce platforms and members that use geographical indications online.[167] This has occurred with the Italian Association of GI Consortia (AICIG) and eBay, where a memorandum of understanding between the two seeks to alleviate the illegality of the use of geographical indications on the eBay platform.[168] But perhaps it is the use of the term "Bavaria" in e-commerce that captures from all three dimensions the arguments on legality that this section of the article seeks to develop – that is, this issue of legality from the perspectives of epistemic communities and domestic and international legal institutions, as also depicted in Figure 2, above. In Bavaria v. Bayerischer, the concern was over the GI "Bayerishces Bier" (Bavarian Beer).[169] However, the infusion of Italian and German domestic laws, transnational European law, and international law via a 1963 Agreement captures how geographical indications stand at the

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166. *But see,* Kemp & Forsythe, *supra* note 160; Tim Jay & Madeline Taylor, *A Case of Champagne: A Study of Geographical Indications*, 29 CORP. GOVERNANCE J 1 (2013); Demetra Makris, *Geographical Indicators: A Rising International Trade Dispute Between Europe's Finest and Corporate America*, 34 ARIZ. J. INT'L & COMP. L. 160, 179-181 (discussing American ambivalence towards GI of Champagne).

167. My discussion of geographical indications in this section is not meant to be exhaustive but rather to introduce a particular point in relation to how e-commerce and the question of *legality* are intertwined and the link to international law. For a general reading on the geographical indication's literature *see, e.g.*, DEV GANGJEE, RELOCATING THE LAW OF GEOGRAPHICAL INDICATIONS (2012); Kal Raustiala & Stephen Munzer, *The Global Struggle over Geographic Indications*, 18 EJIL 337 (2007); Michelle Agdomar, *Removing the Greek from Feta and Adding Korbel to Champagne: The Paradox of Geographical Indications in International Law*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 550 (2008); IRENE CALBOLI & NG-LOY WEE LOON, GEOGRAPHICAL INDICATIONS AT THE CROSSROADS OF TRADE, DEVELOPMENT AND CULTURE: FOCUS ON ASIA-PACIFIC (2017).

168. *See E-Commerce: The Protection of GIs on the Web* (Nov. 28, 2014), *available at* https://www.origin-gi.com/activities/policy-and-advocacy/248-regulatory-issues/8940-28-11-2014-e-commerce-the-protection-of-gis-on-the-web.html (last visited Nov. 15, 2020) (discussing the verified rights owner's program). *See generally*, German-Italian Agreement on the Protection of Indications of Provenance, Designations of Origin and other Geographical Indications of 23 July 1963 (Ger.-It., 1963) (BGBI 1965 II S. 157).

169. Case C-343/07, Bavaria NV v. Bayerischer Brauerbund eV, 2009 E.C.R. I-05491.

intersection of legality and the process of privatizing international law. This echos similar developments in the Havana Club rum dispute,[170] which concerned the source origin of rum production.

The two main international organizations that are responsible for intellectual property disputes within the confines of international law, the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO), approach dispute settlements in different ways. For the WTO, intellectual property disputes are adjudicated via the Dispute Settlement Body (DSB), the decisions of which are binding. The advantage of the WTO's DSB in intellectual property disputes is that the general characteristics of international law are applicable. This is not the case with the WIPO.

The WIPO's dispute settlement mechanism is mediation or arbitration, and while submission to WIPO's arbitration mechanism is binding, the outcome is not. WIPO's Mediation and Arbitration Center (Center) "offers . . . alternative dispute resolution (ADR) options . . . to enable private parties to settle their domestic or cross-border commercial disputes."[171] The operative phrases here are "private parties" and "commercial disputes," as these phrases indicate that state parties are excluded. Moreover, the resolution of domain name disputes and bad faith registration is no longer the primary function of the WIPO Center, although, since its founding in the late 1990s, the Center has administered over 41,000 cases relating to domain name disputes. In this regard, the WIPO Mediation and Arbitration Center is part of the broader rule of international law, wherein the market and commercial activities are provided with the legal certainty necessary to enable the underlying economic function of international law.

It is the existence of legal certainty that provides the operating space for epistemic communities to thrive and exercise authority over the development of international law, which has increasingly relied on private norms to respond to the different challenges that e-commerce and intellectual property pose to the global economy. Moreover, the network of private economic interests generally advances various procedures to

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170. Havana Club Holding, S.A. v. Galleon S.A., 203 F.3d 116 (2d Cir. 2000) (discussing whether rum produced in a foreign county could be labeled Havana club); *see also* Appellate Body Report, *United States-Section 211 Omnibus Appropriations Act of 1998*, WTO Doc. WT/DS176/AB/R (adopted Jan. 2, 2002).

171. *Alternative Dispute Resolution*, WIPO (2018), *available at* https://www.wipo.int/amc/en/ (last visited Nov. 16, 2020); *see also* Joyce A. Tan, *WIPO Guide on Alt. Disp. Resol. (ADR) Options for Intell. Prop. Offs. and Cts.*, WIPO (2018), *available at* https://www.wipo.int/edocs/pubdocs/ en/wipo_pub_guide_adr.pdf (last visited Nov. 16, 2020).

resolve online disputes for intellectual property in e-commerce. At the same time, the very process establishes a normative system of private justice and, parallel to the same sequence, private economic interests advocate that they are providing a form of public service.[172]

There is no doubt that, given the challenges of intellectual property in e-commerce, those private economic interests have moved beyond the domain of national legal standards and rules. The domain of contemporary e-commerce and legality is to fully embrace international legal techniques, procedures, and other methods for online dispute resolution in intellectual property. Even with this development, e-commerce enjoys hybrid normativity, at the same time relying on the legal certainty that both emerging national rules and traditional international rules provide. Thus, while national laws continue to ascend from the domestic paradigm of the state to that of the global paradigm, during that ascension a new normative framework on the globalization of national laws emerges. This includes private global norms and legal regulations, largely abetted by private economic interests, for a global system of law that is beyond hybridization,[173] and one of private authority where, within the global system, legal certainty is paramount to the effective function of modern international law.

V. FROM PRIVATE ORDERING TO COMMUNITY NORMS: TOWARDS THE FIRST ACT OF A CONCLUSION

Scholars have pointed out that, among other things, the participation of non-state actors in the global regulatory system forms part of a governance triangle, due in part to their agenda-setting activities.[174] This argument is appealing, and also has some resonance with my own approach and some of the arguments developed in this article. Thus, I will rely on the agenda-setting aspect of the governance triangle argument by Abbott and Snidal to frame my concluding argument. According to Abbott and Snidal, "agenda-setting"[175] is part and parcel of how non-state

172. *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); *see also* J.R. Hildenbrand, *A Normative Critique of Private Domain Name Dispute Resolution*, 22 J. MARSHALL J. COMPUTER & INFO. L. 625 (2004).

173. *See* REG. HYBRIDIZATION IN THE TRANSNAT'L SPHERE (Paulius Jurčys, Poul F. Kjaer, & Ren Yatsunami, eds., 2013) 71-98.

174. Kenneth Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State* in THE POL. OF GLOBAL REG. 64 (Walter Mattli & Ngaire Woods, eds.) (2009).

175. *Id.* "Agenda-setting requires an ability to capture attention, frame issues in politically powerful ways, gather and disseminate information, and formulate appropriate

actors advance policies and make regulatory changes at the international level. For purposes of my own analysis, I will discuss this task, re-christening it as "private-ordering". I am using the term private-ordering to refer to situations where epistemic communities are the actual agenda-setters in the law and governance of the internet. As a corollary to the task of agenda-setting, subsequent developments on the relationship with intellectual property rules at the international level are equally important to how private ordering is understood. In other words, private ordering is the genesis of a process that epistemic communities undertake to shape the emergence of rules to regulate internet activities as they relate to e-commerce, online dispute resolution, the role of intellectual property rights, and their broader implications for the global economic system.

The formal relationship the term private-ordering has with, for example, how private law incorporates issues of private ordering,[176] especially in relation to intellectual property,[177] suggests that any form of regulatory authority transcends both the state and private actors. My definition of private ordering should partially shield me from what private ordering actually means when discussed in different strands of legal literature.[178]

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ways to proceed . . . Agenda-setters must also have legitimacy; this will stem from perceptions of normative commitment, expertise, and independence from the targets of regulations."

176. *See, e.g.*, Steven Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319, 319 (2002) "The sharing of regulatory authority with private actors (i.e., private ordering) can occur in many ways." *See also*, Matthew Jennejohn, *The Private Order of Innovation Networks*, 68 STAN. L. REV. 281(2016); Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT'L L.J. 471 (2005).

177. *See, e.g.*, Reto Hilty, *Intellectual Property and Private Ordering in* ROCHELLE DREYFUSS & JUSTINE PILA (EDS) THE OXFORD HANDBOOK OF INTELL. PROP. L. (2018); Severine Dusollier, *Sharing Access to Intellectual Property through Private Ordering*, 82 CHI.-KENT L. REV. 1391 (2007); Yafit Lev-Aretz, *Copyright Lawmaking, and Public Choice: From Legislative Battles to Private Ordering*, 27 HARV. J.L. & TECH. 203, 210 (2013) (noting that: "Private ordering in copyright has manifested itself in three classes of interplays: (1) the user-industry relationship (e.g., digital locks on software and end-user license agreements), (2) the inter-industry relationship (e.g., collective rights management organizations and other joint ventures), and (3) the cross-industry relationship (e.g., business partnerships between rightsholders and broadband providers). While the deference to private ordering in user-industry and inter-industry settings has been widely tackled in legal commentary, private ordering in the cross-industry context has yet to be studied in detail").

178. Yafit Lev-Aretz, *Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering*, 27 HARV. J.L. & TECH. 203, 248 (2013) (highlighting the schisms in the academic literature on the scope of private ordering but has defined private ordering as "norms formulated by private parties using decentralized processes.") *See also*, Tehila Sagy, *What's So Private About Private Ordering?*, 45 L. & SOC'Y REV. 923 (2011) (discussing two bodies of literature the privatization-of-law model and the multiculturalist theory).

Thus, the central premise of my development of private ordering is that private ordering is the first step towards the actual realization of regulatory rules for internet governance and the role of intellectual property in the global system. In that regard, private ordering is a form of "informal norms"[179] with the capacity to influence and "provide an efficient effective mechanism to govern conduct."[180] Hence, it is anticipated that private ordering as a framework of informal rules will later generate and influence the other regulatory needs leading to formal international law rules for intellectual property rights.

In this context, the relevance of private ordering that I developed is that it forms the grundnorm of an epistemic community's belief about how the legal and regulatory landscape in e-commerce, internet governance, and intellectual property governance should develop. Furthermore, private ordering reflects how intellectual property rules should respond to the different private systems of rules and communities in global economic governance.[181] As shown in this article, those communities include the private actors in e-commerce where technical standardization is paramount. Moreover, other actors, including those relating to the evolution of norms for online dispute resolution, form part of this community. This does not mean that the community is limited to these examples, rather that these examples track with the discussions in this article.

The ability to frame private ordering through private community norms reflects the fact that the drivers of private ordering, epistemic communities, have sufficient power to conduct the other regulatory tasks attendant to international rules. Such regulatory tasks can be conducted in a manner that only engages the state or group of states as the formal lawmaking authority; on other occasions, the state lawmaking authority can be challenged by non-state actors.[182]

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179. Curtis Milhaupt & Mark West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41, 43 (2000).

180. *Id.*

181. *See also*, Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745, 1745 (1996).

182. On this latter claim, I am thinking of how a number of intellectual property owners and content producers were able to mount an opposition to the SOPA/PIPA copyright bills. *See* Stop Online Piracy Act (SOPA), H.R. 3261, 26 October 2011, bill introduced in the US House of Representatives, and Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PIPA), S.968, US Senate 12 May 2011. For a discussion *see*, Mike Belleville, *IP Wars: SOPA, PIPA, and the Fight Over Online Piracy*, 26 TEMPLE INT'L & COMP. L.J. 303; Michael Carrier, *SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements*, 11 NW. J. TECH. & IP L. (2013); Sandra Schmitz, *The US SOPA, and PIPA – A European Perspective*, 27 INT'L REV. L.,

Because intellectual property epistemic communities can operate in a decentralized process, they can "privatize the rule-making process"[183] that is essential to the content and form of the international rules in intellectual property that relate specifically to their beliefs and interests. The emergence of the Marrakesh Treaty in the WIPO[184] is an example of how an epistemic community can tailor international rules to its needs through my conception of private ordering.[185] Hence, taking another example of an intellectual property epistemic community such as the ICANN, that organization has been able to exert its powers and develop norms for the internet that in a way, as James Boyle argues, "exercise[s] regulatory power over the internet."[186]

What the genesis of private ordering demonstrates is that as epistemic communities enjoy success, two fundamental questions are often resolved at this initial stage: what should permissible rules consist of, and how can those rules contribute to the ideals of the community, especially through governance and enforcement? Because intellectual property rights are an area that comprises different private actors and consists of interactions at the global and national levels, the informal normative rules developed by epistemic communities contribute to the formalization of international rules. Therefore, the ability of private actors to develop private community norms and to reorient policy agendas that are geared towards the emergence of international rules are shaped largely based on the requirements of the actors and producers of intellectual property rights. The result is an increase in global

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COMPUTERS & TECH. 213 (2013); Annemarie Bridy, *Copyright Policymaking as Procedural Democratic Process: A Discourse-Theoretic Perspective on ACTA, SOPA, and PIPA*, 30 CARDOZO ARTS & ENT. L.J. 153 (2012); Melis Atalay, *Regulating the Unregulable: Finding the Proper Scope for Legislation to Combat Copyright Infringement on the Internet*, 36 HASTINGS COMM. & ENT. J. 167 (2014); Yafit Lev-Aretz, *Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering*, 27 HARV. J.L. & TECH. 203 (2013).

183. *See* Freeman, *supra* note 173, at 248.

184. Marrakesh Treaty to Facilitate Access to Published Works for Persons who Are Blind, Visually Impaired, or Otherwise Print Disabled (opened for signature 27 June 2013); *see also*, Freeman *supra* note 173, at 249 (arguing that agreements governing open-source software licenses are examples of private ordering as a result of efforts by the CCO).

185. *See* LAURENCE HELFER, MOLLY LAND. RUTH OKEDIJI & JEROME REICHMAN, THE WORLD BLIND UNION GUIDE TO THE MARRAKESH TREATY: FACILITATING ACCESS TO BOOKS FOR PRINT-DISABLED INDIVIDUALS (2017).

186. James Boyle, *A Nondelegation Doctrine for the Digital Age?*, 50 DUKE L.J. 1, 7 (2000) (explaining that "ICANN is a classic example of a private entity creating new rules in . . . law").

authoritative law that "tends to reflect economic power and private interests" based largely on "community values."[187]

Therefore, private ordering helps to determine how the rules that are adopted by states for global intellectual property governance are nurtured in the incubators of epistemic communities which will then initiate different processes for the production of informal rules and the rules that will eventually form international intellectual property law. Private ordering reflects the authority to create, frame, and nurture what constitutes the groundwork of mandatory action for other actors, such as states, to negotiate treaties for the development of international rules for intellectual property rights.

From a formal point of view, the necessity of private ordering for the needs of the international community allows for epistemic communities and states to familiarize themselves with the causes of action to adopt international regulatory instruments. Hence, the private ordering of community norms and standards not only helps generate international intellectual property rules but also functions as a "fall-back" barrier to prevent uncertainty, and allows solutions to problems that can arise at other stages in the adoption of international intellectual property rules.[188]

In the same way that private ordering helps to promote the protection of intellectual property rights[189] and helps determine how rules addressing copyright or other forms of intellectual property apply, then my conception of private ordering, as I demonstrated, as a genesis process (or agenda-setting in the Abbott and Snidal context) is significant for the emergence of international intellectual property rules. Private ordering not only opens the gates of authority to international rulemaking for epistemic communities, but it also legitimizes the role epistemic communities play in shaping the discourse and rulemaking content of international legal instruments.

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187. Oscar Schachter, *The Decline of the Nation-State and Its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 12 (1998) (stating that under private market conditions, the state gives way for the development of "non-state mechanisms" where "private rather than public international law rules prevail").

188. For constructive arguments in relation to the idea of "fall-back" within international law, *see* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 201-03 (2003) (developing a criterion of fall-back as interpretation of treaty norms and application of the context of other norms of international law). My usage of the term fall-back, in some ways, relates to "other norms" within the international law production context.

189. *See, e.g.*, Hilty, *supra* note 177; Freeman, *supra* note 178.

VI. CONCLUSION

This article demonstrated that the character of epistemic communities in the international legal order can be seen as part of the new living law of the world, wherein epistemic communities are effective participants in global norm production. Specifically, the article engaged in a normative discussion on how technical standardization and e-commerce norms and practices contribute to the internationalization of private activities in the legal sphere. It then demonstrated how epistemic communities are involved in the power and legality of intellectual property rules in different circumstances concerning e-commerce and online dispute resolution. Thus, through a systematic and analytical discussion, I argued that the character of epistemic communities in the international legal order can be seen as part of how authority leads to legalization and globalizes the production norms and normative rules. Given that various epistemic communities are disguised in the normative frame of their economic interests and practices, it is essential to see their activities as part of the paradigm of how new rules and laws in the global economic system emerge in relation to internet governance. Since intellectual property rules are crucial to this change, one can hardly deny that the private rights of intellectual property are changing the normative landscape of the global legal arena. One of the critical issues to note is that the changes are becoming more robust and noticeable due to intellectual property arbitration in tribunals within which international laws are used to settle disputes; and private intellectual property arbitration concerning trademarks, the plain packaging of cigarettes,[190] and patent utility doctrines.[191]

190. *See, e.g.*, Philip Morris Asia Ltd. v. Commonwealth of Australia, Case No. 20212-12, PCA Case Repository (2015).

191. Eli Lilly & Company v. Government of Canada, (2017), ICSID Case No. UNCT/14/2, Final Award.