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## Chapter 1: What Rules for the World Economy?

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This book is a contribution to the debate about one of the most important public issues at the turn of the millennium: the institutions and rules which are to govern the world economy. This impinges directly on the kinds of livelihoods, welfare systems, social protections, goods and services, culture, and environment which people all over the world might enjoy. Our focus is the regulation of international business and international investment flows, which has become the subject of increasing public debate and concern in recent years.

Debate about the scope, form and content of such regulation revived during the 1990s, with the increasing awareness of the pace and impact of globalization. This culminated in the world-wide campaigns connected with the proposed Multilateral Agreement on Investment (MAI), which gathered momentum in 1997-8. Public concerns about the damaging effects of economic liberalization were confirmed by the global economic chain-reactions sparked off initially by the financial crises which began in Asia in July 1997. It has become evident that new thinking is needed if the devastating effects of the new globalism are to be tamed within an adequate framework of global governance.

### 1. International Integration: Negative or Positive?

The past two decades have seen a progressive removal of restrictions on the international flows of money and goods. Currencies have become convertible, and investors and speculators have become able to switch funds around the world at a moment's notice. Firms, especially the giant TNCs, have found it increasingly tempting to locate or sub-contract production wherever they can find the most profitable conditions. Long-term investment still flows mainly between developed countries, and when it ventures elsewhere expects to be provided with skilled labour, a good infrastructure and a large market, but for many firms in many industries factors such as tax breaks; labour that is low-paid relative to its skills; and poor protection of health, safety or the environment play a significant role. On the other hand, for most people freedom of movement in search of a better life or work has become more tightly controlled (Phizacklea, 1997). So if contemporary globalization has created stronger and more complex international linkages, its benefits have been very uneven. A bond-trader in New York, a coffee-grower in Uganda, a Bangalore software programmer, and an outworker stitching clothes on piece-work rates in Leicester or Bataan, are all linked in very different ways to the rapid and unpredictable flows of the world economy. Not only are their gains and losses disparate, but perhaps more importantly, their power to control and cope with the risks of these flows is very different.

In many ways, the opening of markets and the greater international mobility of factors of production can bring opportunities and advantages. Consumers in developed countries benefit from being able to buy exotic produce or low-cost manufactured goods, just as workers in developing countries gain from the employment such trade generates. However, it is a dangerous myth to suppose that unalloyed benefits can come from free or unregulated world markets. This idea became prevalent with the laissez-faire neo-liberalism of the 1980s, which argued for the removal of state 'intervention' and the unleashing of untrammelled market forces as the key to economic growth and prosperity. Certainly, bureaucracies are often inefficient, and

under-investment and other factors led to the deterioration of public sector services, paving the way for privatization in many countries. However, theories which assume the efficiency of markets, and seek to confine the role of the state or the public sphere to remedying ‘market failure’, greatly underestimate the importance of normative standards and regulation in establishing the trust and confidence necessary to ensure that production and exchange can operate smoothly and to the benefit of society as a whole.

## Liberalization and Regulation

The recent processes of globalization have been dominated by liberalization, or the removal of impediments to competition, both border barriers such as tariffs and exchange controls, as well as internal restrictions, such as directed credit and preferential purchasing. In many ways this has entailed de-regulation, especially the reduction of state ownership (privatization) and of structural controls (such as distinctions between banks and other types of financial intermediaries). However, there has also been a significant counter trend towards re-regulation, often as an international process, in the form of more elaborate legal frameworks for business.

The opening up of markets to competition, and of societies to outside influences, means that local standards, norms, and regulatory arrangements are often challenged or undermined. Groups cemented by traditional customary practices come under pressure from outsiders, whether they are closed financial communities such as the City of London invaded by foreign banks, forest peoples in Sarawak disrupted by logging companies, or avocats in Paris threatened by Wall Street business lawyers. In such cases the impact of external economic forces is mediated by changes in regulation, although often only following a crisis or conflict. Thus, the redefinition of the City of London as a global financial centre entailed a series of regulatory reforms, initially sparked off when an influx of credit mainly through foreign bank branches triggered the secondary bank crisis of 1974 (Moran, 1984; 1991), a pattern very similar to the Asian financial crisis of 1997. The activities of foreign logging companies in Sarawak have been facilitated by legislative amendments made by the state government, making it harder for native peoples to maintain their customary land rights (WRM-FM, 1998: 26). The penetration of American-style business law practices in many countries around the world, disturbing traditional legal cultures, has been accommodated by changes to professional practice rules (Dezalay, 1992, Garapon, 1995).

Thus, both the form and content of regulation are themselves an instrument of economic competition. In all societies formal rules enacted by the state influence social behaviour only indirectly, filtered through layers of formal and informal social institutions, and normative patterns and practices. Ordinary people are primarily influenced by the generally accepted standards of social behaviour prevalent in their own communities. Formal state law applies generally and compulsorily to everyone, but it operates by validating some social practices and delegitimizing others, empowering some people and disempowering others. Law attempts to mediate and accommodate social conflicts, by establishing generally applicable principles, often couched in universal terms (equality, freedom, reasonableness, and so on). These may remain hollow aspirations, and in practice may reinforce the economically powerful, if they are not given concrete content and backed by effective compliance mechanisms. Enforcement depends not only on legal procedures, access to which also often favours those with greater economic and social resources, but also on broader social factors, which create the cultural climate in which the abstract principles of the law become translated into the concrete norms and understandings which actually guide people’s conduct. For example, laws against bribery operate very differently in different countries; a range of political, commercial and social factors will influence whether

such a law is interpreted to prohibit, for example, 'grease payments', commission payments to middlemen, or favours by politicians in exchange for campaign contributions.

In fact everywhere, and above all in advanced capitalist countries, economic activities have become regulated in increasingly complex ways. General laws and other regulations cover everything from corporate governance, finance, and competition, to employment terms, health and safety at work, and environmental and consumer protection. More specific regulatory arrangements apply to particular industries, ranging from approval procedures or labelling requirements for food or pharmaceutical products, to qualification standards for professionals and skilled service providers.

The State and Global Governance

Significantly, the importance of regulation and of 'governance' more generally became increasingly recognised during the 1990s, notably by the World Bank. The 'Washington consensus' of the 1980s stressed deregulation and the slimming down of the state, but a counter-current emerging from the resistance to structural adjustment in Africa and debates about the success of state-led development in Asia culminated in the 1997 World Development Report, The State in a Changing World. This accepted a broad role for the state, and stressed the importance of reinvigorating state capacity, conceding that the shift to the minimalist state of the 1980s 'sometimes tended to overshoot the mark' (p.24), and urging that '[e]very country must look to build and adapt its institutions, not dismantle them' (p.75). However, perhaps because its constitution forbids it from political involvement, the Bank uses the term 'governance' which embodies a technicist and apparently apolitical view of the role of the state and the design of institutions (Faundez, 1997, Tshuma, 1999). Furthermore, critics cannot fail to point out that the dismantling of many state institutions, and the weakening of important state capacity and infrastructure, resulted partly from the 'structural adjustment' policies advocated by the Bank and the IMF during the 1980s.

Although the modified Washington consensus now includes the importance of the state and regulation, and discusses a range of options and strategies, it is advocating a 'market-friendly state'. The role of such a state is essentially defined in terms of what is needed to establish and maintain markets, and is only justified if it can be shown capable of remedying 'market failures'. But how are we to ensure that the market, or rather the systems of production and exchange, are people-friendly? The concept of the market-friendly state side-steps important political and ethical questions about who benefits from any particular pattern of state-market interaction, and what social values it promotes. Regulation entails allocating costs and benefits, and it is not enough to ask whether 'efficiency' is increased in abstract economic terms, it is necessary also to consider who bears the costs and who gains the benefits, and whether human welfare is enhanced in terms less easily quantifiable than by an increase in consumption of goods. The concept of 'regulation' indeed is thought by some to exclude direct state involvement in economic activity, and to be limited to establishing the ground-rules, or setting the framework for the activities of private economic actors. In doing so, however, it mediates between individuals and groups which have very different interests, and are often very unequal in their economic power.

The notion of a 'market-friendly state' tends to slip back into that of a laissez-faire, minimalist state, which is confined to protecting private property and enforcing contracts. In fact, the state creates property rights, and defines their limits, so that even this illusory minimalist state is far from a neutral arbiter abstaining from 'intervention' in the market. This has been seen in recent years, for example, in the processes of privatization, under which the various terms of asset

transfer in different countries have created opportunities for financiers, managers and all types of speculators and entrepreneurs.

Indeed the state, and the public sphere more generally, are essential to the management of the social conditions of production and exchange, of which the apparently private sphere of the 'market' is only an aspect. Hence, the contemporary debates and conflicts over the reorganization of state-market relations, on a world-wide scale, involve political and ethical, as well as economic efficiency and technical legal concerns. Recent experience has shown that globalization based simply on liberalization can increase economic insecurity and generate social tensions, exacerbate the damage to the environment, and destabilize the financial system causing economic recession. The challenge is to design international institutions and rules which can help to ensure that the increasing international contacts, flows and opportunities empower ordinary people and enable them to improve their lives, strengthen the safeguards against environmental degradation, and facilitate orderly financial intermediation.

Too often, the spectre of competition is used as a reason to reduce standards for social and environmental protection and financial prudence. Regulatory requirements can be seen, certainly in the short run, merely as imposing costs and reducing competitiveness, which generates arguments for deregulation, and a 'race to the bottom'. This is not inevitable: increased international contacts and closer integration can lead to a diffusion of best practices, and improvements in social and environmental conditions can attract people and investments and improve productivity, leading to a regulatory 'race to the top'. There is certainly a strong element of competition between regulatory systems, and an increased awareness of the need to adapt regulation in response to the international mobility of some economic factors. However, this competition is not played out in terms of abstract economic exchanges, but within specific institutional structures, mediated by political and social practices, and influenced by ideological perceptions. Thus, the stress by politicians and others on the need to be competitive is often more important than actual changes in regulation.

## 2. Global Business and Regulatory Networks

### Transnational Corporate and Contractual Networks

The new patterns of globalization generated by post-industrial capitalism have been characterized by Manuel Castells as based on a 'network society' (Castells, 1998). A key element in these processes are international business networks, dominated by TNCs. The TNCs became the focus of political attention after their emergence in the 1960s and 1970s as the dominant private institutions in the world economy. The pace of internationalization of business accelerated during the 1980s and 1990s, with new trends towards internationalization in finance, services and retail sectors and in medium-sized and even smaller firms. By 1996 there were an estimated 44,000 TNCs with some 280,000 foreign affiliates, although the top 25 firms controlled over half of the outward investment stock (UNCTAD, 1997: 1, 28). These giant corporate groups dominate international economic flows: notably, about one-third of inter-state trade consists of internal flows between affiliates of such groups (UNCTAD, 1997: 18).

However, business networks go well beyond corporate groups: a high degree of control is also exercised through contractual links in supply and delivery chains. Thus, technology licensing and business-format franchising enable firms such as Coca-Cola, Benetton and McDonalds to control large numbers of outlets which are owned and financed by small entrepreneurs (Felstead, 1993). Conversely, large retailers and firms making brand-name consumer goods source production

from hundreds or thousands of small businesses or even artisanal producers, who themselves may sub-contract to smaller workshops and even outworkers. Although the units in these supply and delivery chains are independently owned, the quantity and quality of their products are tightly supervised.

Thus, a high proportion of international economic flows is controlled by major firms which dominate business networks, and can take a longer-term strategic view of trade and investment. The central position of these firms in the global economy puts them at the heart of the issues of business standards, explored by many of the chapters in this book. Much depends on whether they take advantage of inconsistencies and loopholes in international arrangements, in order to give regulatory competition a downward push, or whether accountability mechanisms can be devised to ensure that they adopt and act as a transmission-belt for high business standards. Certainly, the firms themselves can and should actively promulgate and police standards for themselves and their suppliers, as shown by Fridd and Sainsbury in chapter 12. However, as Hepple points out in chapter 10, the worst abuses often take place outside the formal corporate sector. Thus, a broader national and international regulatory system is necessary, to ensure that high standards are generally disseminated (see chapter 13 by Ruth Mayne).

This does not necessarily mean detailed state requirements and enforcement: the important role of formal law is often to strengthen the mechanisms of accountability. Thus, several of our contributors (Hepple, Mayne and Kearney) stress that among what have been described as the core labour standards, the key ones are the right of association and free collective bargaining. It is neither economically nor morally defensible for workers in developed countries to begrudge the transfer of production to lower-paid workers in developing countries; but it can be an act of international solidarity for them to insist that the workers in those countries should have the right to form and join independent trade unions. Equally, Ayine and Werksman point to the obstacles that hinder transnational legal accountability of TNCs. Since these firms gain competitive advantage from their ability to manage dispersed activities in an integrated way, they should not be allowed to shelter behind the fictions of separate legal personality and jurisdictional limits to avoid their global responsibilities.

## Untamed Financial Flows

A more recent and very different phenomenon has been the resurgence during the 1990s of large-scale, short-term international capital flows. Since the 1930s, capital markets and financial intermediation have been largely national, and the postwar régime supervised by the IMF aimed to liberalize only current account payments. However, the ability of TNCs to manage their internal cross-border payments undermined the distinction between current and capital accounts, and the emergence of the Eurocurrency markets and of the system of ‘offshore’ finance dominated by TNCs and their banks created a vast pool of 'hot money' and inevitably led to currency floating . During the 1980s the developed countries ended exchange controls and began to reform their rules to make it easier for domestic banks and savings institutions (such as unit trusts and investment funds) to lend and invest abroad. By the early 1990s, financial liberalization became more general, and the rapid-growth countries of East Asia and Latin America, as well as former communist countries offering apparently promising investment opportunities, became identified as ‘emerging markets’. However, the resulting boom in short-term portfolio capital flows was very uneven (many countries in Africa and elsewhere had little inflow, or even net outflows) and extremely volatile. Peaking at $104bn in 1993, portfolio capital flows to emerging markets fell to less than a quarter of that level in 1995 due to the Mexican peso crisis, but rebounded to $50bn in 1996 (IMF, 1998: 12-13).

The financial crisis sparked off in Asia in 1997 led to an even more dramatic reversal, with drastic economic and social repercussions. The spreading contagion of financial volatility led to proposals through the IMF and elsewhere for ‘strengthening the architecture of the international financial system’; but as Stephany Griffith-Jones points out in chapter 9, these were aimed essentially at increasing the availability of information (transparency) and tightening supervision, intending to facilitate continued liberalization. She stresses that the inherent volatility of such short-term flows requires more serious consideration of regulatory requirements that can act as a brake on both inflows and outflows. Although some of these can, in principle, be introduced unilaterally by states, the competition to attract capital is such that some coordination is necessary. Certainly, collective action would be needed to introduce measures such as a tax on foreign exchange transactions, first proposed in 1972 by Nobel laureate James Tobin, which has been widely supported (ul-Haq et al., 1996; Porter, 1996).

Yet powerful voices in New York, London and Washington still press for the facilitation of unrestricted international capital flows. Unrestricted capital flows were a basic principle of the MAI, and were also proposed (though rejected on this occasion) as a condition of the $18bn US contribution to the new IMF facility in October 1998. The continued enthusiasm of key decision-makers and institutions for the concept of a free global capital market has been attributed by Jagdish Bhagwati to the influence of a ‘power élite’ based on the Wall-Street/Washington nexus, dominated by individuals linked to the large investment banks (Bhagwati, 1998). Indeed, the capacity to switch an enormous volume of finance between countries at a moment’s notice is available to relatively few individuals and institutions (perhaps sixty or seventy large globally-organized financial firms), while a few hundred banks and other investment houses act as the channels for the enormous and growing volume of private savings, all seeking above-average returns. It seems no longer acceptable that they should be allowed to continue these activities with a minimum of regulatory supervision, while expecting to be bailed out by states at enormous expense when their operations create a crisis.

The experience of 1997-8, when many countries which had liberalized capital flows suffered economic disaster, while others such as China and India which had retained controls fared much better, revived the case for capital controls. It also cast a large shadow over the project to extend the IMF’s aims and jurisdiction to liberalization of capital flows, which combined with the MAI and the liberalization of financial services under the WTO, would have created a single global capital market under the aegis of the IMF (Wade and Veneroso, 1998).

## Global Regulation

A counterpoint to global business networks has been the growth of global regulatory networks (Picciotto, 1996; Braithwaite and Drahos, 1999). These entail not only new forms of regulatory cooperation and coordination between states, but also at sub-state level between a wide range of administrative and public authorities, as well as various forms of private governance. The result is a spaghetti-bowl or spider’s web of intertwined organisations and arrangements, which evade the traditional categories of private and public, national and international law. The classic liberal international system which emerged during the 19th century, was seen as a community of equal, sovereign states, loosely coordinated by consensual rules and agreements. This envisaged a hierarchy of legitimacy hinging on governments, which voluntarily entered into public obligations externally with other states, and internally laid down rules binding the private transactions of individual legal persons.

Today, the emerging forms of global governance are characterized by the fragmentation of the public sphere into a complex and multi-layered network of interacting institutions and bodies. Consequently, national systems of accountability and legitimacy have been weakened, as public power has been transferred to bureaucratic, technical and professional bodies at supra-state and sub-state levels. However, there has also been an important resurgence of a social internationalism, sometimes described as the growth of an 'international civil society', which has begun to re-infuse global governance with some of the life-blood of accountability. In some ways globalization opens up opportunities for new forms of international solidarity, political empowerment, and direct popular sovereignty (Braithwaite and Drahos, 1999).

It may be helpful here to outline the skeletal anatomy of the new global governance.

Organizations

Firstly, the distinction between international governmental and non-government organizations (IGOs and INGOs) has become blurred, in many ways. Participation in the work of IGOs has been broadened out, not only by giving some NGOs consultative status, but also by including representatives of private interests and organizations in official delegations. A new kind of professionalized politics has grown up around the caravanserei of major international meetings, in which the power of corporate leaders and lobbyists to enter the inner sanctums has been counterpointed by the increased skill of NGOs in combining well-researched analysis, grass-roots involvement and knowledge, and often spectacular political action. The effect has certainly been to politicize the activities of international economic organizations in recent years, as discussed by O'Brien in chapter 14. Furthermore, a growing number of international organizations have a varied membership, which may include officials from governments, quasi-governmental public bodies, and even representatives of private associations or firms. For example, the Codex Alimentarius Commission, set up as a subsidiary body of the Food and Agriculture Organization (FAO) and the World Health Organization (WHO) to set food standards, accepts food industry representatives on its committees and in national delegations, to the point where it has been widely accused of being industry-dominated. Finally, many INGOs, although they are private associations, perform quasi-public and regulatory functions: for example, business associations such as the ICC set standards for key international contractual arrangements, and operate important international arbitration systems. The work of the International Accounting Standards Committee in agreeing harmonized accounting standards has been a highly political process, and one which is central to the development of adequate corporate transparency.

Beyond the formal organizations, there has been a mushroom growth of bodies whose status is often informal or uncertain, involving specialists with specific regulatory functions. They are often created ad hoc, as a result of particular political initiatives, bringing together the countries, organizations or individuals considered to be key to the issue in question. They may have only an informal constitution and a small secretariat, or none at all, and may be attached more or less loosely to an existing, more formal body. For example, the Port State Control Committee, set up by maritime authorities which are members of the Paris Memorandum of Understanding (MOU) on Port State Control, coordinates its programme of ship inspection (applying standards laid down by the International Maritime Organization and International Labour Organization), operating a computerized system of deficiency reporting and a black-list of defective vessels (http://www.parismou.org); it covers ports in the European region, but has stimulated the formation of similar organizations in other regions. Similarly, the Financial Action Task Force

(FATF), set up by the Group of Seven industrialized countries (G7) to combat money-laundering, has been attached to the OECD, although not formally part of it.

This process of formation of ad hoc groupings is to some extent the result of tactical manoeuvering by powerful bodies or states, which seek to ensure that an issue will be dealt with in a forum which they regard as suitable for their purposes. Perhaps the most successful example in recent years was the move of the USA, urged by its high-tech. industries, to include the issue of intellectual property protection in the GATT's Uruguay Round negotiations, side-stepping the unanimity requirements for amendment of the multilateral treaties which come under the responsibility of the World Intellectual Property Organization (WIPO), and the developing countries' domination of UNCTAD. However, the move to negotiate the MAI under the auspices of the OECD, with which some of this book's chapters are concerned, was unsuccessful, as it excluded many developing countries of special interest to investors, while agreement even between the OECD countries proved elusive.

A degree of coordination between related state regulatory arrangements is provided by regional and global trade-liberalization organizations. The epitomy of this is the EU, which having started with a relatively strong institutional foundation underpinning a common market, has evolved into what could be described as a major node or point of intersection for many regulatory networks. Other regional organizations, such as NAFTA and APEC have a much less institutionalized basis, but also act as nodal points. At the global level, the WTO has become a broad umbrella organization covering issues going well beyond trade, although there is increasing opposition to extending its remit further and diluting its free-trade mission. The WTO has also been slow to develop its coordination with other related organizations, especially those within the UN system, although this forms part of its charter.

A more comprehensive approach was suggested in the Report of the Commission on Global Governance (1995), which proposed the establishment of an Economic Security Council in the UN, the main role of which would be to improve coordination of the activities of these various disparate regulatory networks. This was seen as part of a broader reform of intergovernmental organizations (including greater involvement of NGOs) with an appeal for a commitment to common 'neighbourhood values' (respect for life, liberty, justice and equity, mutual respect, caring, and integrity), and for the articulation of a 'global civic ethic'. The Commission also suggested that a useful source of revenue for often financially hard-pressed international organizations would be the Tobin tax, mentioned above (Commission, 1995: 219).

## Law: International, Supranational and Transnational

A corollary of the fragmentation of the global public sphere into multi-layered networks has been the emergence of more complex patterns of law, across as well as between states. Formally, treaties and other international agreements are part of public international law, which binds only states. Even general multilateral treaties, such as the package of agreements under the WTO, do not create global law directly binding on individuals or firms. However, the WTO has established a strong mechanism for settling disputes, to which states may refer complaints, often on behalf of business lobbies. In many ways this procedure is an advance, since it restrains unilateral protectionist action (a powerful weapon for states with large markets), and requires rule-based justifications. The availability of the sanction of denial of market access remains the underlying strength of the WTO's procedures; its weaknesses are the priority it (necessarily) gives to free trade compared to other values, reinforced by the inadequate resources of developing countries to bring or defend cases, and the lack of formal standing for either INGOs or NGOs representing

social concerns (see Ayine and Werksman, chapter 7). By comparison, other international economic obligations on states are backed by less direct sanctions, but long-term reciprocal advantage and the threat of reputational damage are enough to ensure that most states most of the time pay at least lip-service to their undertakings. The bigger danger is the threat of non-participation or withdrawal, especially by an important state. Notably, the USA has frequently used its non-participation to hobble new initiatives, or ensure they are modified to suit US interests, for example its refusal to ratify the UN Convention on the Law of the Sea until the deep-sea mining provisions were effectively amended.

Various techniques have been developed, however, to give direct applicability to internationally-agreed rules so that they can immediately create rights and (less often) duties for firms and individuals. Under the constitutional law of some countries (for example, the USA) an international treaty is considered part of national law, and can therefore in some circumstances create law directly applying to individual legal persons. This is limited to those treaty provisions which may be regarded as 'self-executing', which means rules which are intended and capable of being applied as law without further legislation. Thus, for example, bilateral tax treaties generally give immediate benefits to international investors in the form of reduction of withholding tax rates. In countries, such as the UK, where treaties do not automatically have this force, the same effect is produced by legislation: in the case of tax treaties, a general provision in the tax code enables each bilateral treaty to be given direct effect as subsidiary legislation.

Where rights, or indeed obligations, are created in this way for individual legal persons by international legal agreements, they can be said to be 'supranational'. In principle, rights created by treaty can be overridden by subsequent national legislation, provided the intention to do so is explicit. In practice, once a state is locked in to a binding multilateral convention, or a network of bilateral treaties, reconciling changes to national laws with international obligations can involve many difficulties. For example, several states complained that some of the changes in the major US tax reform of 1986 entailed breaches of their tax treaties with the US, leading to complex renegotiations and several legislative amendments. A major criticism of the MAI is that states would be locked in to its liberalization and investment protection obligations, which would potentially override a wide range of national laws, leading to uncertainty rather than a stable climate for investors (see chapter 5 below). Since the MAI envisaged direct access to international arbitration by investors, it would make these arbitrators the judges of the validity of any national laws which might be considered contrary to the MAI's principles.

The most developed system of supranational law is that of the EU, membership of which carries an obligation to implement EU law. Each Member State has therefore entrenched EU law internally, so that it overrides inconsistent national laws even if passed later. This is reinforced by the role of the European Court of Justice (ECJ), which has actively developed the doctrines of supranationality and direct effect. The ECJ's activism has been made relatively acceptable politically by balancing the rights of business with some individual social rights (notably, equal pay for women), but nevertheless many consider that European integration has rested too heavily on judicial activism and too little on institutions with more democratic accountability.

The impact on the national-international law divide of increased international economic and social integration has been greatest in relation to the concept of jurisdiction. Already in the 1950s some US academics identified the concept of 'transnational law', referring to the multiplicity of laws that might apply to internationally-organized businesses and transactions (Jessup, 1956; Picciotto, 1995: 195). The notion that economic and business activities which cross national boundaries, or have contacts in several countries, might be subject to several national legal

systems, has posed great problems for state-based concepts of international law. Although principles of private international law have long existed to deal with potential conflicts of private law (for example, which legal system should apply to a contract in international trade), it is harder for a state to cede to another's regulatory law, which involves state policy and entails sanctions.

Understandably, host countries which were recipients of foreign investment began to resent the application to local business activities of the laws of the 'home' countries of the foreign investors. Also unsurprisingly, as the main home country of FDI in the postwar years, the USA increasingly generated hostility for applying 'long-arm' laws to the foreign activities of US-owned businesses. A major arena of conflict was the application of US antitrust laws to break up many of the international cartels which had dominated many industries in the first half of this century. US regulations also commonly disregarded the separate legal personality of foreign subsidiaries, by applying to companies, wherever incorporated, which were owned or controlled by US persons. Accusations of 'extraterritoriality' were especially vociferous when US laws were applied even to agreements between non-US firms outside the US, on the grounds of their 'effects' on the US economy, its consumers, and even exporters. The greater propensity of the US to apply economic sanctions in pursuit of foreign policy goals led to conflicts with its allies over the application of export embargoes, to prohibit US-owned foreign subsidiaries from supplying banned items to destinations under the embargo such as the USSR or Libya. These sometimes extended even to foreign firms which had licensed technology of US origin, or which had dealings with nationalized property, notably in Cuba. In principle, the territorial basis of state jurisdiction should mean that such extensive claims to prescriptive jurisdiction would be hard to enforce without the cooperation of other states. Today, however, any major firm which wishes to have a meaningful presence in the global economy cannot easily afford to disregard the requirements of US law, unless it is willing to forego access to US markets. Increasingly, the same can be said of EU law. Such conflicts have led to the enactment of 'blocking statutes' and retaliatory legislation, as well as attempts to agree limits to the assertion of jurisdiction and to develop regulatory cooperation, for example in competition law (see Roffe, chapter 8 of this volume, and Picciotto, 1983).

In contrast to the expansive tendencies of US regulatory law, US courts have shown increasing reluctance to allow access to private litigants seeking to take advantage of the more highly developed US laws of liability (for example in negligence), in order to sue US parent companies for injuries suffered abroad. This was seen most starkly in the Bhopal litigation (discussed by Ayine and Werksman in chapter 7), when the New York courts held that they were not a 'convenient forum' to hear the claims of Indian victims of the gas plant disaster at the Indian subsidiary of Union Carbide Corporation. This argument becomes harder to maintain if the parent company can be shown to have a direct responsibility for the activities concerned (as was alleged, for example, in the Cape Industries case, discussed in chapter 7), but direct knowledge or involvement by the parent (through directors or senior employees) may be hard to prove. Only rarely have courts accepted that the fact that a TNC operates under centralized management should create a presumption of parent company liability under home country law (Blumberg, 1993).

MOUs, Codes, and Guidelines

The main response to the pressures that globalization has created on the formal separation between national-international law has been the growth of new forms of so-called 'soft law' in the international arena. Firstly, arrangements for administrative cooperation between regulatory

bodies have increasingly become semi-formalized, often through MOUs (Memorandums of Understanding). Since these are not negotiated through central governments, they are not considered binding on states. However, by establishing procedures and conditions for direct cooperation among public authorities and administrative bodies with immediate responsibility for particular areas of regulation, they can be of great practical significance. Cooperation is obviously crucial for effective enforcement of economic regulatory requirements, not only to deal with activities affecting more than one jurisdiction, but also to combat regulatory avoidance which makes use of convenient intermediary jurisdictions to route transactions. Regulatory authorities need to ensure that they have adequate powers under national law to provide appropriate assistance, which may not always be easy to obtain. Legislatures may be willing to give agencies the power to exchange with their foreign counterparts relevant information which they may have acquired as part of their own enforcement activities, although this is increasingly being made subject to guarantees that confidentiality be safeguarded. They are more reluctant to grant powers to investigate on behalf of foreign authorities, to assist in enforcing laws benefiting the other state, or based on principles or policies which they do not recognize. This in turn leads to pressures to establish equivalent regulatory standards.

Clearly, to establish a single global code comprehensively covering the complete range of business responsibilities would be an impossible undertaking. Viewed retrospectively, it is hard to believe that so much effort was expended in attempting to agree a UN Code of Conduct for TNCs, and easy to understand why the attempt eventually failed. It was not fruitless, however, in that the debates spawned more specific initiatives, some of which achieved some success.[i] As Pedro Roffe points out in chapter 8, the UN did agree the Set of Principles on Restrictive Business Practices (RBP Principles), although discussions on the Transfer of Technology Code were stalemated by a difference of perspectives. Indeed, early on in the process two general Codes were agreed: the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977), and the OECD's Guidelines, appended to the Declaration on Multinational Enterprises adopted in 1976. Codes with a more specific focus include the WHO Code of Marketing of Breastmilk Substitutes, and the various banking supervisory standards developed the Basle Committee on Banking Supervision (BCBS, 1997), which were tied in to a comprehensive set of Core Principles put out in 1997.

**Table 1. Global Business Standards**

| Subject-Matter | Organization, Form & Date | Comp |
|---|---|---|
| **Taxation and Finance** | | |
| Convention on Mutual Assistance in Tax Matters | Council of Europe/OECD Treaty 1988, 8 members 1998 | bilatera |
| Harmful Tax Practices | OECD Recommendations & Guidelines, 1998 | review |
| Core Principles for Effective Banking Supervision | Basle Committee on Banking Supervision, code 1997 | review |
| Forty Recommendations on Money-Laundering | Financial Action Task Force, 1990 revised 1996 | self-as |
| **Corporate Behaviour and Fair Competition** | | |
| Restrictive Business Practices Set of Principles | UNCTAD, UN General Assembly resolution 1980 | bilatera |
| Draft Agreement on Illicit Payments | UN, proposal for treaty sent to General Assembly 1979 | nationa |
| Bribery of Foreign Public Officials | OECD treaty, signed 1997 | Worki |
| Corporate Governance | proposed OECD Guidelines, under discussion | none: |
| **Consumer Protection** | | |
| Guidelines for Consumer Protection | UN General Assembly resolution 1985 | none |
| Marketing of Breastmilk Substitutes | WHO Code, 1981 | inform |
| **Social & Employment Standards** | | |
| Fundamental Principles and Rights at Work | ILO Declaration, adopted 1998 | annual |
| Principles on MNEs and Social Policy | ILO Tripartite Declaration, adopted 1987 | Comm |
| Labour Standards | ILO Conventions and Recommendations, various dates | self-as |
| Development Objectives and Action Programme | Declaration of Copenhagen Summit 1995 | UN sy |
| Principles of Good Practice Social Policy | proposal to World Bank Development Committee spring 1999 | to be a |
| **Environmental Protection** | | |
| Rio Declaration | UN Conference on Environment & Development, 1992 | UN, es |
| Agenda 21 | UN Conference on Environment & Development, 1992 | UN, es |
| **Human Rights** | | |
| Universal Declaration on Human Rights | UN Declaration 1948; general international law | Comm |
| Covenant on Civil & Political Rights | UN treaty, agreed 1966, into effect 1976 | states |
| Covenant on Economic, Social & Cultural Rights | UN treaty; agreed 1966, into effect 1976 | states |
| **General** | | |
| Guidelines for MNEs | OECD App. to Declaration & Decisions, 1976, revd. 1991 | Comm |

Such codes have been criticized as ineffective, and this is generally ascribed to their 'non-binding' status. Certainly, they are often explicitly said to be voluntary and not legally enforceable (for example, OECD Guidelines, Introduction, para. 6). However, the negotiation of binding international agreements is a complex and generally very protracted process, often resulting in rules which are expressed in very general and often ambiguous or anodyne terms. Furthermore, such 'binding' rules would depend on state implementation for their effectiveness. Enactment of 'binding' rules into national law can be very patchy, as can be seen for example in relation to ILO Conventions (discussed in chapter 10 by Hepple).

A more valid reason for the non-effectiveness of non-binding codes is the weakness of their mechanisms for monitoring and inducing compliance. Usually they envisage only some kind of general review procedure, and they normally exclude the possibility of complaints about the behaviour of specific firms (for example, RBP Principles, para. F5). Under pressure from its Trade Union Advisory Committee (TUAC), the OECD's Committee for International Investment and Multinational Enterprise (CIIME) has on some occasions considered specific cases arising under the OECD Guidelines (mainly in the period 1975-85) with a view to providing 'clarifications'. However, the trade unions themselves took the view that responsibility for enforcement lay at national level, and generally refrained from conducting international campaigns targeting specific firms (Blanpain, 1979: 52; Blanpain, 1983).

By comparison, campaigns by pressure groups and NGOs around specific issues, and sometimes aimed at the behaviour or activities of specific firms, have had more success, at least in spotlighting and dramatising particular problems. Perhaps the best-known has been the long campaign focusing on the baby-milk issue (discussed by Mayne in chapter 13), but others include pesticides, pharmaceutical drugs, and toxic waste dumping. The issue of child labour, and exploitative working conditions more generally, have also been the focus of recent campaigns, again sometimes targeting individual companies (see chapter 11). These campaigns can perhaps be criticized for prioritizing the concerns of consumers or workers in developed countries, and singling out specific companies on a relatively arbitrary basis, so that they do not necessarily result in lasting and generalized improvements for the people intended to be their beneficiaries. These pitfalls indicate the importance of ensuring that standards should not be unilaterally formulated and imposed, but developed and applied in an internationally coordinated manner. In particular, efforts to raise social and environmental protection standards, especially in developing countries, should be sensitive to local conditions, and should be accompanied by appropriate assistance programmes (illustrated by the Sialkot project discussed by Mayne in chapter 13). This again emphasises that international regulation should aim to empower people, especially the weak, and strengthen mechanisms of accountability.

## 3. Strengthening Global Regulation

The international regulatory networks described in the previous section have resulted in complex and multi-layered interactions between laws, codes and guidelines, operating locally, nationally, transnationally, regionally and internationally (Jacobs, 1994). The challenge of globalization is to design and manage these interactions so as to enhance rather than diminish regulatory effectiveness. As it has become clear that global economic integration is not just a matter of removal of restrictions on market forces, officials and academics have begun to give greater attention to the improvement of regulatory coordination and 'rapprochement' (OECD, 1994). However, this has mainly focused on technical questions, and has only hesitantly begun to tackle the broader issues of how to design arrangements and institutions which balance business rights

and responsibilities, strengthen accountability and state capacity, and empower the disadvantaged. Efforts at improving the effectiveness of international regulation should combine principles of accountability with an understanding of the dynamics of the links between the various layers and types of regulation generated by the new globalism (Braithwaite and Drahos, 1999).

Accountability

First, there is the question of accountability of international regulatory processes. There is no shortage of examples of the 'democratic deficit' caused when intergovernmental bodies operate in secret, or consult selectively, often mainly with business interests. Agreements reached in this way are often subject to little or no scrutiny by national parliaments, since they entail bargains that cannot be unpackaged; but the conflicts around 'fast track' negotiating authority in the US and the Commission's negotiating mandates in the EU, demonstrate the perils. In recent years, as O'Brien shows in chapter 14, international economic organizations have learned the importance of ensuring wider consultations and involvement, and the OECD's experience with the MAI will perhaps prove a salutory turning-point. However, this opens up much more difficult questions about how to design international structures and procedures which are more genuinely responsive to a broad range of public opinion.

An important element must be greater transparency. This is a principle which has increasingly been put forward as an international obligation on states, in respect of their national economic regulations - it features in many of the WTO agreements, and was included also in the MAI. International bodies have been slower to accept this obligation for themselves, although it has now been made much easier, and indeed forced upon them, by the facilities offered by the Internet. But the opening up of international space for debate of itself will be insufficient, unless it takes account of the great inequalities of access to that space which privilege the powerful and silence the disadvantaged. This places an immense responsibility on the intellectuals and professionals who now play the central roles in global networks. They must try to foster principles and procedures to evaluate arguments, taking due account of vested interests and partial positions, including their own.

Global-Local Regulatory Linkages

The second major effectiveness issue lies in managing the interaction between vertical layers of regulation (local, national, regional, international). As discussed in the previous section, the fragmentation of the public sphere has created greater complexity in the forms of interaction between these levels. This question is often considered mechanistically, failing to take into account the greatest virtue, and vice, of the law, and of regulation more broadly: its great flexibility. The application of rules is not a mechanical but a social process, which depends in particular on interpretation. Rules are always expressed at a certain level of abstraction, and their application to specific contexts allows a degree of flexibility of interpretation. Indeed, this feature is a major reason why regulation has become a central feature of the current phase of globalization, since it offers the possibility of mediating between the pressures for global homogeneity and those for local diversity and difference.

However, the indeterminacy of abstract legal rules, especially those expressed in universal terms, also tends to undermine effective enforcement, especially in an international context where national interpretations may vary greatly. For example, both the recent OECD anti-Bribery convention and the proposed UN draft require the criminalization of 'undue' payments to an

official for performing public duties; this leaves considerable room for interpretation in deciding on the acceptability of the common practice of paying commissions to 'middlemen'. So even a binding international standard may remain an empty aspiration unless it is supported by effective international procedures for monitoring practical implementation at the national and local levels, but these are often lacking or weak. Where they exist, they generally rely on self-assessment by each government or regulator, which do not always receive close scrutiny by the international body to which they are submitted. An alternative is a process of 'peer review', adopted for example by the Financial Action Task Force, which enables closer examination of actual practice on the ground by an experienced regulator from another country. National regulators of all kinds are now increasingly aware of the need to improve cross-border cooperation, and although they are sometimes suspicious of the role of international bodies, arrangements for mutual recognition and assistance in enforcement are proliferating. However, the practical impact of all these procedures crucially depends on their transparency, and their responsiveness to pressures of public opinion.

Codes appear to provide a more direct link than do treaties between internationally-agreed standards and practical compliance by firms. Thus, an industry or company code, such as Sainsbury's Principles and Code of Practice explained in and appended to chapter 12, may provide a direct link between local practices of contract suppliers and internationally-agreed principles; indeed, consumer pressures may mean that high standards in Sainsbury's home market are transmitted via the Code to the suppliers, providing a positive impetus or social spread-effect in the supplying country. It is noteworthy that while some regulations, such as product standards, will be regarded as binding contractual conditions, the social standards in the Code are more negotiable, although they are to be monitored by the same inspection system. Clearly the company considers it important to ensure that standards are not imposed inappropriately or without sensitivity to local conditions. On the other hand, Kearney argues forcefully in chapter 11 that firms may adopt codes merely to deflect social and political pressures, and Mayne in chapter 12 argues that corporate codes should complement not replace state regulation. Once again, the key to practical effectiveness is whether such codes improve accountability by helping to empower those whose social conditions they aim to improve.

## Enhancing Multilateralism

Effective international regulation also requires improved horizontal coordination, not only between states but also between and across international organizations and arrangements. As discussed in the previous section, linkages between such bodies have increasingly developed, but in an ad hoc way, in response to tactical and often power-political considerations. Liberalization and the new wave of globalization have led to an awareness of the need for improved coordination between related international régimes. Thus, the formation of the WTO has created formal links between the multilateral trade system and other related régimes (Picciotto, 1998). Most of these may be described as negative linkages, creating a presumption that national rules are compatible with GATT market-access obligations if they comply with internationally-agreed standards, for example technical or health standards for goods and products. The TRIPs agreement goes further, and establishes a positive linkage, by requiring WTO members to implement its detailed minimum standards for intellectual property protection, including the main provisions of international intellectual property treaties.

The liberalization of currency and capital controls, followed by the financial market crises and volatility since 1994, finally led in 1998 to talk of 'strengthening the architecture of the global financial system'. This included the concept of 'a system of multilateral surveillance of national

financial, supervisory and regulatory systems [which] could encompass surveillance of such areas as banking and securities supervision, corporate governance, accounting and disclosure, and bankruptcy' (G7, 1998: para.17). However, there has been little indication of how this might be accomplished, apart from some mention of 'greater cooperation and an improved relationship' among existing institutions such as the IMF, the World Bank, and the Basle Committee. The failure to address this need to improve regulatory coordination was perhaps the central flaw in the MAI, due to its origins in the laissez-faire neoliberalism of the 1980s. Thus, as discussed in detail in chapter 5, the MAI's obligations would have acted as 'disciplines' on national state regulation. As it became clear that this would bring into question many regulatory régimes (for example, intellectual property, taxation, monetary and financial regulation), this resulted in various exclusions and 'carve-outs'. Thus, far from providing a framework of rules offering a stable and secure basis for international investment, the MAI would have fostered uncertainty about the validity of many existing national rules, and actually undermined efforts to improve international coordination in some important areas.

The failure of the MAI demonstrated the need for a new approach to a global regulatory framework for international business. This would need to link the rights of business to fulfilment of responsibilities, and aim to strengthen state-level regulation through flexible linkages to internationally-agreed standards. A high priority should be to link liberalization and investment protection provisions, such as those envisaged in the MAI, to equally strong multilateral arrangements to strengthen international fiscal and financial regulatory cooperation. These already exist in embryo (see Table 1), but they are greatly weakened by the reluctance of states to participate in them, or to enforce them rigorously, due to the fear of losing out in the competition to attract finance. In fact, long-term capital is most likely to be attracted to states with educated and skilled workers and a sound infrastructure (as pointed out in chapter 2), but the capacity to develop these been undermined everywhere by a fiscal 'race to the bottom'. A major element in the decline of the legitimacy of income taxes has been the availability of facilities for international tax avoidance and evasion. Developed states, through the OECD, have slowly begun to develop the means of combatting this (OECD, 1998), but they are finding it hard to maintain sufficient consensus among themselves, let alone extend the initiative to other countries. The unwillingness to make decisive moves to block some of the main international tax loopholes is mainly due to fears that financial markets would use the 'offshore' system to go further underground. Much the same argument is made about some aspects of financial market regulation.

The problems posed by international avoidance of tax and financial regulations would be more easily overcome by accepting the principle that the advantages of an investment protection agreement should be open only to states which also accept the rules for cooperation in tax enforcement and elimination of harmful tax practices, and to investments coming from such participating states. Also included in such a package deal should be participation in systems for regulation of financial markets and prudential supervision of financial firms, as well as money-laundering and financial fraud. The arrangements which have been developed at the international level so far are far from perfect, but their inclusion in a broader multilateral framework would facilitate their acceptance and make it easier to strengthen them. This would reverse the presumption of the MAI, which would have encouraged the continued use of offshore centres and havens for tax and regulatory avoidance, by offering protection to investments even if routed through such jurisdictions.

A wide range of internationally agreed standards for business could also be included within such a framework, such as agreements to combat bribery and illicit payments, corporate governance

and disclosure requirements, and marketing rules for products such as drugs, tobacco, or babyfood. These need not form part of the basic package which states would be required to accept, but could be linked to it in various ways. For example, a firm's rights under investment protection rules could be conditional on its compliance with relevant business standards; thus, it could not complain of cancellation of a hospital supply contract if it could be shown to have breached rules on marketing of pharmaceuticals or babyfood. Principles of environmental protection, and minimum social and employment standards, could also be associated within the framework, by creating a presumption that an investor is responsible for ensuring compliance with such standards by the businesses involved with the investments. Such linkages need not require the inclusion of all these arrangements under the same institutional umbrella. However, the time is surely ripe for some rethinking of the roles and relationships of the international financial and economic institutions, and the lack of an organization responsible for regulating international investment and business standards is clearly a gap which needs to be filled.

Above all, what is needed is a recognition that globalization is not merely a matter of unrestricted market forces. It requires a strengthening of international standards and cooperative arrangements, to provide a strong basis of mutual confidence. Without such a strong foundation of positive standards, paper guarantees against discrimination or expropriation, or unfair treatment of any kind, would in any case be ineffectual or illusory.

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[i] An excellent collection of the relevant documents has been provided by UNCTAD in the 3-volume International Investment Instruments: A Compendium (1996).