RBPI

Revista Brasileira de Política Internacional

ISSN 1983-3121

http://www.scielo.br/rbpi

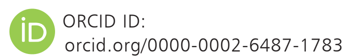
Monetary impacts and currency wars: a blind spot in the discourse about Transnational Legal Orders

DOI: http://dx.doi.org/10.1590/0034-7329201600114

Rev. Bras. Polít. Int., 60(1): e006, 2017

Marcus Faro de Castro

Universidade de Brasília, Faculdade de Direito, Brasília – DF, Brazil (mfcastro@unb.br).


ORCID ID:
orcid.org/0000-0002-6487-1783

Abstract

The literature on transnational legal orders (TLOs) establishes new criteria for the elaboration of analyses regarding complex legal and economic issues which transcend the nation state. By looking into the so-called "currency war" controversy of 2010-2013, the paper argues that TLO theory remains limited in its ability to shed light on relevant aspects of cross-border impacts of monetary policy changes.

Keywords: Currency wars; Transnational legal ordering; Legal analysis; Currency Wars; Monetary policy.

Received: August 21, 2016
Accepted: October 6, 2016

Introduction

In the aftermath of the global economic and financial crisis of 2008-2009, several governments around the world adopted economic policies to prop up their national economies, including fiscal and monetary stimuli. On the monetary side of economic policy, beginning in 2008, a coordinated action by the central banks of Canada, China, the euro area, Sweden, Switzerland, the UK and the U.S. was rolled out to cut short-term interest rates. Subsequently, with rates approaching the so-called "zero lower bound", central bankers began seeking policy alternatives (Bowdler and Radia 2012).

In the U.S., a major package of fiscal stimulus was structured under the American Recovery and Reinvestment Act, adopted in 2009. But authorities were not satisfied that *fiscal* measures would be sufficient to impart enough momentum to economic recovery. Thus in a speech given at the London School of Economics in the same year, Federal Reserve chairman, Ben Bernanke, remarked that additional "strong measures" would have to be adopted in order

Copyright:

• This is an open-access article distributed under the terms of a Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided that the original author and source are credited.

• Este é um artigo publicado em acesso aberto e distribuído sob os termos da Licença de Atribuição Creative Commons, que permite uso irrestrito, distribuição e reprodução em qualquer meio, desde que o autor e a fonte originais sejam creditados.

to impart sustained momentum to the economy. Among the "strong measures" mentioned by Bernanke, he referred specifically to the removal of "troubled assets" from financial institutions' balance sheets through public purchase of such assets (Bernanke 2009).

Bernanke's reference to "public purchases of troubled assets" is key to much of what economists have called "unconventional monetary policy", which includes prominently a policy that became known as "quantitative easing" (QE). As indicated by Bowdler and Radia, QE essentially involves "large-scale asset purchases financed by the issuance of central bank money" (Bowdler and Radia 2012, 604). The Federal Reserve Bank, the Bank of England, and the Bank of Japan have put in place programmes of such large-scale asset purchases. But the central banks of the U.S. and of England have moved beyond the more conventional practice of purchasing short-term government securities – the basis of Japan's QE from 2001 to 2006 – and have targeted "longer-dated gilts, as well as private-sector assets, including corporate bonds and mortgage-backed securities" (Bowdler and Radia 2012, 607).

The nature and extent of the cross-border economic effects of such policy changes have been subject to debate, but they also pose a daunting challenge to contemporary international law scholars. Would there be a way to frame such issues *legally* so as to bring into consideration relevant political, economic, global and local factors, and also normative considerations involved in them, and at the same time offer responses as to what kind of institutional reforms would be legally meaningful or required in the face of complaints against monetary policy shifts with major potential cross-border destabilizing effects?

A body of interdisciplinary literature produced by legal scholars has been emerging in recent years with the aim of dealing analytically with complex issues in which the interactions of local and global players, as well as "middle-ground" negotiators and actors originate several relevant consequences which together are said to form "transnational legal orders" (TLOs) (Halliday and Shaffer 2015; Shaffer 2013). This recent body of literature – which has been called "TLO theory" – proposes several analytical criteria which seem helpful in addressing complex issues related to processes by which TLOs are formed or transformed. It seems, however, that TLO theory misses opportunities to describe processes of policy and institutional change derived from cross-border monetary impacts, which may originate from unilateral action.

Indeed, a situation that seems to fall largely outside the reach of the analytical categories of TLO theory under its current form is the cross-border influence of monetary policy and financial flows upon different markets and actors' strategic stances. The present paper calls this "monetary impacts" – an instance of which was involved in what the Brazilian Minister of Finance in 2010 called "currency war", and was later more hyperbolically referred to as "monetary tsunami" by Brazilian president, Dilma Rousseff (Financial Times 2010; The Telegraph 2012). The paper therefore explores this heuristic shortfall of TLO theory and suggests ways to overcome it by adding to it other ideas and analytical tools.

In Section 2, the paper offers an account of the arguments and ideas on which TLO theory has relied to develop its framework of analysis. This description of TLO theory characterizes it as an outgrowth of analytical work that has delved into what it has called "recursivity of law" (Halliday

and Carruthers 2009). In Section 3, the paper discusses the strategies deployed by the Brazilian government and other actors to address the issue of cross-border influence of monetary policy in general, and specifically the economic spillovers of QE practiced by developed countries in the aftermath of the 2007-2008 crisis. Section 4 develops a discussion of the analytical limitations to TLO theory to engage in fruitful analysis of institutional change deriving from monetary policy and financial regulation which underly cross-border monetary flows. The discussion in this section will highlight what appears to be a "blind spot" in TLO theory, which limits its ability to account for cross-border monetary impacts and their consequences, including economic spillovers that elicit policy reforms from governments. Suggestions of how to add to TLO theory ideas, and analytical criteria which may be useful to address institutional and legal change deriving from cross-border transmission of monetary impacts are given in Section 5. A summary of the main arguments of the paper is offered in Section 6.

Main ideas and scope of 'TLO theory'

The Theory of Recursivity of Law

In 2009, Terence Halliday and Bruce Carruthers published an important study on the generation of what can be called a *global law of corporate bankruptcy* (Halliday and Carruthers 2009). An interest in establishing such a global law was the result of assessments made by several major international and global actors regarding the causes and consequences of the Asian Financial Crisis of 1997-1998. One of the components of a package of reforms thought to be useful in the prevention of future similar crises and their propagation through cross-border "contagion" was the adoption in many countries of a law of corporate bankruptcy carrying certain key institutional features.

In their work, Halliday and Carruthers studied the relations and attritions between: (i) national polities (including subnational groups), international organizations and other relevant international actors (such as international professional associations, NGOs etc.), and (ii) global markets. From a theoretical standpoint, Halliday and Carruthers criticized existing literature – including the works of authors writing under the "world polity theory", the "world systems theory", "postcolonial globalism" and "law and development" (Halliday and Carruthers 2009, 5-6).

The main contribution of the argument elaborated by Halliday and Carruthers (2009) was their view of global law as "recursive". By this they meant that stabilization of adopted normative ideas applicable in a given issue area is the result of multiple and reiterative interactions between the global and the local. Such interactions are protracted in time, take place in a dimension which Halliday and Carruthers label "the middle" (of the relation between global and local), and is impacted by asymmetrical fields of power in which expert "intermediaries" become important actors. Halliday and Carruthers derived from their analyses the view that global law is a *contingent* – not a necessary – result of multiple and reiterated cycles of strategic interaction among global and local actors.

This “recursivity” theory of global law projects an image of international politics in which globalization is characterized as “negotiated” among stakeholders, rather than “imposed” by the global center onto the periphery. Indeed, one of the main general “findings” of the work of Halliday and Carruthers is that, given the possibility that local forces will resist and “foil” strategies through which global actors attempt to export policy and laws, “globalization must be negotiated, not imposed.” (Halliday and Carruthers 2009, 422).

TLO Theory

The book published by Halliday and Carruthers in 2009 was empirically focused on the construction of a global law of corporate insolvency, whose general “model” became UNCITRAL’s 2004 Legislative Guide on Insolvency. The ideas and perceptions advanced in the book have quickly spurred further research and academic discussion around the notion of “recursive law” resulting from the interplay between global and local actors (Shaffer et al. 2011). The articles gathered in Shaffer (2013) sought to refine conceptually, and to apply to different empirical instances of policy reform, the ideal of “recursivity” of law along the lines established by Halliday and Carruthers (2009). Halliday and Shaffer (2015, 3-72), also engage in refining the analytical framework initially developed by Halliday and Carruthers.

Through these subsequent efforts, a theory of “transnational legal ordering” has been advanced. The arguments developed by these recent works converge in the project to construct a comprehensive theory that aims to account for instances of what has been named “transnational legal order” (hence, the shorthand designation, “TLO theory”). As a result, TLO theory has incorporated many of the claims and concepts of the work on the recursivity of law under globalization.

One of the arguments developed by TLO theory is that transnational legal ordering involves the interplay of different kinds of norms, spanning from privately created codes of conduct, foreign legal models propagated by international organizations, hard law, soft law, of a bilateral, regional or multilateral nature, constructed by state and/or private actors.

In their effort of refinement of previously elaborated ideas, Halliday and Shaffer define a TLO as “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions” (Halliday and Shaffer 2015, 5). Moreover, they neatly differentiate conceptually “transnational law” (which is the law of transnational legal orders) from Westphalian international law, as well as from “global law”. Whereas the coordinates of the Westphalian juridical system have been blurred in recent decades, the proposed notion of “global law” remains misleading since supranational laws often are not truly global in their reach.

Halliday and Shaffer also clearly and expressly distinguish the concept of TLO from notions related to competing theoretical frameworks, namely: “regime theory”, “world polity theory” and “global and transnational global pluralism”. Thus the main differences between regime theory and TLO theory is that the former remains state-centric, excludes interactions of domestic politics with international processes and fails to deal with law directly, or in ways that avoid oversimplification

of legal phenomena and ideas. TLO theory contrasts with regime theory in all those aspects, since "recursivity" is actor-centric, looks at the interactions between domestic and international politics, and also takes into consideration, in elaborate terms, the complexities of legal ideas and practices. The distinctions between TLO theory, on the one hand, and world polity theory and global and transnational legal pluralism, on the other, refine earlier criticisms developed by Halliday and Carruthers (2009).

In addressing the "formation and change of TLOs", Halliday and Shaffer (2015) recognize that transnational law-making does not exist constantly and is not a continuous process. Hence they propose that "facilitating circumstances" and "precipitating conditions" are elements that may trigger recursive cycles of norm formation and implementation until "settlement" (stabilized institutionalization) is reached (Halliday and Shaffer 2015, 32-35).

With respect to "settlement" or "institutionalization" of TLOs, Halliday and Shaffer (2015) indicate that, once a process of recursive cycles of actor collaboration and/or confrontation at different levels (transnational, national and subnational) is under way, it may lead to the formation of a TLO, which may at some point in time become a more stable institution. But they recognize that different degrees of stability may be reached in different circumstances.

Moreover, Halliday and Shaffer (2015) explore different possibilities of "alignment" among ways in which actors relying on different presuppositions (including ideologies, cognitive practices and strategic interests) construe behaviors and thus frame issues. Therefore, according to them, there may be correspondence of a TLO with an underlying issue, multiple TLOs may correspond with parts of an issue, or there may be non-alignment, or yet "competitive or antagonistic" alignment among actors' views on how issues should be framed, what the problems to be confronted are and what should be considered as desirable reforms. The crossovers of different possibilities of norm "settlement" with different modes of "alignment" generate several possibilities (type and pace) of institutionalization of TLOs.

The picture of order-formation that TLO theory develops is multifaceted and context-bound, since it proceeds from empirical observation of actual practice and includes many levels of discourse and action that become interwoven, many kinds of actors, different kinds of participants to a non-continuous and contingent process of norm formation and institutional change. Moreover, TLO theory incorporates a concern with how power and resistance strategies become enmeshed with discourse and procedures of intermediation at play in the formation of TLOs. The theory of TLO formation also contrasts in interesting ways with, and provides a promising alternative to, other theoretical perspectives that miss out on several of the aspects of international and local politics incorporated into the very notion of a TLO. For all these reasons, TLO theory is a highly attractive and promising framework of analysis, corroborated by its application to empirical work that has begun to emerge (e.g., Machado 2013; Kim and Boyle 2013; Klug 2013; Helfer 2015).

However, TLO theory itself so far seems to have neglected how certain economic relations, which are kept largely secluded from the arenas of actor-centered "intermediation", have an important impact on the very processes by which "order" is formed and transformed in many countries and among them. This topic will be developed below.

The Brazilian attempt to subject monetary policy to international legal coordination

It was in the context of enhanced monetary flows crucially influenced by unconventional monetary policy, including QE, that Brazilian Finance Minister, Guido Mantega, began complaining against what he termed "currency war" in September 2010 (Financial Times 2010). In referring to "currency war", Mantega was essentially using a catchphrase that conveyed the concerns of Brazilian industrialists with the rapid reduction of their capacity to export, resulting from the effects of QE on the price of the dollar. There was the perception that the combination of low interest rates with "issuance of central bank money" by the U.S. caused an increased inflow of cheaper dollars in emergent markets and an appreciation of local currencies (International Monetary Fund 2013). In this view, cheaper dollars hurt exports and also offered an incentive for governments in emerging markets to adopt protectionist measures in trade and financial policies.

By the end of 2010, the Brazilian National Confederation of Industry (NCI), in fact, made it clear that the "currency war" had become the third most pressing concern of major Brazilian industrialists, topped only by their dissatisfaction with high taxes and cut-throat competition (G1-Valor Online 2010). In 2011, the chairman of the NCI pressured the government for policy changes, requesting "urgent measures" to stop the fall of the value of the dollar (Folha de São Paulo 2011). A report commissioned by the Federation of the Industries of the State of São Paulo (FISSP) also made it explicit that analysis of exchange rate data indicated exchange rate depreciation would result in significant increase of the GDP per capita. Moreover, an article published by the chief economist at the FISSP (Fonseca 2010) insisted that a dangerous process of "deindustrialization of Brazilian exports" was taking place: a fall in the exports of manufactured products as a share of total exports. In his article, the chief economist of FISSP characterized such deindustrialization of exports as a direct result both from Chinese exchange rate misalignment and from "the choice made by the U.S. of dumping more than 600 billion dollars in the economy (quantitative easing 2)" (Fonseca 2010).

The controversies underlying assessments of the international impacts of unconventional monetary policy have lingered on. Academic economists joined discussions in specialized journals as well as through op-eds published in newspapers and blogs. Thus, for example, Pedro Rossi, a professor of economics from a prestigious Brazilian university (Unicamp), rebuked arguments of renowned American economist, Paul Krugman, on the matter of "currency wars" (Krugman 2013). According to Rossi (2014), the phrase "currency war" was not a misconception. Using the phrase to describe current facts, he remarked, was not a silly gesture of Brazilian authorities, as had apparently been suggested by Krugman (Rossi 2014)[1]. The phrase, argued Rossi, actually "laid bare the dysfunctionalities of the international monetary system and its asymmetrical character". Rossi insisted that the language used by Brazilian authorities aimed at highlighting the fact that

1 According to Krugman (2013), "currency war" was a non-issue. In his own words: "OK, people have been asking me where I stand on the "currency war" issue. My answer is that it's all a misconception, and it would be a very bad thing if policy makers take it seriously."

the international monetary system is "hierarchical and dysfunctional" and that it works to the detriment of emerging economies, which have to "bear the effects of the monetary policies of the center". Rossi's conclusion was that authorities in emerging economies were justified in adopting "defensive measures" (e.g. a tax on cross-border capital flows) to offset the impacts of monetary policy pursued by the countries in the center (Rossi 2014). From an economic point of view, it would seem reasonable to argue that the strong valuation of Brazilian currency was due much more to appreciation linked to inflow of dollars, either connected to commodity high prices or Brazil's high official interest rates, than to QE. In this case, it would seem pointless to say that there was a "currency war" due to QE. Yet, as one would expect, what the "true" economic facts are about cross-border influence of QE have remained, to a certain extent, a matter of controversy. [2]

On the diplomatic front, the Brazilian government developed a strategy under which the issue of trade-related aspects of exchange rate policy would be officially taken to the World Trade Organization (WTO) (Pereira and Allard 2012; Auboin and Ruta 2013). In principle, the idea was to transform the discussion about the links between monetary policy and trade policy from a purely *political* into a *legal* argument and eventually progress toward norm enactment and implementation. The strategy of addressing the issue of cross-border monetary impacts by legal means had already come under consideration in American political and diplomatic circles in the case of alleged "currency manipulation" by China (for instance, United States Senate 2007, Staiger and Sykes 2010, Mercurio and Leung 2009). In 2011, Brazil attempted its own legal move.

Indeed, the Brazilian proposal was presented to the WTO in 2011. It outlined two "pillars" by reference to which institutional action in the WTO should be organized. Activities of the first pillar would be aimed at fostering discussion based on a review of relevant economic theory and case studies that addressed the issue of the relationship between exchange rates and international trade. As stated in the Brazilian proposal, Brazilian diplomats were convinced that "exchange rates do influence, in some cases significantly, the foreign trade performance of any given country" (Auboin and Ruta 2013). So, in order to consolidate this view institutionally, they proposed that the WTO's Working Group on Trade, Debt and Finance should produce a review of specialized theory and empirical evidence.

The second pillar was intended to put in motion a process of elaboration of the meaning and practical reach of what is known as the "coherence mandate" embedded in the Marrakesh Final Act of 1994. This mandate states that "[g]reater exchange rate stability, based on more orderly underlying economic and financial conditions, should contribute towards the expansion of trade, sustainable growth and development, and the correction of external imbalances" (World Trade Organization 1993). Moreover, under the coherence mandate, the WTO must "pursue and develop cooperation with the international organizations responsible for monetary and financial

2 Brazilian academic economists have often sided with the view that unconventional monetary policy adopted in the global North is detrimental to economic interests of industries in the global South. See, e.g, Prates and Cunha (2011). On the other hand, a team of economists of the Brazilian Central Bank has resorted to intensive use of models (statistical tests) to advance the notion that QE has had "positive effects" on the Brazilian economy. See Central Bank of Brazil (2013), subsequently published as Barroso, João Barata R. B., Luiz A. Pereira da Silva, and Adriana Soares Sales (2015).

matters". The Brazilian proposal was, in short, that the WTO should elaborate a more detailed legal meaning of the "coherence mandate" as a way of beginning a process of more effective international coordination between monetary and trade policy.

Whatever the merits of these proposals, the efforts of Brazilian diplomats failed. Major global powers, including China, were not in favor of further developing discussions of trade-related aspects of monetary and exchange-rate policy in the WTO. The prevalent view was that such matters should be discussed within the IMF (World Trade Organization 2013; Pereira and Allard 2012).

Cross-border transmission of monetary impacts as a blind spot in 'TLO theory'

The Emergence of Global Finance

A theory of "recursive law", subsequently refined into "TLO theory", is supportive of this basic view about how institutions and policies change across the world today. The conflicts between the Brazilian and other interests around trade-related aspects of monetary policy, however, seem to defy explanations provided by the theory of "recursivity" of law, incorporated into TLO theory.

The question of whether the Brazilian attempt to subject monetary and exchange rate policy to international coordination was legally warranted is not at issue here. Rather, it is the question of whether the analytical framework of TLO theory is appropriate to be employed in the investigation of the concerns of Brazilian industrialists and policy makers which are attempted to be captured under the term "currency war".

Contrary to what is suggested by TLO theory, the transformation of order by means of cross-border monetary impacts does not result from "negotiated" normative materials and explicitly designed legal reform. In fact, the formation of several aspects of cross-border monetary and financial relations, which economists often call "spillover effects" (e.g. United Nations 2013), have become largely secluded from contestation and, hence, from arenas of TLO formation and explicit legal reform that result from a process of negotiation. An account of how "free" global finance has grown beyond the reach of regulation typical of "embedded liberalism" that characterized the international post-World War II settlement, with its crucial directive that proscribed free speculative cross-border capital movements, helps to clarify this point.

As indicated by Helleiner (1996), after an international settlement was reached at the end of World War II, under which speculative cross-border capital movements remained "illegal" because of the risk of economic disruption they were associated with, international economic accommodation led to corrective devaluations across Western Europe in 1949. This helped the creation of the European Payments Union (EPU) in 1950. As a mechanism of coordination of payment systems, the EPU was instrumental in strengthening the balance-of-payment position of countries in the region and was part of the "cautious move to European dollar convertibility" (Helleiner 1996, 67-77).

Further steps in that direction were: (i) the reopening of London's foreign exchange market in 1951, (ii) the permission granted in 1953 to banks of EPU member-countries to deal in other countries' currencies, and (iii) the reopening in 1954 of London's commodity markets in standardized commodities (as grain and gold). These reforms and policies helped bring Western Europe close to market-based dollar convertibility by 1955. Before convertibility was achieved, some extra time was needed by a few governments to accumulate enough monetary reserves that could be used to stem speculative movements of capital. Thus many governments only agreed to restore the convertibility of their currencies with dollars after balance-of-payment positions had strengthened in 1958.

The conditions described above provided the institutional context in which the so-called Euromarket flourished in the 1960s. Although the changes indicated above brought a degree of freedom to private operators not seen in decades, states continued to be wary of disruptive cross-border capital movements. The uneasiness of public authorities was due their perception that speculative capital movements could affect exchange rate stability and trade relations, restricting thereby policy autonomy (ibidem, 91). In fact, the greater freedom of private operators since the 1960s encouraged the growth of speculative capital flows beyond the capacity of available schemes to offset them. In other words, there was "increasing inability of unilateral capital controls to handle speculative flows" (ibidem, 103). Yet, the U.S. remained opposed to the creation of monetary cooperation schemes (cooperative capital controls) in the early 1970s and even announced, in 1973, that it would abolish its own capital control program in 1974.

According to Helleiner, the position of U.S. officials against monetary cooperation and in favor or market freedom throughout the 1970s reflected their interest in using speculative capital movements to induce policy reforms in other countries. As expressed by Helleiner, the U.S. "perceived speculative capital movements as an important central tool in [its] strategy of encouraging foreigners to absorb the adjustment burden required to correct the country's large current account deficits" (ibidem, 112). As described by Helleiner, the U.S. strategy in the 1970s context could be captured in the notion that "[m]arket pressures would achieve what direct negotiations could not: both the revaluation of the currencies of Western Europe and Japan and an expansion of their economies" (ibidem). This was an instance of what Helleiner (adapting a term used by Susan Strange) calls "market-based 'structural' power" (ibidem, 114)[3]. Of course, the subsequent "triumph of neoliberalism" (Gilpin and Gilpin 2001, 309-316), which owes much to the propagation of reform "scripts" by international financial institutions, has had as a core element the exercise of the kind of "market-based structural power" mentioned by Helleiner.

This basic element of the neoliberal reform agenda – namely, market-based structural power – did not decline after the onset of the 2007-2008 crisis. In the areas of global finance and monetary relations, the exercise of market-based structural power requires seclusion of financial and monetary institutions and practices from contestation. This is the reason why *de facto* fluctuation, subject only to nationally (not globally or transnationally) defined normative parameters, has become the standard practice in the area of exchange rate policy.

3 "Market-based 'structural' power", proposed by Helleiner (1996), is an idea similar to that of "monetary power", used by Kirshner (1995).

On the other hand, besides *ad hoc* bilateral relations, the more or less improvised G-7 and (more recently) G-20 summits, and also the rather informal, "clublike" meetings of central bank senior executives and officials in the BIS, there are scant venues to build effective coordination of monetary policies of different countries in the world today. Whatever role policy makers may have attempted to carve out for soft law as a means to discipline – on the basis of "prudential regulation" – what some academics envision as a global financial "system" (Brummer 2012), a substantial degree of global or transnational institutionalization of policy in that area remains more an idea than a tangible reality. Hence the difficulty in describing an existing, normatively settled TLO in the area of cross-boundary financial relations – what Helleiner (2015) has termed (with many caveats) "transnational financial legal order" (TFLO). As expressed by Helleiner (2015, 232): "It is difficult (...) to describe the TFLO as having become highly 'institutionalized' (in the sense that [Halliday and Shaffer] use the term) not just because of ongoing changes in the normative content of the order at the transnational level." According to Helleiner (ibidem) many developments have undermined the "effectiveness of a number of tools that have encouraged compliance with the TFLO's soft law in the past." Moreover, the financial connections of monetary policy and exchange-rate policy with privately organized (and often insufficiently regulated) financial markets – which include opaque practices known as OTC markets, dark pools, algorithmic trading and shadow banking – make the challenge of legal regulation all the more difficult.

If global actors are sometimes motivated to jump into action and produce global law or TLOs – as was the case of a global law of corporate insolvency discussed above – after the Bretton Woods accord, they have lacked the necessary drive to harness the energies of financial markets and of international monetary relations in order to produce new norms conducive to something like a post-Bretton Woods legal order of monetary and financial relations. The shift to more or less informal efforts to disseminate global standards of prudential financial regulation (Helleiner 2015) was more a failure than a success in establishing and settling some kind of TLO.

Quite naturally, more recently, the need of cooperation in this field has been clearly perceived by many important actors. As remarked by Bernanke in his 2009 speech at the LSE, for example, "a clear lesson of the recent period is that the world is too interconnected for nations to go it alone in their economic, financial, and regulatory policies". Yet the fact remains that the U.S. Secretary of the Treasury, Timothy Geithner, in that same year, rejected the European idea to engage in an effort to create a global financial regulator (Financial News 2009; Agência Estado 2009). It was a fundamental refusal by a hegemon to cooperate. And effective cooperation never took off in the area of global financial and monetary governance.

Analytical limitations of TLO theory

TLO theory, which has grown out of a "recursivity theory of law", certainly aspires to have a say in all issues related to transnational governance-building, but it remains limited in its ability to analyze crucial matters of global or transnational *financial* governance. As already indicated in a previous section, characterizing the existence of a "transnational financial legal order" (TFLO)

is certainly spreading too thin the categories of TLO theory. Several aspects of the means through which institutional and legal change takes place as a consequence of cross-border transmission of monetary impacts inevitably remain outside of the analytical scope of TLO theory. Some points about this important limitation of TLO theory will be briefly addressed below.

- Halliday and Carruthers note that the focus of their analysis has special emphasis on "the middle" (of the relations between the global and the local). Halliday and Shaffer also make it clear that TLO theory is interested in new forms of social connection forming "processes [that] spur the development of intersecting, transnational economic, social, regulatory, and judicial networks" in which participants "act as intermediaries between national and transnational governance arenas". Yet, paradoxically, TLO theory has no analytical equipment to look at "the middle" of processes that connect, on one end, operations whereby central banks in the global North purchase billions of dollars' worth of mortgage-backed securities, and, on the other end, industries in the global South pile up their manufactured products and face the prospect of disinvestment, while workers lose the jobs. Indeed, "the middle", between "powerful" central banks at the global center and local economies around the world, in the case of QE and cross-border transmission of monetary impacts, does not involve "intermediation" in the sense the word is used in TLO theory analytics, but does require instead the deployment of *market-based financial strategies*, which are unilateral, many and diverse.
- TLO theory is all about the analysis of "migration of law across borders" (Shaffer 2013, 1). But cross-border monetary impacts do not imply such migration of law across borders. It typically takes place in the absence of any cross-border "migration of law". Arbitrage opportunities that become available to speculators are enough to cause devastating cross-border monetary impacts.
- TLO theory has incorporated the idea of "recursivity" of law-making and implementation as a central feature of its framework. It therefore describes "transnational legal processes" as "the processes through which [transnational legal] norms are constructed, carried and conveyed, always confront national and local processes, which may block, adapt, translate or appropriate a transnational legal norm and spur its reassessment" (Shaffer 2013, 1-2). In contrast to these features of transnational legal processes, institutional or policy changes resulting from cross-border monetary impacts do not involve discursively intermediated and contested mutual adjustments between local law and some "model" global (or transnational) law. So there is not a norm to be blocked, adapted, translated or appropriated and elicit reassessments. There are financial impacts which spread through certain financial channels and eventually translate into outcomes in the real economy, often spurring policy and legal reform.
- TLO theory posits that a series of recursive cycles of norm formation come into play and may eventually reach some degree of "settlement". As put by Shaffer (2013, 14), "[s]ome sort of settlement may occur that persists over time until that settlement is destabilized." In

the case of institutional change resulting from cross-border capital flows, there is no norm to be "settled". Change is not the outcome of a history of reiterative adaptation of some discursive background (a norm), it is only an absolutely contingent reaction to price swings.
- Recursivity in TLO theory may involve foiling, resistances, adaptations of a model norm and associated reform scripts, all of which contribute to the notion that, whenever there is settlement, it must be regarded an expression of a "negotiated" order[4]. In contrast to this, cross-border transmission of monetary impacts results from unilateral action.

Given the above remarks, it seems clear that TLO theory as a set of concepts, ideas and analytical remains quite limited when it comes to cross-border transmission of monetary impacts.

Mixing 'TLO theory' and 'LAEP'

In recent years legal scholars from the global South have begun developing new ideas and insights that incorporate local concerns, but benefit from, and at times converge with, the work of legal scholars from the global North. In what follows, some brief suggestions will be given of how this possibility to promote meaningful convergence of research agendas might be explored with respect to TLO theory and new legal approaches to policy reform developed in Brazil (Castro 2014). Specifically, the paragraphs below will argue that ideas and analytical tools taken from the Legal Analysis of Economic Policy (LAEP) approach (Castro 2014; 2016) can be usefully blended into TLO theory to enlarge its ability to probe into issues related to (cross-border) transmission of monetary impacts.

There are several basic ideas proposed by the LAEP approach which provide elements of a framework to be employed in the analysis of economic policy and practices. Such ideas are intended to help legal scholars address several aspects of economic policy-making, including what comprises "the middle" of monetary and financial relations of the global with the local, which was shown to be a "blind spot" of TLO theory in its current form. Some of the main ideas of the LAEP approach are the following:

(i) Markets have an "institutional" fabric of their own, formed prominently by partially overlapping networks of contracts.

(ii) "Contractual contents" are normative stipulations with legally binding force. As such, normative stipulations structure relational expectations and are a guide to relational performance. Relational expectations refer to expectations that individuals and groups

4 In one of their descriptions of these characteristics of recursivity, Halliday and Carruthers (2009, 29-30) state the following: "Our investigations indicate that ostensibly weak countries can foil hegemonic power. Countries develop repertoires of resistance, weapons of the weak through which they manage to carve out zones of independence form external pressure. In these openings, they deviate and design, reject and adapt, conform and contest as their situation permits. These repertoires (…) reinforce our argument that globalization is contested and negotiated".

form regarding the actions or attitudes (performance) of other individuals or groups or organizations.

(iii) Contractual contents are either privately negotiated by the parties to a contract, or "injected" into contracts by law from public deliberation: mainly from the legislative, administrative (decisions and policies adopted by regulatory agencies) or judicial processes, or a combination of them (Castro 2014, 47). The binding force of contractual contents is deemed a consequence of legally valid contract formation, amendment or termination. Contractual contents will be considered "public-interest contents" if they are "injected" from public deliberation, while contractual contents that are privately negotiated are deemed "private-interest contents" (Castro 2014).

Contracts can be combined in "portfolios". Often portfolios are professionally-packaged contractual aggregates formed by clusters of contracts interconnected by strategically designed intercontractual linkages that presuppose the legally binding force of contracts. They are carriers of combinations of normative stipulations and, hence, relational expectations regarding both utility contents and monetary contents of contracts. Some will be private-interest contents, others will be public-interest contents.

In contractual terms, monetary impacts are changes in *monetary contents* of a contract or portfolio through *interporfolio monetary relay*. This consists in the practice through which a received monetary impact originated from changed relational performance in portfolio "A" and affecting a contract of portfolio "B" is deflected in the form of changes in relational performance in other contracts of the same portfolio ("B") which cause changes in monetary contents of a third portfolio ("C"). Thus, for example, if the price of the energy bill of my business goes up, I can raise the prices of commodities I sell.

One of the main challenges of affording "protection" through law to portfolios that stand as the institutional support of fruition of fundamental rights is that price signals travel through contractual networks by means of *interportfolio relay*. Although specific price signals may affect some portfolios, not others, the price of money and of financial assets (interest rates) spreads quickly and pervasively throughout many contractual networks.

It is important to understand that price movements may come as responses to changes in private investment strategies, but they may also result from public policy decisions. Upward or downward movements of money market interest rates occur largely in response to monetary policy decisions. Here is a stylized description of this process (Castro 2014, 47):

> Since, in their ordinary operation, banks engage in transactions in the interbank market [in the U.S., the so-called federal funds operations] and decide where to allocate funds – whether in government securities carrying a given interest rate or some other asset, such as short-term interbank credits etc. – the base rate [sometimes also called policy rate] is contractually transmitted to all other contracts banks engage in and thus to consumer credit, corporate credit and so on.

This example is useful to highlight the fact that, according to the LAEP approach, both tax charges (or tax credits) and policy-induced variations in interest rates (the "base rate" or "policy rate") are public-interest monetary contents "injected" into contracts through the implementation of economic policies. Thus such public-interest monetary contents will vary according to tax policy, monetary policy and financial regulation.

The indications above also help to clarify the fact that large-scale speculative or policy-induced price movements may – by means of *interportfolio relay* – "implode" portfolios in affected markets and may indeed throw into disarray a whole national economy. "Implosion" occurs because contractual networks unravel as portfolios cease to generate expected opportunities of consumption and/or investment. This possibility is connected to the fact that, in the areas of financial regulation and monetary policy, public policies may take the form of sets of newly created "structured portfolios" designed to attain certain projected financial results by means of (sometimes cross-border) interportfolio relay. And, in many cases, the interportfolio relay affects relational performance in portfolios of foreign economies where the parties to relevant contracts do not match "the public" in the name of which the original policy and regulations were designed at the global center.

Of course, in many instances, the introduction of new policy-based structured portfolios may become a driver of cross-border transmission of monetary impacts. This kind of financial (as opposed to actor-centric) mediation, may then become unidirectional. Figures 1 and 2 below offer graphic representations of two different pictures of transnational legal ordering. Figure 1 refers to the notion of transnational legal ordering as it is conceived under TLO theory in its current conceptual form. An expanded version of TLO ordering would include what is represented in Figure 2: the presence of unidirectional interportfolio relays.

Figure 1: TLO formation under current TLO theory

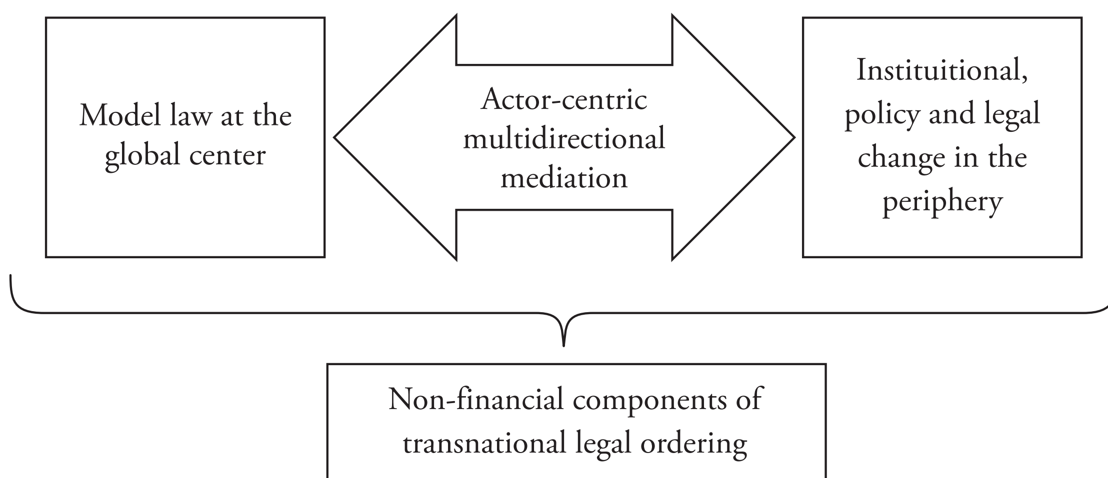
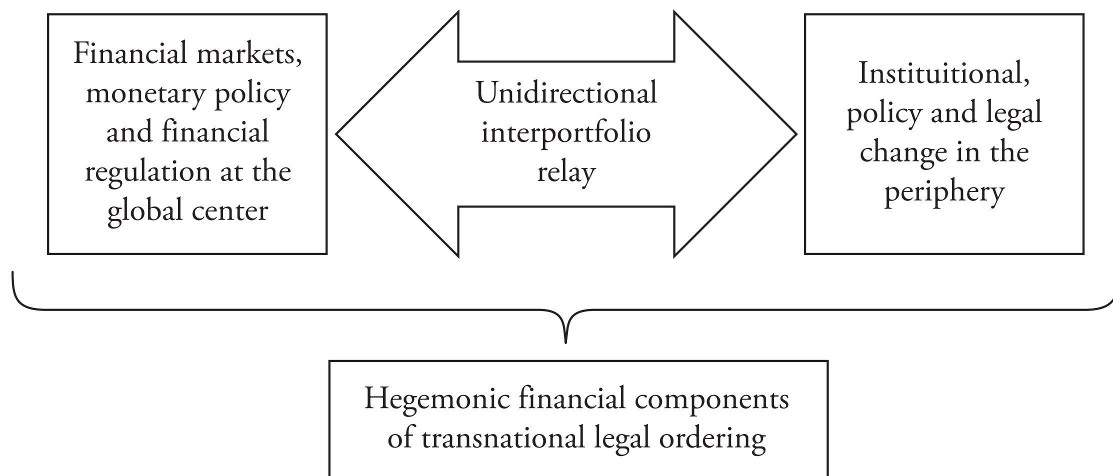


Figure 2: TLO formation under "expanded TLO theory"



In the context of transnational legal ordering conceived under an "expanded TLO theory", it becomes relevant to consider that many aspects of technical details of the process by which portfolios are set up are legal in nature. As remarked by Katarina Pistor (2012, 9),

> Lawyers do (...) play a critical role in the world of finance. They help structure new instruments, advise market participants on the legality of their actions and devise strategies for them to minimize the costs of regulatory restrictions. Lawyers also serve as expert witnesses to Congress and work in committees or at regulatory agencies that are charged with developing new legislation or regulations.

Thus, one important conclusion that may be derived from the above arguments is that "intermediation", in the sense the term is used in TLO theory in its current form, should be enlarged to include many new elements derived from analysis of the legal set up of portfolios. Special attention should be given to criteria by which portfolios are "packaged" unilaterally by monetary authorities and to how attendant monetary strategies play out through interportfolio relay.

Conclusion

This paper has described TLO theory as an outgrowth of a theory of recursivity of law. The assessment offered of TLO theory is that it ingenuously elaborates a framework of analysis that is useful to reveal with clarity how norm-making and implementation in the world today follows patterns that cannot be precisely anticipated and may foster the creation of many variations of institutions and policies, with different degrees of practical and conceptual stability and varied degrees of comprehensiveness of given issue areas. For these reasons, TLO theory remains an attractive set of ideas.

However, the paper also showed that TLO theory, in its current form, remains limited in its ability to analyze processes through which important policy changes take place and indeed

whole programs of governments may be swept out or restricted. Specifically, TLO theory does not seem able to equip legal scholars with tools to develop useful analysis of cross-border monetary impacts, which are an expression of what authors have diversely called "market-based 'structural' power" and "monetary power", and which may be described as the result of interportfolio relay flowing from portfolios strategically structured by monetary authorities.

Therefore, suggestions were made whereby elements from the "legal analysis of economic policy" can be added to TLO theory and produce an "extended" version of it. An "extended TLO theory", it is suggested, may be capable of enabling legal scholars not only to canvas processes of "mediation" of transnational legal ordering that are actor-centric, but also "unpack" other specifically monetary and financial processes that currently lay outside the purview of most analytical approaches of norm formation in the context of globalization.

Bibliographic references

Agência Estado. "Geithner Rejeita Proposta de Criar Regulador Financeiro Global." *Agência Estado*, April 3, 2009. http://www.estadao.com.br/economia/not_eco349567,0.htm. Accessed April 14, 2014.

Auboin, Marc and Michele Ruta. "The Relationship Between Exchange Rates and International Trade: A Literature Review." *World Trade Review* 12, no. 03 (July 1, 2013): 577–605. Accessed August 13, 2016. doi:10.1017/S1474745613000025.

Barroso, João Barata R. B., Luiz A. Pereira da Silva, and Adriana Soares Sales. "Quantitative Easing and Related Capital Flows into Brazil: Measuring Its Effects and Transmission Channels Through a Rigorous Counterfactual Evaluation." Available online 25 June 2015, ISSN 0261-5606. *Journal of International Money and Finance* June 2015,. doi:10.1016/j.jimonfin.2015.06.013.

Bernanke, Ben. "The Crisis and the Policy Response." *Stamp Memorial Lecture at London School of Economics (Jan. 13, 2009)*. n.p., 2009. http://www.federalreserve.gov/newsevents/speech/bernanke20090113a.htm. Accessed April 19, 2014.

Bowdler, Christopher and Amar Radia. "Unconventional Monetary Policy: The Assessment." *Oxford Review of Economic Policy* 28, no. 4 (December 1, 2012): 603–21. doi:10.1093/oxrep/grs037.

Brummer, Chris. *Soft Law and the Global Financial System: Rule Making in the 21st Century*. Cambridge, United Kingdom: Cambridge University Press, 2012.

Castro, Marcus Faro de and Daniele Kleiner Fontes. "Some New Ideas on the Role of Legal Analysis Applied to the Regulation of Telecommunications Services in Brazil." *Journal of Law and Regulation / Revista de Direito Setorial e Regulatório* 2, no. 1 (May 13, 2016): 1–30. Accessed August 13, 2016. http://www.ndsr.org/SEER/index.php?journal=rdsr&page=article&op=view&path%5B%5D=223.

Castro, Marcus Faro de. “New Legal Approaches to Legal Reform in Brazil.” *University of Brasília Law Journal / Revista de Direito da Universidade de Brasília* 1, no. 1 (2014): 21–61.

Central Bank of Brazil. Research Department, Working Paper no. 313. Barroso, João B. R.; Silva, Luiz A. P. da; Sales, Adriana S. (2014). “Quantitative Easing and Related Capital Flows into Brazil: Measuring its Effects and Transmission Channels through a Rigorous Counterfactual Evaluation”. http://www.bcb.gov.br/pec/wps/ingl/wps313.pdf. Accessed March 16, 2013.

Financial News. *Geithner Rejects Global Regulation Idea*. April 3, 2009. http://www.efinancialnews.com/story/2009-04-03/geithner-rejects-global-regulation-idea?ea9c8a2de0ee111045601ab04d673622. Accessed April 17, 2014.

Financial Times. Brazil’s Currency War ‘Alert’. September 27, 2010. http://www.ft.com/cms/s/0/33ff9624-ca48-11df-a860-00144feab49a.html#axzz2xewncVIX. Accessed August 20, 2012.

Folha de São Paulo. “Presidente Da CNI Defende ‘medidas urgentes’ Para Conter Dólar.” *Folha de São Paulo*, April 1, 2011. http://www1.folha.uol.com.br/mercado/2011/04/896997-presidente-da-cni-defende-medidas-urgentes-para-conter-dolar.shtml.

Fonseca, Roberto Giannetti da. “Valorização Cambial No Brasil E as Armas Para Defender a Indústria Na Guerra Cambial.” *Revista Brasileira de Comércio Exterior* 105 (2010): 25–30. Accessed August 13, 2016. http://www.funcex.org.br/publicacoes/rbce/material/rbce/105-RGF.pdf.

G1-Valor Online. “Guerra Cambial é a Terceira Maior Preocupação de Empresários, Diz CNI.” *Valor Online* (G1 Globo), October 27, 2010. http://g1.globo.com/economia-e-negocios/noticia/2010/10/guerra-cambial-e-a-terceira-maior-preocupacao-de-empresarios-diz-cni.html.

Gilpin, Robert and Jean M Gilpin. *Global Political Economy: Understanding the International Economic Order*. Princeton, NJ, United States: Princeton University Press, 2001.

Halliday, Terence C. and Bruce G. Carruthers. *Bankrupt: Global Lawmaking and Systemic Financial Crisis*. Stanford: Stanford University Press, 2009.

Halliday, Terence C. and Gregory Shaffer, eds. *Transnational Legal Orders*. Cambridge, United Kingdom: Cambridge University Press, 2015.

Helfer, Laurence R. “Pharmaceutical Patents and the Human Right to Health: The Contested Evolution of the Transnational Order on Access to Medicines.” In *Transnational legal orders*, edited by Terence C. Halliday and Gregory Shaffer, 311–39. Cambridge, United Kingdom: Cambridge University Press, 2015.

Helleiner, Eric. “Regulating the Regulators: The Emergence and Limits of the Transnational Legal Order.” In *Transnational legal orders*, edited by Terence C. Halliday and Gregory Shaffer, 231–57. Cambridge, United Kingdom: Cambridge University Press, 2015.

Helleiner, Eric. *States and the Reemergence of Global Finance: From Bretton Woods to the 1990s*. Baltimore: Cornell University Press, 1996.

International Monetary Fund.*Unconventional Monetary Policies – Recent Experience and Prospects – Background Paper*. n.p., 2013. https://www.imf.org/external/np/pp/eng/2013/041813.pdf. Accessed March 21, 2014.

Kim, Minzee and Elizabeth H. Boyle. "Neoliberalism, Transnational Education Norms , and Education Spending in the Developing World, 1983-2004." In *Transnational legal ordering and state change*, edited by Gregory C. Shaffer, 121–47. Cambridge, United Kingdom: Cambridge University Press, 2012.

Kirshner, Jonathan. *Currency and Coercion: The Political Economy of International Monetary Power*. Princeton, NJ, United States: Princeton University Press, 1997.

Klug, Heinz. "Access to Medicines in the Transformation of the South African State." In *Transnational legal ordering and state change*, edited by Gregory C. Shaffer, 148–79. Cambridge, United Kingdom: Cambridge University Press, 2012.

Krugman, Paul. "Currency War Confusions." *Paul Krugman Blog* (New York Times), February 15, 2013. http://krugman.blogs.nytimes.com/2013/02/15/currency-war-confusions/?_php=true&_type=blogs&_r=2.

Machado, Maíra R. "Similar in Their Diference: Trananational Legal Processes Addressing Money Laundering in Brazil and Argentina." In *Transnational legal ordering and state change*, edited by Gregory C. Shaffer, 50–88. Cambridge, United Kingdom: Cambridge University Press, 2012.

Pereira, Antonia F and Silas W Allard. "Looking to Fill an International Regulatory Gap: Brazil Brings the Issue of Exchange Rates and Trade Before the World Trade Organization." *Emory International Law Review* 26, no. 2 (2012): 535–53. http://law.emory.edu/eilr/_documents/volumes/26/2/recent-developments/pereira-allard.pdf. Accessed August 13, 2016.

Pistor, Katharina. "On the Theoretical Foundations for Regulating Financial Markets." *Columbia Public Law Research Paper*, Paper Number 12-304, July 20, 2012,. Accessed August 13, 2016. doi:10.2139/ssrn.2113675.

Rossi, Pedro. *Krugman e os Impactos da Política Monetária Americana No Brasil*. (Jornal do Brasil), March 21, 2014. http://www.jb.com.br/pedro-rossi/noticias/2014/03/21/krugman-e-os-impactos-da-politica-monetaria-americana-no-brasil/.

Shaffer, Gregory C., ed. *Transnational Legal Ordering and State Change*. Cambridge, United Kingdom: Cambridge University Press, 2013.

Staiger, Robert W. and Alan O. Sykes. "'Currency manipulation' and World Trade."*World Trade Review* 9, no. 04 (August 24, 2010): 583–627. doi:10.1017/s1474745610000340.

The Telegraph. *Brazil President Dilma Rousseff Blasts Western QE as "monetary tsunami."* (Telegraph.co.uk), April 10, 2012. http://www.telegraph.co.uk/finance/economics/9196089/Brazil-president-Dilma-Rousseff-blasts-Western-QE-as-monetary-tsunami.html. Accessed October 21, 2013.

United Nations. "The Spillover Effects of Unconventional Monetary Policies in Major Developed Countries on Developing Countries."DESA Working Paper No. 131 – ST/ESA/2013/DWP/131. New York: UN Secretariat – Department of Economic and Social Affairs, 2013. http://www.un.org/esa/desa/papers/2013/wp131_2013.pdf. Accessed October 10, 2015.

Unite States Senate. "Dodd, Shelby Introduce Currency and Market Access Legislation to Level the Playing Field for U.S. Workers and Companies." *U.S. Senate Committee on Banking, Housing, and Urban Affairs* (Minority Press Releases), June 21, 2007. http://www.banking.senate.gov/public/index.cfm/2007/6/dodd-shelby-introduce-currency-and-market-access-legislation-to-level-the-playing-field-for-u.s-workers-and-companies. Accessed October 21, 2015.

World Trade Organization. "Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking." *Declaration on the contribution of the world trade organization to achieving greater coherence in global economic policymaking*. n.p., 1993. https://www.wto.org/english/docs_e/legal_e/32-dchor_e.htm.