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RESTRUCTURING GLOBAL GOVERNANCE

Current discussions of "globalization" afford an opportunity to reflect on the development of the modern international system and its governance as well as to evaluate prospects and strategies for the future. However, the term "globalization" is ambiguous. It conceals diverse and sometimes conflicting trends and strategies; it appears to project a post-Cold War optimism of increasing global unity and prospects for a new world order based on a strengthened framework of international institutions. Nonetheless, tendencies towards fragmentation exist, in addition to an increasing awareness of diversity and, perhaps, global disorder.

Certainly, efforts are being made to produce blueprints for a reformed global organizational framework. Perhaps the most comprehensive effort was last year's Report of the Commission on Global Governance (the Report). It combines wide-ranging and detailed proposals for reform of intergovernmental organizations, including greater involvement of multiple non-governmental organizations (NGOs). The Report calls for a commitment to common "neighbourhood values," such as respect for life, liberty, justice and equity, mutual respect, caring, and integrity, and it calls for the articu-

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lation of a "global civic ethic." Underpinning many of the proposals and much of the rhetoric was the concept of the emergence of a "global civil society," mainly expressed in the growth of NGOs and their increasing involvement in decision-making by international organizations.[1] Yet, while the Report was undoubtedly based on a sound evaluation of many global institutional problems, its proposals combined realist minimalism with liberal rhetoric in a way which indicated an awareness of the utopianism, in the present conjuncture, of any attempt at a comprehensive redesign of global governance.

If globalization stands for anything, it represents changes in the competitive dynamic of the world market, involving strategic conflicts to reorganize the institutions through which it is structured. Thus, transforming the international system is a key issue; the basic unit of that system is the national state. The existence of a world market is hardly new; neither is the realization that states are interdependent.[2] The challenge is to understand, in historical perspective, the dynamics of current changes in the nature of that interdependence, along with the interrelationship of its economic and political aspects, and the role of law. Although there are strong underlying socio-economic forces at work, it is misleading to suggest that inexorable tides of global economic flows are eliminating the political structures of national states. To begin with, quantitative analyses of trans-border flows are said to show little significant proportionate increase, over the long term, in cross-border compared to intrastate socio-economic activity.[3] Cer-

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1 COMMISSION ON GLOBAL GOVERNANCE, OUR GLOBAL NEIGHBOURHOOD: THE REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE (1995). Despite the ending of the Cold War, the tone of the Report, as well as the reactions to it, have been low-key, compared to the Brandt Commission reports of 1980 and 1983. Richard Falk has also argued that the Report reflects some of the dilemmas of liberal internationalism; thus, it is too populist for the elites and insufficiently radical for the international activists. Richard Falk, *Liberalism at the Global Level: The Last of the Independent Commissions*, 24 MILLENNIUM 563, 574-76 (1995) (reviewing OUR GLOBAL NEIGHBOURHOOD: THE REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE).

2 It was nearly 150 years ago that Karl Marx and Friedrich Engels stated that the capitalist world market had "given a cosmopolitan character to production and consumption in every country," so that "in place of the old local and national seclusion and self-sufficiency, we have intercourse in every direction, universal inter-dependence of nations." Karl Marx & Frederick Engels, *Manifesto of the Communist Party*, *in* 6 KARL MARX FREDERICK ENGELS COLLECTED WORKS 477, 488 (1976).

3 *See, e.g.*, Janice E. Thomson & Stephen D. Krasner, *Global Transactions and the Consolidation of Sovereignty*, *in* GLOBAL CHANGES AND THEORETICAL CHALLENGES 195 (Ernst-Otto Czempiel & James N. Rosenau eds., 1989). It is often pointed out that in quantitative terms the degree of openness and integration in the world economy was in some respects greater in 1913 than it is today. *See, e.g.*, P. HIRST & G. THOMPSON, GLOBALIZATION IN QUESTION 26 (1996); PAUL KRUGMAN, PEDDLING PROSPERITY: ECONOMIC NONSENSE IN THE AGE OF DIMINISHED EXPECTATIONS 257-59 (1994).

tainly, many border barriers, such as tariffs and exchange controls, have been eliminated or reduced, and there has been a movement towards internal liberalization in many sectors. Thus, the potential for flows between states has greatly increased. As important, however, are the increasing socio-economic disparities within and between states, which are exacerbated by unequal opportunities for mobility, control over flows, and access to global spaces. Notably, moves to facilitate international movements of financial capital have generally not been paralleled by similar freedom for people (even as labour).

Indeed, the national state has been put under pressure from intensification of economic activity and internal social changes as well as from external economic or social forces; clearly there exists an interaction between the two. In general, the introduction of biological, electronic, and computer-based technologies, and with them the shift to a post-industrial society, have created major implications for government at every level: local, national, regional, and global. Thus, an awareness of the need for new forms of international cooperation and global governance often stems from pressures for regulation reforms at the local or national level. Locally, models or prescriptions from the international arena are used as catalysts or weapons. It is as part of this broader process that international institutions, especially those dealing with economic relations, are undergoing broad re-evaluation.

In this context, it is not surprising that there is now a broad cross-disciplinary debate over the state-market dyad. Equally unsurprisingly, international economic law finds itself at the confluence of these policy issues and debates, resulting in a transformation of the field itself.[4] On the one hand, some economists, such as the neo-institutionalists, have focused attention on the institutional and legal frameworks which regulate markets, renewing a link to classical political economy.[5] On the other hand, the state-centered and neo-realist approaches to international politics which dominated the Cold War period have been increasingly challenged by more socially-oriented theories of world politics; these theories try to look through the state and bring out the role of non-state actors and institutions.[6] To do so

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4 *See* Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33-61 (1996).

5 *See* Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organizations: Toward Comparative Institutional Analysis*, 17 NW. J. INT'L L. & BUS. 470 (1997).

6 An early work in this vein, largely disregarded by international relations orthodoxy, was JOHN W. BURTON, WORLD SOCIETY (1972). Later critiques within international relations theory of the state-centrism of neo-realist views have gone through successive phases: transnational

adequately, however, requires an understanding of the particular character of statehood as a form of governance. Both international law and international relations have suffered from the tension between state-centred approaches, which personify "the state" as an acting subject with unlimited and unchanging sovereignty, and universalist perspectives, which simply dissolve it or treat it as just another social institution.[7] An attempt to grasp the pressures for change in the international system today should be based on an analysis of how this system developed historically, based on the separation of the "public" sphere of politics, in relation to the "private" sphere of the market and economic relations.

The broad argument of this paper is that there has been a growing fragmentation of the classic liberal internationalist system,[8] as

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politics, pluralism, and neo-liberal institutionalism. *See* Steve Smith, *The Self-Images of A Discipline: A Geneology of International Relations Theory, in* INTERNATIONAL RELATIONS THEORY TODAY 1, 21-24 (Ken Booth & Steve Smith eds., 1995). There has also been a confluence with sociologists who have become interested in the international state system. *See* ANTHONY GIDDENS, THE NATION-STATE AND VIOLENCE (1985). More recently, sociologists have become interested in transnational politics and globalization. *See* LESLIE SKLAIR, SOCIOLOGY OF THE GLOBAL SYSTEM (1991); GLOBAL CULTURE: NATIONALISM, GLOBALIZATION AND MODERNITY (Mike Featherstone ed., 1990).

7 This point is elaborated in Sol Picciotto, *International Law in a Changing World, in* FRONTIERS OF LEGAL SCHOLARSHIP 189 (Geoffrey P. Wilson ed., 1995). The need to theorize the state is shown, for example, by the difficulties experienced by regime studies, which have been criticised by some for ignoring formal inter-state organizations. The regime studies have been criticised by others for concentrating on inter-state cooperation and ignoring private actors and institutions. Virginia Haufler, *Crossing the Boundary between Public and Private: International Régimes and Non-State Actors, in* REGIME THEORY AND INTERNATIONAL RELATIONS 94 (Volker Rittberger ed., 1993). For an interesting attempt to examine the conditions influencing the balance between state and private regulatory institutions, see TONY PORTER, STATES, MARKETS AND REGIMES IN GLOBAL FINANCE (1993).

8 I take classic liberalism to be the movement to reform political structures by ending privilege and introducing freedom and democracy, at least for property-owners; it also embodies openness, mainly through free trade, in relations between states. Although the international system based on the national state could therefore be described as liberal, there have been sharp differences as to how it should be conceptualized both among international lawyers and international relations theorists. The pivotal role of the state meant that the dominant paradigm in both disciplines was state-centred, i.e., positivism in international law and realism in international relations. The growing revival of universalist and neo-Groatian perspectives in international law after 1918 was paralleled by the work on international cooperation of liberal functionalists such as David Mitrany, but the gap was widened by the retrenchment of realism in international relations during the Cold War. However, the emergence of regime theory and other neo-functionalist approaches to international relations provided a basis for a new rapprochement between international law and international relations. Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993). The weakening of the classic liberal system has created a reconciliation not only between neorealist and neoliberal perspectives but also within them. *See, e.g.*, NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE (David A. Baldwin ed., 1993) (presenting a collection of pieces which shows that within international relations theory these two perspectives now differ essentially

originally conceptualized by Emmanuel Kant and Adam Smith and developed during the 19th century.[9] This system was based on the concept of a community of equal, sovereign states, loosely coordinated by consensual rules and agreements based on broad general principles, and an allocation of jurisdictional competence between them based primarily on territoriality. This classic liberal disposition envisaged a clear hierarchy of orders of legitimation, the fulcrum of which was state sovereignty. Internally, the state might tolerate or even encourage other normative orders, subject to the overriding authority of state law, which alone could authorize coercive sanctions. Externally, formally equal sovereigns entered into voluntary agreements based on reciprocal bargaining over national interest.

Thus, in the classic liberal international system, sovereignty functioned as a means of legitimating the distribution of power both within and between states. This system has come under pressure, as much or more from the intensification of socio-economic relations as from their heightened international integration. Within states, there has been a trend towards disintegration of government and an increased delegation of regulatory authority and normative competence to professionals and specialists, such as lawyers, accountants, economists, scientific experts. Thus, there has been a shift from "government" to "governance," as the central political institutions of the state have found it increasingly difficult to resolve social conflicts or to reconcile the diversity of social interests, which some say have resulted from the

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over their degree of optimism as to the possibilities of international cooperation in a world still characterized by anarchy in the sense of an absence of world government). One author has also pointed out that much less divides those working within the Hobbesian, Grotian, and Kantian perspectives on world politics than is sometimes thought. Andrew Hurrell, *International Society and the Study of Regimes*, *in* REGIME THEORY AND INTERNATIONAL RELATIONS 49, 50-51 (1993).

9 In his sweeping critique of realism in international relations theory, Justin Rosenberg has argued incisively that it was not until the 19th century that the world was integrated into a single geopolitical system. JUSTIN ROSENBERG, THE EMPIRE OF CIVIL SOCIETY: A CRITIQUE OF THE REALIST THEORY OF INTERNATIONAL RELATIONS (1994). He argues that the ending of personalised relations of domination created societies of formally free and equal legal subjects governed by impersonal institutions of statehood. Externally, states themselves were constituted as formally free and equal: the lack of any centralised or overarching institutions leads to the characterisation of this international society as "anarchy" by realism and its celebration by liberalism as a community of a higher order based on reciprocity and common interests. International law, being a much older discipline than international relations, has had to reintegrate its earlier intellectual heritage, but this meant that 19th century positivism was able to draw on the absolutist doctrines established in the post-Westphalia period of mercantilism, while the growing universalism of the 20th century could hark back to the jus gentium tradition of Grotius and the "primitives." *See* David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L. J. 1 (1986).

increased uncertainties of the "risk society."[10] Internationally, the arrangements for allocating competence between states have also tended to break down, evidenced by the increased salience and frequency of inter-jurisdictional conflicts. This article's first section will consider the classic liberal internationalist system in historical perspective, focusing on the interaction of the national and international processes of legitimation of some of the central institutions of corporate capitalism. It will also analyse its limitations and the pressures which have led to its increasing fragmentation.

This process of fragmentation provides the context, I argue, for the various neo-liberal debates, theories, and strategies enveloped by the concept of globalization. The difficulties and dilemmas involved in the attempts to reconstruct the international system along neo-liberal lines can perhaps be summarised by considering two broad alternative trends. One response to the strains of the international system has been along classic liberal lines, to attempt to reform the framework of international institutions while respecting national sovereignty. At a minimum, this involves strengthening both the basis of internationally-agreed substantive principles as well as the procedures for inter-state dispute-settlement.[11] These attempts, however, suffer

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10 *See* ULRICH BECK, RISK SOCIETY: TOWARDS A NEW MODERNITY (Mark Ritter trans., 1992).

11 An example of these procedures is the new law of the sea, the overarching framework for which is now provided by the 1982 U.N. Convention on the Law of the Sea [hereinafter UNCLOS]. This concedes substantial extensions to national jurisdiction over maritime regions, while creating some obligations towards the global commons, together with a requirement to resolve disputes by negotiation or adjudication. Despite its 1994 effective date and its ratification by EU member states and Japan (Senate consent to U.S. accession is still awaited), UNCLOS provides only a loose framework for continued negotiation in disparate forums. Critics have pointed to the indeterminacy of most of its central concepts. Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 1, 28 (1990), argues that UNCLOS has no "real" rules but allocates decision-making power elsewhere by the use of equitable principles. For some of these concepts this indeterminacy is chronic, such as the reliance on "equitable principles" in the delimitation of maritime boundaries; for some it is shared with other global regimes notably the principle of "sustainable development" in environmental protection; and for some it has been introduced by the Agreement negotiated primarily to obtain the adherence of the United States and other OECD states. G.A. Res. 48/263, U.N. GAOR, 48th Sess., Annex, Agenda Item 36, at 13, 17, U.N. Doc. 94-33298 (1994). Examples of indeterminacy in this Agreement are the requirement that deep-sea bed mining operations by the Enterprise set up under Part XI should be conducted in accordance with "sound commercial principles," or that the transfer of technology to it should be on "fair and reasonable commercial terms." Thus, the actual content of a principle such as the conservation of fish stocks by reference to the "maximum sustainable yield" depends on related texts and agreements (e.g., the Convention on Straddling Fish Stocks concluded in August 1995), which then depend upon bargaining between the main coastal and fishing states to set and enforce specific catch limits. This bargaining is, in turn, mediated through networks of specialists, such as marine scientists, lawyers, diplomats, and political representatives.

from the limits and strains of liberal internationalism. Internally, the state's monopoly of legitimate coercion enables the establishment, allocation, and enforcement of property rights and other entitlements. Internationally, however, such arrangements must be sanctioned by agreement based on the bargaining of national state interests. The difficulty of reaching agreement, except at the most basic level of common state interests, means that general international law establishes only a very loose framework of coordination. Although this is extensively supplemented by more particular treaty arrangements, these are a very uneven patchwork, since they depend upon the existence of specific common interests or reciprocal benefits. Above all, there is a general inadequacy in the institutional arrangements which attempt to integrate political and economic considerations.

An alternative, but in many ways complementary, response has been the construction of a complex maze of regulatory or administrative networks, forged by the direct interaction of various types of professionals and officials with recognized competence or authoritative knowledge.[12] Section II will trace the development of such networks, using examples from some issue-areas in international business regulation, to try to draw out some of their salient features.

In Section III, I will consider the attempts at a neo-liberal synthesis. These attempts focus on broadening the scope of regional and global free-trade organizations to take on a wide range of responsibilities of policy coordination in relation to many aspects of economic regulation. I will consider some of the problems involved in these processes, looking mainly at the European Union (EU) and the World Trade Organization (WTO). Generally, I conclude that while this trend attempts to strengthen policy formation at the international level by creating a linkage between issues, it neither resolves the problems of fragmentation nor provides an adequate institutional basis to address the social issues that underpin the effective functioning of markets.

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[12] Others have also pointed to the role in international policy coordination of what have been termed "epistemic communities." *See, e.g.*, Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1 (1992). For a number of perspectives on this subject, see generally *Special Issue on Knowledge, Power and International Policy Coordination 46* INT'L ORG. 1 (Peter M. Haas ed., 1992). I avoid this term since it defines groupings as being formed around a shared set of beliefs or value-systems, which I think obscures the ways in which professional and scientific ideas are themselves also the product of competing practices, strategies, and indeed epistemologies, which are also political, as discussed later.

Thus, the major characteristic of global governance in the current period is fragmentation into a complex and multi-layered network of bodies and institutions interacting in ways that express rivalry and competition as much as cooperation and coordination. The processes and strategies of neo-liberal globalization are still very limited and highly contradictory. The pressures towards economic liberalization are strong, but they tend to starkly reveal the weaknesses of the increasingly fragmented political structures and their lack of legitimacy. It is not that globalized economic activities are unregulated; indeed, they are often subject to a bewildering complexity of layers of interacting regulation. Thus, global governance seems caught on the horns of a neo-liberal dilemma.[13] One tendency makes a virtue of this necessity and welcomes regulatory diversity and competition as part of the process of reformulation of the system, or even as its organizing principle. The other seeks to find ways of enhancing coherence and strengthening the institutional building-blocks of the global political system.

In this context it is not surprising that law and lawyers are playing an increasingly important international role. Since law links the apparently autonomous spheres of politics and economics, lawyers are accustomed to mediating not only between the public sphere of the state and the private sphere of the market but also between different public spheres. There is a long tradition in comparative and international law of the cosmopolitan lawyer working at the interface between legal orders. Unlike the state official or politician, whose duty is to the national interest, the lawyer-diplomat can develop an intellectual capital which transcends particular national legal fields.[14] More-

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13 This has also been described as the crisis of modernity or the transition to a post-modern system of governance. *See, e.g.*, John G. Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139-74 (1993). Ruggie argues that the "unbundling of territoriality" is leading to "a rearticulation of international political space." *Id.* at 171. In more direct and immediate terms, Susan Strange, the forerunner in developing an interdisciplinary approach to international political economy, argues that the dispersal of power away from the nation-state means that no one is exercising authority, so that the necessary task of structuring globalized markets is being ineffectually fulfilled (although multinationals have filled the gap somewhat). Susan Strange, *Who Governs? Networks of Power in World Society, Special Issue*, HITOTSUBASHI J. INT'L & POL. 5 (1994).

14 A good example of this is the international community of commercial arbitrators, which has developed in the form of a friendly rivalry between nationally-based grouping – expressed also in the debate about the autonomy of the lex mercatoria. *See, e.g.*, LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT (Thomas E. Carbonneau ed., 1990) (covering the internal debates); Yves Dezalay and Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, 29 L. & SOC. REV. 27 (1995) (providing a socio-legal study).

over, lawyers have the advantage of speaking the same fundamental language of fairness, justice, and order; although, it can have many dialects and variations. Thus, the task of the cosmopolitan lawyer is not to create a legal Esperanto but to interpret one to another, to evaluate differences, and to facilitate interactions. Unlike economists, whose mission seems to be to subject everyone to the same iron laws of economic efficiency, lawyers offer the prospect of preserving particularity while facilitating consensus. However, this is illusory unless law also confronts the questions of power and inequality which are too often concealed by the separation between the private sphere of the economy and the public sphere of politics.

A. Liberal Internationalism and Jurisdictional Interaction

1. The National State and the World Market

The common picture of the international system, as consisting of a community of nation-states, is misleading as regards both the substance and the scope of statehood. By personifying "the state," it implies that the system consists of a collection of separate, compartmentalized, national units. The modern state consists of public authorities exercising exclusive power over a geographically defined territory, resulting from the separation of the public sphere of politics from the private sphere of economic relations, or "the market." Since these private economic and social relations transcend state boundaries, the exercise of powers and functions by different states inevitably overlaps and intersects. This interaction creates both a competitive tension between states and pressure towards emulation, imposition, or harmonization of the substance of state institutions and regulation. Historically, the national state emerged as part of a global process creating a world market, involving an interaction between internal and external political, social, and cultural processes which formed the "imagined communities" of nation-hood.[15] The modern form of the state – a product especially of the French Revolution and Napoleonic movements – was consolidated through the creation of a world market based on industrial capitalism during the 19th century.

Thus, although national institutions grew in local soil, this was very much part of a global process, which included institutional transplants and grafts. Indeed, in the important formative period of corpo-

[15] The evocative phrase is the title of a study which traces the cultural and social processes of formation of national identity between the 16th and 18th centuries; originating in Europe and later mirrored in colonised South America, they become established as a universal model under modernism. BENEDICT ANDERSON, IMAGINED COMMUNITIES (2d ed., 1991).

rate capitalism between 1865 and 1914, many of its key institutions were developed as part of an international process of debate, emulation, and coordination.[16] These institutions included: the legal framework for incorporation, the regulation of competition through laws on restraints of trade or cartelization, the harnessing of science and technology into commercialized industrial and cultural production through intellectual property laws, and the introduction of a general tax on income and profits as the main source of state finance.

Although these institutions were established by and helped to consolidate national states, and although there were often significant national differences of form, they could be said to have established a loosely coordinated framework for international corporate capitalism. This can be described as classical liberal internationalism. The forms of coordination respected and indeed reinforced national sovereignty, in the sense that the substance of regulation was generally left to national processes of legitimation, while its scope was defined internationally to facilitate mutually desirable socio-economic interactions. Limitations on the scope of applicability of national regulation entailed negotiation for the jurisdictional limits of political sovereignty. The modern state formally has exclusive powers within its territory, but international intercourse across state boundaries necessarily creates overlapping jurisdiction, which can be quite extensive. The following section will address methodologies for dealing with this problem of jurisdictional overlap.

2. *Coordinating Jurisdictional Interaction*

A number of techniques evolved for dealing with jurisdictional interaction, to try to respect national politico-legal diversity while facilitating international socio-economic interaction. First, there might be unilateral acceptance of restrictions on jurisdictional scope. There is a long history of judicial doctrines dealing with overlapping jurisdiction in private-law matters, based on principles of conflicts of law or private international law; although their relationship to public international law has been ambivalent and controversial.[17] Within this ap-

16 *See* LAW AND THE FORMATION OF THE BIG ENTERPRISES IN THE 19TH AND EARLY 20TH CENTURIES (Norbert Horn & Jurgen Kocka eds., 1979) (providing a collection of articles on related topics).

17 This ambivalence has been expressed in the chequered history of the concept of "comity," which was developed in the Netherlands, especially by Ulrich Huber, in last quarter of the 17th century "to mediate between the pretensions of territorial sovereignty and the needs of international commerce." Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 9 (1966). Huber enunciated three axioms: (1) each state had sovereignty within its territory; (2) all persons

proach, it was possible for national courts or tribunals to adopt a generous attitude for acceptance of jurisdiction to adjudicate, while trying to avoid conflicts through the application of choice of law rules in deciding the substantive issues presented. As regards penal or public law, courts have generally deferred to the authority of the legislature or executive to express public policy.[18] This has two distinct consequences: either courts have felt disqualified from applying foreign penal or public law[19] or they might try, where possible, to avoid conflicts by restricting the scope of their own law. Therefore, a common presumption arose that sanctions should not normally be im-

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within the state's territory, permanently or temporarily, were held to be its subjects; and (3) state rulers arranged through comity that the laws of each state were to be enforced within its boundaries in order to maintain validity and nonprejudice to other states' laws and citizens. *Id.* at 26 n.52. Theorists differed over whether comity was a matter for the discretion of each sovereign state, as was maintained by Voet and Pufendorf, or whether it was based on the existence of a *jus gentium,* which Yntema saw as being reborn as "transnational law" in the 1960s. *Id.* at 28-31. However, although the concept of comity was adapted by Lord Mansfield in Britain, it fell into disuse there as well as in continental Europe. There nevertheless remained disagreements in both Britain and Europe as to whether deference to foreign law in appropriate cases was entirely within the discretion of national courts and based on the importance of doing justice between private parties, or whether it expressed a link between private and public international law and a unity-in-diversity of legal systems. *Id.* at 31. In the United States, the comity concept was imported by Story but later modified into a discretionary principle with an ambiguous status between law and policy; it has been criticised as being unhelpful. Joel Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 54, 77-79 (1991).

18 I use the term private law in the traditional sense of the law governing relations between private parties. However, the distinction between public and private law was never easy to maintain, and it became more elusive as new forms of regulatory law introduced public policy issues more directly into the evaluation of private relations. This led to calls for the application of conflicts principles to public law. Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for their Interaction*, 163 Recueil des Cours 311 (1979). More recently it has been argued that all law should be considered as public law and conflicts should be approached from the policy perspective of allocation of governmental responsibility between states. Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT'L L. 975, 985 (1994).

19 However, the origins of the "public law taboo" are obscure and its scope uncertain. *See* Trachtman, *supra* note 18, at 997. The gap was filled to some extent by interstate cooperation in criminal matters, especially extradition. A particular anomaly has been taxation, which is normally excluded from such general cooperation arrangements, although there are some specific bilateral and multilateral treaty provisions for assistance in tax enforcement. Refusal to extend comity to tax laws (and public law more generally) is often misleadingly justified by citing Lord Mansfield's dictum: "no country ever takes notice of the revenue laws of another." Holman v. Johnson, 98 Eng. Rep. 1120-21 (K.B. 1775). However, Mansfield was concerned with ensuring that private contracts would be enforced even if they entailed breach of a foreign revenue law, to prevent easy escape from contractual obligations in a mercantile era of stringent customs duties and widespread smuggling. *See* PICCIOTTO, INTERNATIONAL BUSINESS TAXATION, 299-304 (1992).

posed on extra-territorial acts.[20] A classic instance of this was the United States Supreme Court's rejection, in the 1909 American Banana case, of the claim that the Sherman Act might apply to anti-competitive behaviour taking place abroad, although the dispute was between U.S. corporations and affected U.S. imports. Stating firmly that the legality of an act must be determined by the law of the place where it occurred, Justice Holmes asserted that to decide otherwise "not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."[21]

Unilateral restriction of jurisdictional scope might also be decided by the legislature, and could take a flexible form. A good example of this was the introduction of the foreign tax credit by the United

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20 The legislature might nevertheless assert a broader jurisdiction, as some countries have, often to assert a claim to protect its nationals abroad. Such claims would be hard to reject under the permissive rule of public international law adopted by the Permanent Court of International Justice in The Lotus case. The S.S. Lotus, P.C.I.J. Series A, No. 10, World Court Reports (Hudson ed., 1935). However, a claim to prescriptive jurisdiction over acts outside the territory is futile, unless it can be enforced against the perpetrator's person or property. States were generally unwilling to cooperate to facilitate such enforcement through procedures such as extradition, unless the actions complained of took place within or had a close connection with the requesting state. Thus, penal or public law jurisdiction could only be effectively asserted by a state against those with a close connection to its territory, i.e., residents, nationals, or those doing business or having assets within it. This could, of course, still produce substantial overlapping of jurisdiction, which becomes greater as states become more socially and economically integrated.

21 American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909). The case was decided at the height of the conflict over the interpretation of the Sherman Act; a majority of the Court, led by Harlan, generally espoused a strict view of the Act's prohibition of combinations, whereas Holmes and White espoused a more liberal view. One of the arguments in this debate was that the Sherman Act, if applied strictly to all agreements between firms, was effectively an anti-cartel law and was thereby paradoxically encouraging the more rapid growth of large corporations in the United States, in comparison to Europe. Whatever its merits, the comparison was explicitly drawn in public debates and marshalled by the Senate Committee on Interstate Commerce in a report of 1911 on Trusts in Foreign Countries. *See* MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916 154 n.166 (1988). Thus, Holmes's assertion of the need to recognise regulatory diversity was also, as is often the case, an argument for a degree of harmonisation with other countries. For a more personal account of Holmes's decision in the American Banana case see JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 65-110 (1976). As is well known, the effects of the judgment were subsequently limited, and the Court held in United States v. Sisal Sales Corp., 274 U.S. 268 (1927) that a conspiracy between U.S. corporations to monopolise sisal exports from Mexico to the United States was formed in the United States and affected imports. Thus, they fell within the Sherman Act and could not be exempt simply because one element of the conspiracy involved inducements to Mexican officials. However, prior to 1938, only about a dozen cases were initiated by government agencies involving foreign commerce, and they all concerned monopolisation of foreign sources of raw materials to push up U.S. import prices. *See* FEDERAL ANTITRUST LAWS (1949). More will be said below about the activation of the antitrust laws after 1937, involving an attack on global cartels in the manufacturing industry.

States in 1918, which entailed an acceptance of the policy that a foreign country had the prior right to tax income of a U.S. citizen from activities taking place there.[22] The acceptance of unilateral restrictions on jurisdiction provided a rudimentary form of coordination, but its limitations eventually led to jurisdictional conflicts and attempts at international coordination.[23] Thus, the British government resisted pressures to limit taxation of residents' worldwide income but preferred attempting to negotiate international arrangements, which in the United Kingdom's view, ought to favour residence over source taxation in order to stimulate international investment. The conflict between the residence and source principles proved hard to resolve, and although models for bilateral tax treaties were internationally agreed as early as 1928, few had been adopted by 1939.[24] In the meantime, internationally-operating firms found their own means to mitigate what they considered to be unacceptable jurisdictional conflicts by developing avoidance techniques, such as the use of tax

22 This was introduced soon after the imposition of the first federal tax on corporate income of 1917 at six percent, which was doubled one year later, and coupled with a graduated tax on "excess profits." The shift to direct taxation of income as the major source of state revenue took place in most developed industrial states in the same period, and marginal rates rose sharply during the Great War. One result was that internationally-operating businesses began to campaign against "international double taxation" and pressure their legislatures for relief. The Netherlands introduced a limited version earlier, but the United States was the first to allow a general foreign tax credit. THE REVENUE ACT, sec. 222 (individuals) and sec. 238 (corporations). The justification given to Congress in 1918 was directed at the position of individuals, arguing that the thousands of U.S. citizens working in Canada or South America on behalf of U.S. business might be induced to give up their U.S. citizenship if they were liable to a double tax burden. Although it was pointed out that rich U.S. citizens living abroad on U.S. investments, such as the Actors in Britain, would continue to pay tax in both countries. H.R. 12863, 56 CONG. REC. 677-78 APP. (1918) (statement of Hon. Claude Kitchin). It was extended in 1921 to allow a credit in respect of dividends remitted by a foreign subsidiary in respect of taxes paid on income from which they derived, but the credit was limited to the proportion of the U.S. to the non-U.S. source income. For a discussion of the early debates about the jurisdictional scope of income taxation and their internationalisation through the International Chamber of Commerce and the Fiscal Committee of the League of Nations, see PICCIOTTO, *supra* note 19, at 1-37 (1992). The limitations of the unilateral credit led the United States (despite its withdrawal from the League) to send a national expert to the Fiscal Committee, who actually played a leading part in the drafting of the model tax treaties – the foundation for the spread of a network of bilateral treaties after 1945.

23 The foreign tax credit creates an incentive for host countries to raise their rates on inward investment, since the foreign investor pays the higher of the home and host country rates.

24 The treaties which were negotiated in the 1930s generally resulted from pressures by firms with foreign branches or subsidiaries complaining to their home governments about "double taxation" of profit remittances. Thus, France was the most successful country in negotiating treaties prior to 1939; it concluded some half-dozen agreements largely due to complaints about the application of the French tax on revenue from securities to all companies doing business in France. In the case of foreign firms, the dividend distributions of the parent company were taxed in proportion to the assets in France. PICCIOTTO, *supra* note 19, at 26.

havens and transfer-price adjustments. This spurred national tax administrations to accept the need for tax treaties, realizing that regulatory enforcement on a purely national basis would be ineffective in view of the opportunities for avoidance and evasion available to internationally-operating businesses.[25]

In contrast, some institutions came much earlier to be coordinated within a multilateral framework. This was notably the case for intellectual property rights. In the late 18th century, philosophers' and political economists' ideas about free trade based on property rights derived from labour, led to the replacement of the traditional system of royal grant of privileges by the first modern intellectual property laws.[26] Initially, these were on a national and competitive basis, although foreigners were gradually given the same rights as na-

25 Concern about use of tax havens initially focused on wealthy individuals or families, leading to legislation such as the U.S. foreign personal holding company provisions first enacted in 1934 and strengthened after evidence to a Joint Congressional Committee on Tax Evasion and Avoidance of 1938. The important U.S.-UK treaty of 1945 resulted partly from pressures by UK firms with subsidiaries in the United States which complained to the Foreign Office in 1944 that the lack of a UK foreign tax credit had led them to have recourse to "unsatisfactory expedients such as invoicing goods at higher prices to the subsidiary or leaving profits to accumulate in the US." *See* PUBLIC RECORD OFFICE File FO371/38588; *see also* PICCIOTTO, *supra* note 19, at 39-40.

26 The protection of authors and inventors developed on the basis of a classical liberal notion of rights, in which a universalistic principle both permits and conceals the balancing of different economic interests and thereby produces pragmatic outcomes. The strongest conception of rights to intellectual property was in France, especially in relation to the rights of authors to the fruits of their labour, influenced not only by the philosophers and the Revolution but also by political campaigns by authors like Victor Hugo, who had been cut adrift from the patronage of earlier times on the new seas of commerce. Even in France, however, a more utilitarian approach was accepted for technology. Thus, the French Minister for Commerce, introducing what was to become the new French patent law of 5 July 1844, said that although an inventor might be philosophically thought to be entitled to a perpetual property right in the fruits of labour, the aim of the legislation was more pragmatic and utilitarian. *See* YVES PLASSERAUD & FRANÇOIS SAVIGNON, PARIS 1883: GENÈSE DU DROIT UNIONISTE DES BREVETS 77 (1983). The U.S. conception was more pragmatic from the outset, as the Constitution empowered Congress to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. CONST. art. I, § 8. This was granted by Congress in the first modern patent legislation of 1790. Typically, English pragmatism reached a similar conclusion earlier, without universalistic declarations. Although, there were considerable conflicts aimed at the freedom to use innovations and the right to be published: the 1623 Statute of Monopolies had ended all privileges – with exceptions for new manufactures and printing – and the 1709 Statute of Anne protected publication of books with titles that were registered at Stationers' Hall. However, this meant that its liberalisation was deferred until quite late: the hodgepodge of statutes was denounced in the report of the Gorrell committee in 1909, which laid the basis for a broad rationalisation in the Copyright Act of 1911, as a law "wholly destitute of any sort of arrangement, incomplete, often obscure, and . . . ill-expressed." 1 LADDIE ET AL., THE MODERN LAW OF COPYRIGHT AND DESIGNS § 4.102, 330 n.1 (2d ed. 1995).

tionals, either unilaterally or reciprocally, and by agreement.[27] By the mid-19th century, however, a combination of liberal and anti-monopolist economic views and universalist ideologies of science and authorship, which were focused through the great scientific Expositions, laid a basis for international negotiations leading to the conclusion of the Conventions of Paris in 1883 for industrial property, and of Berne in 1886, for literary and artistic works.[28] Both the Paris and Berne Conventions adopted a similar approach to international coordination, leaving the substance of the system of regulation to each state to decide for itself, while being obliged to grant national treatment to others.[29] The Paris Convention was in this respect particularly minimalist, in that although it defined industrial property "in the broadest sense" it did not specify what could or should be protected, nor in what way, nor for how long. The Berne Convention was more specific, laying down a minimal level and period of copyright protection (agreed in the early revisions culminating in the Berlin Conference of 1908), but it still left for decision within each state what should be the scope of the key terms "work" and "author," and the requirement of fixation, or the protection not of an idea but of its embodiment.[30]

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27 For patents, the English law required an invention to be new to the kingdom; other countries introduced patents of importation or of introduction; both systems allowed national rights to be granted to a person who was essentially pirating a foreign invention. The French law of 1791 also voided a French patent if the holder applied for protection abroad in respect of the same invention or imported the articles from abroad. These protectionist restrictions were relaxed in the free-trade period of the mid-19th century. At this time, an 1869 article in The Economist even predicted the abolition of patents; instead, the world recession after 1873 led to their establishment within the international framework of the Paris Union. *See* PLASSERAUD & SAVIGNON, *supra* note 26, at 82-97. For copyright, the period of mercantilist competition in which states refused protection to works published abroad gave way during the first part of the 19th century either to unilateral protection of foreign works, as in the French law of 1852, or to the extension of protection on the basis of reciprocity and/or by agreement. Still, some states, such as the United States, regarded themselves as importers of ideas and resisted universalist arguments. SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 1886-1986, at 17-37 (1987).

28 Both conventions were finalised by interstate diplomatic processes after being prepared during a series of privately organised international conferences, particularly during the Paris Exhibition of 1878. Thus, there was an interesting interaction of official state support with private initiative from bodies that today we might describe as non-governmental organisations. *See generally* PLASSERAUD & SAVIGNON, *supra* note 26; RICKETSON, *supra* note 27. For a more general discussion of the formation of the public international unions between 1860 and 1913 see CRAIG N. MURPHY, INTERNATIONAL ORGANIZATION AND INDUSTRIAL CHANGE: GLOBAL GOVERNANCE SINCE 1850 (1994).

29 Due to the requirement of novelty and the procedure for registration of patents, national treatment was operationalized by a 12-month right of priority in the Paris Convention.

30 The dominance of French ideas created greater specificity and made broad acceptance more difficult. Notably, although U.S. delegates attended the 1885 Berne Conference – reinforcing the United Kingdom in the ranks of the pragmatists – the United States did not sign or ratify

Thus, although the regulatory and institutional bases of corporate capitalism were established as part of the consolidation of the modern national state in the second part of the 19th century, it was recognized from quite early in the process, and particularly after 1870, that this required a degree of international coordination. In rather few cases, universalist concepts emerged with sufficiently broad support to establish a basis for legitimation directly at the international level. This was the case, to some extent, for the rights of authorship embodied in the Berne Copyright Convention. More often, the mediation and accommodation of divergent private interests was left primarily to national provisions and processes of legitimation, but their interaction was dealt with by international arrangements based on balancing national interests and establishing jurisdictional limits. Thus, the classic liberal system depended upon a balance between a broad base of cosmopolitan support for a universalistic principle and the existence of an approximate reciprocity of national economic interests between the major states.[31]

3. *Limits of Liberal Internationalism*

This classic liberal internationalist system clearly provided only a rudimentary framework for coordinating the regulation of international economic activity, although it was capable of development and refinement. Although the national and the international were formally separate spheres, state sovereignty, which provided their point of articulation, was a fluid interface rather than an impermeable barrier. Thus, although international agreements formally bound only states, where they were intended to create private rights and obligations they could be incorporated directly into national law as a matter of practice or a constitutional principle. More difficult was the problem of voluntarism which followed from state sovereignty; this made it

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the Convention. As stronger levels of protection were negotiated into the Berne text under French influence, the United States continued to prefer reliance on unilateral measures, bilateral agreements, and the minimalist provisions of the Universal Copyright Convention of 1952 and did not join the Berne Convention until 1988. *See generally* PLASSERAUD & SAVIGNON, *supra* note 26; RICKETSON, *supra* note 27.

31 Thus, the Paris Industrial Property Convention was underpinned by the relative technological equilibrium among the main industrial powers. The major focus for the balancing of national interests in technology transfer has been article 5, which originally allowed national laws to require local working while restricting states from voiding a patent on the grounds of importation. This was originally mainly aimed at the French law, and was later the main target of national opponents of the convention. PLASSERAUD & SAVIGNON, *supra* note 26, at 218. The possibility of local working requirements was progressively restricted in subsequent revisions, by limiting the remedy for non-working to licensing, culminating in the Lisbon Congress of 1958 and the revolt of technology-importing countries. *Id.* at 256-57.

hard to achieve agreement on a multilateral arrangement of any substance, unless common interests or universalist sentiments were very strong.[32] However, more flexible techniques could be developed; an example is the use of a Model treaty to provide the basis for negotiation of bilateral agreements suitably adapted for the particular characteristics of the particular parties' national systems and their interactions, notably for coordinating income taxation.[33] The adoption of "soft law" codes, which attempted directly to bridge the gap between the international and the national, later developed as a variant.[34]

Nevertheless, the limitations and weaknesses of the classic liberal system were often apparent to those involved in the development of the arrangements which constituted it. A good example is provided by the adoption of the Arm's Length Principle, based on separate accounting, in the taxation of international corporate groups. This was the outcome of a study based on national reports from 28 states and carried out for the League of Nations Fiscal Committee between 1931 and 1933.[35] Those involved were well aware of the problems involved in taxing a firm with branches or subsidiaries in different countries:

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32 While formal empires still subsisted, the colonial powers could extend to their colonies and dependencies both their internal laws and their participation in those international arrangements, as far as they were considered appropriate. Upon achieving constitutional independence, these territories generally accepted the inheritance of most of these internal and international regulatory regimes.

33 The first model tax treaties were adopted at the intergovernmental conference organised in 1928 under the auspices of the League of Nations. Report Presented by the General Meeting of Governmental Experts on Double Taxation and Fiscal Evasion, League of Nations Doc. C.562.M.178 (1928). The treaty texts were supplemented by a Commentary, which formed part of the travaux préparatoires and could facilitate uniform application of their provisions by national courts. In the post-war period, this role was taken over mainly by the OECD's Fiscal Committee, its authoritative Model treaty, and its Commentary. A less firmly institutionalised treaty network was that of the bilateral investment treaties, developed in the 1970s following an OECD draft convention of 1968, while the Asian-African Legal Consultative Committee drafted alternative models in 1984. M. S. Bergman, *Bilateral Investment Protection Treaties*, 16 N.Y.U. J. INT'L L. & POL. 1 (1983); U.N. CENTER ON TRANSNATIONAL CORPORATIONS, BILATERAL INVESTMENT TREATIES, U.N. Doc. ST/CTC/65 (1988).

34 Perhaps most prominent have been the codes for multinational business. LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES (Norbert Horn ed., 1980). However, the whole question of these codes became politicised so that their actual content and function became obscured. Other forms of international economic "soft law" aim at facilitating intergovernmental policy coordination without the rigidity of hard law obligations. *See* David C. Mulford, *Non-Legal Arrangements in International Economic Relations*, 31 VA. J. INT'L L. 437 (1991); Rachel de la Vega, *A Hard Look at Soft Law*, Panel Report, 82 AM. SOC'Y INT'L L. PROC. 371 (1988).

35 Despite U.S. non-membership of the League, the study was funded by the Rockefeller Foundation and implemented by an American lawyer, Mitchell Carroll, with a supplementary report on the accounting aspects by Yale Professor Ralph C. Jones. Taxation of Foreign and

evaluating whether the separate accounts of each entity showed its "true" profit, and whether it was important to have recourse to "empirical methods" to check the profit-split within the firm as a whole. The report considered the alternative of a global approach and fractional apportionment but rejected it as "impractical," given the difficulty of getting international agreement both on methods of computing net income and on a formula for apportionment. Nevertheless, some of those involved anticipated that what could not be resolved by a global agreement on formula apportionment would have to be negotiated through a lengthy, piecemeal, and ad hoc basis.[36]

On the other hand, from the international businesses' perspective, the inadequate international coordination of business regulation created barriers and burdens, as well as inequalities in the conditions of competition. This was felt most acutely in relation to taxation, which imposed direct costs on business, especially when marginal rates climbed high during the first World War. The campaign against "international double taxation" quickly became internationalized, through the recently-created International Chamber of Commerce, which participated in the work of the League Fiscal Committee. However, as progress on formal intergovernmental agreements proved slow, individual firms soon took steps to organize and structure their activities to minimize the adverse impact. Indeed, it could be said that the emergence of the international corporate group, later termed the transnational corporation (hereinafter TNC), as an increasingly dominant form of organization for international business from the 1880s, was in response to the international regulatory framework of liberal internationalism. Such firms, by their nature, internalize the management of regulatory difference and are able to structure the form and location of their activities either to avoid regulatory barriers or to take advantage of regulatory divergence.[37] As an important aspect of this,

National Enterprises, League of Nations Doc. C.73. M.38 1932 I (1932); Doc. C.425 M.217 1933 IIA; Doc. C.425(a) M.217(a) 1933 IIA (1933); Doc. C.425(b) M.217(b) 1933 IIA (1933).

36 However, the practical starting-point of national tax administrations was the separate accounts; even before 1935 they accepted that many items of general overhead and financing of capital items might have to be allocated on a formula basis and were already accustomed to checking for a "fair" profit-split by reference to factors like the proportion of turnover. They also understood that adjustment of accounts by one authority would involve negotiations with others for possible "corresponding adjustments," and that this could over time result in ad hoc allocations by formula. *See* PICCIOTTO, *supra* note 19, at 32-35.

37 Thus, a primary reason for the early growth of manufacturing TNCs was to avoid regulatory barriers, including tariffs and government procurement rules or preferences, e.g., for railway or telephone equipment. *See* MIRA WILKINS, THE EMERGENCE OF MULTINATIONAL ENTERPRISE: AMERICAN BUSINESS ABROAD FROM THE COLONIAL ERA TO 1914 168-69 (1970). Generally, analysts of the TNC explain its competitive advantages as arising from the exploitation on

TNCs pioneered the development and use of jurisdictions of convenience to mitigate regulatory burdens and the impact of conflicts. Thus, the internalization of planning by business firms themselves could remedy the somewhat inadequate coordination between states. This has been especially important in relation to the regulation of finance and taxation; techniques pioneered in the 1930s led to the emergence of tax "havens" and "offshore" financial centres as a key element of the international financial system in the 1950s and 1960s. These techniques were tolerated, and even encouraged, by authorities in the major states.[38]

In any case, it was hardly conceivable that the liberal internationalist arrangements, first conceived in the period between 1870 and 1914 could be strengthened in the autarchic and protectionist 1930s. When it came to planning the foundations for the post-war global order, the need for such a strengthening was clear, but the task was already rendered more difficult by the extent to which national state activities had increased and diverged by neo-Keynesian measures. Nevertheless, there was some success in establishing global macroeconomic institutions on the basis of a delicate compromise that Ruggie has called "embedded liberalism."[39] Significantly, however, attempts to provide global policy coordination across issue areas generally failed. In lieu of a broader trade organization to make up the third leg of IMF-IBRD-ITO, the GATT was established on an "interim" basis. Other global forums, notably the UN ECOSOC, became paralysed by the Cold War and increasing north-south divisions. Only in Europe was there sufficient impetus to envisage an approach which could provide linkage at the international level for a range of economic policy regulatory regimes, through the formation of the European Communities. However, this has perhaps aptly been described

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an international scale of combinations of assets and locations. JOHN H. DUNNING, EXPLAINING INTERNATIONAL PRODUCTION 13-39 (1988). Local competitive advantages may include internalisation of the management of diverse currency rates, financial markets, and regulatory regimes.

38 Thus, the initial emergence of the Eurodollar market resulted from (1) the problem of reconciling national monetary and banking policies with the international fixed-rate regime, and (2) the decisions by the authorities of key countries, such as the United States and Germany, to apply different rules as between purely domestic and internationally-oriented monetary and banking transactions. For a more detailed exposition of these arguments, see PICCIOTTO, *supra* note 19, at 117-25, and Sol Picciotto, *The Construction of International Taxation*, *in* PROFESSIONAL COMPETITION AND PROFESSIONAL POWER 25-50 (Yves Dezalay & David Sugarman eds., 1995). *See also* Eric Helleiner, *Explaining the Globalization of Financial Markets: Bringing States Back In*, 2 REV. INT'L POL. ECON. 315 (1995).

39 John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982).

as the "European rescue of the nation-state," in that the Communities' institutions were designed to provide policy coordination of functional areas within a bureaucratic framework – the main legitimation for which was still based on diplomatic bargaining of national interests.[40]

The changes in the international system that progressively undermined classic liberal internationalism during the 1960s and 1970s are fairly obvious. Formal decolonization stimulated the vast growth in the number of states and the increasing north-south division, which, in turn, led to imbalances that made it hard to maintain the momentum of voluntary participation in international coordination arrangements. These arrangements were based on evaluations of national interest and reciprocal grants of national treatment. Developing countries asked for "positive discrimination" to take into account their special position. They could also justify this by pointing to the equally mercantilist attitudes of some of the present developed countries at an earlier stage, such as their reluctance to protect foreign rights in technology at the time when they were technology importers.[41] The centrally-planned economies were even more insistent upon their sovereign right to choose the terms on which they participated in international arrangements, especially those of an economic character.

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40 ALAN S. MILWARD, THE EUROPEAN RESCUE OF THE NATION-STATE (1992). Milward may overstate the view that the prime concern of the statesmen involved was to restore their national states, but he rightly stresses that the degree of integration envisaged was only that strictly necessary to enshrine their interdependence and to contain Germany, in particular. In the debate on European integration, the split between neorealists and neofunctionalists is a false division, just as with liberal internationalism, since the contradictions lie in the phenomenon itself. Thus, it is true that the intention of the European integrationists has been to establish bureaucratic coordination of specific functional areas in the hope that this would create "spill-over" and broader cooperation, as the neo-functionalists have argued. It is also true that the primary focus for the formation of public interest remained the national states so that negotiations at the international level concerned the balancing of national interests, as the neo-realists have argued.

41 This conflict resulted in the reluctant negotiation of the Protocol to the Berne Convention at Stockholm in 1967; although the Convention itself was saved by the compromise agreed at Paris in 1971, it has remained deadlocked since then and has thus been unable to keep pace with the needs created by communications technology advances. RICKETSON, *supra* note 27. The Paris Union has been subject to similar divisions and deadlock. In the tax field, despite the attempt to reconcile the source and residence principles in the 1943 Mexico draft of the League of Nations Model Treaty, and the later work of the UN Expert Group between 1967 and 1978, the spread of bilateral double tax treaties was overwhelmingly among OECD countries, apart from those applied by colonial states to their dependencies in the immediate post-war period. Particularly notable was the lack of tax treaties between Latin American countries and the United States, due both to the former's insistence on the source principle and the U.S. Congressional rejection of a "tax sparing" clause. *See* PICCIOTTO, *supra* note 19, at 55-57.

Much less obvious, however, but perhaps more serious, were the broader underlying changes which made it increasingly difficult to coordinate even among the OECD countries on the basis of classic liberal internationalism. The gathering momentum of international trade and investment, especially direct investment by the increasingly dominant TNCs, created strains on the loose framework of coordination of national policies and regulation. While the TNCs complained of being subject to a diversity of inadequately coordinated national systems which could even subject them to conflicting requirements,[42] critics of "the multinationals" pointed to their ability to use their global power to evade and undermine national regulation.[43] Jurisdictional conflicts became focused on legal disputes about "extraterritoriality;" attempts were made to refine rules about jurisdictional scope,[44] but many also argued that broader issues about the nature of statehood and its territorial basis were involved. Although a distinguished economist proclaimed in 1969 that "[t]he nation-state is just about through as an economic unit,"[45] the actions of the OPEC states in 1973 and 1974 created disruptions in global financial flows with

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42 *See, e.g.*, THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS (Dieter Lange & Gary Born eds., 1987).

43 Such concerns were not confined to radical critics. In a 1973 speech, the Governor of the Bank of England discussed the power of the multinationals and reflected upon "whether their power is such as to represent a significant reduction in the sovereignty of the host government," especially over economic policy-making. Lord Richardson, Address Before The Société Universitaire Européenne de Recherches Financières (April 11, 1973), *in* 13 BANK OF ENGLAND Q. BULL. 184, 186 (1973).

44 Decades of disputes over the extraterritorial application of U.S. antitrust laws flowed from the reinvigoration of those laws by the Department of Justice after 1937 under Thurman Arnold and from their application to international cartels. MARC A. EISNER, REGULATORY POLITICS IN TRANSITION (1993). Although U.S. lawyers and economists had been relatively successful in spreading the antitrust gospel to Europe and Japan during and after the War, attempts to establish an international mechanism to coordinate national competition rules failed both in the stillborn ITO and in the deadlocked UN ECOSOC. Sigmund Timberg, *Restrictive Business Practices as an Appropriate Subject for United Nations Action*, 1 ANTITRUST BULL. 409 (1955). During the 1970s, jurisdictional conflicts spread to other issues, such as Worldwide Unitary Taxation, PICCIOTTO, *supra* note 19, and trade embargoes, A. L. C. DE MESTRAL & T. GRUCHALLA-WESIERSKI, EXTRATERRITORIAL APPLICATION OF EXPORT CONTROL LEGISLATION: CANADA AND THE USA (1990); Sol Picciotto, *Jurisdictional Conflicts, International Law and the International State System*, 11 INT'L J. SOC. L. 11 (1983). The issue came to a head in 1983 – escalated by the application of U.S. trade embargo laws to the supplying of U.S.-origin technology to the Soviet gas pipeline – and was taken up at summit meetings and through the OECD. This resulted in an attempt to define principles for "consideration and restraint" in the exercise of jurisdiction, echoing the "jurisdictional rule of reason" developed in the United States. *See generally* OECD, MINIMIZING CONFLICTING REQUIREMENTS (1987).

45 CHARLES KINDLEBERGER, AMERICAN BUSINESS ABROAD 207 (1969).

profound and recurrent consequences.[46] Thus, it was clear that the strains on the international system were not caused only, or even primarily, by increased international integration. Just as potent was the increasingly active and interventionist role of national states in response to domestic concerns,[47] which placed greater strains on the loose forms of coordination characteristic of liberal internationalism.

B. The Growth of Global Regulatory Networks

1. The Nature of International State Networks

The fluid and criss-crossing nature of international contacts of a wide variety of types has increasingly been referred to as a metaphorical "network." The concept has been applied to international organization from a fairly orthodox "interdependency" and institutional perspective.[48] It has also been deployed by political scientists to map the interactions of agents or actors involved in "policy-making," initially within a national context.[49] More recently it has been used to describe new forms of transnational politics, based on the growth of "principled issue networks" involving non-governmental organiza-

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[46] Although the petrodollars were successfully recycled in the short-run, that this was done to a large extent through the private banking system created a debt overhang which led to a renewed crisis, sparked by the Mexican default of 1982. For an excellent account of the ways in which the growth of the banks' exposure was encouraged and facilitated by political decisions, especially those of the United States and the IMF, in an attempt to balance national and international financial concerns, see ETHAN B. KAPSTEIN, GOVERNING THE GLOBAL ECONOMY: INTERNATIONAL FINANCE AND THE STATE 58-80 (1994).

[47] Sociologists of law have discussed the trend towards "juridification," in which economic, technological, and social changes led to a politicisation of social relations focused on the national state and resulted in new forms of social regulation, generally of a more "interventionist" character, despite the misleadingly narrow terms "legalization" and "juridification." *See* JURIDIFICATION OF SOCIAL SPHERES, A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW (Gunther Teubner ed., 1987). The shift towards formalization or materialisation of the regulation of economic activity, although often originating nationally, was quickly seen to have international ramifications. For example, banking and financial services in the United Kingdom were supervised on an informal basis under the aegis of the Bank of England until the secondary banking crisis and the Herstatt Bank collapse of 1974, as well as the rapid awareness of the new international role of the City of London, all finally led to the formalization of the system of supervision under a spate of Banking Acts and Financial Services legislation. *See, e.g.*, Brian Quinn, *Cross-Border Regulation of Banking*, *in* LEGAL ISSUES OF CROSS-BORDER BANKING 109-16 (R. Cranston ed., 1989). For a personal memoir by a British banker testifying to the "considerable increase in the role of the lawyer" since the late 1970s, see I. Cheyne, *Reflections on Corporate Rescues*, BUTTERWORTHS J. INT'L BANKING & FIN. L. 321, 322 (1994).

[48] *See, e.g.*, HAROLD JACOBSON, NETWORKS OF INTERDEPENDENCE: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL POLITICAL SYSTEM (2d ed. 1984).

[49] *E.g.*, David Knoke, *Networks of Elite Structure and Decision-Making*, 22 SOC. METHODS & RES. 23 (1993); *See also* POLICY NETWORKS: EMPIRICAL EVIDENCE AND THEORETICAL CONSIDERATIONS (Bernd Marin & Renate Mayntz eds., 1991).

tions and others operating on the basis of shared ideals on global issues, such as humanitarian and environmental causes.[50] Others have gone further and boldly argued for the emergence of a "global-civil society," based on global networks which "are all united, more or less, by common norms or codes of behaviour that have emerged in reaction to the legal and other socially constructed fictions of the nation-state system."[51]

As shown in the previous section, the phenomenon of networking is somewhat inherent in the system of liberal internationalism. The scope of state sovereignty is fluid, and state jurisdictions overlap and interact. The result is that the modern international state system consists of networks, or webs, of state activity. Further, the decentralized decision-making also implicit in sovereignty means that cooperation or coordination arrangements between states are voluntary and develop according to the mutual interactions of groups of states. What is important to consider is what changes have taken place in the character of this process.

In particular, the question raised in the context of globalization is whether and in what ways a transformation may be taking place from a primarily interstate, or inter-governmental, system to one with a more directly global character. Evidence of this is the growth of a dense network of international institutions and governance arrangements cutting across states and involving all kinds of private and public social actors: social activists, scientific experts, professionals, academics, business managers, and various public officials. Within a neo-liberal perspective, it may be argued that these groupings and interactions begin to create a global policy arena in which issues are increasingly resolved free from the refraction of the state and national interest prism.

On closer examination, however, many of the claims made by these neo-liberal accounts are hard to justify; the process appears more complex, conflicting, and contingent than they sometimes sug-

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50 *See, e.g.*, Kathryn Sikkink, *Human Rights, principled issue-networks and sovereignty in Latin America*, 47 INT'L ORG. 411 (1993); Margaret Keck & Kathryn Sikkink, Transnational Issue Networks in International Politics (April 1994) (unpublished conference paper, on file with the author). There are some similarities with the concept of "epistemic communities," in that the focus is seen as being a shared value-system. However, the use of the "network" metaphor rather than that of "community" implies a looser process, and the emphasis is on shared ideals rather than specialist knowledge. The "transnational politics" perspective still sees the state as the main site of power but argues that sovereignty is being reshaped by creating new limits on its power through transnational access to ideas and resources.

51 Ronnie D. Lipschutz, *Reconstructing World Politics: The Emergence of Global Civil Society*, 21 MILLENNIUM 389, 398 (1992).

gest. In many ways, the construction of international issue networks and global policy arenas does not constitute a reduction of the scope of interstate politics but rather its pursuit by other means.[52] Certainly, this may entail an attempt to "depoliticize" issues by developing technical, scientific, managerial, or professional techniques and basing their resolution on universalizing discourses. However, such techniques are neither neutral in themselves nor in the processes of their development and application. Rather, it is their very appearance of objectivity, rationality, and universality that underpins their power and utility. A different view is expressed by Adler and Haas; they argue that the "epistemic communities," which form around global policy issues and are agreed upon a common set of values or a worldview, can facilitate international policy formation by "narrowing the range within which political bargains could be struck." As an example, they cite the way in which the core of the Bretton Woods monetary system, fixed rates, and the dollar-gold standard, was agreed by expert consensus, leaving a narrower range of issues, such as the extent of balance-of-payment support, to be "resolved purely through political muscle."[53] However, Raymond Mikesell's personal memoir of those negotiations gives a rather different flavour, showing that the "experts" between 1943 and 1945 were highly political individuals like Harry White, who conducted a clandestine foreign policy, and that key matters, such as the proposed international monetary fund (IMF) quotas, were calculated on the basis of political acceptability; although, it was put forward as objective and scientific in order to facilitate acceptance.[54]

Nevertheless, it can be said that the struggles over global governance are to a great extent being fought through the debates waged within and between various scientific and professional disciplines and their universalising discourses. These discourses may pertain to free trade and open markets, the rule of law and human rights, or biodiversity and the ecosphere. Although the arguments within these debates are conducted in technical, rational, and objective terms, they are also deeply political in many ways. This is expressed and exemplified

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52 *See* Yves Dezalay, *Between the State, Law and the Market: The Social and Professional Stakes in the Construction and Definition of a Regulatory Arena*, *in* INTERNATIONAL REGULATORY COMPETITION AND COORDINATION: PERSPECTIVES ON REGULATORY REFORM IN EUROPE AND THE UNITED STATES 59 (W. Bratton et al. eds., 1996).

53 Emanuel Adler & Peter M. Haas, *Conclusion: epistemic communities, world order and the creation of a reflective research program*, 46 INT'L ORG. 367, 378 (1992).

54 RAYMOND F. MIKESELL, THE BRETTON WOODS DEBATES: A MEMOIR 21-22 (Essays in International Finance No. 192, 1994).

through the grand narratives of the emerging "global civil society." These discourses attempt to provide means of evaluating and justifying the technical policy prescriptions of specialists by reference to broader social trends, needs, or demands. However, the inadequate political underpinning, or chronic "democratic deficit," of international institutions makes it extremely difficult for these bodies to give coherent expression to social values and preferences. Instead, their actions are generally reactive to global crises, which provide a focus for public attention and dramatize the need for an internationally-coordinated response. If a global politics exists today, it consists of the management of the responses, through the complex layers of interacting institutional networks, to global dramas: Chernobyl, the ozone layer, AIDS, famine in Africa, the Barings Bank collapse, or the recent "mad cow disease" scare. Such crises are often very real but may be seen, like outbreaks of a contagious disease, as symptomatic of failures of public governance.

2. *Networks in Global Economic Regulation*

Certainly, the complex networks that have grown up in the sphere of international business and economic regulation can be seen as a response to some of the problems of coordination of state regulation within the classic framework of liberal internationalism, as discussed in the previous section. In the classic model, where interstate legitimation is based on bargaining between governments and driven by national interests, coordination of national regulation takes place through diplomacy and in intergovernmental agreements and organizations. As that model has been put under pressure, in the ways described in the previous section, there has been an increasing growth of international networks at sub-state level, such as direct contacts between national regulators with specific functional responsibilities. Thus, officials whose powers and policies have been developed within the hierarchy of the national state have increasingly developed horizontal cross-border contacts with their counterparts in other states, by-passing the coordination of national levels of government and the mediation of diplomatic channels and Foreign Offices. The growth of these links has also resulted from the strategic interplay among regulators. For example, some may seek to expand the scope of their jurisdiction by creating a forum which they can influence, while the aim of others may be to counter unilateral assertions of jurisdiction by establishing international procedures to constrain the more aggressive regulators.

Although most of these links have initially been formed by public officials for specific functional purposes, I argue that they form part of a broader process of developing neo-liberal forms of global governance, but in a narrower sense than is suggested by some of the "globalization" talk. They form part of a more general shift from "government" to "governance," involving the delegation or transfer of public functions to particularized bodies, operating on the basis of professional or scientific techniques. Thus, central bankers, tax collectors, antitrust law enforcers, financial market regulators, and others, have asserted, or been given, increasing autonomy and a "depoliticization" of their functions. This facilitates new forms of international coordination which are more decentralized, involving direct contacts between national officials and regulators responsible for specific functions. Such international arrangements constitute a direct response to a felt need, on the part of these officials, for closer cooperation on an international scale to fulfill their national responsibilities.

These networks raise a number of legal and institutional questions, which generally result from two broad predicaments: linkage and legitimation. I will deal with each of these interrelated issues in turn in each of the next sub-sections in the context of specific examples of networking, such as the regulation of financial institutions and markets.

3. Networking and Linkages

International regulatory and policy networks are formed in an informal, ad hoc manner. Like spiders' webs, they may take advantage of existing institutions as points of attachment but form links opportunistically and without strict regard to formal organizational membership. Their specific functional focus and ad hoc formation means that there is considerable overlap between bodies with similar or related functions. However, the random nature of the interconnected networks, and the often disparate nature of the memberships of institutions fulfilling related functions, makes it very hard to achieve coherence between related, though functionally separate, policy areas. At the same time, the single-function focus means that it can be hard to achieve agreement among participants, unless there is a strong common interest. This is true because the single-issue focus makes it hard to offer trade-offs through package deals.

A good example is the relatively recent rapid growth of networks of bank and financial market regulators. Although they have used

formal institutional points of contact, notably the Bank for International Settlements (BIS) and the European Union (EU), the main functional activities have developed through informal groupings. Thus, since 1963, the BIS has "hosted" regular meetings (generally monthly) of central bank representatives, with various functional responsibilities from the so-called Group of 10 countries (G10); BIS also has helped to provide the secretariat for meetings of the G10 Ministers and Central Bank Governors. In 1974, following the Herstatt Bank collapse, a new grouping was brought into being:[55] the Basle Committee on Banking Regulations and Supervisory Practices. It involves senior officials from the central banks and banking supervisory agencies of the G10, in addition to Luxembourg and Switzerland. The work of the Basle Committee in developing, first, the so-called Concordat of Principles for the supervision of banks' foreign establishments,[56] and then the 1988 Capital Adequacy Accord, has gradually become more visible. The negotiating tactics which produced this latter agreement are instructive in showing how the networking process operates. The Accord did not smoothly emerge from the work of the Basle group but was precipitated by a bilateral approach by Paul Volcker, Chairman of the U.S. Federal Reserve Bank (the Fed), to the Bank of England's Governor Leigh-Pemberton, apparently going behind the back of Peter Cooke, the Bank of England official who was chairing the Basle Committee. The resulting agreement between the Bank of England and the Fed had the effect of creating a "zone of exclusion" which threatened Tokyo, Frankfurt, and Paris. Jacques Delors, President of the European Commission, criticized this action as not "communautaire." Further negotiations with Japan resulted in a modified trilateral agreement and left the Basle Committee to work out the details with the commercial banks before issuing the final Accord.[57]

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55 Accounts differ on whether the parent was the BIS itself or the G10. *Compare* James V. Hackney & Kim Leslie Shafer, *The Regulation of International Banking: An Assessment of International Institutions*, 11 N.C. J. INT'L L. & COMM. REG. 475, 488 (1986) (attributing the creation of the Basel Committee to the BIS), *with* BANK FOR INTERNATIONAL SETTLEMENTS, COMMITTEE ON BANKING REGULATIONS AND SUPERVISORY PRACTICES, REPORT ON INTERNATIONAL DEVELOPMENTS IN BANK SUPERVISION 1 (1986)[hereinafter BIS report].

56 The Concordat was first issued in 1975 and then revised in 1983 to include consolidated supervision, after the Banco Ambrosiano collapse. REVISED BASLE CONCORDAT *reprinted in* CURRENT LEGAL ISSUES AFFECTING CENTRAL BANKS 475, 475-81 (Robert C. Effros ed., 1992). Supplementary documents were issued in 1990 and 1992 to strengthen cooperation by home and host supervisors, especially after the experience of BCCI. TONY PORTER, STATES MARKETS AND REGIMES IN GLOBAL FINANCE 60-61 (1993).

57 *See* ETHAN B. KAPSTEIN, SUPERVISING INTERNATIONAL BANKS: ORIGINS AND IMPLICATIONS OF THE BASLE ACCORD (1991); KAPSTEIN, *supra* note 46; Peter C. Hayward, *Prospects for*

Implementation of the Accord depends upon national bank supervisors. This is based on the principles in the Concordat, which gives the primary role to a particular bank's "home country" supervisor. The Concordat principles also require cooperation in the exchange of information between the home and host countries where the bank has branches. This cooperation requires the development of close contacts among many supervisors, including those of the smaller states which have developed as "offshore" financial centres. Thus, the members of the Basle Committee have used their influence to urge the formation of a half-dozen other specialized, regional groupings with which it can coordinate supervision efforts, such as the Offshore Group of Bank Supervisors.[58] A wider international dissemination of the ideologies and practices generated by these relatively small groupings has taken place through the International Conference of Bank Supervisors, first held in London in 1979.[59] Although these are all relatively informal groupings rather than organizations with a conventional constitution, representation is usually by top officials. However, other groups may be formed with specific operational responsibilities, which may then prepare for the high-level agreements or take responsibility for their implementation.

Thus, within the EU, the high-level Banking Advisory Committee (BAC) has played a formal and strategic role in the development of the EEC's programme of financial market integration; a more practical part has been played by a more shadowy "Groupe de Contact." This has met at least since 1971 and has been described as "informal and autonomous in nature," promoting close relationships between bank supervisors which "in turn facilitate . . . a frank and confidential

International Cooperation by Bank Supervisors, 24 INT'L LAW. 787, 788 (1990) (noting the "informal" nature of the accord and describing it as "nothing more than a statement of intent"); PORTER, *supra* note 56, at 52-101.

58 *See* BIS report, *supra* note 55, at 50-64. Membership of the Offshore Group appears to include 19 states: Aruba, the Bahamas, Bahrain, Barbados, Bermuda, Cayman Islands, Cyprus, Gibraltar, Guernsey, Hong Kong, Isle of Man, Jersey, Lebanon, Malta, Mauritius, Netherlands Antilles, Panama, Singapore and Vanuatu. UNITED STATES GENERAL ACCOUNTING OFFICE, INTERNATIONAL BANKING: STRENGTHENING THE FRAMEWORK FOR SUPERVISING INTERNATIONAL BANKS, GAO/GGD 94-68, at 64 (1994). It is hard to judge how effective a body this really is; probably more important are the close links that leading central banks such as the Bank of England have with such centres. Other groupings include the Commission of Latin American and Caribbean Banking Supervisory and Inspection Organizations, and the Southeast Asia, New Zealand and Australia (SEANZA) Forum of Banking Supervisors.

59 Thus, nearly one hundred countries responded to a "wide ranging questionnaire" distributed by the Basle Committee secretariat to collect information on the nature and scope of supervision of foreign banking establishments. BIS report, *supra* note 55, at 2.

exchange of information on problem cases."[60] The partial overlap of membership between these EEC groupings and the Basle Committee has been a source of tension, although such tension may in some contexts prove productive.

These groupings of officials, with all their intricacies and semi-formal character, constitute only part of the picture; clustered around them are the more informal and often personalized contacts with senior directors, officials, and other banking and finance figures. These also may become semi-formalized in bodies such as the Group of 30, which involves personalities from banking and investment institutions, or in various sorts of international financial conferences and meetings.

In turn, these groupings with specific, functional banking concerns overlap with other regulatory networks. The publication of the Basle capital standards produced a strong influence on financial markets through its risk assessments by, for example, weighing government debt over business loans, or residential mortgage lending over secured commercial loans. Furthermore, the breakdown of barriers between different types of financial intermediation and thus between banks and "non-banks," has caused the concerns of bank regulators to converge with those of financial market regulators. These have been more visibly institutionalized in the International Organization of Securities Commissions (IOSCO), established in 1984. Efforts have been made to establish a liaison between IOSCO and the Basle Committee.[61] Thus, when the Basle Committee moved on to refine its standards to account for different types of risk, especially market risk,

60 BIS report, *supra* note 55, at 65. The BAC includes representatives of the Finance Ministry or Treasury as well as the Central Bank and, where they are separate, the banking supervisory institution. It was established and given a formal role by the EEC's First Banking Directive, Council Directive 77/780, 1977 O.J. (L322), and in later Directives, but at the urging of the Commission it has concentrated on "determining the basic direction of integration in the sphere of credit institutions and in settling political, structural or programme-related questions." Report of Chairman BAC, 1982-85, CEC XV/122/85-EN, 4. Meanwhile, the Commission refers to "expert groups" in preparing detailed legislative proposals. The Groupe de Contact long predated the BAC and was formed by the bank supervisors of Member States (so that formally the EC Commission is only an observer); it discusses detailed issues of solvency and liquidity, including confidential aspects relating to individual institutions. Its calculations of solvency and liquidity ratios were reported to the BAC and helped provide the basis for both the EEC's and the Basle Committee's capitalisation rules. *Id. See also* Interview with U. Bader, European Commission official responsible for banking regulation (July 6, 1993, on file with the author).

61 *See* Benn Steil, *International Securities Markets Regulation, in* INTERNATIONAL FINANCIAL MARKET REGULATIONS 197-233 (Benn Steil ed., 1994). *See also* Richard Dale, *International Banking Regulation, in* INTERNATIONAL FINANCIAL MARKET REGULATION 167-96 (Benn Steil ed., 1994) (examining the "Basle regulatory regime" and problems in preventative regulation); PORTER, *supra* note 56 (comparing IOSCO with the Basle Committee); G. Underhill, *Keeping Governments out of Politics: Transnational Securities Markets, Regulatory Cooperation and Polit-*

it tried to do so in ways which would make them compatible with other financial regulatory requirements.[62] In turn, the disclosure requirements of securities market regulators are related to accounting standards, which are set mainly through the International Accounting Standards Committee (IASC), a committee consisting of the professional accountancy bodies of over 80 countries. However, the establishment of a joint programme between IOSCO Technical Committee and the IASC to produce acceptable accounting standards for financial statements was seen in Europe as a move by U.S. authorities to dominate the formulation of IAS standards; the domination was to be achieved through the sanction of refusing access to U.S. capital markets.[63]

Further interlinkages occur through the role the OECD plays in monitoring international capital markets, although the specialists tend to prefer the less political forums, such as IOSCO and the Basle Committee.[64] The OECD is also an important focus for the coordination of international taxation. Intersecting concerns exist: bank confidentiality and the tax treatment of loan-loss provisions. However, taxation is generally separated from other regulatory arenas by administrative "Chinese walls" at the national and international levels; states which

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ical Legitimacy, 21 REV. INT'L STUD. 251 (1995) (discussing the difficulties of "the internationalisation of the securities markets" and the role of the IOSCO).

62 Interview with E. Waitzer, Chair of IOSCO Technical Committee (June 1995, on file with the author). *See also* Steil, *supra* note 61, at 222-24. A tripartite report on the supervision of financial conglomerates was put together under the initiative of the Basle Committee, IOSCO, and the International Association of Insurance Supervisors (IAIS) in August 1995, and it was declared that the three bodies planned to use the report as a basis to develop working arrangements between the different supervisors of financial conglomerates. INTERNATIONAL SECURITIES REGULATION REPORT, August 17, 1995.

63 The Securities Exchange Commission requires foreign firms seeking a listing on a U.S. exchange to comply with U.S. standards of financial disclosure (including accounting rules), and has so far rejected the IAS standards because of (i) their inadequate treatment of intangibles such as goodwill, and (ii) the lack of a standing body to issue interpretations. But the SEC's argument that the higher U.S. standards protect U.S. investors and should be adopted by others have been countered by critics, including U.S. exchanges, who point out that the U.S. markets are losing business as U.S. institutions can simply invest in foreign firms through non-U.S. exchanges. Some argue for "greater deference to home country disclosure standards in circumstances under which the secondary market is deemed to price shares efficiently." Edward F. Greene et al., *Hegemony or Deference: U.S. Disclosure Requirements in the International Capital Markets*, 50 BUS. LAW. 413, 418 (1995). European suspicions were further fueled when moves were announced to "improve the efficiency" of the informal "Group of Four" (the United Kingdom, the United States, Australia and Canada), adding the IASC as the final member; the Group of Four aims to influence the wider IASC forum by publishing discussion papers on emerging issues. ACCOUNTANCY AGE, April 25, 1996.

64 Charles A. E. Goodhart, *Discussion*, *in* THE INTERNATIONALISATION OF CAPITAL MARKETS AND THE REGULATORY RESPONSE 103, 104 (J. Fingleton & D. Schoenmaker eds., 1992).

act as financial centres oppose closer cooperation over taxation. More recently, an entirely new point of attachment was created which has resulted in a new network relating to bank regulation: the Financial Action Task Force, created by the Group of Seven (G7) to combat money-laundering.[65] This has developed a set of requirements, including a know-your-customer obligation for banks, which have been propagated well beyond the G7 countries by seeking endorsements from offshore centres and backed by a monitoring system.[66]

These broader multilateral groupings are counterpointed by meetings of inner circles, such as trilateral discussions between the United States, the United Kingdom, and Japanese authorities.[67] They are further supplemented by networks of bilateral cooperation agreements, which facilitate operational and cooperative information exchange. The establishment of such arrangements has spread downwards from central banks and other state regulators, to self-regulating associations and individual exchanges which have direct responsibility for policing markets and supervising their member firms.[68]

Nationally, the structures and cultures of finance, and the closer contacts between banking and financial markets regulators, have contributed to some parallelism or convergence of regulatory approaches. However, "turf battles" between regulators are far from unknown. Internationally, however, they are endemic, and attempts to develop

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65 William W. Park, *Anonymous Bank Accounts: Narco-Dollars, Fiscal Fraud and Lawyers*, 15 FORDHAM INT'L L.J. 652, 657 (1992).

66 *Id.* at 655-58. *See also* INTERNATIONAL EFFORTS TO COMBAT MONEY-LAUNDERING xviii-xix (W.C. Gilmore ed., Cambridge International Documents Series 4, 1992).

67 *See* Richard C. Breeden, *Reconciling National and International Concerns in the Regulation of Global Capital Markets*, *in* THE INTERNATIONALISATION OF CAPITAL MARKETS AND THE REGULATORY RESPONSE 27, 32 (J. Fingleton & D. Schoenmaker eds., 1992).

68 It is beyond the scope of this paper to analyse the nature of private-public interactions in any detail. The study by Tony Porter compares the Basle Committee and IOSCO and argues that the stronger role of non-public institutions in IOSCO, and its generally weaker role, is due to the higher degree of concentration in the securities industry. PORTER, *supra* note 56, at 123-29. However, this seems to me to neglect the reasons for public or state regulation. The primary reason for central bank involvement has been to ensure monetary stability, and their focus is on prudential regulation of financial firms, to prevent a systemic crisis. This certainly overlaps with the concern to ensure integrity and stability of markets, but the organization of markets is necessarily rooted in the practices and rules developed by market participants, although these have been subject to state monitoring and supervision, in various ways and to different degrees. This accounts for the mixed private-public character of IOSCO, and the overlap between its concerns and those of the Basle Committee. A more difficult question is to define the extent and form of public involvement in private industries and markets. The Basle Committee's central dilemma appears to be whether to focus central bank attention on the need to ensure each bank has an adequate internal system (which gives regulators considerable discretion and may result in big differences in the stringency and efficacy of national enforcement), or continue to try to specify agreed global standards in sufficient detail to be meaningful.

convergence are more likely to be seen as regulatory imperialism. A significant part of the problem lies in the kaleidoscopic nature of the disparate forums and contacts. This makes it hard to achieve compromise solutions based on trade-offs, while making it hard to coordinate related policies and even creating incoherence between them. Particularly glaring is the disjuncture between coordination of capital income taxation and the regulation of financial markets and institutions. Many of the problems of regulating the international financial system stem from the growth of offshore financial centres, which have varying degrees of respectability and offer a range of privileges for non-residents. One such privilege is exemption from tax and confidentiality. Those responsible for the stability of the financial system consider that to be an overriding concern and are willing to relegate to lesser importance measures to combat tax avoidance and evasion. However, tax advantages are the main motivation fueling the use of offshore centres and thereby undermining the financial system.[69]

4. Problems of Legitimation

Generally, the growth of international networks is commonly explained as resulting from the national regulators' increasing awareness of the need for international coordination of their established national systems of supervision in response to the globalization of banking and financial markets. A closer examination reveals a more complex picture in which international trends in financial markets have been brought home to national regulators by spectacular events. These events have revealed the inadequacies of their national arrangements as well as the need for an internationally coordinated response.[70]

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[69] Thus, in 1989 the European Commission, to reduce some of the possibilities for tax evasion created by financial liberalisation, proposed a minimum 15% withholding tax on income from bank deposits, shares, and bonds held by EU residents in other EU states. However, the proposal was defeated due to the fear, expressed particularly by the main EU financial centres of the United Kingdom, Luxembourg, and Ireland, that it would provoke a capital flight to non-EU financial centres. Further proposals failed again in 1994. Many offshore financial centres are dependent upon or have close links with major states; the latter are unwilling to use their power to end tax haven status, partly because this would damage the economies of those small statelets, but mainly because others which would be harder to monitor would take their place. Instead, they have concentrated on trying to improve supervision of the financial sectors, by, for example, sending former Bank of England officials to act as supervisors. *See* PICCIOTTO, *supra* note 19, at 126-131. The result is an institutionalised system of offshore finance, which facilitates not only "legal" tax planning and avoidance but also capital flight from developing countries, illegal tax evasion, and other fraud and money-laundering.

[70] Kapstein identifies three major trends resulting from the era of floating exchange rates, high inflation, and volatile interest rates of the 1970s: (1) globalization of both assets and liabilities which meant that problems originating from international operations directly affected do-

Thus, a series of bank collapses, from Continental Illinois and Herstatt, through Ambrosiano, to BCCI and Barings, in turn, have stimulated successive, national, and international financial market regulation formulations and revisions.

Similarly, the greater headway has been made in creating an obligation on banks to monitor their customers in order to combat money-laundering. The Financial Action Task Force owes much to its having been attached to the high profile G7 meetings and the linkage to the "global panic" about narcotic drugs. In the international taxation arena, the issue of transfer pricing was dramatized by the high profile revelations about the pharmaceutical firm of Hoffmann-La-Roche in a 1973 report produced by the UK Monopolies Commission.[71] The issue of privileged trading on financial markets by knowledgeable insiders was dramatized in the late 1980s by high profile prosecutions, beginning in the United States with the Levine-Boesky-Milken affairs – later spreading through the world from Liechtenstein to Japan. The importance of the cause célèbre is nothing new; it is also a feature of national arenas. However, the global inter-connectedness both of markets and of news media could be said to have created a new kind of global stage for such dramas. On the other hand, the highly decentralized and fragmented international networks that comprise globalized regulation seem to take action only when galvanized by such high profile and newsworthy occurrences.

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mestic markets; (2) innovation in forms of financing, especially securitization and the development of instruments buffering financial risk (e.g., interest rate caps and swaps) which led to a rapid rise of contingent off-balance-sheet liabilities; and (3) growth of essentially speculative intermediation such as on foreign exchange markets. ETHAN B. KAPSTEIN, SUPERVISING INTERNATIONAL BANKS: ORIGINS AND IMPLICATIONS OF THE BASLE ACCORD (1991).

As these changes were dramatised for national regulators (for the Bank of England by the secondary banking crisis of the mid-1970s, for the USA by the Continental Illinois crash of 1984) they moved to reform national systems, but the banks quickly pointed out that a unilateral move to tighten national regulation, notably by changing from a simple fixed capital-asset ratio to a risk-weighted calculation, would affect their international competitiveness, thus domestic reforms had to be negotiated within an international agenda. *Id.*

71 UK MONOPOLIES COMMISSION, CHLORDIAZEPOXIDE AND DIAZEPAM (1973). The investigation was into the pricing of the tranquillisers librium and valium and showed that Roche was paying its Swiss affiliate £370 and £922 per kilo for the active ingredients, while the same compounds could be bought from small companies in Italy (which had no patent protection for pharmaceuticals) for £9 and £20 respectively. Roche argued the high prices were justified by its research programme, although separate contributions were shown in the UK affiliate's accounts for this. The publicity in this case led to investigations in many other countries, stimulated the Inland Revenue to set up a special Transfer Price Unit, galvanised the OECD's Fiscal Committee into producing its celebrated report on Transfer Pricing in 1979, and contributed to the pressures which led the U.N. to set up its Centre on Transnational Corporations. *See* PICCIOTTO, *supra* note 19, at 188-89.

Thus, although such events dramatize and justify the need for a direct response to the global issues identified, they also tend to emphasize the inadequate forms of the international response. A chronic lack of legitimacy plagues direct international contacts at the sub-state level among national officials and administrators. One reason is that they are informal in nature: even where they are publicly visible, they are often not founded on conventional legal instruments, such as treaties, but rather on "gentlemen's agreements," which may be semi-secret. Where some pressure develops for a degree of formalization, the preferred format is often the Memorandum of Understanding (MOU), often described as an "administrative arrangement" not intended to be a legally-binding agreement.[72] This is the case both for the initial agreement establishing the forum and setting out its procedures, as well as for agreements on more substantive matters resulting from such contacts. For example, the Concordat and the Capital Adequacy principles agreed by the Basle Committee have no formal legal status but are nevertheless regarded as binding, with honour as its seal.

In some contexts, there has been an attempt to provide a more formal legal basis for administrative cooperation. Thus, tax treaties establish a "competent authority" procedure, authorising tax administrators to reach agreement, both in respect to the liability of a specific taxpayer and on the interpretation of the treaty's provisions. Nevertheless, the international legal status of such agreements is unclear. Under national law, they are at best persuasive but not binding.[73] Attempts by the United States and the EU to establish coordination of antitrust law enforcement have been hampered by restrictions on the powers to strike international bargains of those authorities, particularly the European Commission.[74] A recurring issue in many coopera-

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72 Such arrangements are usually initiated by regulators or agencies themselves, who generally prefer to keep them informal, but the Foreign Affairs ministry may be consulted. In the United States, the State Department likes to look at inter-governmental agreements or programmes to ensure they are based on adequate legal authority, but this examination is nominal given the vast proliferation of international arrangements by a plethora of public bodies. Interview with Kenneth Lopp, Department of State Legal Adviser, International Economic Affairs (June 1, 1992, on file with the author). Whether an agreement is concluded as a formal treaty generally depends on the extent to which the issue has become politicised or those involved want it to have political resonance. *See also* Mulford, *supra* note 34, at 437.

73 U.S. courts have been more willing than UK courts to give weight to interpretative agreements. *Compare* Xerox Corp. v. United States, 14 Cl. Ct. 455 (1988) *with* IRC v. Commerzbank STC 285 (1990).

74 A Press Release of 23 September 1991 announced the signing and provided the text of what was called an Agreement between the Government of the United States and the Commission of the European Communities regarding the Application of their Antitrust Laws. Simulta-

tion arrangements has been the extent of investigative powers of officials. In particular, the issue is whether a national official may use the compulsory powers available under national laws in support of a foreign investigation, even when there is no local regulatory interest.[75]

These technical legal difficulties are an expression of a broader problem, created by the politically-motivated preference for international cooperation over supranationalism. Perhaps naturally, state officials look for practical solutions to practical problems and are skeptical about the utility of grand global institutional designs. It comes as no surprise, for example, that the leading central bankers

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neously, Sir Leon Brittan, who was the architect and signatory of this document on the European Commission side, also signed another document with Richard Breeden of the SEC, which was described as a Joint Statement on the Establishing of Improved Cooperation between the Commission and the SEC on Securities Regulation. The latter was not described as an "agreement," because the European Commission has no powers of its own in enforcing securities laws. However, the European Commission does have specific powers to enforce EEC competition law. Nevertheless, EU member states objected to the Commission's having negotiated the agreement on antitrust cooperation without the prior authority of the Council of Ministers, and this objection was upheld by the European Court of Justice [hereinafter ECJ]. *See* Case 327/91, French Republic v. Commission, 8 E.C.R. I-3641 (1995). This institutional objection was overcome by the Agreement being concluded by the Council on behalf of the Community. *See* Council Directive 95/47 1995 O.J. However, the Court's decision emphasised the limitations on the Commission's powers, which will greatly restrict the scope of this agreement. In particular, the ECJ has been very strict as to the confidentiality of information divulged to the Commission, which makes sharing of information with foreign authorities difficult. Further, once the Commission has initiated a proceeding, especially under the Mergers Regulation, it has little discretion but is mandated to take a decision, making it hard for the Commission to defer to the US authorities if they are deemed to have a stronger interest in a case, as envisaged in the "positive comity" provisions of the Agreement. The difficulties of coordinating competition law enforcement have a long history; although the OECD established a procedure in relation to competition law matters with an international dimension as early as 1967 (later amended in 1979 and 1986), this only institutionalised a procedure for notification and consultation between national authorities. Its limits were shown by the complexities posed by the attempt by Gillette to purchase the Wilkinson Sword wet-shaving business in 1989-1991, which led to proceedings in 14 jurisdictions. RICHARD WHISH & DIANE WOOD, MERGER CASES IN THE REAL WORLD, 66-83 (1994). *See also* FORDHAM CORPORATE LAW INSTITUTE (1991) (discussing the international antitrust cooperation by various participants and commentators); *60 Minutes with the Honorable James F. Rill, Assistant Attorney General, Antitrust Division, U.S. Department of Justice*, Panel, 60 ANTITRUST L.J. 217, 227 (1991). Sir Leon Brittain actively argued for greater formalization of international cooperation; the U.S.-EC "agreement" was an attempt at such formalization. Although his more ambitious proposals to include this issue within the ambit of the GATT/WTO made little progress given the weight of other matters which nearly sank the Uruguay Round agenda, the issue is still a live one. *See* Ernst-Ulrich Petersmann, *International Competition Rules for the GATT-MTO World Trade and Legal System*, 27 J. World Trade 35, 35-86 (1994).

75 U.S. regulators have generally taken the view that a state should allow its officials to use their national enforcement powers also for the enforcement of another state's laws, under appropriate agreements and safeguards. While this has been accepted by the United Kingdom and other countries for financial and corporate market regulation, there has been a reluctance to accept such an extensive obligation for tax cooperation. PICCIOTTO, *supra* note 19, at 274-78.

should consider a discreet committee with a dozen members meeting in Basle, to be a more suitable forum for discussing international banking supervision than a Global Central Bank. Nevertheless, it may be surprising that little pressure seems to have been created for existing global bodies, such as the IMF, to be more involved.

The problem goes far beyond this, however, as the minimal level of institutionalization of international bodies and procedures is routinely justified in the name of national sovereignty. As already mentioned, the informal nature of international networks allows them to operate so much in the shadows that often their very existence is concealed; their activities, and even their decisions, are generally unpublicised. This is so even for decisions of considerable importance, which have quasi-legal or even formally binding status. This issue has become more acute as cooperation has moved from harmonized prescription to joint enforcement.[76] For example, revenue authorities generally do not publish the details of "competent authority" proceedings, whether they are individual adjudications or interpretative agreements. This secrecy exists despite the proceedings' effect on taxpayers' rights under tax treaties. Similarly, little is publicly known about other major decisions on international taxation, such as bilateral Advanced Pricing Agreements (APAs) on transfer pricing methods. Not only are competent authority or APA agreements not openly published, even the parties themselves may be allowed little participation in the negotiations and given no detailed reasons for the outcome.[77]

From the national administrators' and regulators' perspective, informality and confidentiality are essential to retain the flexibility needed for reconciling the national and international levels of deci-

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76 *See generally*, ASIL, *International Enforcement in the Clinton Administration*, 10 INT'L ENFORCEMENT L. REP. 204 (1994).

77 Business has long fought for a more binding and legally-based procedure for resolving individual "corresponding adjustment" cases. Arrangements providing for arbitration of such cases, provided that negotiations have failed, have now been established in some bilateral treaties, and in a multilateral treaty agreed among the EU member states. Decisions under the EU arbitration procedure may only be published with the agreement of the parties and competent authorities. PICCIOTTO, *supra* note 19, at 291-95. Other arrangements for coordinated tax enforcement, such as simultaneous examination of related firms in an international corporate group, have developed mainly on the initiative of the U.S. Internal Revenue Service, which has also been pressing other state tax authorities since 1990 to join it in arrangements for giving suitable TNCs advance approval for their internal transfer pricing methodologies under the Advance Price Agreement procedure. Several OECD countries have now moved towards adopting APA procedures, which would entail decisions often involving millions of dollars. *See* S. A. Baik & A. Patton, *Japan Steps Up Transfer Price Adjustment: Joins the APA Fray*, 11 TAX NOTES INT'L 1271 (Nov. 13, 1995).

sion-making. Thus, tax officials have long been reluctant to accept a binding obligation with a right to international arbitration to avoid international "double taxation," through, for example, a mandatory "corresponding adjustment" of transfer prices. They consider that such matters must be inherently discretionary, given the complexity of the issues and the interlocking nature of the policy interests involved. However, from another perspective, such bureaucratic rationality smacks of arbitrariness. It is largely to counter this, in my view, that there has been some movement towards publicising some of the activities of international regulation described. Indeed, the formulation and publication of rules and guidelines, such as the Basle Concordat, constitute an attempt to generate ideological momentum. Thus, there has been the creation of something like "policy communities" of a corporate character, which may have an often important role in ensuring acceptability among those most closely affected. It is for these reasons that contacts and cooperation between regulators have been "regularized" through MOUs laying down modalities for exchange of information and consultation and that powers to participate in such arrangements have been embodied in national laws. Within this rather minimal cloak of legitimacy, some often extensive cooperative arrangements have been established: joint tax examinations of international corporate groups and joint auditing and supervision of transnational banks.

A process of national and international legalization accompanies these cooperative arrangements. Law can provide a stronger basis of legitimation, but it is weakened by the multi-jurisdictional nature of the international legal field. Since the 1930s, a new breed of transnational business lawyer emerged; since the 1960s, transnational business law has become firmly institutionalized and itself transnationalised in the large law and accountancy firms. However, while law and lawyers may help to mediate the complex interactions of multiple jurisdictions, they are also caught up in the tensions of that system.[78] Internationally-harmonized rules, however skillfully drafted, tend to express universal aspirations in very general terms. The process of giving them substantive content spreads through the network of regulatory contacts and institutions through which political and economic bargains may be struck. Law may oil the wheels, but it does not alter the structure of the machinery.

[78] There has been an increasing awareness of the politization of conflicts of laws. *See, e.g.*, Trachtman, *supra* note 18 (offering a sophisticated attempt to resolve some of the tensions of multijurisdictional interactions in the new policy contexts).

C. The Dilemmas of Neo-Liberalism

There has been a gaining momentum to transform international institutions, partly in response to some of the tensions outlined above. A significant result has been the movement towards the institutionalization or restructuring of functional networks. Significantly, this has taken place mainly around trade blocs or trade agreements. The most developed of these, the EU, is now facing some crucial issues of institutional structure. By comparison, the North American Free Trade Agreement (NAFTA) has a more decentralized and underdeveloped institutional framework, but it should not be forgotten that substantial coordination already exists in a number of areas, especially in business regulation between the United States and Canada. The most spectacular development has been the achievement of the Uruguay Round in creating the World Trade Organization (WTO) as a broad umbrella which now links trade and market access bargaining to a very wide range of business regulations and social protections. However, while there is a lengthening list of issues which have been suggested for inclusion under the WTO framework, there has been a noticeable reluctance to create links with the more "political" institutions in the UN system, let alone provide the WTO itself with any direct structures of political accountability.

A major transformation of the liberalization agenda has produced the broadening scope of trade organizations. First, attention shifted from the reduction of border barriers to so-called "non-tariff barriers," which potentially encompass any normative or regulatory differences affecting market transactions. Secondly, negotiations are now concerned with virtually every sort of cross-border business or economic relation, which can come under the heading of "services" or international investments.[79] This directly poses a central dilemma of

[79] The WTO now covers international direct investment, both in manufacturing via trade-related investment measures (TRIMs) and in almost everything else by virtue of the wide definition of services in The General Agreement on Trade in Services (GATS), Multilateral Trade Negotiations, The Uraguay Round, The Legal Texts, CIS June 25, 1994 H78 0-2, as including provision through a commercial presence in another country. *Id.* at art. 1.2. This means that the WTO's Dispute-Settlement Understanding (DSU) now covers investment disputes and provides the possibility of trade sanctions for violation of investment obligations. Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to WTO Agreement, reprinted in 33 I.L.M. at 1226. DeAnne Julius points out that this effectively makes WTO into the international organization for regulating MNEs called for by Kindleberger and others over 25 years ago and advocates its further reinforcement by giving TNCs direct access to the dispute-settlement procedure. DeAnne Julius, *International Direct Investment: Strengthening the Policy Regime, in* MANAGING THE WORLD ECONOMY FIFTY YEARS AFTER BRETTON WOODS (Peter B. Kenen ed., 1994).

liberalism: whether market relations are natural and self-regulating or require a normative and regulatory basis, which entails a political balancing of interests and mediation of power. The ramifications of this debate can be seen throughout the processes of institutional restructuring now under way.

Europe has maintained the strongest commitment to underpinning wide-ranging economic integration with political institutions. Nevertheless, there have been growing disagreements about the extent and form of these institutions. The European Union's recently launched Intergovernmental Conference (IGC) has the task of confronting the questions of institutional design largely avoided in the Maastricht Treaty of European Union (TEU). The creation of the Single Market opened up a range of mostly unanswered questions about the scope of Community action[80] and the institutional framework of European regulation.[81] Whatever its limitations, the Euro-

80 The TEU combined the European Economic Community, Euratom, and the European Coal and Steel Community into a single European Community; it also added two further "pillars" of intergovernmental cooperation (Foreign and Security Policy and Judicial and Home Affairs), to form the European Union. For convenience, any or all of this framework is generally referred to as "the EU." This complex structure resulted from the reluctance of some to bring the more "political" issues fully under the umbrella of the supranational institutions. There has also been considerable disagreement on whether the creation of a single market requires, or should be followed either by, (i) the establishment of Economic and Monetary Union (EMU), or (ii) common policies in the social sphere. The main achievement of Maastricht was to lay down a framework and timescale for EMU, although whether this can actually be achieved, and which currencies would be included, is still very much an open question. As regards the social dimension, the objectives of the EC have never been defined in narrow economic terms, although the dominant concern has been market-creation, which has imposed limits on the content and form of the policies adopted. For example, a much-overlooked aspect of the European social dimension is the women's policy, which has certainly brought substantial changes to national regulation on equal pay and non-discrimination; but while the strength of womens' politics since the 1970s succeeded in activating the provision on equal pay in the Treaty of Rome (art. 119), which was originally aimed at ensuring that French industry was not disadvantaged, it has had less success in broadening the agenda to social issues such as childcare. *See generally* CATHERINE HOSKYNS, INTEGRATING GENDER: WOMEN, LAW AND POLITICS IN THE EUROPEAN UNION (1996). The TEU further expanded Community competence in many areas where economic and social policy overlap, such as public health; the environment; education and training; and health and safety at work. Although the UK government blocked a further broadening of the provisions relating to labour and employment, the other eleven Member States adopted a separate Social Policy Agreement which allows them to use Community institutions to develop policy in this area. This gave the United Kingdom an opt-out but also created a shut-out, because now the UK government can be excluded from the formulation of measures if they are dealt with under this heading. Since measures can often be justified under alternative headings involving different procedures, there is considerable scope for tactical maneuvering in the procedural and institutional labyrinth.

81 The completion of the Single Market was based on a "new approach" to regulatory coordination, aiming at a minimal level of harmonisation combined with mutual recognition of regulation between the member states. This was reinforced by the principle of "subsidiarity,"

pean Union has been and continues to be of central importance both as a catalyst and a precursor for global institutional developments. There is a lengthening queue of states at its doors claiming admission, which will further add to the institutional strains and require the reconciliation of "deepening" with "widening" of the European Union framework.

The creation of the WTO has established a focus for global renegotiation of a virtually unlimited range of global governance issues, by linking them to the bargaining of market access. The evident purpose of this linkage is to provide the threat of a trade sanction to overcome the lack of reciprocity, and other limitations, of single-issue functional coordination. The motivation for bringing such matters under the umbrella of the WTO was to provide important incentives capable of overcoming some of the problems in reaching political agreement at the international level on matters such as copyright protection for computer software. However, it also introduces a strong element of competition which exacerbates problems of inequality in international economic power. Understandably, ambivalence exists about the desirability of linking social protection issues to market access bargaining. Nevertheless, arguments have been made for building on the WTO institutions to provide a structure for at least a corporate form of global governance.

In fact, the linking of regulatory coordination issues to trade organizations neither resolves the problems of linkage of regulatory networks nor those of legitimacy. At the global level, it adds to the growing agenda of international negotiation and bargaining through the increasingly complex networks of contacts and institutions which now make up global governance. The WTO itself has not replaced organizations in related fields but has added new obligations paralleling those of other institutions and creating new linkages, while also

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enshrined by the Maastricht agreement in art. 3b of the EC Treaty, which explicitly states that the Community shall take action only if and in so far as its objectives cannot be sufficiently achieved by the MS, due to the "scale and effects" of the action. However, no criteria for subsidiarity have been established, so the degree to which harmonisation is necessary and the extent to which regulatory diversity can be tolerated is left for pragmatic resolution. Although the drive for European integration previously favoured regulatory harmonisation and coordination, the subsidiarity principle has facilitated arguments for regulatory diversity and competition, influenced to some extent by US debates. *See* INTERNATIONAL REGULATORY COMPETITION AND COORDINATION (W. Bratton et al. eds., 1996). But the subsidiarity principle still leaves wide open the extent of regulatory coordination or degree of competition. A particular problem is that, although the "Brussels bureaucracy" is much reviled, its role in most fields is only to monitor and coordinate enforcement, which is primarily the responsibility of national state officials. Thus, even "harmonised" rules may be very unevenly applied.

creating new potential conflicts. Thus, for example, the TRIPS agreement requires WTO members to comply with most of the main provisions of the Paris and Berne Conventions, as well as adding many new obligations, both as regards substantive intellectual property rights (e.g., copyright protection for software) and their enforcement.[82] However, it does not replace either of those conventions nor does it take over the role of WIPO. Although, it does substantially intrude into its jurisdiction. Similarly, a central principle of the Agreements on Technical Barriers to Trade and on Sanitary and Phytosanitary Measures is the requirement that national regulation comply with internationally-agreed standards and be scientifically justifiable. This requirement creates an interaction of WTO negotiations and procedures with those of a range of other international bodies.

Far from rationalizing global governance into clearly-defined groupings, the process of regional integration merely adds organizational layers and complicates their interactions. It now seems that the most likely outcome of the EU's current IGC will be to create new forms of "variable geometry" to add to the complexity created by the TEU, with its three "pillars" and various opt-outs. Further layers of agreements cloak the main EU bodies both among the full EU members themselves as well as various types and groups of associated states. A maze of arrangements results, as various conflicts and disputes result in complex institutional compromises.[83] Elsewhere, there is an even more kaleidoscopic pattern of heterogeneous organizational creation, which seems to develop pragmatically, or even opportunistically, as part of strategic processes. Thus, the creation of one

82 For example, rights should be enforceable by injunctions, damages, and seizures of infringing products. However, art. 44(2) provides that these obligations do not override domestic law. Agreement on Trade Related Aspects of Intellectual Property Rights, 33 I.L.M. 81 (1994). Furthermore, judicial authorities are merely expected to have such remedies available; they retain the discretion whether to grant them.

83 Even among EU member states, some matters may be dealt with by separate treaty, thus outside of the EU institutional framework. Treaty of Rome, Treaty Establishing the European Economic Community, Jan. 1, 1958, art. 220, 261 U.N.T.S. 140; and Treaty on European Union, Nov. 1, 1993, art. K.3, 31 I.L.M. 247. However, intergovernmental arrangements may also be linked to the EC institutions. In particular, the Court of Justice may be given jurisdiction in relation to such agreements, though this has proved controversial; the British government's refusal to accept such jurisdiction over the treaty establishing EUROPOL has resulted in another opt-out for the United Kingdom. Treaties with non-members may entail their acceptance and implementation of many areas of EC law, which does not generally entitle them to participate in the institutions. However, various structures have been created, ranging from the grafting of parallel institutions onto those of the EC by the European Economic Area treaty, to the various types of "political dialogue" with associated countries. *See* Helen E. Hartnell, *Subregional Coalescence: The Transformation of Regional Economic Integration in Europe*, 18 Nw. J. Int'l L. & Bus. (forthcoming Nov. 1997) (manuscript on file with author).

entity may stimulate the formation of another, as with NAFTA and MERCOSUR, and then generate an overlapping forum with a broader or different remit, as with the initiative for a Free Trade Area Initiative of the Americas.[84] In Asia, APEC functions as a "consultative forum" for negotiation and coordination of a range of issues, even though its formal institutionalization is minimal.[85]

Instead of enabling coordination of regulation in different but related areas or providing institutions of political accountability for globalized regulation, the thrust of the trade linkage is towards deregulation and regulatory competition. Certainly, the increasing complexity of the problems posed by the dynamics of global markets has created radical uncertainty about the desirability and effectiveness of regulation. This has been seen most starkly in the recent debate over derivatives.[86] Powerful arguments abound for regulatory requirements to be minimized and to concentrate on establishing transparency and accountability so as to improve private monitoring, rather than relying on direct oversight or intervention by public officials. However, the track record of self-regulatory bodies, whether large firms or associations, is hardly reassuring. All that can be said is that dramatic failures, from the collapse of Barings to the string of TNCs which have lost billions in the speculation-driven financial markets, have not yet led to systemic crisis. However, these failures are hardly good examples of efficiency in the management of economic resources, particularly at a time when a large portion of the world's population still lack the essentials of clean water, adequate food, and basic housing.

Thus, the central dilemma of neo-liberalism is only too evident: the pressures to further develop international economic integration continually run up against the limitation that the primary political unit remains the "sovereign" nation-state. The proliferation of international regulatory networks described in this article can be seen as a symptom of this contradiction. As I have argued, the neo-liberal pro-

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84 Other commentators have argued for a looser forum with no specific remit but the primary task of coordinating other inter-American organizations: K. W. Abbott & G. Bowman, *Economic Integration in the Americas: "A Work in Progress,"* 14 NW. J. INT'L L. & BUS. 493 (1993).

85 *See* Merit Janow, *Assessing APEC's Role in Economic Integration in the Asia-Pacific Region*, 17 NW. J. INT'L L. & BUS. 947 (1997). Thus, APEC has been described like a network of networks. Jane Kelsey, Regional Economic Integration in the Asia Pacific and Regulatory Networks - The Case of APEC, Paper delivered to the Conference on Globalisation Law and Social Science (Glasgow, May 1996)(transcript on file with the author).

86 GROUP OF 30, GLOBAL DERIVATIVES STUDY GROUP, DERIVATIVES: PRACTICES AND PRINCIPLES (1993).

cess of focusing global governance issues on trade organizations does little to remedy the chronic "democratic deficit" of international institutions. To the technocrats and corporations most directly involved, this may seem an advantage. However, there is an increasing realization that markets are actually about people. In a very basic sense, the arrangements for global governance of economic interaction must command popular confidence. From the endless debates about national "sovereignty" to the consumer boycott of beef, especially in Germany, following the "mad cow" debacle in the United Kingdom, there is no shortage of evidence that they are failing their social responsibilities.