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CONSTITUTIONALISING MULTI-LEVEL GOVERNANCE?

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Abstract

Multi-level governance entails transformations of statehood, including significant changes in both the public sphere of politics and the so-called private sphere of economic activity, and in their modes of interaction, including law. The fragmentation of the public sphere and the decentring of the state have led to new types of formalized regulation and the emergence of global regulatory networks, intermingling the public and the private. The transition from government to governance means a lack of a clear hierarchy of norms, a blurring of distinctions between hard/soft and public/private law, and a fragmentation of public functions entailing a resurgence of technocracy. Renewed international legalisation has been viewed by some in formalist terms, as helping to provide certainty and predictability, and this has been used to try to buttress the legitimacy of global governance. However, in the debates about 'constitutionalisation' of global governance, even advocates of human rights norms have been critical of suggestions that they should be entrenched in international economic agreements, which they fear would reinforce the tendency for economic liberalisation obligations to undermine national constitutional rights. Although there have been attempts to improve coordination between international regimes, they seem generally to spawn further regulatory networks, and any formal constitutionalisation of international regimes seems unlikely.

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Governance and Legitimacy

A number of commentators have described and analysed in various ways the shift from government to governance and the emergence of international regulatory networks (e.g. Jordana & Levi_Faur 2004, Kooiman 1993, Ladeur 2004, Picciotto 1996, Rhodes 1997, Sand 1998, Slaughter 2004). They are generally agreed that these changes involve a fragmentation, hollowing-out, disaggregation, or de-centring of the state, with a devolution or delegation of specific functions to specialised regulators, and new types of public-private interactions. There is also a general consensus that these are global trends, although perspectives vary as to the importance of domestic political processes compared to international influences as drivers of these processes.

A key question raised by these changes is their implications for the legitimacy of governance processes. Here opinions are more varied. Some see these developments, especially the growth of international regulatory or governance networks, as essentially a further development or even strengthening of the classic liberal system of interdependent states. Thus, Anne-Marie Slaughter has painted a picture of what she describes as 'the real New World Order' as essentially a growth of networks of cooperation between government officials at the sub-state level, who remain accountable to citizens through national state mechanisms (Slaughter 1997). However, in response to those who argue that this is a more far-reaching and problematic phenomenon which raises basic questions about political legitimacy (Alston 1997, Picciotto 1997), she has conceded that there may be some accountability problems (Slaughter 2001). While continuing to maintain the legitimacy of these forms of cooperation due to their inter-governmental character, she has responded with a 'menu of possible solutions' and some 'global norms' (Slaughter 2004, 230-260), generally aimed at making them 'more visible'. However, she does go so far as to suggest mobilizing around them a 'whole set of transnational actors', which might even amount to 'a kind of disaggregated global democracy based on individual and group self-governance' (Slaughter 2004, 240), and has recognized that this entails alternative visions of 'vertical democracy' through national states, or a more radical type of 'horizontal democracy' (Slaughter 2004b, 148-52).

While it seems clear that national states are far from dead or even in decline, statehood has been undergoing substantial transformations, both internally and internationally. The main attention has been focused on the 'democracy deficit' of the international sphere, although it seems clear that national systems of representative democracy have also been put under great strain. It is generally considered that decisions at the global or international level are too remote from ordinary citizens to be subject to the usual accountability mechanisms of traditional representative democracy. Legitimation has come to depend firstly on expertise, and secondly on the increasing legalisation of international institutions. There has also been a growing debate about constitutionalisation at the international level, building further on legalisation. Extension of the dominant liberal model of constitutionalism to the international

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level would entail entrenching constitutionalised norms as constraints on national states. Not surprisingly, this has been controversial, given its implications for national structures of democratic accountability.

The legitimacy of the increasingly extensive and important amount of international regulatory activity has come to rely substantially on expertise, since much of the activity of international regulatory networks is done by technical specialists, sometimes described as 'epistemic communities'. This concept was developed within a neo-functional paradigm, to suggest that a stronger basis for international cooperation may be provided by delegating specific issues to be dealt with in a depoliticized manner by specialists deploying scientific, managerial or professional techniques and working within shared universal discourses (Haas 1992). This perspective fits with the traditional Weberian perspective of technocracy which sees it as the instrument of politics, a means of implementing policies which have been formulated through political processes. From this viewpoint, the growth of delegation to specialist regulators is a response to the problems of governing increasingly complex societies, by giving greater autonomy to technocratic decision-makers within a policy framework set by government. In the international context it has been suggested that communities of experts working within a shared epistemic perspective can facilitate the resolution of global policy issues by 'narrowing the range within which political bargains could be struck' (Haas 1992, 378).

However, the complexity of governing modern societies has exacerbated the dangers which Weber already identified with the 'iron cage' of technocracy when it becomes based on instrumental rationality and loses any basis in social values (Rubin 2003, 146-150). The fragmentation of the state and the new forms of interaction of the 'public' and the 'private' spheres entail not a retreat but a remodelling of statehood, towards what has been described as a 'new regulatory state' (Loughlin & Scott 1997, Braithwaite 1999). Roles previously considered as those of government have been recast as societal problems concerning a variety of actors (Pierre 2000). Influential commentators have argued for the redefinition of the role of government, to separate 'steering' from 'rowing', suggesting that politicians should define aims and targets but subcontract delivery, which should be competitive and aim to meet the needs of customers (Osborne & Gabler 1992). While maintaining a separation of policy-formulation and operational delivery, this approach devolves greater responsibilities on those responsible for implementation, who are more directly accountable for the effectiveness of service delivery, although through more diffuse, market-style mechanisms.

The fragmentation of the state and the shift away from hierarchical command-and-control towards more decentralised, networked forms of regulation can also be understood from a Foucaultian perspective of 'governmentality'. The disintegration of hierarchical bureaucratic structures in both the public and private sectors can be seen as shift in modes of social control towards more dispersed and internalised disciplinary forms, 'from the cage to the gaze' (Reed 1999). Thus, the new regulatory governance may be said to involve 'a proliferation of a whole range of apparatuses pertaining to government and a complex body of knowledges and "know-how" about government' (Rose and Miller 1992, 175). In particular, Miller and Rose have developed Latour's concept of 'action at a distance' into a notion of 'government at a distance', as the construction of networks of interests allied by the adoption of shared vocabularies, theories and explanations (Miller & Rose 1990, 10). This entails a different and more critical view of expertise, and one which may have particular relevance to global governance.

Technicism is one of the three major features which distinguish multilayered network governance from the classical liberal international system (for further detail see Picciotto, forthcoming). These characteristics are inter-related, and derive from the fragmentation of the

classical liberal international system, which largely resulted from the processes of liberalisation which it itself promoted. The next section will briefly outline these characteristics; this will be followed by an exemplary analysis, focusing on the governance of finance and taxation. The final section will discuss some issues raised by the debates on legalisation and constitutionalisation of global institutions. This will focus mainly on the WTO, which is an important node or point of intersection of regulatory networks, has certainly become much more legalised, and which some have suggested should be constitutionalised.

Characteristics of Multi-Level Global Governance

First is the destabilisation of the traditional normative hierarchy, in which international law bound states, while principles of jurisdictional allocation and choice of law determined which national system of rules applied to activities of private actors. The heterarchical character of networked governance means that the determination of the legitimacy of an activity under any one system of norms is rarely definitive, it can usually be side-stepped or challenged by reference to another system. Various forms of supranational and infranational law have created complex interactions between a variety of adjudicative and regulatory bodies at different levels. These involve both competition and coordination.¹ Various types of linkages have emerged between different but related regulatory networks, but their kaleidoscopic character makes it difficult to establish overall coherence. This gives private parties, both individuals but especially legal persons such as firms and organisations, opportunities to manage regulatory interactions through strategies of forum-selection and forum-shifting.² Indeed, as has been argued by Boltanski and Chiapello (1999, 444ff.), power in a networked world derives from mobility and connectedness.

Secondly, there has been a blurring between categories of norms, in particular between 'hard' and 'soft', and public and private law. Thus, regulation typically involves a mixture of legal forms, both public and private, and an interplay between state and private ordering, or frequently norms with a hybrid status. Public bodies may use private law forms, such as service contracts, for regulatory purposes (Collins 1999, Freeman 2000, Vincent-Jones 1999), while private bodies may operate regulatory arrangements. Global economic regulatory networks in particular use 'soft law' forms, such as codes of conduct, Memorandums of Understanding (MoUs), and Guidelines. This results from several factors. One is the emergence of regulation based on the increased formalisation of norms, in place of informal and closed systems of 'club rule' (Moran 2003). The second stems from the previously mentioned characteristic that global governance is increasingly heterarchical. From the perspective of the traditional hierarchical system, international or global norms governing non-state entities have no formal binding force, hence are regarded as 'soft' law. This includes norms governing both private actors such as firms (e.g. business codes of conduct, and regulatory standards developed by international

¹ The debates about regulatory competition and the 'race to the bottom', or to the top (Murphy, 2004) have tended to overlook the many ways in which regulatory regimes are interdependent and coordinated (Picciotto 1996).

² Braithwaite and Drahos (2000, ch.24) have analysed this, but mainly in relation to powerful states, i.e. governments, and for norm-creation; in fact (as they mention), forum-shopping was a tactic developed by lawyers acting for private parties, and it was extended beyond litigation to selection of jurisdictions of convenience to structure international business activities for optimal regulatory exposure (e.g. the use of 'havens' for tax avoidance, flags of convenience for shipping, and offshore finance centres (OFCs) for financial activities). Many of the forum-shifting strategies Braithwaite and Drahos discuss were devised by and resulted from the pressures of business lobbies.

bodies such as the International Standards Organisation (ISO)), as well as public bodies (e.g. MOUs between national regulators). Even governments may resort to 'soft' forms of agreement to foster policy learning, convergence and cooperation, often between multiple layers of public and private bodies.³

The third characteristic of multilayered governance, as already suggested above, is the fragmentation and technicisation of state functions. Certainly, there is evidence that global expert action networks have been extremely effective in mobilizing and sustaining some global governance regimes, for example Canan and Reichman's sociological study of the 'global community' of environmental experts and activists which formed around the Montreal Protocol (2002). However, the contribution of technical specialists to international diplomacy is often to help gain acceptance for proposals which are put forward as objective and scientific, although actually carefully calibrated for political acceptability. Far from being depoliticized, such networks often include activists as well as technical specialists; and even if the issues are specialized, the participants share common social values.

These characteristics may be analysed in relation to the governance of a variety of issues, e.g. environmental protection, intellectual property, food production, communications and the internet, etc.

Governance of Taxation and Finance: 'Offshore' and the Transformation of Sovereignty

A major catalyst for the process of fragmentation of state functions and the emergence of complex jurisdictional interactions has been the development of 'offshore' statehood. This involves the creation of specific regulatory regimes governing particular activities, sometimes amounting to legal and constitutional enclaves, or a kind of privatisation of sovereignty.

A notable example is that of 'flags of convenience' (FoC) for international shipping. This dates back to the 1920s, when the US authorities encouraged registration of US-owned ships in Panama, to reduce costs while ensuring availability of the ships in wartime, resulting in arrangements devised by US lawyer-diplomats.⁴ After the 2nd world war another similar group developed Liberia as a flag state, with the added advantage that its shipping (and later corporate) registry business was sub-contracted to a US corporation based near Washington.⁵

³ Even the EU, with its strong institutional framework, has resorted to the 'open method' of coordination on sensitive issues such as social policies and taxation (Mosher & Trubek 2003, Radaelli 2003).

⁴ Panama had seceded from Colombia in 1903, with US support, to facilitate construction of the Canal. William Cromwell, of the New York law firm Sullivan and Cromwell, having drafted some of the documents for that country's independence, became that country's representative in the US, and also acted for the shipowners; he was succeeded in this role by John Foster Dulles, the future Secretary of State (Carlisle 1981, 16).

⁵ The Liberian International Ship and Corporate Registry is run from Vienna, Virginia USA. This is a continuation of an arrangement originally devised by a group including former US State Department officials, headed by Edward R. Stettinius, who after working in the corporate sector at General Motors and as chairman of US Steel, had been Roosevelt's Secretary of State. In 1947 he formed Stettinius Associates with other former State Department staff, and established a number of development projects in Liberia on a profit-sharing basis with the government, of which the ship registry became the most long-lasting, indeed it became the leading flag of convenience in 1955. The Stettinius group drafted Liberia's Maritime Code (with contributions from Esso and State Department lawyers), aiming to take over the flags of convenience business from Panama, one of its advantages (from the perspective of shipowners) being that the administration of the ship registry was sub-contracted to a private company based in the USA (Carlisle 1981). During the 1990-1996 civil war its contribution to the Liberian government budget increased from 10-15% to 90%. However, in 1996 Charles Taylor, who had

Thus, flag states essentially offer a ship registration service, the administration of which may have little or no physical contact with the state itself, being sub-contracted to private firms. The actual surveys and the issuing of safety certificates for ships are done by recognised private classification societies, including the American Bureau of Shipping and Lloyd's Register of Shipping.⁶ Due to long-standing concerns about the safety standards of such 'open registries', spotlighted especially by the long-running campaign of the International Transport Federation (ITF) of trade unions, regulatory networks have emerged to try to deal with low-standard ships and registries. A key development has been cooperation between the maritime authorities of Port States. They now coordinate their inspection systems, based on checklists of internationally-agreed standards, deficiency reporting, a computerised database, and the sanction of detention of vessels found defective.⁷ Thus, the seaworthiness and employment conditions of ships are governed by a variety of regulatory bodies, both public and private, national and international. None of them have definitive jurisdiction, although port authorities can apply the ultimate sanction of detention (Couper et al, 1999; Gerstenberger, 2002, Murphy 2004, ch.2).

The use of 'havens' for avoidance of income and profits taxation, which was an element in the FoC system, also emerged in the first decades of the 20th century. It was kept within tolerable bounds until the 1960s by a combination of national measures (controls on currency, capital movements and asset transfers) and allocation of tax rights based on a network of tax treaties. The increased international integration of business by transnational corporations (TNCs) and corporate networks led to the growth of networks of international tax administration, although mainly amongst the leading OECD countries. With the shift to currency convertibility, the liberalisation of capital movements and trans-nationalisation of banking, tax havens also became 'offshore' finance centres (OFCs), acting as a catalyst for the emergence of a new internationalised financial system. 'Offshore' became a generalized phenomenon by the 1970s, and acted as a catalyst for a dual process of national deregulation and international reregulation. Controls over economic activity based on direct state command over 'national' firms often had to be abandoned, but as a result international regulatory networking gradually emerged.

launched the rebellion in 1989 and was at that time a member of a six-person Council of State, initiated challenges to International Registries Inc. of Virginia (IRI) which was running the registry, and from whom Taylor had been unable to obtain funds during the civil war. Legal proceedings were begun in the US courts alleging that IRI was diverting shipowners from Liberia to the Marshall Islands registry, and was failing to account properly to Liberia for its receipts. Taylor worked with a US lawyer, Lester Hyman, and on Taylor becoming President of Liberia the Liberian government signed an agreement with Hyman for the establishment of a new company, the Liberian International Shipping and Corporate Registry (LISCR), which took over the business in 2000 (United Nations, 2001). Competition for the ship registry business, as well as the costs of ensuring adequate safety standards for the ships it registers, mean that LISCR makes profits mainly from the corporate registry side of the business (United Nations 2001; interview information), which essentially facilitates tax avoidance.

⁶ See <http://www.liscr.com/>. Ten such bodies have formed the International Association of Classification Societies (IACS), which in December 2005 adopted a set of Common Structural Rules for ship classification and approval, see <http://www.iacs.org.uk/csr/index.html>.

⁷ The first was established by 20 maritime authorities covering Europe and the north Atlantic, based on the Paris MOU (Memorandum of Understanding), for details see <http://www.parismou.org>. This has been followed by Asia-Pacific, Caribbean and Latin American groups. The ITF also maintains an international network of inspectors (131 in 43 countries in 2003, see ITF, 2005: 7), who also liaise with the Port State Control system (interview information).

Legal enclaves or special jurisdictions have been created for a variety of activities, often linking tax incentives with other regulatory advantages. These include Export Processing Zones (EPZs), Special Economic Zones, or Enterprise Zones. Building on the older concept of free ports, which allowed duty-free importation of goods in transit, the EPZs aimed to facilitate the establishment of industries based on assembly or processing of imported inputs for re-export. However, they often went further, and created enclaves in which other measures were relaxed or waived, especially employment and social protection regulations.

Although specially-designed laws may be found everywhere, some states or statelets offer a more comprehensive package of arrangements specifically devised for avoidance purposes of one sort or another, so they may be considered designer jurisdictions. This phenomenon has been described as the ‘commercialization of sovereignty’ (Palan 2002, 2003, 59-62). Tax avoidance or evasion is often a central feature. This generally entails special provisions for non-residents, taking advantage of legal fictions such as corporate personality, and the indeterminacy of abstract legal concepts such as income and residence. This type of ‘ring-fencing’ has indeed been offered in many countries, aiming to attract specific types of business or investment. However, the more comprehensive package offered by outright havens generally depends on their having a regime of zero or low taxation of income or profits. The importance of taxation to modern state economies, and the centrality of income taxation, means that outright havens often have some very distinctive features.

Three examples may be taken as illustrations. Dubai is one of the former Trucial states which in 1971 merged to form the United Arab Emirates (UAE). Specific powers are delegated to the UAE federal government, while others are reserved to the member emirates, and the Emir of Dubai is currently Prime Minister of the UAE. The legal system is based on a dual system of Shari'a and civil courts, and the criminal law is enacted at federal level. Although oil is important in Dubai’s economy, its relatively lower level of oil reserves has led it to a policy of economic development to attract mobile business, building on its tradition as an entrepot on what was known as the Pirate Coast. The Jebel Ali Free Zone helped establish it as a major port, and was used as a model first for Dubai Internet City, with a highly developed technical infrastructure, and most recently the Dubai International Financial Centre (the DIFC), established in 2002. To facilitate this, the UAE government passed a decree essentially creating a legal enclave within the physical territory of the DIFC. This territory is now empowered to operate its own system of civil laws, essentially to govern commercial, corporate and financial matters, with its own courts, staffed mainly by British judges.

A second example is the Cayman Islands (CI), a British dependency, now classified as an Overseas Territory (OT). The CI has long had a high degree of internal autonomy, even when administered by Britain from Jamaica, and preferred not to become part of an independent Jamaica, so has remained a UK territory, with a very ambivalent relationship to the various arms of the British government. The CI have associated status with the EU, together with other OTs, under Part Four of the EC Treaty; although in principle they are part of the Customs Union, they are allowed to ‘levy customs duties which meet the needs of their development and industrialisation or produce revenue for their budgets’. However, the CI has never had any direct taxation, and government revenues rely largely on indirect taxes, mainly import duties, consumption taxes and licence fees. It emerged as an OFC in the 1970s and quickly became a major centre of (notional) bank assets, now ranked as 5th largest globally, although more recent growth has been in investment funds, especially hedge funds and equity funds. The British-appointed Governor chairs the Cabinet, appoints three of the 8 Ministers, and has certain reserve powers, including a general power to legislate ‘in the interests of public order, public

faith, and good government'. Although the UK government is generally responsible for its international relations, powers to negotiate international agreements have been delegated to the CI under 'Letters of Commitment' from the Foreign and Commonwealth Office, especially in relation to finance and tax matters.

A third example is the Principality of Liechtenstein, which was part of the Holy Roman Empire but became a sovereign state in 1816, although closely tied to Austria, since its Princes were prominent in the Austro-Hungarian Empire, indeed had acquired the territory in order to qualify for a seat in the Imperial Diet, and lived in Vienna until after the 1st World War. At that time a poor rural territory, it entered into a customs and monetary union with Switzerland, and in the 1930s and especially the 1950s laid the basis to emerge as a prosperous but tiny enclave, with some high-tech industry, but mainly based on finance, especially private banking. Geographically it is far from 'offshore', being a landlocked entity surrounded by other landlocked states. It is in many respects closely integrated with those neighbours, since it has no major airport or rail connection, and no physical border or customs formalities. However, both immigration and residency are very closely controlled.

Although they are legal enclaves, the regulatory systems of such centres are closely interlinked with those of other countries. Their status as havens depends on their being able to offer regulatory advantages in relation to other countries, which means that they must manoeuvre within certain limits of tolerance. Indeed, the emergence of OFCs in the 1970s entailed a degree of encouragement from the monetary authorities of the leading OECD countries, as a way of managing the transition from fixed to floating exchange rates, and the hard-to-control boundaries between the current and capital accounts of the balance of payments. However, the emergence of offshore finance has also been identified at various times since then as a weak point of the system of financial regulation, both as regards systemic security, and its use for illicit purposes. Thus attempts have been made to bring the regulatory systems of OFCs into line with global norms since the 1980s, mainly through informal international regulatory groupings such as the Basel Committee for Banking Supervision (BCBS), the International Organisation of Securities Commissions (IOSCO), and the Financial Action Task Force (FATF). Concerns about the increase in tax evasion and avoidance due to economic globalisation also led to attempts by the tax authorities of the OECD countries to take action against havens, which since 1998 has been coordinated through the campaigns against 'harmful tax competition' of the OECD's Committee on Fiscal Affairs (OECD-CFA), and the Code of Conduct Group set up by the EU as a form of 'soft coordination' (Radaelli 2003).

'Offshore' is not a niche or marginal phenomenon. As part of the attempts to bring them more closely into the global governance networks, organisations such as the OECD and the Financial Stability Forum have identified over 40 countries as havens or OFCs (most of them being both). Beyond these specific jurisdictions, 'offshore' is also a system or process of regulatory interaction driven by competition, which in many ways also permeates major 'onshore' states. Attempts have been made to bring some closer coordination of financial regulation, especially after the debates following the Asian crisis of 1997-8. They were orchestrated mainly through the G7 Finance Ministers and Central Bank Governors, but drawing in a wider group of emerging economy and leading developing countries,⁸ resulting in the establishment of the

⁸ The April 1998 meeting called by the G7 was attended by Finance Ministers and Central Bank Governors from Argentina, Australia, Brazil, Canada, China, France, Germany, Hong Kong SAR, India, Indonesia, Italy, Japan, Korea, Malaysia, Mexico, Poland, Russia, Singapore, South Africa, Thailand, the UK and the US, as well as he

Financial Stability Forum (FSF), through which a Compendium of financial standards and codes was identified. The FSF continues to maintain an overview of these standards,⁹ but the actual monitoring of compliance with these standards and codes, by all major financial centres, has been given to the staff of the IMF and WB (in conjunction with the FATF and related bodies for AML-CFT standards), through a process named the Reviews of Standards and Codes (ROSCs). However, tax aspects have been kept separate, under the auspices of the OECD-CFA, which has established a Global Forum in response to the insistence of non-OECD countries that tax cooperation should be even handed, to establish a 'level playing field'.

Thus, attempts to establish a clearer structure and more orderly coordination of regulatory arrangements have tended rather to spawn new groupings and networks.

Legitimacy and Legalisation

The law and lawyers have played a major role in the construction and management of these globalised regulatory networks. Much of this work is low-profile or behind the scenes. However, there has also been a more visible trend towards legalisation of global governance institutions, to a great extent in response to some of the legitimacy problems mentioned above.

An egregious example is the WTO, demonstrated by the great stress placed on the WTO as embodying the Rule of Law in world trade. Thus, after the organisation was shaken by the debacle at Seattle, the then Secretary-General Mike Moore delivering a speech on 'The Backlash against Globalisation?' concluded as follows:

The WTO is a powerful force for good in the world. Yet we are too often misunderstood, sometimes genuinely, often wilfully. We are not a world government in any shape or form. People do not want a world government, and we do not aspire to be one. At the WTO, governments decide, not us.

But people do want global rules. If the WTO did not exist, people would be crying out for a forum where governments could negotiate rules, ratified by national parliaments, that promote freer trade and provide a transparent and predictable framework for business. And they would be crying out for a mechanism that helps governments avoid coming to blows over trade disputes. That is what the WTO is. We do not lay down the law. We uphold the rule of law. The alternative is the law of the jungle, where might makes right and the little guy doesn't get a look in. (Moore 2000).

The political acceptability of compliance with the wide range of WTO obligations rests essentially on the quasi-judicial form of its dispute settlement (DS) procedure, and principally its Appellate Body (AB). Yet this role has been framed by a narrow mandate which formally reserves the power to interpret the agreements to the 'political' bodies of member state representatives.

An influential group of commentators has suggested that the WTO rates highly on a spectrum of the extent of legalization according to three criteria: being based on rules which are regarded

heads of the BIS, IMF, WB and OECD; this (with some changes in membership) later became semi-formalised as the G20.

⁹ The FSF Secretariat prepares a paper for the biannual FSF meetings which surveys ongoing work and regulatory initiatives relating to financial market supervision, going well beyond the 12 Compendium standards.

as binding, which are precise, and the interpretation of which has been delegated to a third party adjudicator (Abbott, Keohane, Moravcsik, Slaughter and Snidal, 404-6). This has been criticized as taking a narrow view of law (Finnemore and Toope). The formalist view rests on the premise that law provides relatively precise rules, so that legalization entails political decisions by states to make 'credible commitments', the application of which they delegate to adjudicators operating within a formalist rationality (Abbott and Snidal, 426-7).

Yet WTO adjudication entails skilful navigation through a labyrinth of legal rules, not only within the complex structure of the WTO agreements themselves, but also the many related regulatory regimes with which they intersect. The key WTO obligations are expressed in terms of abstract general principles, subject to counteracting exceptions, involving a high degree of indeterminacy (Trachtman 2001). Despite this, the AB has adopted a formalist approach which stresses a literal approach to the rules, largely to avoid accusations of creative interpretation. It has done so with some subtlety, emphasising the objective application of the words of the agreements to placate the broader public, while hoping to convince specialists in trade and economic regulation through shared understandings of the interpretations which are desirable to achieve the goals of free trade. Unfortunately, it risks failing to convince insiders, while doing little to reach out to persuade a broader constituency of the fairness of WTO rules.¹⁰

Global Rule of Law and 'Constitutionalisation'

The trend to legalisation of global governance has been seen by some as a step towards the establishment of a global rule of law, perhaps formalised through forms of 'constitutionalisation'. It is again the WTO that has been the focus of these debates, perhaps unsurprisingly since its structure and emphasis on market liberalisation has made it a node of intersection of many regulatory arrangements.

The theme of the WTO as an institutionalisation of the rule of law in the world economy has been debated among academic commentators under the rubric of the 'constitutionalisation' of international economic law. The term was applied to its predecessor, the General Agreement on Tariffs and Trade (GATT) by the doyen of trade lawyers, John Jackson, who coined the term the 'trade constitution' in the following sense:

It is a very complex mix of economic and governmental policies, political constraints, and above all ... an intricate set of constraints imposed by a variety of "rules" or legal norms in a particular institutional setting. ...This "constitution" imposes different levels of constraint on the policy options available to public or private leaders.¹¹

The current WTO Director-General, Pascal Lamy, has stressed the 'integrated and distinctive' nature of the WTO's legal order, and has considered its relationship to the legal systems of other organizations with sensitivity to accusations of being hegemonic (Lamy, 2006, p 977). However, he is forthright in stating the WTO's basic philosophy as being that 'trade opening obligations are good, and even necessary, to increase people's standards of living and well-being' (*ibid.*, p 978), and although he points to various means by which the WTO legal system

¹⁰ This analysis is developed in greater detail in Picciotto 2005.

¹¹ I cite this statement from the first edition of his text (Jackson, 1989, p 299), where the word 'constitution' is put in inverted commas; the wording remained very similar in the second edition (1997), but the inverted commas had gone.

contributes to an overall coherence of international law, he accepts that there are 'cracks' in that coherence (*ibid.*, p 982).

From a political perspective, Stephen Gill has attacked the 'new constitutionalism' represented not only by the WTO but other institutions of global governance as a 'project of attempting to make transnational liberalism, and if possible liberal democratic capitalism, the sole model for future development' (Gill, 2003, p 132). Gill argues that the global constitutionalisation project is well under way, and headed in a clearly undesirable, neo-liberal direction.

A detailed study by Deborah Cass, however, suggests that it is inappropriate or premature to assume that the constitutionalisation of the WTO is a *fait accompli* (Cass, p 2005). She identifies six core elements of the accepted meaning of the term, and outlines three models or 'visions' of WTO constitutionalisation: (i) institutional managerialism ('management of policy diversity between states by institutions and rules'), (ii) rights-based constitutionalisation (recognition of a right to trade, enforced in national laws) and (iii) judicial norm-generation (development of a WTO constitutional system by the Appellate Body, adopting constitutional procedural rules and incorporating domestic subject matters such as health) (*ibid.*, pp 21-22). I will consider here the latter two models, including the contentious issue of the effects of a strong 'constitutionalisation' of the WTO, with the inclusion of human rights in its core principles might ameliorate

Constitutional norms could emerge through the potential role of the WTO's Appellate Body (AB), as the apex of its dispute settlement system (DSS), in developing the jurisprudence of the WTO. This would follow the trail blazed by the European Court of Justice, which played a transformative role by developing doctrines such as supremacy and direct effect of European law, to help reconfigure the European Community as more than merely an international organisation (Stein, 1981; Weiler, 1991). There are nevertheless significant limitations on the role a judicial body can play in this respect. This has been clearly demonstrated by the EU's failure to create the political basis for any kind of 'constitution', leaving it in the institutional limbo of 'multi-level governance'. These limitations are even more clear for the AB, which has been kept on a very tight leash by the WTO's member states, as well as lacking the channels for networking with national judiciaries which have been an important element of the ECJ's relative success (Helfer & Slaughter, 1997). Although the AB is indeed an international economic court in all but name (Weiler, 2001), and has been gradually developing a coherent body of jurisprudence, it has done so under the cloak of a strict formalism, as suggested in the previous section (Picciotto, 2005).

Nevertheless, a basis exists for the AB to seek to enhance both its own and the WTO's legitimacy by incorporation of human rights norms. As Pauwelyn points out, although it may have come as a surprise to some trade negotiators, general rules of international law necessarily apply to the relations between WTO member states, and the WTO agreements form part of that general body of law and must be accommodated to it in some way (Pauwelyn, 2001). Indeed, the AB has often stressed that the reference to clarification of the WTO agreements 'in accordance with the customary rules of interpretation of public international law' requires it to apply the principles of the Vienna Convention on the Law of Treaties (VCLT), which include 'any relevant rules of international law applicable in the relations between the parties' as relevant context for treaty interpretation. Since many human rights principles are recognised as obligations *erga omnes* in general international law, and WTO member states are all parties to the UN Charter as well as in many cases other specific human rights conventions, the legal route lies open for the AB to assert that WTO obligations should be interpreted in line with obligations under international law, including human rights principles.

Yet there has been a marked reluctance to do so, not only on the part of the AB but also of WTO diplomats and officials.¹² In any case, a claim under the dispute settlement procedure must allege a breach of WTO rules and, under the formalist approach favoured by the WTO, other rules can only be applied if they are invoked by the defendant state. Hence, the fact that no state has yet invoked human rights obligations in a dispute under the WTO (or for that matter the GATT), has been said to demonstrate that there is no incompatibility (Lim, 2001, 284).

Even when non-WTO rules applicable between the parties are invoked, there is considerable scope for an adjudicator to decide whether to adopt a bold or cautious approach to the general question of the relationship between WTO rules and other international law obligations. From the side of the WTO, the preference has been for caution. First, the issue can be construed narrowly so as to confine it to WTO rules. This fits well within the AB's emphasis on the principle of 'judicial economy', or avoiding pronouncing on issues which are not necessary to resolve the specific complaint before it. In particular, this means that consideration of non-WTO rules can be avoided unless they are clearly in conflict with WTO obligations. A different approach has been suggested, notably by the work of the International Law Commission (ILC) on the Fragmentation of International Law (ILC 2006). This argued that international law must be regarded as a system, and hence that its norms may have relationships of interpretation, and not only of conflict. Under this approach the interpreter of a treaty has an obligation (under article 31(3)(c) of the VCLT) to take into account any relevant rules of international law applicable between the parties, and interpret them as far as possible in such a way as to further the 'objective of "systemic integration"' (ILC, 2006, para 17). So far, however, the AB has been reluctant to look beyond the texts of the WTO Agreements, unless a conflict is alleged with another norm. A key tactic then is to adopt a strict approach which assumes that rules are compatible unless it is impossible to comply with both. This has been the view of the AB, which has defined a conflict as 'a situation where adherence to one provision will lead to a violation of the other provision'.¹³

Legal indeterminacy leaves much room to interpret rules so as to find them compatible. A notable example is the approach taken by the AB to the application of the 'precautionary principle' to food safety rules. It has rejected arguments that the WTO rules should be interpreted in the light of this principle, on the grounds that (i) opinions differ as to whether the principle is accepted as binding in international law, (ii) that it would therefore be 'unnecessary, and probably imprudent ... to take a position on this important, but abstract, question', and that in any case (iii) the principle is reflected in WTO rules.¹⁴ Finally, even if a conflict were to be found, there is considerable room for debate on how it should be resolved under the various accepted treaty interpretation principles. In particular, the principle *lex specialis derogat legi generali* (priority should be given to a specific rather than more general rules) is likely to lead to the view that WTO trade rules cannot be overridden by general human

¹² WTO staff members have published academic articles on the subject (notably Lim, 2001; Marceau, 2002), although of course stressing that the views expressed are strictly their own and do not bind either the WTO secretariat or its member states. It is nevertheless interesting to note that one article by a member of the External Affairs division (Lim, 2001) appeared a year or so after the WTO's sharp response to the UN High Commissioner over the 'nightmare report'.

¹³ *Guatemala - Cement* 1998, para. 65, cited by Pauwelyn (2001, 551), who points out that this approach means that a state may be unable to exercise a right created under international law subsequent to the WTO agreements.

¹⁴ *EC Hormones* (1998,) para 123, which focused mainly on the agreement on Sanitary and Phytosanitary Measures (SPS). Not surprisingly, the Panel report in *EC Biotech Products* (2006, WT/DS291/R) followed this view (para. 7.89).

rights obligations (unless, of course, the latter are considered fundamental principles of *jus cogens*). Indeed, even authors who consider that the AB should apply non-WTO rules where relevant tend to accept that in case of a conflict the WTO rules should prevail (Bartels, 2001).¹⁵

The general approach has been to stress the strictly limited function of WTO's dispute settlement system, to the point where it is said to be a *lex specialis*, or a self-contained legal system (Marceau, 2002, pp 32ff). Some writers nevertheless concede that 'if the WTO system is self-contained, it is not entirely self-contained' (Palmetter & Mavroidis, 1998, p 413), in that WTO rules may themselves refer to or incorporate other international law rules (Trachtman, 1999, p 343). This is most notoriously the case for the TRIPS agreement, which incorporates (and therefore makes binding on all WTO members) the major provisions of key intellectual property conventions administered by WIPO. Slightly more indirectly others, such as the SPS and Technical Barriers to Trade (TBT) agreements, create an obligation for WTO member states to use standards developed by relevant international organisations where they exist.¹⁶ Such provisions in effect make the WTO's DSS an enforcement body also for these other areas of international law.¹⁷

The 'partly self-contained' view of the WTO means that it is a matter for each state to ensure compatibility of WTO rules with its international obligations, such as human rights norms, which are not specifically incorporated into the WTO agreements. 'States, members of the WTO, remain fully bound and responsible for any violation of their international law obligations but they cannot use the WTO remedial machinery to enforce them.' (Marceau, 2002, p 34). Furthermore, the WTO is considered to be no more than a forum for states, with no executive powers, unlike the IMF and World Bank, so that neither the organisation itself nor its secretariat can have any direct obligations to ensure compatibility of its work with human rights obligations (Lim, 2001, p 280).

This approach suggests a modest role for WTO rules and their enforcement, but the effect is in fact quite the opposite, it reinforces their power. The WTO is exceptional, indeed unique, among international organisations as regards the range and effectiveness of its compliance mechanisms. Most prominent is the DSS, which provides independent adjudication providing a complainant with a guarantee of a decision within a relatively short timescale, and the possibility of applying what amount to trade sanctions if the decision is not complied with. Less visible, but also effective, are the more extensive procedural arrangements for supervision of member state compliance through the range of WTO committees. In contrast, the compliance mechanisms of international human rights instruments must be described as weak. They rely mainly on self-reporting by states and scrutiny by committees of experts. Some (notably the ICCPR) also provide options for states to allow complaints by other states, as well as individual petitions, and other mechanisms such as fact-finding missions have also been

¹⁵ Bartels bases this on treating articles 3.2 and 19.2 of the DSU as a 'conflicts' rule, since they specify that DSS decisions cannot add to or diminish rights or obligations of WTO members, Panels and the AB must apply the WTO rule in case of a conflict. Marceau does not agree with this reasoning but comes to the same conclusion. Pauwelyn (in my view rightly) says that these provisions actually aim at reining in the DSS from expansive or adventurous interpretations of WTO trade rules, but provides only a very egregious example of a situation in which a Panel might be obliged to find a WTO rule invalid, viz. if the WTO were to conclude a slave trading agreement (p 564).

¹⁶ TBT art. 2(4), and SPS art. 3(1).

¹⁷ Thus the AB has ruled on whether food labelling regulations complied with a Codex standard (*EC Sardines* 2002, WT/DS231/AB/R), and a Panel has ruled on the validity of copyright exceptions under the 'three-step test' of the Berne Copyright Convention (*US - Copyright Act 2000*, WT/DS160/R).

developed. Crucially, however, compliance depends on 'naming and shaming', and lacks the hard economic impact of the WTO's ultimate sanction of withdrawal of trade advantages. These are the potential attractions of a more formalised inclusion of human rights principles within the WTO framework, which are effectively denied by treating WTO law in an apparently modest way as a *lex specialis*.

The argument for a rights-based 'constitution' of the WTO has been advanced most fervently by Ernst-Ulrich Petersmann, who has for some years and in many repeated writings proposed a combination of trade and human rights from a social-market perspective based on ordo-liberal theory.¹⁸ This aims to entrench internationally-agreed principles to secure the 'effective judicial protection of the transnational exercise of individual rights' (Petersmann, 1998, p 26). It would enshrine economic rights such as the 'freedom to trade' as fundamental rights of individuals, legally enforceable through national constitutions in national courts (Petersmann, 1993). While accepting that freedom of trade should also be accompanied by other human rights, which should all be enshrined in the WTO 'constitution', Petersmann's emphasis is on rights of private property and market freedoms. However, he goes further and argues that liberal traders should welcome the inclusions of human rights protecting individual freedom, non-discrimination and equal opportunities, and that the mercantilist bias of WTO in favour of producers could be corrected by the protection of competition and of the rights of 'the general consumer and citizen interest in liberal trade and ... human rights' (Petersmann, 2000, p 22).

Already, the effect of institutionalisation of the WTO is to constrain national policy choices by embedding broad and stringent international obligations to liberalise international economic flows. WTO enthusiasts argue that this is necessary since national state regulation tends to be protectionist because it is the product of the 'capture' of states by special interests. For example:

'Free trade and democratic government face a common obstacle - the influence of concentrated interest groups. ... The WTO and the trade agreements it administers act to restrain protectionist interest groups, thereby promoting free trade and democracy.' (McGinnis and Movsesian, 2000, p 515).

The anti-democratic implications of this view are justified by its roots in a particular concept of liberal democracy, in which state power must be confined, in order to safeguard individual rights and liberties. This would be further reinforced by the strong vision of constitutionalisation of the WTO, put forward especially by Petersmann, who considers that both national states and the WTO's rules and discourse are producer-biased, and sees his proposals for entrenching human rights as a means of counter-balancing this by representing general consumer and citizen interests (Petersmann, 2005, p 87). However, giving individuals, including 'investors' and corporations, rights which they could enforce directly, in national courts or through the WTO's DSS or both, would further constrain the possibilities of collective action through the state or public bodies, and operate to exacerbate economic inequalities by handing a powerful weapon to those whose economic power can be defended in terms of morally-underpinned economic rights.

¹⁸ Eg Petersmann, 1993, 1998, 2000, 2002a, 2002b, 2003, 2004, 2005. For a discussion of ordo-liberalism and its relation to classical liberalism, from a neo-liberal perspective, see Sally, 1998.

Conclusions

Does constitutionalisation have a part to play in an emerging system of global meta-governance? Much obviously depends on the model of constitutionalism that is proposed. As the analysis above has suggested, the model which has been put forward is essentially the liberal one. This type of constitution is a pre-commitment device, aiming to restrict the power of the state, and hence also the will of the people, by a strong form of institutionalisation of meta-principles. Especially when linked to the principles of economic liberalisation which form the main planks of the dominant international organisations (such as the WTO, as discussed above), the dangers of imposing constraints on state action based on general principles of individual liberty, in the area of economic regulation, are fairly clear.¹⁹ Yet it is equally clear that the traditional forms of jurisdictional and regulatory coordination of classical liberalism are inadequate in a world which is increasingly closely integrated.

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¹⁹ They are spelled out in much more detail in Schneiderman (forthcoming).

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