

## “Keynesian” Shipping Containers?

### *Maritime Transnational Regulation before the Advent of “Neoliberalism”*

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Containers are the material representations of the rhizomatic movement of global capital that characterizes the post-West. They are a concrete symbol of the transnational imaginary they embody.<sup>1</sup>

At present [1992] we are living through a curious combination of the technology of the late twentieth century, the free trade of the nineteenth, and the rebirth of the sort of interstitial centres characteristic of world trade in the Middle Ages.<sup>2</sup>

#### 12.1 INTRODUCTION

Future observers will not hesitate in concluding that our age has been profoundly marked by the anxieties of the adjective “global.”<sup>3</sup> In law, history, ethnography, and other diverse fields of knowledge and practice, much ink has been spilled on what exactly does it mean to have a global perspective.<sup>4</sup> For better or worse, the relentless onslaught of what is understood as “globalization” rang the death knell of methodological nationalism across the social sciences: The nation-state has slowly, but surely, lost its privileged place as primal unit of the international system.<sup>5</sup>

<sup>1</sup> S. Hirsch, *Inhabiting the Icon: Shipping Containers and the New Imagination of Western Space* (2013) 48:1–2 *Western American Literature* 17.

<sup>2</sup> E. Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (1992), at 182.

<sup>3</sup> M. Lang, *Globalization and Its History* (2006) 78:4 *The Journal of Modern History* 899.

<sup>4</sup> In law, see G. Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in *Global Law without a State* (G. Teubner ed., 1997), 3–28. S. Merry, *Global Legal Pluralism and the Temporality of Soft Law* (2014) 46:1 *The Journal of Legal Pluralism and Unofficial Law* 108. In history, see S. Conrad, *What Is Global History?* (2016); T. Duve, *Global Legal History* (2017). In ethnography, see E. Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* (2013); E. Darian-Smith and P. McCarty, *The Global Turn: Theories, Research Designs, and Methods for Global Studies* (2017).

<sup>5</sup> A. Wimmer and N. Glick Schiller, *Methodological Nationalism and Beyond: Nation-State Building, Migration and the Social Sciences* (2002) 2:4 *Global Networks* 301; G. Vasilev,

In this vein, the (international) legal field has witnessed the emergence of an ever-growing body of literature that questions the traditional assumptions regarding the (state-centric) sources and processes that govern lawmaking in the international sphere. Thus, it appears that a classical approach concerned mainly with state consent can no longer explain – if it ever did – the complex regulatory dynamics of informality, normative pluralism, and fragmentation that occur in contemporary global governance.<sup>6</sup> Transnational law, a term coined by Jessup in the past century, seems to be more analytically precise than international law to categorize the way regulation at the world scale occurs nowadays.<sup>7</sup> In this spirit, international lawyers and their fellow interdisciplinary travelers have opened the “black box” of the state – daring to “disaggregate” its inner contents and de-reify its “univocity.”<sup>8</sup> This, in turn has diminished its relative importance vis-à-vis other actors in the international sphere, such as international organizations and even private actors.

Implicit in this narrative, however, lies an ambiguous assumption about the role of time in the transformations that occur in (international) law and society. This assumption revolves a seemingly banal question: what is globalization and when did it exactly occur? Was it in the nineties, as most early theorists of globalization tend to argue? Or, as historians suggested, was there a deeper *longue durée* in the genealogy of the processes of world-making?<sup>9</sup> But even if this was the case, when did this earlier and broader globalization occur?<sup>10</sup> If not the nineties, were then the seventies the pivotal decade where the “shock of the global” was first felt?<sup>11</sup> But what to make then of the pioneer global connections of the nineteenth century and its so-called first globalization?<sup>12</sup> And what shall we do if, as postcolonial scholars have argued, these different interpretations about the origins of globalizations have been dazzled by the

Methodological Nationalism and the Politics of History-Writing: How Imaginary Scholarship Perpetuates the Nation (2019) 25: 2 *Nations and Nationalism* 499.

- <sup>6</sup> See, inter alia, N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010); P. Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (2012); J. Pauwelyn, R. Wessel, and J. Wouters, (eds.), *Informal International Lawmaking* (2012); R. Liivoja and J. Petman, *International Law-Making: Essays in Honour of Jan Klabbers* (2014); T. Schultz, *Transnational Legality: Stateless Law and International Arbitration* (2014).
- <sup>7</sup> P. Jessup, *Transnational Law* (1956). See further P. Zumbansen, *The Many Lives of Transnational Law: Critical Engagements with Jessup’s Bold Proposal* (2020).
- <sup>8</sup> S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (1996); A. Slaughter, *A New World Order* (2005); J. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (2008).
- <sup>9</sup> For an introduction, see J. Osterhammel, Globalizations, in *The Oxford Handbook of World History* (J. Bentley ed., 2012), 89–104. See also B. Gills and W. Thompson (eds.), *Globalization and Global History* (2006); Conrad, *supra* note 4, at 97, 110–114.
- <sup>10</sup> For an overview of the historiography, see J. N. Pieterse, Periodizing Globalization: Histories of Globalization (2012) 6:2 *New Global Studies*.
- <sup>11</sup> N. Ferguson et al. (eds.), *The Shock of the Global: The 1970s in Perspective* (2010); D. Hellema, *The Global 1970s: Radicalism, Reform, and Crisis* (2019).
- <sup>12</sup> E. Hobsbawm, *The Age of Empire, 1875–1914* (1989); C. Bayly, *The Birth of the Modern World, 1780–1914: Global Connections and Comparisons* (2004).

spell of Eurocentrism, and instead one must go back to the Early Modern or even the Medieval periods to think about non-Western global connections?<sup>13</sup> Perhaps, as my decolonial Latin American colleagues have suggested, one could trace the start of globalization all the way back to the Caribbean encounters that happened in 1492.<sup>14</sup>

In this chapter, I do not aim to provide a definitive and comprehensive answer of how international legal scholars should engage with the “origins” of globalization or of “transnational law.”<sup>15</sup> Indeed, as Bloch reminds us, often the search for origins can mislead historians and laypeople alike into confusing causes and effects.<sup>16</sup> Instead, my much more modest contribution is to highlight that, for better or worse, international lawyers have overwhelmingly come to adopt one (out of many) interpretations about the beginnings of globalization: the so-called neoliberal late eighties.<sup>17</sup> While it is undeniable that the end of the cold war has brought unprecedented qualitative and quantitative changes in the way global integration occurs, it might also be a disservice to focus too much on the novelty of it all.<sup>18</sup> Or, to paraphrase Bloch again, one must not exaggerate the advantages of the present.<sup>19</sup> In fact, for a long time the state has often relied –willingly or not – on hybrid and private authorities to “govern in different sites, in relation to different objectives.”<sup>20</sup> Historians, to paraphrase Tuori, have long shown that the only accurate use of the adjective “Westphalian” is related to dogs, not states or world-systems.<sup>21</sup>

For this reason, in this chapter I invite the discipline to also interrogate the plethora of instances of private regulation and non-state lawmaking that predated the arrival of neoliberal globalization at the end of the twentieth century. To do so, I reconstruct the process through which private and public actors from the North

<sup>13</sup> S. Gunaratne, *Globalization: A Non-Western Perspective: The Bias of Social Science/ Communication Oligopoly* (2008) 2:1 *Communication, Culture & Critique* 60.

<sup>14</sup> E. Dussel, *Origen de La Filosofía Política Moderna: Las Casas, Victoria y Suárez (1514–1617)* (2005) 33:2 *Caribbean Studies* 35; W. Mignolo and A. Escobar (eds.), *Globalization and the Decolonial Option* (2013).

<sup>15</sup> On the impossibility (and perhaps unfeasibility) of such definition, see P. Zumbansen, *Transnational Law: Theories & Applications*, in *Oxford Handbook of Transnational Law* (P. Zumbansen ed., 2021), at 5.

<sup>16</sup> M. Bloch, *The Historian's Craft*, trans. P. Putnam (1992), at 24ff.

<sup>17</sup> M. Koskenniemi, *International Law as “Global Governance,”* in *Searching for Contemporary Legal Thought* (J. Desautels-Stein and C. Tomlins eds., 2017), 199–218.

<sup>18</sup> L. Winner, *The Whale and the Reactor: A Search for Limits in an Age of High Technology*, 2nd ed. (2020).

<sup>19</sup> Bloch, *supra* note 16, at 47.

<sup>20</sup> N. Rose, P. O'Malley, and M. Valverde, *Governmentality* (December 2006) 2:1 *Annual Review of Law and Social Science* 83, at 86. See also S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (2008).

<sup>21</sup> K. Tuori, *The Beginnings of State Jurisdiction in International Law until 1648*, in *The Oxford Handbook of Jurisdiction in International Law* (S. Allen et al. eds., 2019), 24–39. See *supra* note 6, at 27. See also B. Teschke, *The Myth of 1648: Class, Geopolitics, and the Making of Modern International Relations* (2003).

Atlantic competed within (and beyond) the International Organization for Standardization (ISO) to set the global standards for containerized maritime shipping in the mid-twentieth century. I argue that in this “Keynesian” epoch, the lines between the private and the public were as blurry as they seem in our contemporary regulatory dilemmas. To be sure, I do not claim there was anything distinctively “Keynesian” about shipping containers. My use of the adjective is meant to describe how they emerged in a period that the Western legal imagination has often associated with the dominance of a broad Keynesian compromise in macroeconomic management during the so-called *Les Trentes Glorieuses* (1945–1975), which was later upended by the general crisis of the seventies and the rise of “neoliberalism.”<sup>22</sup> This framing, I suggest, casts a shade of doubt on the narratives that center the novelty of private lawmaking. It highlights, instead, that we have much to learn from the long histories of “pre-neoliberal” non-state transnational regulation – of which maritime shipping is but merely one example. After the introduction already presented to the reader, I turn to the relative hegemony of the ‘globalization as a product of the nineties’ thesis in contemporary studies of transnational law-making and private governance (Section 12.2). Then, I turn to the concrete case of shipping containers as an example of “pre-neoliberal” transnational standardization (Section 12.3). Finally, I close with some concluding remarks on the importance of material “nuts and bolts” standards in global governance, at a time in which most attention seems to turn to the allure of immaterial, digital, or service-based standards (Section 12.4).

## 12.2 VISIONS OF GLOBALIZATION IN THE SCHOLARSHIP ON PRIVATE LAWMAKING

Despite the “almost infinite variety” of transnational law and its corresponding analyses,<sup>23</sup> there is a common trope in most of the recent scholarly interventions: a repetition of key words that denote the emergence of something new or the transformation of a previous state of affairs. As Steinitz puts it, regardless of the differences between different theories or approaches, one can detect an underlying sense of “increased urgency” in academic narratives.<sup>24</sup> Transnational legal norms or actors “have grown in prominence,”<sup>25</sup> are “increasingly frequent,”<sup>26</sup> or stem from an

<sup>22</sup> E. Hobsbawm, *Age of Extremes: The Short Twentieth Century* (1994), at 257–286, 403–432.

<sup>23</sup> Jessup, *supra* note 7, at 4.

<sup>24</sup> M. Steinitz, Transnational Legal Process Theories, in *The Oxford Handbook of International Adjudication*, (C. Romano, K. J. Alter, and Y. Shany eds., 2013), at 340.

<sup>25</sup> P. Delimatsis, Global Standard-Setting 2.0: How the WTO Spotlights ISO and Impacts the Transnational Standard-Setting Process (2018) 28 *Duke Journal of Comparative & International Law* 273.

<sup>26</sup> E. Partiti, Polycentricity and Polyphony in International Law: Interpreting the Corporate Responsibility to Respect Human Rights (2021) 70:1 *International and Comparative Law Quarterly* 133, at 134.

“evolving complex society.”<sup>27</sup> Instances of private lawmaking emerge out of the “progressive” interlinking of commerce or on the heels of certain rising technologies of communication or transport.<sup>28</sup> For instance, Berman links both the rise of human rights norms (which he pinpoints to a post–world war II constellation) and the end of the cold war in an overarching narrative arc of the erosion of traditional law throughout the twentieth century.<sup>29</sup> Graz, in turn, suggest the late eighties were the moment in which governance finally escaped from the narrow corridors of corporate management to become a global trend – a view that is shared by Delimatsis’ helpful introduction to this edited volume (“The Resilience of Private Authority in Times of Crisis,” Chapter 1).<sup>30</sup> To cite one last example, Zumbansen notes that “while the globalization of human and institutional, material and immaterial affairs is widely accepted to have prompted, inter alia, significant challenges for inherited conceptual frameworks of societal ordering, the contours of what will replace them remain nebulous at best.”<sup>31</sup>

But the rather ambiguous notion of globalization itself is hardly problematized in a historical fashion.<sup>32</sup> While interventions recognize that the phenomena of transnational and private governance is not entirely new, scholars tend to suggest we are standing on the verge of a threshold.<sup>33</sup> Perhaps the most explicit elaboration of this radical transformation has been offered by Pauwelyn, Wessel, and Wouters, in their oft-cited conclusion that the post–cold war formal lawmaking enthusiasm of the nineties has bled into a more complicated landscape of informal regulation in our post-national age.<sup>34</sup> This framing dovetails neatly with the contested history of the body of knowledge and practices that we often understand under the label of

<sup>27</sup> P. Zumbansen, Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism, in *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (G. Handl, J. Zekoll, and P. Zumbansen eds., 2012), at 55.

<sup>28</sup> U. Sieber, Legal Order in a Global World: The Development of a Fragmented System of National, International, and Private Norms (2010) 14:1 *Max Planck Yearbook of United Nations Law* 1.

<sup>29</sup> P. Berman, From International Law to Law and Globalization (2004) 43 *Columbia Journal Transnational Law* 485, at 555.

<sup>30</sup> J. Graz, *The Power of Standards: Hybrid Authority and the Globalisation of Services* (2019), at 31. On the rise of a new era of “Private Ordering 2.0,” see P. Delimatsis, “The Resilience of Private Authority in Times of Crisis” in this volume (Chapter 1).

<sup>31</sup> P. Zumbansen, Introduction: Transnational Law, with and beyond Jessup, in *The Many Lives of Transnational Law: Critical Engagements with Jessup’s Bold Proposal* (P. Zumbansen ed., 2020), at 21.

<sup>32</sup> F. Garcia, Globalization’s Law: Transnational, Global or Both? (2016) *Global Community: Yearbook of International Law and Jurisprudence* 31.

<sup>33</sup> A. Cutler, V. Haufler, and T. Porter (eds.), *Private Authority and International Affairs* (1999), at 4.

<sup>34</sup> J. Pauwelyn, R. Wessel, and J. Wouters, When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking (2014) 25:3 *European Journal of International Law* 733; N. Rajkovic, The Visual Conquest of International Law: Brute Boundaries, the Map, and the Legacy of Cartogenesis (2018) 31:2 *Leiden Journal of International Law* 267, at 276.

“neoliberalism.”<sup>35</sup> While Slobodian and other global historians have shown the long roots of this school of thought in the early twentieth century, few would deny that its heyday would come in the late eighties and in specially in the aftermath of the cold war.<sup>36</sup> Indeed, wouldn’t it make sense to date the rise of private rule-making precisely at the crossroads of this paradigm shift in the ways states and markets (and their relations) were understood in Western political thought?<sup>37</sup>

In this chapter, I do not want to create a straw person argument. It is undeniable that there is much truth to this framing. At the same time, following Winner and other proponents of the history of science and its cousin science and technology studies (STS), I want to take a step back before assuming the novelty of our neoliberal world.<sup>38</sup> Instead of seeing technology as a game changer per se, Winner would push us to see how seemingly unprecedented forms material and ideological techniques draw from the legacy of previous institutional arrangements.<sup>39</sup> While it is tempting to feel that our age has long surpassed the dilemmas of the previous century, a closer look into the historical record shows that many of the techniques of governance that we now associate with the emergence of private authority in the last decades have indeed long roots in the previous forms of regulatory imaginaries. Logistics, as we will see with more detail, was long a science closely related to military and public power before it became the realm of transnational private lawmaking.<sup>40</sup> Technical standards created by private transnational bodies, despite their recent salience, were an integral part of the nineteenth-century project of “governing the world.”<sup>41</sup> As Tzouvala (drawing from the work of the historian Pedersen) recently noted, international legal scholarship on the use of standards, indicators, and “international best practices” can learn much from the seemingly unrelated context of the interwar colonial mandates system of the League of Nations.<sup>42</sup> While the power of multinational corporations and their supply chains might seem unprecedented, our colleagues working on imperial history would be quick to point out that “company-states” have been a fundamental force in the

<sup>35</sup> G. Gerstle, *The Rise and Fall of America’s Neoliberal Order* (2018) 28 *Transactions of the Royal Historical Society* 241.

<sup>36</sup> Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2018); J. Klabbers, Book Review “Globalists: The End of Empire and the Birth of Neoliberalism” (2020) 31:1 *European Journal of International Law* 369. See also D. Leshem, *The Origins of Neoliberalism: Modeling the Economy from Jesus to Foucault* (2017); J. Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (2019).

<sup>37</sup> S. Strange, *States and Markets* (2015). See also A. Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (2003).

<sup>38</sup> Winner, *supra* note 18.

<sup>39</sup> L. Winner, *History of Technology Contextualized: Technology’s Storytellers* (1986) 231:4739 *Science* 750.

<sup>40</sup> D. Cowen, *The Deadly Life of Logistics: Mapping Violence in Global Trade* (2014).

<sup>41</sup> M. Mazower, *Governing the World: The History of an Idea, 1815 to the Present* (2013), at 65–93.

<sup>42</sup> N. Tzouvala, *Capitalism as Civilisation: A History of International Law* (2020), at 106–107. See also S. Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (2015).

making of the modern world.<sup>43</sup> While Delmitatis convincingly argues that enormous transformations have occurred in the domain of privately led normative constellations in the last decades, in this chapter, I take his caveat that one must not forget that not all of this means that non-state regulatory orders are –themselves – a “recent phenomena.”

Indeed, as Zumbansen himself noted,

it is important to mention that a growing segment of transnational law scholarship points to the fact that the questions raised by transnational law resonate on many levels with those already raised by critical legal scholars and, in particular, legal sociologists and legal anthropologists at earlier times in the context of domestic [and colonial] law.<sup>44</sup>

For these reasons, my aim in this chapter is to push transnational legal scholars to look for traces of our contemporary fascinations in previous times and places, especially those in which the silhouette of territorial state is less visible: cases of colonial administration and the high seas.<sup>45</sup> I suggest that we might be able to understand better the resilience of private authority and lawmaking if we place their normative activity in the a broader chronological and spatial framework of analysis.<sup>46</sup> In what follows, I provide a modest example of the role of private and non-public actors in the creation of maritime shipping standards in the mid-twentieth century, long before the advent of neoliberalism (broadly understood). I suggest this is only but an initial sketch of a history that remains to be written about the domestication of land and sea by private (or privatized) visions of world ordering in the second half of the twentieth century.<sup>47</sup> To do so, I draw from the rich literature on

<sup>43</sup> J. Barreto, *Cerberus: Rethinking Grotius and the Westphalian System*, in M. Koskeniemi, W. Rech, and M. Jiménez *International Law and Empire: Historical Explorations* (2017); A. Phillips and J. Sharman, *Outsourcing Empire: How Company-States Made the Modern World* (2020).

<sup>44</sup> Zumbansen, *supra* note 31, at 27.

<sup>45</sup> On the later, see R. Mawani, *Across Oceans of Law: The Komagata Maru and Jurisdiction in the Time of Empire* (2018); L. Khalili, Keynote Address, Millennium 2020 Online Conference, October 22, 2020, [www.millennium2020.co.uk/recordings?fbclid=IwARojaXc3NCLuMj-Vf3cgKXtvEnF\\_ZrIvOkZC6k\\_VBI\\_Nsidj5aJvH\\_5xidM](http://www.millennium2020.co.uk/recordings?fbclid=IwARojaXc3NCLuMj-Vf3cgKXtvEnF_ZrIvOkZC6k_VBI_Nsidj5aJvH_5xidM). On the former, see L. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (2002), at 127–166. This follows Delimitatis’ invitation (“The Resilience of Private Authority in Times of Crisis,” Chapter 1) to engage with forms of private regulation that become borderless.

<sup>46</sup> Following the pathbreaking work done by scholars of International Organizations. See S. Block-Lieb and T. Charles Halliday, *Global Lawmakers: International Organizations in the Crafting of World Markets* (2017), at 228.

<sup>47</sup> For a more extensive discussion, see D. R. Quiroga-Villamarín, *Normalising Global Commerce: Containerisation, Materiality, and Transnational Regulation (1956–68)* (2021) 8:3 *London Review of International Law* 457. The following section draws from this article, which in turn is a revised version of a chapter of my MA dissertation, *Containing Globalization: A Material History of Transnational Regulation through Shipping Containers*, submitted in 2020 at the IHEID.

containerization that has emerged in neighboring disciplines to augment our understandings of transnational regulation.<sup>48</sup>

### 12.3 KEYNESIAN STANDARDIZATION? CONTAINER STANDARDIZATION BEFORE THE HEYDAY OF NEOLIBERALISM

To begin, a word or two on the world of pre-containerized shipping is in order, so the reader can better grasp the sociotechnical transition that occurred in just a couple of decades. Indeed, if one looks today at what George has called our “mechanized, inhuman docks,”<sup>49</sup> it is difficult to imagine these places as bustling *entrepôts* of human interaction. For instance, as its Port Authority itself recognizes and celebrates, Hamburg has been “transformed dramatically” since the first container ship arrived on their docks on May 31, 1968.<sup>50</sup> Before that, in crowded and dense spaces, the movement of cargo and the conditions of labor were negotiated at every twist and turn. For this reason, Sekula argues that the European ports of the interwar era should be remembered as unstable melting pots of “overlapping cosmopolitanisms, both bourgeois and proletarian.”<sup>51</sup> Appalling work conditions converted these docks into spaces of contention, in which disputes between labor and capital slowed down the operations of an already lethargic industry. Tight relationships between kin and a particular understanding of the nature of the dangers of this industry gave rise to a distinct “maritime masculinity” working class culture.<sup>52</sup>

For our present discussion, what matters is that all goods were transported as break-bulk cargo, which can be “characterized by its multiplicity and diversity [as] cargo arrive[d] in any number of shapes, sizes, and configurations.”<sup>53</sup> This, of course, required “swarms of workers [that] clambered up gangplanks with loads on

<sup>48</sup> See, for an overview of the literature, F. Broeze, *The Globalisation of the Oceans: Containerisation from the 1950s to the Present* (2000); B. Cudahy, *Box Boats: How Container Ships Changed the World* (2006); T. Birtchnell, S. Savitzky, and J. Urry (eds.), *Cargomobilities: Moving Materials in a Global Age*, Changing Mobilities (2015); L. Hoovestel, *Globalization Contained: The Economic and Strategic Consequences of the Container* (2016); A. Klose, *The Container Principle: How a Box Changes the Way We Think* (2015); M. Levinson, *The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger*, 2nd ed. (2016). For a different perspective, see A. Sekula and N. Burch, *The Forgotten Space: Notes for a Film* (2011) 69 *New Left Review* 263; A. Sekula, *Fish Story*, 3rd ed. (2018).

<sup>49</sup> R. George, *Deep Sea and Foreign Going: Inside Shipping, the Invisible Industry That Brings You 90% of Everything* (2013), at 29.

<sup>50</sup> Port of Hamburg, Anniversary “50 years of Containers in Hamburg” in the World Wide Web (May 15, 2018), [www.hafen-hamburg.de/en/news/anniversary-50-years-of-containers-in-hamburg-in-the-world-wide-web-35793](http://www.hafen-hamburg.de/en/news/anniversary-50-years-of-containers-in-hamburg-in-the-world-wide-web-35793).

<sup>51</sup> A. Sekula (ed.), *Fish Story*, 2nd English ed. (2002), at 133.

<sup>52</sup> D. Williams, Recent Trends in Maritime and Port History, in *Struggling for Leadership: Antwerp-Rotterdam Port Competition between 1870–2000*, Contributions to Economics (R. Loyen, E. Buyst, and G. Devos eds., 2003), 11–26.

<sup>53</sup> Cudahy, *supra* note 48, at 9.

their backs or toiled deep in the holds of ships, stowing boxes and barrels in every available corner.”<sup>54</sup> For this reason, maritime shipping demanded a copious amount of workers, both when it comes to sailors and stevedores (also called dockers in the United Kingdom, wharfies in Australia, or longshoremen in the United States). What is more, the packing, loading, and delivery of cargo took quite some time, which entailed that vessels could spend more time at port than at the high sea. This “colorful chaos of the old time pier,” in which workers, cargo, and crewmates of all places swelled in spatially dense locales seems almost foreign in comparison with today’s automatized ports.<sup>55</sup> The rise of containerized maritime trade – a revolution that occurred across several decades and regions of the globe – can only be understood in the backdrop of the crisis and collapse of this previous regulatory imagination of world ports.

In sum, this fragmented system of break-bulk cargo did not allow for standardized practices, which in turn implied that cargo loads, working conditions, and ship sizes were negotiated at every loading, departure, and arrival. In fact, laborers did not even have a fixed or guaranteed schedule of work. Across the North Atlantic, the turns of employment were adjudicated each dawn following a rather irregular practice called the “pick-up,” “shape-up,” or “scramble.” Thus, even in one country, ports worked under very different conditions. One example of this is the variety of jurisdictional approaches, regulations, and strategies pursued by organized labor in one coast of the United States compared to the other.<sup>56</sup>

Another important issue was the tight connection between the (private) merchant navy and the (public) military-industrial complex. One must note that the concept of the “merchant navy” itself was only coined amidst the interwar fears of the return of a total war.<sup>57</sup> With the rise of oil and diesel power, naval strategy demanded “maritime time, previously unpredictable, [to be submitted] to a new metronomic industrial regularity.”<sup>58</sup> With the cold war looming over the horizon, North Atlantic elites realized that it was important to maintain a robust and reliable national private fleet that could be temporarily enlisted in the support of the war effort if needed.<sup>59</sup> In other words, maritime policy was strongly connected with the fears and anxieties of national security concerns, and private actors were expected to act taking into account this national interest rather than the pure maximization of profit. Of course, there were exceptions to this trend, especially in the industry of oil tanking, where some rogue companies were avoiding these national regulations by listing their ships

<sup>54</sup> Levinson, *supra* note 48, at 20.

<sup>55</sup> *Ibid.*, at 7.

<sup>56</sup> *Ibid.*, at 135–169.

<sup>57</sup> J. McDermott, Total War and the Merchant State: Aspects of British Economic Warfare Against Germany, 1914–16 (1986) 21:1 *Canadian Journal of History* 61.

<sup>58</sup> Sekula, *supra* note 51, at 108.

<sup>59</sup> Cowen, *supra* note 40, at 4. See also A. Tooze, *The Deluge: The Great War and the Remaking of the Global Order, 1916–1931* (2015), at 35.

in the registry of another (laxer) state: a practice we now call “flags of convenience.” Sekula and Khalili have shown that these unorthodox practices later became a template for containerships in the late eighties.<sup>60</sup> However, in the fifties and sixties, public and private actors in the shipping field still saw their *métier* as an extension of national maritime war policy.

In exchange, North Atlantic states provided generous subsidies and enacted protectionist regulations to strengthen their domestic seafaring industries. In the United States, for example, the 1916 Shipping Act, the 1920 Jones Act, and the Marine Act of 1936 “combined a New Deal interest in invigorating the nation’s dormant industrial base with a concern for future [military] international engagements.”<sup>61</sup> While they required companies to use domestic captains, crews, and ships for all domestic trade, they rewarded their loyalty with discounted prices on wartime ships and public assistance for the creation of new models. Even if these measures did not apply for international trade, a similar mindset prevailed on the high seas. As Broeze reminds us, a transnational network of commodity and bulk conference maintained the stability of prices in transatlantic shipping.<sup>62</sup> While Hoovestall assumes that containerization has, from its very beginnings, implied a (neo)liberal challenge to state sovereignty and its regulatory overreach.<sup>63</sup> I argue that this reading fails to capture the enormous dependence of early (and even contemporary) containerized trade on state subsidies, international trusts, and other non-market mechanisms.

It was in this context of a union between maritime trade and war policy and the irregularity of break-bulk cargo that the owner of a US trucking company first thought of linking sea and land in a single transport chain. While some companies had tried loading automobiles and trailers into ships (a technique that is now called roll-on & roll-off: ro/ro), the owner of this North Carolina trucking company, the magnate Malcolm McLean, wanted to maximize the amount of cargo per ship. He suggested removing the chassis of the truck and leaving only a box filled to the brim with goods on the ship’s deck. After acquiring a peripheral steamship firm (renamed Sea-Land), McLean had to remove himself from the chair of his previous hauling company, to avoid contravening the regulations of the US Interstate Chamber of Commerce.<sup>64</sup> In what has been called an “unprecedented piece of financial and legal engineering,” he pursued a leveraged buyout with a loan delivered by the

<sup>60</sup> Sekula, *supra* note 51, at 134. See also L. Khalili, Tankers, Tycoons, and the Making of Modern Regimes of Law, Labour, and Finance, Aga Khan Program Lecture, April 13, 2020, [www.gsd.harvard.edu/event/laleh-khalili-tankers-tycoons-and-the-making-of-modern-regimes-of-law-labour-and-finance/](http://www.gsd.harvard.edu/event/laleh-khalili-tankers-tycoons-and-the-making-of-modern-regimes-of-law-labour-and-finance/).

<sup>61</sup> Cudahy, *supra* note 48, at 3.

<sup>62</sup> Broeze, *supra* note 48, at 72.

<sup>63</sup> Hoovestall, *supra* note 48, at 3. Compare with Cudahy, *supra* note 48, at 174. See further M. Mazzucato, *The Entrepreneurial State: Debunking Public vs. Private Sector Myths* (2015).

<sup>64</sup> Cudahy, *supra* note 48, at 24.

National City Bank (now Citibank) to buy a bigger shipping firm: Waterman.<sup>65</sup> Then, he bought (through a subsidized government program) a couple of old World War II-era oil tankers, which he adapted to make the pioneer vessels of containerization. Instead of seeing McLean as a lone private entrepreneur, I argue that one must note his dependence on public subsidies and other elements of the regulatory landscape of the mid-fifties.

In his quest, McLean enlisted the help of an engineer named Keith Tantlinger from Brown industries (based in Spokane, Washington) to design the first modern shipping containers. These novel boxes could be stacked up to two when placed on a ship, travel by train, or fit in a chassis pulled by a truck, Tantlinger suggested a length of thirty-three feet just because the available space aboard the refitted oil tankers was divisible by thirty-three, making these new boxes at least seven times bigger than all previous experiments. The first container-carrying ship left port in New York in 1956, signaling the start of containerized trade on the US east coast. On the west coast, a rival company called Matson sailed its first hybrid ship in 1958, which was quickly followed by its first fully containerized ship in 1960. For Broeze, this was the threshold of a new decade in which “the fundamentals of the new system were determined, on the basis of which containerization during the 1970s could spread all over major trade routes of the world.”<sup>66</sup>

Before this global expansion could take flight, the “early days of containerization . . . were plagued by the kind of format war familiar to historians of science: differences in widths, interlocking methods, and internal as well as external specifications generated turbulence.”<sup>67</sup> In 1957, McLean had used a slightly bigger model of thirty-five-foot long containers, as this was the maximum length of trucks allowed by the state of Pennsylvania. Over on the west coast, Matson instead opted to carry out an “extensive engineering analysis” that revealed that twenty-four feet was the best length for the narrow Hawaiian roadways, which their business model wanted to conquer. Moreover, after the Korean War, the US Army had been using ten-foot “Conex” boxes. With the purpose of calming the standards wars raging between overlapping regulatory authorities and competing companies, the US Maritime Administration (MarAD) created a panel in 1958 tasked with the creation of universal sizes for containers. The same year, the American Standards Association (ASA) (renamed to the American National Standards Institute [ANSI] in 1969), a private nonprofit organization, also created a task force with the same aim. Then the National Defense Transportation Association also demanded a seat at the table. The stage was set for a competition between different visions of (self-) regulation by private and public actors. I suggest we see this confrontation as an early case of what Delimatsis identifies as instances of “voluntary economic

<sup>65</sup> Levinson, *supra* note 48, at 60.

<sup>66</sup> Broeze, *supra* note 48, at 28.

<sup>67</sup> C. Mutlu, Containers, in *Making Things International* (M. Salter ed., 2015), at 69.

activism.” Each transport operator sought to cloak their private – and even often patented – standards with a stamp of public approval, thus setting the industry-wide norms of conduct. While the old system of maritime trade was not, yet, in crisis, private and public actors quickly understood that the potential of standardized containerized trade could create a “critical juncture” to reshape the rules of the game.<sup>68</sup>

In this context, MarAD created two expert commissions (on dimensions, construction, and fittings) tasked with endorsing “the principle of standardization of container sizes for the United States Merchant Marine.”<sup>69</sup> This was not a minor issue, because only the ships that accommodated standardized containers could be allocated public “differential subsidie[s], mortgage insurance or other form of Government aid.”<sup>70</sup> This can be seen as a pioneer case of “free riding of private ordering”: non-state actors benefit from state legitimacy and even public subsidies without assuming the political costs of their outward role as standard-makers. These norms, as Delimatsis argues, function “in the shadow of the state” but still have a very heavy weight in the sliding scale of bindingness due to their function as gatekeepers to the market or to public aid.<sup>71</sup>

Due to the importance of these standards, it quickly became clear that creating a single universal size would not be easy, these committees instead tried to make a “modular family” of containers. In their proceedings, they argued that they “would have to be guided mainly by domestic requirements with the hope that foreign practice would gradually conform to our standards.”<sup>72</sup> Hence, they settled on a width of eight feet, as this was the average dimension in US regulations (whereas some European railroads and highways had a limitation of seven feet). The question of length, however, proved more controversial: as we have seen, the shipping companies of the east coast tended to prefer longer containers (thirty-five feet) whereas west coast firms would have preferred a length of twenty-four feet. As a compromise, MarAD suggested a modular family based on multiples of eight: eight feet, sixteen feet, twenty-four feet, thirty-two feet, and forty feet.<sup>73</sup>

On the other hand, also in 1958, ASA had created a Materials Handling Sectional Committee (MH-5). This committee was composed of several subcommittees, one

<sup>68</sup> See P. Delimatsis, “The Resilience of Private Authority in Times of Crisis” in this volume (Chapter 1).

<sup>69</sup> Congress of the United States, Committee on Standardization of Van Container Dimensions, Minutes of 18 November 1958, in *Standardization of Containers: Hearings before the Subcommittee on Merchant Marine and Fisheries of the Committee on Commerce of the Senate* (1967), at 253.

<sup>70</sup> *Ibid.*, 254.

<sup>71</sup> P. Delimatsis, “The Resilience of Private Authority in Times of Crisis” in this volume (Chapter 1).

<sup>72</sup> Congress of the United States, *supra* note 69, 254.

<sup>73</sup> *Ibid.*, 255.

of them tasked with “van” containers.<sup>74</sup> This body suggested instead a modular family of twelve feet, seventeen feet, twenty feet, twenty-four feet, thirty-five feet, and forty feet. Against them both, the National Defense Transportation Association (which represented firms handling military cargo, without participation from “civil” shipping or trucking companies) instead pushed for the adoption of a system comprising lengths of multiples of ten feet (to facilitate integration with the Army’s Conex format).<sup>75</sup> In the midst of this dispute, the chairperson of ASA’s MH-5 surprisingly agreed with the military cargo companies’ standards and argued for the elimination of the twenty-four foot and thirty-five foot sizes and to instead adopt a modular family of ten feet, twenty feet, thirty feet, and forty feet.<sup>76</sup> In “three critical meetings” that occurred in late 1959, this proposal was eventually ratified.<sup>77</sup> This left the two early proponents, Sea-Land and Matson, with abnormal sizes compared to the agreed upon standards. While they would try to overturn these sizes throughout the sixties (eventually raising their complaints against the ASA all the way up to the US Congress), their ultimate defeat meant that standardization helped latecomers “gain at the expense of the pioneers.”<sup>78</sup>

This struggle in the United States ultimately proved to be only a dress rehearsal for a later global dispute that began when, in 1961, the ISO created its own committee for the standardization of containers (chaired by the ASA).<sup>79</sup> As Vince Gray (who worked in the US Merchant Marine Academy, the ASA, the US Navy, the US delegation to ISO, and ISO itself) reminds us, when ASA brought their case before the ISO for the creation of an ISO committee on container standards, they did so because they wanted to globalize their national formula.<sup>80</sup> The assigned committee, Technical Committee 104, would have its inaugural meeting in New York (1961),

<sup>74</sup> ASA-MH5 Van Container Subcommittee Meeting – February 25, 1959, cited in Congress of the United States, *Ocean Cruise Vessels: Hearings before the Subcommittee on Merchant Marine and Fisheries of the Committee on Commerce of the Senate* (1967), at 63.

<sup>75</sup> Congress of the United States, Minutes of the September 11 1959 Meeting of the NDTA Special Subcommittee on Containerization and Standardization, in *Standardization of Containers* (1967), at 329.

<sup>76</sup> Levinson, *supra* note 48, at 181.

<sup>77</sup> Congress of the United States, *supra* note 69, at 63–65.

<sup>78</sup> Levinson, *supra* note 48, at 182.

<sup>79</sup> On the ISO and its role in Global Governance, see K. Hallström, *Organizing International Standardization: ISO and the IASC in Quest of Authority* (2004); W. Higgins and K. Hallström, Standardization, Globalization and Rationalities of Government (2007) 14:5 *Organization* 685; K. Hallström and W. Higgins, International Organization For Standardization, in *Handbook of Transnational Economic Governance Regimes* (C. Tietje and A. Brouder eds., 2009), 201–211; J. Koppell, International Standards Organization, in *Handbook of Transnational Governance: Institutions and Innovations* (T. Hale and D. Held eds., 2011), 289–295; P. Delimatsis (ed.), *The Law, Economics and Politics of International Standardisation* (2015); Gray, *supra* note 30. See further S. Bijlmakers, “The International Organization for Standardization: A Seventy-Five-Year Journey Toward Organizational Resilience” in this volume (Chapter 13).

<sup>80</sup> Cited in International Organization for Standardization (ISO), *Friendship among Equals: Recollections from ISO’s First Fifty Years* (1997), at 40.

followed by other meetings in France (1964), Germany (1964), The Netherlands (1965), London (1967), and the USSR (1967), and it would adopt its first global standard, ISO 668, in 1968. In 2020, this standard has just been updated for the seventh time, and it has now been joined by a wide variety of ISO standards on shipping containers.<sup>81</sup> It would be too simplistic, however, to tell this story as if it were simply a US imposition on the rest of the world.<sup>82</sup> Klose aptly noted that Kurt Eckelmann (the Hamburg-based shipping magnate who chaired the ISO’s subcommittee on container sizes) pushed for the ASA standards due to the profound divisions among the European delegations (and the absence of the global south at the negotiation table).<sup>83</sup>

For this reason, it would be more precise to narrate the ISO negotiation process as a long dispute not only between national preferences but also among the different transportation philosophies of shipping, trucking, and train executives from all around the North Atlantic region. Length and sizes were not the only thorny questions at hand. While Sea-Land had initially threatened to sue the firms that followed their interlocking designs, McLean and Tantlinger eventually permitted royalty-free use of their corner castings and twist locks.<sup>84</sup> At the end of the process, the 1967 draft forwarded by the ISO to its member bodies for review included three accepted series of sizes, of which only Series 1 became a universal industry standard.<sup>85</sup> According to this model, boxes should comply with a uniform height and width of eight feet (or 2,435 millimeters) and could have lengths of forty feet (12.192 meters), thirty feet (9.144 meters), twenty feet (6.096 meters), or ten feet (3.048 m).<sup>86</sup> These new sizes eventually became the “universal yardstick of the brave new world of containerisation.”<sup>87</sup> Ever since, the acronym TEU (twenty-foot equivalent unit) became a cornerstone of the new universal language of the maritime trade. The later global (and perhaps neoliberal) development of the containerization only became possible due to these seemingly banal normalized series of material practices and discursive knowledge that entrench a particular socio-technical imaginary of world commercial integration.<sup>88</sup>

<sup>81</sup> See, e.g., details on the ISO website, [www.iso.org](http://www.iso.org), ISO 668, Series 1 Freight Containers.

<sup>82</sup> Cited in ISO, *supra* note 80, at 42.

<sup>83</sup> Klose, *supra* note 48, at 51.

<sup>84</sup> Levinson, *supra* note 48, at 186–187.

<sup>85</sup> ISO, *supra* note 80, at 42.

<sup>86</sup> Congress of the United States, *supra* note 69, at 314–315.

<sup>87</sup> Broeze, *supra* note 48, at 15.

<sup>88</sup> M. Foucault, *Abnormal: Lectures at the Collège de France 1974–1975*, trans. G Burchell (2003), at 50. On the notion of socio-technical imaginaries, see S. Jasanoff and S. Kim, Containing the Atom: Sociotechnical Imaginaries and Nuclear Power in the United States and South Korea (2009) 47:2 *Minerva* 119; S. Jasanoff, Future Imperfect: Science, Technology, and the Imaginations of Modernity, in *Dreamscapes of Modernity: Sociotechnical Imaginaries and the Fabrication of Power* (S. Jasanoff and S. Kim eds., 2015), 1–33; S. Jasanoff, Subjects of Reason: Goods, Markets and Competing Imaginaries of Global Governance (2016) 4:3 *London Review of International Law* 361.

#### 12.4 CONCLUDING REMARKS: MATERIAL STANDARDS IN GLOBAL GOVERNANCE

In their pathbreaking history of global standards, Yates and Murphy argue that we could periodize the creation of transnational engineering norms in at least three waves.<sup>89</sup> While they recognize the undeniable importance of the “third wave” that emerged in the late eighties,<sup>90</sup> they insist on the pioneer efforts of the late nineteenth century and the historical relevance of the processes that led to the creation of standards for a global market in the sixties and seventies.<sup>91</sup> In my view, international legal scholars have tended to focus mostly on the (undeniably important) actors and events of this third wave, paying little heed to the longer history of technical standardization.<sup>92</sup> In a way, this is entirely understandable – the third wave standards seem to deal with cutting-edge issues of social regulation that intersect with certain traditional legal concerns, like corporate social responsibility or environmental protection.<sup>93</sup> Most importantly, the rise of the service economy has led scholars to focus their attention on the immaterial and digital “containers” that underpin global commerce today, instead of the sturdy old boxes that remind us more of the technological feats of yesteryear.<sup>94</sup>

Instead, I conclude this chapter with a plea for the interrogation of “old twentieth century” technological devices, especially their material implications. As I have explored more elsewhere, in the last decades across the social sciences and the humanities there have been important calls to reengage with the materiality of the social world, in the wake of the critique of the fascination of our intellectual age with discourse.<sup>95</sup> Slowly but surely, even our discipline has come up to speed with this “new materialist” perspective that comes from feminist social theory and the history of science, leading to new studies of the material practices, objects, and infrastructures of global governance.<sup>96</sup> But, as I have argued in the past, one of the

<sup>89</sup> J. Yates and C. Murphy, *Engineering Rules: Global Standard Setting since 1880* (2019).

<sup>90</sup> *Ibid.*, at 239–323.

<sup>91</sup> *Ibid.*, at, respectively, 17–126, 158–189.

<sup>92</sup> For a brief overview, see A. B. Villarreal, *International Standards and the Agreement on Technical Barriers to Trade* (2018), at 8.

<sup>93</sup> J. Clapp, The Privatization of Global Environmental Governance: ISO 14000 and the Developing World (1998) 4:3 *Global Governance* 295; S. Bijlmakers and G. Van Calster, You’d Be Surprised How Much It Costs to Look This Cheap! A Case Study of ISO 26000 on Social Responsibility, in *The Law, Economics and Politics of International Standardisation* (P. Delimatsis ed., 2015), 275–310.

<sup>94</sup> Graz, *supra* note 29, at 55.

<sup>95</sup> D. Quiroga-Villamarín, Domains of Objects, Rituals of Truth: Mapping Intersections between International Legal History and the New Materialisms (2020) 8:2 *International Politics Reviews* 129.

<sup>96</sup> L. Eslava and S. Pahuja, Between Resistance and Reform: TWAIL and the Universality of International Law (2011) 3:1 *Trade, Law and Development* 103; M. Chiam et al., History, Anthropology and the Archive of International Law (2017) 5:1 *London Review of International Law* 3; J. Hohmann, The Treaty 8 Typewriter: Tracing the Roles of Material Things in

limitations of these first waves of new materialist interventions has been their fidelity to “traditional” state and consent-centered understandings of regulation. As Pottage has argued in the case of new materialists approaches to domestic law, often our work has been “too indulgent of the lawyer’s sense of the law.”<sup>97</sup> Perhaps we have been caught under Article 38’s specter of sources,<sup>98</sup> in our studies of legal documents, rituals, and courts.

For this reason, the materiality of standards (and the standardization of materiality) remains a relatively unexplored and promising area for further cross-fertilization between new materialist approaches and a transnational law perspective. This chapter, with its incipient exploration of the little-known history of material standards in the history of maritime commerce is only but a snapshot of the many instances the relation between (private) expertise and physical and technical infrastructures colluded to create socio-technical imaginaries of world ordering. If we are, indeed, living in an era of “Private Ordering 2.0,” perhaps it might be helpful to unearth the blueprints of previous hybrid regulatory constellations that preceded the age of the “territorial” and “public” nation-state. In hindsight, such an age might appear as a rather short interlude in a longer span of time marked by “private” and “extraterritorial” forms of global ordering.<sup>99</sup>

Imagining, Realising, and Resisting Colonial Worlds (2017) 5:3 *London Review of International Law* 371; D. Joyce and J. Hohmann, Introduction, in *International Law’s Objects*, (J. Hohmann and D. Joyce eds., 2018), 1–11; B. Kingsbury, Infrastructure and InfraReg: On Rousing the International Law “Wizards of Is” (2019) 8:2 *Cambridge International Law Journal* 171; J. Hohmann and D. Joyce, Material Pasts and Futures: International Law’s Objects (July 1, 2019) 7:2 *London Review of International Law* 283. See also D. Quiroga-Villamarín, Book Review: *International Law’s Objects* (2021) 21:1 *Melbourne Journal of International Law* 236.

<sup>97</sup> A. Pottage, *The Materiality of What?* (2012) 39:1 *Journal of Law and Society* 167, at 170.

<sup>98</sup> *Of the Statute of the International Court of Justice*. See further R. Parfitt, *The Spectre of Sources* (2014) 25:1 *European Journal of International Law* 297.

<sup>99</sup> D. R. Quiroga-Villamarín, *Vicarius Christi: Extraterritoriality, Pastoral Power, and the Critique of Secular International Law* (2021) 34:3 *Leiden Journal of International Law* 629, at 641–642. See also N. Krisch, *Framing Entangled Legalities beyond the State*, in *Entangled Legalities Beyond the State* (N. Krisch ed., 2021), at 7–11.

