Global disordering

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'Global Disordering': Practices of Reflexivity in Global Economic Governance

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Abstract

In this article, I offer a reinterpretation of late 20th-century 'neo-liberal' transformations of global economic governance. My argumentative foil is a macro-institutional interpretation of the post-1980s period in which neo-liberalism appears as programmatic institutional form and disciplinary formation. I argue that a second, and complementary, dynamic also needs to be taken into account – namely, the emergence and operationalization of a set of critical technologies for embedding practices of reflexivity within the state. I suggest, moreover, that attention to this dimension of neo-liberalization provides a new perspective on the present. I offer an interpretation of the current moment of transition as one in which a similar repertoire of neo-liberal techniques of reflexivization is, in a second iteration, being trained on the architecture of global economic governance itself.

1 Introduction

Are we, as former United Kingdom Prime Minister Gordon Brown has recently suggested, on the cusp of a 'post-neoliberal' future for the global economic order?[1] The idea is certainly in the air: one does not have to look far to find invocations of 'post-neoliberal globalization', the 'fall' of the neo-liberal order, a world 'after neoliberalism' or the 'emergence of a post-neoliberal order'.[2] The heart of such claims is that a combination of recent epochal events – the COVID-19 pandemic, climate change, the rise

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1 Presidential Lecture at the World Trade Organization (WTO) Public Forum, 12 September 2023.

2 G. Gerstle, *The Rise and Fall of the Neoliberal Order: America and the World in the Free Market Era* (2022); J.E. Stiglitz, 'A New Global Order: Professor Joseph Stiglitz on Post-neoliberal Globalisation', Speech delivered at the European University Institute, 28 September 2023; Foroohar, 'After Neoliberalism – All Economic Is Local', 101(6) *Foreign Affairs* (2022) 134; Davies and Gane, 'Post-Neoliberalism: An Introduction', 38(6) *Theory, Culture and Society* (2021) 3.

of anti-liberal populisms, major new geopolitical tensions, the digital revolution, all coming not long after the global financial crisis – have 'shattered past orthodoxies on the desirable models of international economic integration, and the institutional arrangements underpinning them'.[3] While this is hardly the first time the death of neoliberalism has been announced, it is hard to deny that we are at an inflection point as significant as that which occurred around the end of the Cold War.

In this article, I suggest that, in order to think clearly about the present 'post-neoliberal' moment – if that is indeed what it is – international lawyers need first to take another look at global economic governance during the neo-liberal period itself and complicate some of our assumptions about it. My argumentative foil is what I shall call a 'macro-institutional' interpretation of global economic governance during the last decades of the 20th century. According to this interpretation, the last decades of the long 20th century were a time during which a particular institutional form of the state – described as neo-liberal, characterized in shorthand as 'pro-market' and associated with the collection of policy priorities that we know as the Washington Consensus – was promoted and propagated through a variety of international economic institutions, with transformational consequences both for the nature of global economic governance and for state formations across the globe. In this story, 'neo-liberalism' appears primarily as programmatic institutional form, and global economic governance appears primarily as a coercive formation promoting alignment with this institutional form. This foil is admittedly something of a simplification, but I would suggest that it remains a central reference point for international (economic) lawyers' understanding of this period.

Importantly, by saying that this is a 'central reference point' for international lawyers, I mean that this macro-institutional view has deeply structured the conversations that we have about global economic governance. We routinely ask, for example, how far international trade and investment law constrain the regulatory autonomy of states and how far they discipline deviation from free-market principles. We have extensively examined the ways in which international financial institutions have promulgated the Washington Consensus through loan conditionalities as well as the extent to which their subsequent good governance agenda has encoded market-orientated policy preferences. We discuss and debate the extent to which international regulatory organizations have been successful in promoting convergence around expert-defined best practice regulation in this or that field of economic regulation. More generally, our debates about the neo-liberal period very often take the form of conversations about whether and to what extent this 'macro-institutional' story is true and how it should be qualified, modified or corrected. It is true, of course, that there is more to our conversation than this; there is, for example, an important strand of critical international legal scholarship that complicates our understanding of neoliberalism in hugely productive ways and with which my account shares a great deal,

[3] 'Global Governance and the Emergence of a Post-neoliberal Order?', *Socio-Economic Review*, available at https://sase.org/global-governance-and-the-emergence-of-a-post-neoliberal-order/.

even if my focus is different.[4] But I do maintain that the macro-institutional view still shapes much of the background common sense that we bring to these conversations.

My claim is not that the macro-institutional interpretation is wrong, but I do suggest that it is incomplete. I suggest that we should understand neo-liberal global economic governance as being constituted by two related but distinct dynamics. On the one hand, it does indeed involve the propagation of particular programmatic forms of the neo-liberal state, albeit forms that are only indistinctly defined and subject to almost constant change. But, on the other hand, it also involves the deployment and operationalization of a set of critical technologies for embedding practices of 'reflexivity' within the state. 'Reflexivity' is used here to connote a particular style, ethos and practice of governing that seeks to routinize critical self-reflection in decision-making systems; valorizes flexibility, adaptation and innovation as key attributes of adequate governance systems; and encourages continuous improvement through varied techniques of measurement, peer evaluation, iterative review and revision. It is, roughly speaking, the analogue at the state level of the ethic of competitive, self-improving and reflexive entrepreneurialism that is characteristic of neo-liberal individual subjectivity. It is not a single or an invariant 'thing' but, rather, a style that is only ever manifested contingently and locally.

Thus, global economic governance became, from the 1980s onwards, a stage for the pursuit of a variety of different projects of reflexivization: subjecting the state to new structures of competition and new techniques of expert evaluation and ranking; disciplining regulatory decision-making through routinized protocols of rational-sceptical review and embedding it within fields of reflexive technical expertise;[5] and consolidating audit and performance management as central techniques of public administration. Here, neo-liberalism appears less as a programmatic ideological formation designed to promote markets as a solution to the problem of value and more as a set of techniques for displacing the question of social value from the practice of statecraft altogether. Following others, I describe the work of this second (reflexivizing) dynamic as the work of disenchantment or the 'desacralization' of the social state.

From around the 1980s, then, I argue that global economic governance came to be a set of spaces in which two kinds of work were done on the post-war social state: the programmatic work of market-oriented re-institutionalization and the critical work of reflexivization. In some respects, these two dynamics were complementary, but, in others, they pushed in different directions: one promoting institutional alignment, the other encouraging institutional experimentation and change. As a consequence, neo-liberal global economic governance helped to produce and propagate globally the regulatory state as a highly heterogenous institutional form. Neo-liberalization, to borrow Neil Brenner, Jamie Peck and Nik Theodore's formulation, produced a 'tendential, discontinuous, uneven, conflictual and contradictory reconstitution of

[4] See note 18.

[5] For a leading account of such reflexive expertise within international law, see D.W. Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (2018).

state-economy relations', which '*intensif[ied]* the uneven development of regulatory forms across places, territories and scales' rather than reduced it.[6]

This account of neo-liberalization, I suggest, can provide us with a new perspective on the present. The claim that we are in the early stages of a 'post-neo-liberal' global economic order is typically articulated in institutional terms – in short, it is the claim that the market-oriented neo-liberal policy paradigm, discredited since at least the global financial crisis and probably well before, is finally giving way to new institutional models and policy programmes. I argue that, at the same time, it can also be productively understood by reference to the dynamic of reflexivization. I suggest, first, that these new institutional models are also evidence of the success and power of reflexive neo-liberal technologies of government in constituting the regulatory state as a dynamic and self-reinventing institutional form. And, second, I offer a complementary interpretation of the current moment as one in which a reconfigured repertoire of techniques of reflexivization is, in a second iteration, being trained on the architecture of global economic governance itself.

Two important clarifications are necessary.[7] First, there is a risk that an argument of this kind is perceived as an attempt to rehabilitate neo-liberalism – after all, reflexivity and its associated aspirations to learning, adaptation, experimentation and evidence-based scepticism have a positive valence. To be clear, then, I take the reflexivizing dynamics of neo-liberalization seriously but not necessarily at face value. This means that, on the one hand, I believe that the work of reflexivization needs to be analysed on its own terms, not merely as a cover for, or as part of, the programmatic work of market-promoting institutionalization. But, on the other, I also take it as given that reflexive practices are always situated within, and bound up with, structures of power, mechanisms of domination and patterns of inequality in ways that demand further investigation. One aim of this article is to help lay the groundwork for precisely such investigation. Second, this is an argument about the character and dynamics of neo-liberal global economic governance, not an account of how it came to be, who made it so, why and to what ends. This is not because I eschew actor-centred explanation – in fact, it is precisely the opposite. The account I offer here posits neo-liberalization not as disembodied force or policy programme but, rather, as a particular set of governance technologies that are deployed by specific actors for specific purposes in specific contexts. It is implicit in the argument of this article that the stories of such deployments can only be told contextually. While I offer illustrations of a number of such stories throughout the article, my main aim is simply to provide a framework for future explanatory accounts, in which actors and their varied and evolving interests can appropriately take centre stage in place of 'neo-liberalism' as a determining, macro-structural force.

The argument proceeds in three main moves. In section 2, I introduce three available interpretations of neo-liberal global economic governance by way of a reading

[6] Brenner, Peck and Theodore, 'Variegated Neoliberalization: Geographies, Modalities, Pathways', 10(2) *Global Networks* (*GN*) (2010) 182, at 184 (emphasis in original).

[7] My thanks to anonymous reviewers for drawing attention to the need for both of these clarifications.

of an important debate within the discipline of social anthropology about a decade ago. It is the third of these interpretations that I find most promising for international (economic) lawyers, and, in many ways, this section can be understood as an attempt to make key elements of this third interpretation available in a new way to an international legal audience. In section 3, I draw on this literature to redescribe the post-1980s transformation of global economic governance as a period during which specifically neo-liberal technologies of government were internationalized – that is to say, made available and deployed at the international level, through a variety of existing and new spaces of global economic governance – in diverse projects of state reform, oriented around the contestation of an inherited institutional landscape. My aim in this section is to show how those institutions of global economic governance that are commonly analysed as technologies of institutional constraint, coercion and convergence can be productively reinterpreted as instruments of reflexivization. Section 4 then offers reflections on the implications of this redescription in regard to our understanding of contemporary transformations.

2 Neo-liberalism Three Ways

If we understand neo-liberalism as a package of market-oriented policies and institutional reforms, how do we explain the heterogeneity of neo-liberal state forms produced over the last three decades? This is an impossibly large question, but a useful entry point into it is through a debate between Stephen Collier, Mathieu Hilgers, Jamie Peck, Nik Theodore and Loïc Wacquant in the pages of *Social Anthropology* in 2012.[8] In fact, this debate was directly concerned with a somewhat different task – namely, differentiating distinct anthropological approaches to the study of neo-liberalism and clarifying the stakes of the choice between them. But, in the course of doing so, the participants had rather a lot to say about the institutional heterogeneity of the neo-liberal state. From the standpoint of their conversation, there emerge three broad explanatory approaches: structural approaches (discussed by Wacquant), the approach of variegation (discussed by Peck and Theodore) and governmentality approaches (discussed by Collier). In this section, I outline each, with a view to demonstrating why the third seems to me to deserve renewed attention amongst international lawyers.

[8] Hilgers, 'The Historicity of the Neoliberal State', 20(2) *Social Anthropology* (*SA*) (2012) 80; Wacquant, 'Three Steps to a Historical Anthropology of Actually Existing Neoliberalism', 20(2) *SA* (2012) 66; Peck and Theodore, 'Reanimating Neoliberalism: Process Geographies of Neoliberalisation', 20(2) *SA* (2012) 177; Collier, 'Neoliberalism as Big Leviathan, or … ? A Response to Wacquant and Hilgers', 20(2) *SA* (2012) 186. The following discussion also draws on the earlier work of these scholars as well as other scholars in the conversation, including Hilgers, 'The Three Anthropological Approaches to Neoliberalism', 61 *International Social Science Journal* (2011) 351; L. Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (2009); Brenner, Peck and Theodore, 'Variegated Neoliberalization: Geographies, Modalities, Pathways', 10(2) *GN* (2010) 182; S.J. Collier and A. Ong, *Global Assemblages: Technology, Politics, and Ethics as Anthropological Problems* (2005); S.J. Collier, 'Second Thoughts on "The Death of the Social?" Neoliberalism as Critique' (2014), available at https://stephenjcollier.files.wordpress.com/2014/05/neoliberalism-as-critique.pdf; Collier, 'Neoliberalism and Rule by Experts', in W. Larner and V. Higgins (eds), *Assembling Neoliberalism* (2017) 23.

Structural approaches do not begin as explanations of institutional variation at all but, rather, the opposite: they are, in fact, theories of the 'institutional core' of neo-liberalism.[9] While Wacquant's conceptualization of neo-liberal punitive penality is the exemplar of such approaches in the debate referenced above, there are many kinds of structural explanations. In most of them, neo-liberalism is understood as a market rule, a political ideology and social formation organized around the idea of the self-regulating market, which sets in train projects of marketization and commodification by way of a retrenchment and reconfiguration of the state. In programmatic terms, it is associated most commonly with the policy prescriptions associated with the Washington Consensus: fiscal constraint, trade liberalization, privatization, deregulation, floating exchange rates and so on. Neo-liberalism, in this telling, is above all a disciplinary regime that imposes a set of constraints on states as a means of securing the rights of capital, promoting free trade and establishing the conditions for free markets. This disciplinary regime takes shape in significant part at the international level, through the workings of global financial markets, structural adjustment programmes of international financial institutions, the legal constraints imposed on states by bodies such as the World Trade Organization (WTO) and so on. The touchstone of structural approaches is simply that they see neo-liberalism as a macrostructure, and explanation proceeds in the first instance through an identification of its core (often institutional or policy) characteristics.

Even if structural approaches do not begin as explanations of institutional heterogeneity, they do not ignore it. Most, if not all, such accounts explicitly acknowledge the fact that neo-liberal projects take very different forms in different places. To simplify only slightly, what is common to structural accounts is that variation is understood fundamentally as a function of local context – that is to say, it is explained by forces and dynamics at work wherever and whenever neo-liberal projects are implemented or operationalized. This claim has numerous variations. Neo-liberal projects of marketization, for example, are observed to generate and encounter resistance of various kinds in different spaces, such that the precise form they take reflects the form and strength of that resistance. They can open up new spaces of political mobilization, which are available to be used opportunistically by local actors. If neo-liberalism essentially consists in the protection of the rights of capital, the exact political priorities of capital may vary from place to place. Neo-liberalism may achieve different degrees of penetration in different countries, depending on their levels of vulnerability to external pressure or the presence of countervailing pressures. Neo-liberalism looks different in different places depending on the position that various states occupy in the global structure of economic relations and so on.

A number of powerful accounts of late 20th-century global economic governance are structural accounts of this type. I would include in this category, for example, Stephen Gill's account of the 'new constitutionalism';[10] David Harvey's foundational work on

[9] Wacquant, *supra* note 8, at 71, especially n. 5.

[10] Gill, 'New Constitutionalism, Democratisation and Global Political Economy', 10 *Pacifica Review* (1998) 23; Gill, 'Globalisation, Market Civilisation and Disciplinary Neoliberalism', 24 *Millennium* (1995) 399; Gill, 'The Constitution of Global Capitalism' (2000), available at https://ciaotest.cc.columbia.edu/isa/

neo-liberalism as a class project;[11] Quinn Slobodian's conceptualization of the General Agreement on Tariffs and Trade (GATT) / WTO as pursuing a project of 'encasement' of the free market against democratic control;[12] David Held's analysis of the promulgation of the Washington Consensus,[13] among many others. Although these authors are not lawyers, their accounts do contain important claims about the law. The most important of these, for our purposes, is the key idea that international economic law has 'functioned to embed and transmit ideas about the proper relation between state and market'[14] and has been used as a mechanism for powerful (Western) states to restructure state formations globally in their own idealized, market-oriented image.

As many international lawyers understand well, this idea about international law has certain weaknesses. For one thing, it overstates the restrictive content of international economic law, which is much more ambiguous and qualified in the disciplines it imposes than this account acknowledges. It also overstates the effectiveness in practice of international economic law as a general constraint on state action. This is a problem not just in the interests of accuracy but also because obscuring the contestability and ambiguity of international economic law is itself an ideologically charged act with performative effects.[15] For another thing, it leaves many core features of the international legal landscape inadequately explained. How, for example, do we account for the fact that key institutions of international economic law are in fact pluralist in regard to market structure, both aspirationally and, to a significant extent, in practice?[16] How do we account for the fact that the range of policy options available to states within this system apparently changes over time, even where the 'law' itself does not? What, more generally, are we to do with the fact that key aspects of 'neo-liberal' policy programmes – even such fundamental matters as the central distinction between 'market-enabling' and 'market-interfering' regulations – remain indeterminate or, at least, constantly unsettled and in play?

It is in part on account of these considerations that some international economic lawyers engaging most directly with this tradition have developed more complex

gis01/. According to Neil Brenner, Jamie Peck and Nik Theodore, 'the new constitutionalism entails not only a rolling back of progressive-constitutionalist restrictions on capitalist property rights, but the rolling forward of a new international juridical framework that systematically privileges the discretionary rights of capital on a world scale. This entails the construction of supranational institutional forms and the reconfiguration of existing state apparatuses in ways that "lock in" the market-disciplinary agendas of globalized neoliberalism'. Brenner, Peck and Theodore, *supra* note 8, at 193.

11 D. Harvey, *A Brief History of Neoliberalism* (2005); see also Duménil and Lévy 'Costs and Benefits of Neoliberalism: A Class Analysis', 8 *Review of International Political Economy* (*RIPE*) (2001) 578.

12 Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2018); General Agreement on Tariffs and Trade 1994 (GATT), 55 UNTS 194.

13 D. Held, *Global Covenant: The Social Democratic Alternative to the Washington Consensus* (2004).

14 I take this helpful formulation from Orford, 'How to Think about the Battle for the State in the WTO', 24 *German Law Journal* (2023) 45, at 66.

15 Orford, *supra* note 14, at 60; Lang, 'Beyond Formal Obligations: The Trade Regime and the Making of Political Priorities', 18(3) *Leiden Journal of International Law* (2005) 403.

16 For one recent intervention of this sort, see Howse and Langille, 'Continuity and Change in the World Trade Organization: Pluralism Past, Present, and Future', 117(1) *American Journal of International Law* (*AJIL*) (2023) 1.

accounts of neo-liberalism and its relation to law. I have, for example, separately described the way in which international economic law 'normalizes' particular state forms rather than more simply formally requiring adherence to them.[17] More generally, others have developed accounts of neo-liberal legality that foreground not only the fact of legal indeterminacy but also its functionality, as well as taking seriously the ambiguity and plurality of neo-liberal thought and situating law as only one element of much larger heterogenous assemblages of neo-liberal governance.[18] The account I offer here overlaps with those in many ways, but its focus is different because it has been developed as a response to a different and additional weakness of the macro-institutional approach, which has received less attention in the existing international legal literature.

In his contribution to the above debate, Stephen Collier notes that macrostructural ways of explaining variation come at a cost.[19] By locating the source of variation at the 'local' level, these accounts contribute to a flattening and simplification of our understanding of the workings of neo-liberalism in and through international spaces. At the international level, neo-liberalism still appears to be a more or less unidirectional force, and structures of global economic governance are still conceived of as more or less powerful inhibitors of the productive powers of local political contestation. International institutions are imagined largely as a transmission belt for neo-liberal ideas, programmes and policies – whatever their form – while the productive work of reconstitution, creolization, adaptation, combination and recalibration is imagined to occur primarily at the national or local level. Accordingly, structural approaches offer very few conceptual resources for thinking clearly about the ways in which institutions and processes of global economic governance may actively and endogenously produce heterogenous institutional forms at the level of the state. And they offer very few resources for thinking about the internal inconsistency, multiplicity and variability observable within even the most 'neo-liberal' international spaces.

This weakness, I would argue, is mirrored in many mainstream international legal conversations about the sort of work global economic governance does and how it does it. A rather huge amount of international legal scholarship has been focused on the specific levers of constraint and discipline that international economic institutions

[17] Orford, *supra* note 14; Orford, 'Theorizing Free Trade', in A. Orford and F. Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (2016) 701; Orford, 'Locating the International: Military and Monetary Interventions after the Cold War', 38 *Harvard International Law Journal* (*HILJ*) (1997) 443; Orford, 'Food Security, Free Trade, and the Battle for the State', 11 *Journal of International Law and International Relations* (2015) 1; Lang, *supra* note 15; see also generally Tarullo, 'Logic, Myth and the International Economic Order', 26 *HILJ* (1985) 533; Tarullo, 'Beyond Normalcy in the Regulation of International Trade', 100 *Harvard Law Review* (1987) 546.

[18] In regard to literature that addresses global economic governance in particular, see, e.g., H. Brabazon (ed.), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (2017), especially the contributions by Brabazon, Krever, Perrone and Palacios Lleras; B. Golder and D. McLoughlin (eds), *The Politics of Legality in an Neoliberal Age* (2017), especially the chapters by Tzouvala, Manfredi, Biebricher; Johns, 'On Failing Forward: Neoliberal Legality in the Mekong River Basin, 48(2) *Cornell International Law Journal* (*CILJ*) (2015) 347.

[19] Collier, 'Neoliberalism as Big Leviathan, or … ? A Response to Wacquant and Hilgers', 20(2) *SA* (2012) 186, at 192.

have at their disposal to constrain state action and limit the range of institutional possibilities open to states. Accordingly, we repeatedly and rigorously debate the degrees of freedom, flexibility or autonomy that international economic law leaves to states to shape markets according to their wishes. But we have no clear ways of even asking the question of how international legal practices might themselves facilitate this kind of market here and that kind there. The possibility that international economic law might be – endogenously and even by design – productive of heterogeneity and contestation at the level of state form is rarely given sustained attention.

The framework of 'variegated neo-liberalism', advanced most prominently by Brenner, Peck and Theodore, offers one way out of these difficulties.[20] These authors seek to build a theory that places regulatory differentiation at the heart of neo-liberalization – as 'intensified' by it and constitutive of it – rather than viewing such differentiation as the result of 'interruptions, diversions, exceptions or impediments' to it.[21] As already signalled in their analytical and terminological shift from 'neo-liberalism' (a thing) to 'neo-liberalization' (a process), they reject the idea that an essential 'institutional core' of neo-liberalism can readily be ascertained.[22] This is true not just at the level of political practice but also at the ideational level: these authors (especially Peck) are careful to describe the intellectual origins of neo-liberalism as internally diverse, eclectic and even contradictory.[23] Neo-liberal thought, for them, is an 'intellectually hybrid and unevenly developed ideological form'.[24] For them, the most that can be said in substantive terms is that processes of neo-liberalization have tendential dynamics and that they unfold within 'strategic targets' and 'strategic priorities', defined in part by the 'ideational coordinates of neoliberalism'.[25]

Accordingly, for these authors, processes of neo-liberalization are necessarily productive of institutional variation as a result of at least four related dynamics. First, as they observe, early projects of neo-liberalization arose as a response to inherited institutional landscapes, which were themselves highly differentiated. Thus, the specific 'vulnerabilities and crisis points' of the social state, itself a globally differentiated form, helped to 'establish[] the founding rationales, ideological targets, fields of opportunity, and spaces of realization for the first rounds of neoliberalization'.[26] Second, neo-liberalization proceeds iteratively and experimentally, often in response to its own prior failures. 'Market rule', these authors argue, is 'less concerned with the imposition of a singular regulatory template, and much more about learning by doing (and

[20] The primary reference is Brenner, Peck and Theodore, *supra* note 8, but see also Peck and Theodore, *supra* note 8; Peck and Theodore, 'Variegated Capitalism', 31(6) *Progress in Human Geography* (2007) 731; Brenner and Theodore, 'Cities and the Geographies of "Actually Existing Neoliberalism"', 34(3) *Antipode* (2002) 349; Peck and Tickell, 'Neoliberalizing Space', 34(3) *Antipode* (2002) 380; see also Jessop, 'Rethinking the Diversity and Varieties of Capitalism: On Variegated Capitalism in the World Market', in G. Wood and C. Lane (eds), *Capitalist Diversity and Diversity within Capitalism* (2011) 209.

[21] Brenner, Peck and Theodore, *supra* note 8, at 188, 207, 210.

[22] Peck and Theodore, *supra* note 8, at 183.

[23] See, e.g., Peck 'Remaking Laissez Faire', 32(1) *Progress in Human Geography* (2008) 3.

[24] Brenner, Peck and Theodore, *supra* note 8, at 213.

[25] *Ibid.*, at 210.

[26] *Ibid.*, at 211, 213.

failing) within an evolving framework of market-oriented reform parameters and strategic objectives'. It proceeds by way of 'crisis-riven and often profoundly dysfunctional rounds of regulatory restructuring', through which 'the ideological creed, regulatory practices, political mechanisms and institutional geographies of neo-liberalization have been repeatedly reconstituted and remade'.[27] Third, and as a consequence, neo-liberalization is associated with 'unpredictable layering effects' as 'the sedimented imprint of earlier policy regimes seldom completely disappears', such that iterative rounds of market-oriented regulatory reform produce hybridized and idiosyncratic institutional formations.[28] Fourth and finally, even if neo-liberalization can be said to have certain characteristic market-oriented tendencies and trajectories, 'the neo-liberal playbook provides no guidance whatsoever on where to draw the line on those rolling programmes of marketisation, commodification and privatisation that its utopian rhetoric inspires'.[29] It follows that its (constitutive) boundaries always and inevitably remain to be defined, again and again, in its spaces of operationalization.

As I have said elsewhere,[30] there is a huge amount in this framework that I find attractive and that is of direct relevance for international lawyers. Indeed, some of the most compelling accounts of neo-liberal global economic governance that I know of in international legal scholarship seem to me to share much with it. But, in the context of this article, I want to draw specific attention to the next move in Brenner, Peck and Theodore's argument, in which they posit that neo-liberalization has proceeded broadly in two phases. The first, formative phase of neo-liberalization ('disarticulated neo-liberalization'), which occurred primarily over the 1980s, was 'characterized by a proliferation of relatively unconnected, conjunctural and contextually bound projects of market-oriented institutional creative destruction'.[31] But, in its second phase ('deep neo-liberalization'), which has occurred from the 1990s onwards, these projects 'have increasingly been embedded within transnationally interconnected, rolling programmes of market-driven reform that draw upon shared ideological vocabularies, policy repertoires and institutional mechanisms derived from earlier rounds of market-driven regulatory experimentation and cross-jurisdictional policy transfer'.[32] In this second phase, neo-liberalization is characterized by the emergence of 'geoinstitutional rule regimes' that 'govern' and 'reshape[] the … parameters for processes of regulatory experimentation'.[33] A central consequence of neo-liberalization, they argue, 'has been to subject otherwise diverse forms of (localized and national) regulatory experimentation to certain common, underlying parameters of marketization and commodification'.[34]

[27] *Ibid.*, at 216, 210; see also J. Peck, *Constructions of Neoliberal Reason* (2010) (on neoliberalism's dynamic of 'failing forward').
[28] *Ibid.*, at 189.
[29] Peck and Theodore, *supra* note 8, at 179.
[30] See Lang, 'Heterodox Markets and "Market Distortions" in the Global Trading System', 22(4) *Journal of International Economic Law* (*JIEL*) (2019) 677.
[31] Brenner, Peck and Theodore, *supra* note 8, at 213–214.
[32] *Ibid.*, at 209.
[33] *Ibid.*, at 185, 215.
[34] *Ibid.*, at 219.

Here, then, Brenner, Peck and Theodore bring us to the central question for international lawyers and the question that animates this article. How do late 20th-century transformations in global economic governance relate to the tremendous array of projects of state re-constitution and re-configuration that we have seen since then? But it is precisely here that their otherwise rich conceptual structure offers little. We meet, more or less, the same flattened and simplified version of the relation between neoliberalization and global economic governance in the post-Cold War period that we saw earlier:

> [A] variety of global and multilateral regulatory institutions – the WTO, the IMF [International Monetary Fund], the World Bank and the post-Maastricht EU [European Union], for example – were mobilized during the 1990s to 'lock in' mechanisms of market rule, to enhance capital mobility and thus to extend commodification. In these and other ways, coercive and competitive forms of policy transfer became mutually entwined, remaking not only 'local' regulatory formations but the 'rules of the game' within which they were (and arguably continue to be) recursively embedded. Under these circumstances, the dull compulsion of neoliberal regime competition – reinforced by hierarchical pressures from multilateral institutions and strong states, and lubricated by the sprawling epistemic communities of experts, practitioners and advocates – served to canalize and incentivize regulatory restructuring strategies along broadly market-oriented, commodifying pathways.[35]

This is not to say that neo-liberalization, in this account, suddenly becomes again an agent of institutional convergence – we are reminded, after all, that 'the regulatory isomorphism entailed by this deep(ening) formation of neoliberalization has been necessarily truncated' by the dynamics described above. But it remains the case that, for all its other benefits, there is little in this account that helps us to think about the ways in which global economic governance may be a space for the active production of diverse institutional formations rather than an exogenous limit to it. Regulatory experimentation, again, is imagined as a product of local context, while the international is imagined as a space of 'macrospatial rules, parameters and mechanisms' that 'channel, circumscribe and pattern' such experimentation.[36]

To get around this problem, we need to turn to a third set of approaches, which are referred to as 'governmentality' approaches in the *Social Anthropology* debate. 'Governmentality' is evidently a familiar frame for many international lawyers, but the specific use to which that notion is put here, and the particular focus of analysis, differs somewhat from most international lawyers who work within this framework.[37] The work I am interested in here begins, naturally enough, with Michel Foucault, runs through the work of the 'Anglo-Foucauldians' during the 1980s and 1990s, including scholars such as Nikolas Rose, Peter Miller, Colin Gordon and Michael Power, among others,[38] and then is represented in the 2012 *Social Anthropology* debate most

[35] *Ibid.*, at 215 (references omitted).
[36] *Ibid.*, at 201.
[37] See note 57 below.
[38] See, e.g., Rose, O'Malley and Valverde, 'Governmentality', 2 *Annual Review of Law and Social Science* (2006) 83; M. Power, *The Audit Society: Rituals of Verification* (1997); Rose and Miller, 'Political Power beyond the State: Problematics of Government', 43 *British Journal of Sociology* (1992) 173; Rose, 'Governing "Advanced" Liberal Democracies', in A. Barry, T. Osborne and N. Rose (eds), *Foucault and Political Reason: Liberalism,*

prominently in the work of Stephen Collier and Aihwa Ong as well as William Davies and Wendy Larner.[39] One of the contentions of this article is that this tradition provides international lawyers with a particularly productive set of conceptual tools for thinking about the transformations of global economic governance in the late 20th century – tools that, crucially, help us to avoid some of the difficulties described above.

For present purposes, the most relevant point of entry into this tradition is the account of 'advanced liberalism' that Rose (and his co-authors) developed over the course of the 1990s.[40] In this account, familiarly enough, advanced liberalism emerged over the second half of the 20th century in critical reaction to the social (welfare) state. Importantly, however, the figure of the 'social state' evokes, for Rose, much more than just an institutional form or a political programme. It is associated with a particular problematic of rule – that is to say, a particular way of answering the foundational questions of who should govern what, in pursuit of what goals, using what ends and with what justification. In this problematic of rule, in Rose's famous articulation, 'the social, as a plane of thought and action … [was] a key zone, target and objective' of statecraft.[41] The nation was to be governed in the interests of the social body. Political forces 'would now articulate their demand upon the State in the name of the social'.[42] And the social body itself was made amenable to measurement, analysis and intervention through the emergence of 'social statistics, sociology and all the social sciences', alongside new domains of technical expertise on which practices of statecraft heavily relied.[43] Statecraft in the social imaginary, one might summarize, involved the constitution, discernment and expression of social value.

Although in this modality of government, the 'economic' and 'social' domains were imagined as distinct, nevertheless they were 'governed according to a principle of joint optimization'.[44] On the one hand, the economy was governed in the name of

Neo-Liberalism and Rationalities of Government (1996) 37; Rose, 'The Death of the Social? Refiguring the Territory of Government', 25 *Economy and Society* (1996) 327; Rose, 'Government, Authority and Expertise in Advanced Liberalism', 22(3) *Economy and Society* (1993) 283; Miller and Rose, 'Governing Economic Life', 19 *Economy and Society* (1990) 1; N. Rose and P. Miller (eds), *Governing the Present: Administering Economic, Social and Personal Life* (2008); Miller, 'On the Interrelations between Accounting and the State', 15 *Accounting, Organizations and Society* (1990) 315; G. Burchell, C. Gordon and P. Miller, *The Foucault Effect: Studies in Governmentality: With Two Lectures by and an Interview with Michael Foucault* (1991); Rose, 'Calculable Minds and Manageable Individuals', 1 *History of the Human Sciences* (1988) 179; M. Dean, *Governmentality: Power and Rule in Modern Society* (2nd edn, 2010).

39 See select references to Stephen Collier's work in note 8 above; A. Ong, *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty* (2006); Ong, 'Neoliberalism as a Mobile Technology', 32 *Transactions of the Institute of British Geographers* (2007) 3; W. Davies, *The Limits of Neoliberalism: Authority, Sovereignty and the Logic of Competition* (rev. edn, 2017); Larner, 'Neo-liberalism: Policy, Ideology, Governmentality', 63 *Studies in Political Economy* (2000) 5; Larner, 'Neoliberalism?', 21 *Environment and Planning D: Society and Space* (2003) 509; Larner, 'Neoliberalism, Mike Moore, and the WTO', 41(7) *Environment and Planning A: Economy and Space* (2009) 1576; see also Ferguson, 'The Uses of Neoliberalism', 41(1) *Antipode* (2009) 166.

40 See especially Rose, 'Government', *supra* note 38; Rose, 'Death of the Social', *supra* note 38; Rose and Miller, 'Political Power', *supra* note 38; Miller and Rose, 'Governing Economic Life', *supra* note 38.

41 Rose, 'Death of the Social', *supra* note 38, at 327.

42 *Ibid.*, at 329 (italics removed).

43 *Ibid.*

44 *Ibid.*, at 338.

the social, in support of the overall health of the social body. Thus, the social state was actively involved in the management of labour relations as a means of ensuring social peace, developed new macroeconomic techniques of demand management to smooth out the business cycle, established key integrative and solidaristic institutions of social protection and social insurance and developed regimes of health and safety regulation to protect the social body against the undesirable consequences of industrial life. On the other hand, and at the same time, the social was governed in the name of the national economy: '[T]he production of a labour market itself became part of the responsibilities of economic government, and a range of interventions into the social would maximise the economic efficiency of the population.'[45] These interventions included vocational guidance, and rules around child care, social work and, indeed, institutions of social insurance themselves.

'Advanced liberalism' – and, for the purposes of my argument, this term can be understood as being synonymous with 'neo-liberalism' – takes shape as a way of expressing deep scepticism about this way of doing statecraft and imagining politics. One common target of criticism was the rigid and inflexible bureaucratic structure of the social state, which imposed considerable economic costs and resulted in significant social injustices. Neo-liberalism emerges, in Collier's words, as in part 'a style and practice of thinking that aims, in part, to point out the inefficiencies, inequities, and irrationalities of the social state'.[46] Another was its heavy reliance on the discretion of experts and their dubious claims to objectivity. Neo-liberalism represented a political sensibility and aesthetic that emphasized the unknowability of the social world and was instinctively sceptical of those forms of expertise that laid claim to know the world in granular detail, as a way of making it amenable to intervention. Most fundamentally, neo-liberalism was associated with a deep scepticism of claims to know or represent the 'social body' and a tendency to note the mystifications, misrepresentations and outright deceptions involved in its claims to accurately understand and faithfully represent 'social' value, preferences and predilections. The target of neo-liberal critique, then, was only in part the institutional forms and political programmes of the social state – the deeper target was 'sacralization of the social' which accompanied it and was so central to its political imaginary. In that sense, to draw again on Collier, neo-liberalism 'functions as a form of critique in Michel Foucault's sense, a movement of thought that refuses the "sacralization of the social"'.[47]

What neo-liberalism offered, accordingly, was a set of critical technologies to be deployed in and against the social state in the service of its desacralisation, 'de-socialisation'[48] or 'disenchantment'.[49] 'Desacralisation', in this sense, refers to a project of reorganizing the practice of statecraft so as to de-centre and de-mystify the 'social', especially by ensuring that claims to speak and act for the benefit of the social body are tested, subject to discipline and made accountable, limited in their reach and,

[45] *Ibid.*
[46] Collier, 'Neoliberalism as Critique', *supra* note 8, at 5.
[47] *Ibid.*
[48] Rose, 'Death of the Social', *supra* note 38, at 340.
[49] Davies, *supra* note 39, ch. 1.

indeed, eradicated where less suspect sources of value and authority can be found. It works by reflexivizing the category of the social – iteratively subjecting it to sceptical scrutiny and self-questioning, rendering it provisional, fragile and mobile – and, as a result, reduces its vitality as a principle of collective political action.

These techniques of desacralization were multiple and diverse. At the level of bureaucratic organization, new technologies of performance management derived from business were applied to the state.[50] Performance indicators and audit, quantification and budget disciplines emerged as new and more formal techniques for scrutinizing and disciplining bureaucratic discretion in place of systems of accountability based largely on professional norms and expert credentials. In the domain of economic regulation, a variety of techniques were developed to overcome rigidity and encourage practices of reflexivity, learning and continuous improvement. Thus, new regulatory decision-making protocols – cost-benefit analysis, impact assessment, proportionality analysis – were developed to ensure that state interference with the proper functioning of competitive order was adequately justified. Regulatory functions were outsourced to independent bodies and, at the same time, disaggregated, with some governance tasks reallocated to private entrepreneurial actors organized in competitive relation with one another, and the state was recast in the new role of overseer of self-governed firms. At the same time, there was a reconfiguration of the role of scientific and technical expertise in regulatory decision-making. This entailed a transfer of responsibility for science and innovation to the market and a parallel reassertion of the authority of science and scientific expertise over both bureaucratic expertise and public knowledges. It was made manifest through the disciplining of regulatory decision-making through formalized practices of scientific risk assessment and through increasing delegation of values debates to expert bodies.[51] All of these new modalities of regulatory governance helped to distance regulatory decision-making practices from those associated with the social state, in which the economy was governed in the name of, and for the protection of, social values and the social body. Each of them helped to reflexively embed practices of self-critique in the regulatory decision-making practices themselves.

At the level of political rationality, the disenchantment of the social state involved reordering practices of statecraft around the idea of competitive order (paradigmatically, market order, though also other forms). On the one hand, this meant subjecting states themselves to the discipline of competition and reorganizing economic governance around the pre-eminent goal of national economic competitiveness.[52] Thus, states were increasingly enrolled into an international economic order characterized by intense interstate competition for capital and talent. A variety of state functions

[50] See, e.g., C. Hood *et al.*, *Regulation inside Government: Waste-Watchers, Quality Police, and Sleazebusters* (1999); see generally Power, *supra* note 38.

[51] See generally, S. Jasanoff, *The Fifth Branch: Science Advisers as Policymakers* (1998); S. Jasanoff, *Science and Public Reason* (2012); Jasanoff, 'Constitutional Moments in Governing Science and Technology', 17(4) *Science and Engineering Ethics* (2011) 621; Jasanoff, 'The Practices of Objectivity in Regulatory Science', in C. Camic, N. Gross and M. Lamont (eds), *Social Knowledge in the Making* (2011) 307.

[52] See note 60.

were subjected to direct competition from private actors offering such functions for profit. On the other hand, it meant reorienting the state around the goal of creating and sustaining the essential preconditions for competitive (market) order.[53] This involved establishing the appropriate legal foundations for efficient competitive markets, such as property rights, a regime of contract, stable money, an orderly insolvency regime, efficient corporate governance, adequate risk regulation and so on. In addition, various regulatory technologies were marshalled to help produce certain capacities and behaviours at the individual level necessary for well-functioning competitive order – self-responsibility, entrepreneurialism, prudence, the capacity to engage in the particular kinds of calculation characteristic of market actors. In this way, as Rose noted early on, 'social insurance, as a principle of solidarity, gives way to a kind of privatization of risk management'.[54] It also included the development of novel evaluative methodologies, derived from the new field of law and economics, for assessing the normative desirability of particular laws by reference to their impact on market competition.[55]

In all of these ways, then, neo-liberalism inaugurated a new rationality of rule in which competitive order, rather than 'the social body', appeared as the *a priori* of political practice and the 'zone, target and objective' of government. But, here, a key distinction needs to be made, which is important for the account I am presenting here. On the one hand, it is usual to interpret the centrality of competitive order in the neoliberal imagination in programmatic terms as a valorization of markets as the ideal form of social order and as expressing an ideological and normative preference for 'market' values over other values. But the literature set out above suggests a different interpretation. Reorganizing statecraft around a notion of 'competitive order', in this account, was a way of *dis*enchanting ('*de*sacralizing') the social state. The virtue of competitive (market) order was that it avoided the question of social value altogether. That is to say, it provided a technique for solving the problem of value (the production of 'market value' via the competitive process) without recourse to a mystified conception of 'social value'. It offered a programme of economic governance (constituting and maintaining competitive order) that apparently did not rely on a substantive notion of the health of the social body.[56] It offered an apparently secure – because desocialized – normative standpoint from which to mount a pragmatic critique and reinvention of the social state. It offered, furthermore, a set of technologies for addressing the specific pathologies of the social state by promising a modality of statecraft that was decentralized rather than subject to singular control; dynamic rather

[53] M. Foucault, *The Birth of Biopolitics* (2008); Davies, *supra* note 39; T. Biebricher, *The Political Theory of Neoliberalism* (2018).

[54] Rose, 'Government', *supra* note 38, at 296.

[55] See, e.g., Davies, *supra* note 39, ch. 3 (addressing the adoption of Chicago School's efficiency analysis of law across a variety of regulatory and bureaucratic agencies).

[56] Even if different governments and thinkers offered divergent visions of 'right' competitive order, it is a premise of neo-liberal practice that the question of 'right' competitive order is, ultimately and essentially, a technical question, a question of deduction from first principles or revealed through a process of legal evolution.

than rigid and inflexible; open-ended rather than narrowly teleological; and modest rather than hubristic in its claims to knowledge.

The centrality of competitive order in neo-liberal thought and practice, then, on this account signals less a celebration of competitive 'market value' as an authoritative expression of 'true' or 'right' value, and more, in contrast, a means of avoiding the question of 'right' value altogether. Neo-liberalism is a mode of governmentality – that is to say, it is oriented around the displacement of thick, normative questions of social value – and its preferred choice of means is the competitive process as a mere, formal technique of valuation. Moreover, it is a set of technologies for reconstituting the social state as an entrepreneurial, competitive and self-reflexive actor, not (or not just) a programme for expanding and multiplying markets as the pre-eminent and privileged form of institutionalized social order.[57]

This way of understanding neo-liberalism leads us quite directly, it seems to me, to a different way of interpreting the transformations of global economic governance in the last two decades of the 20th century. The claim advanced here is that, during this period, institutions and processes of global economic governance were reconstituted as spaces for the deployment and operationalization of these critical technologies of disenchantment. On this account, neo-liberal global economic governance helps to produce reflexive states – where this process is understood as the embedding and internalization of a particular kind of impulse towards competitive self-reinvention, operationalized through specific institutionalized practices of self-reflection and cultures of expert reflexivity and enabled by a context of intense interstate competition for capital. Importantly, I conceive of this reflexivizing logic of neo-liberalization as sitting alongside its more programmatic logic and the relationship between the two as complex and highly ambiguous. The point is that both need to be acknowledged as central dynamics set in train during the late 20th-century transformation of global economic governance.

In the next section, I will put flesh on these bones and show how late 20th-century global economic governance might be reinterpreted along these lines. But, for now, the point I want to make is that this approach opens up precisely the space that is

[57] An aside: in what follows, my analysis is most closely aligned with those who deploy the idiom of neo-liberal governmentality to understand the 'global governance of state behaviour' or the 'conduct of the conduct of countries'. Merlingen, 'Governmentality: Towards a Foucauldian Framework for the Study of IGOs', 38(4) *Cooperation and Conflict* (2003) 361, at 362; J. Joseph, *The Social in the Global: Social Theory, Governmentality and Global Politics* (2012). This is connected to, but distinct from, that work that addresses the constitution of the responsibilized and autonomous individual subject (technologies of the self) and the production of the self-governed and adaptive firm (techniques of management). It is also distinct from, though connected to, that literature that focuses on the knowledge practices of global agencies: their entanglements in ways of knowing and thus governing populations and their role in the construction of associated imaginaries of governance. See, e.g., M. Dean, *Governmentality: Power and Rule in Modern Society* (2nd edn, 2010), ch. 10; W. Larner and W. Walters (eds), *Global Governmentality: Governing International Spaces* (2004); I.B. Neumann and O.J. Sending, *Governing the Global Polity: Practice, Mentality, Rationality* (2010); Innes and Steele, 'Governmentality in Global Governance', in D. Levi-Faur (ed.), *The Oxford Handbook of Governance* (2012) 716. In these analyses, changes to state structures and institutions are certainly part of the story but, not in themselves, the focus of attention and are often deliberately decentred.

foreclosed by the macro-institutional account: it helps us to conceptualize and describe the active role that global economic governance plays in promoting and propelling heterogeneity of institutional formations at the state level. It does this in two main ways. The first and most familiar has to do with the conceptual move of reconceiving neo-liberalism as, in part, a particular set of techniques or technologies ('arts') of governing. The benefit of this move is that it treats the impact and politics of these techniques as something to be investigated and not presupposed – that is to say, as a contingent effect of the particular political projects and purposes for which they are deployed by particular agents in particular contexts. The analytical turn to 'techniques', in other words, comes with the additional claim that these techniques are under-determined and, by design, are able to be repurposed.[58] They are means of productively assembling new relations and institutional formations through their practical deployment in particular spaces. In Collier's words, they 'are mobile and amenable to redeployment across contexts; they can be used for different kinds of political purposes … there is no deep structural logic that animates the diverse forms of advanced liberal government. Rather, there is a focus on the contingent assemblage of various elements in particular countries and sectors'.[59]

It will be clear why this approach is helpful as a way of understanding the diversity of institutional forms that global economic governance has helped to produce over the past three decades and more. If our focus is on a set of productive technologies of government, and if our method is to follow these technologies as they assemble and reassemble practices of statecraft, then institutional heterogeneity is to be expected: variation is endogenous to the model, not something exogenous that needs further analytical resources to explain. It is, moreover, a form of explanation that returns actors and their diverse interests and projects to the heart of the explanatory paradigm in place of 'neo-liberalism' as an impersonal and determining structural force.

Second, this approach posits dual dynamics of neo-liberalization: both the establishment of a new problematic and programme of government ('how to establish the foundations of well-functioning competitive order?') and, at the same time, a set of critical technologies for doing particular kinds of reflexivizing work on the social state. It is the addition of the second limb that points us in new directions: the internalization of critical technologies within reconfigured institutions of governance does not exogenously constrain the state so much as help to drive particular kinds of institutional innovation on the part of states, instilling (in principle at least) an aspiration towards the continuous 'adaptation' and 'improvement' of governance functions. As we will see, this provides us with an explanatory framework within which dynamics of institutional convergence and divergence co-exist and, therefore, one in which institutional variation is again a perfectly expected result, not requiring an analytically problematic differentiation between 'global structure' and 'local context' to explain.

[58] To repeat, this is not the same as claiming that neo-liberalization is entirely open-ended, as if anything is possible. Neo-liberal technologies of government are generative, but they also deeply condition the conduct of government by making available certain strategies and modalities of politics, while precluding others.

[59] Collier, 'Neoliberalism as Critique', *supra* note 8, at 13.

3 Reinterpreting Late 20th-Century Transformations

In this section, I offer an alternative reading of late 20th-century global economic governance based on the governmentality literature just set out. Focusing deliberately on those elements that are most often offered as evidence of the programmatic character of neo-liberalism, I redescribe them as venues in which a range of critical technologies of reflexivization – of 'desacralization' – were put to work in a manner that has been profoundly consequential for the emergence of the reflexive regulatory state in all its heterogenous variety. In this telling, global economic governance appears as a support and space for such technologies, even as it was reconstituted around them. The heterogeneity of new state formations, accordingly, appears (in part) as a direct effect of global economic governance, which promotes institutional innovation, even as it conditions and orientes the diverse trajectories of institutional development that result.

A *Constituting the State as an Entrepreneurial Subject of Competitive Order*

I begin with the structure that is most often placed at the heart of the institutional vision of neo-liberalism: inter-jurisdictional competition. From the late 1980s, in this familiar account, a new order of inter-jurisdictional competition was constructed, which set states in intense competition with each other for newly mobile capital. This order rested on three primary elements. First, the freedom of factors of production (capital, labour) as well as products to move between jurisdictions was established at the international level. The mobility of finance, for example, was enabled in part by the activities of bodies such as the International Monetary Fund (IMF) as well as international regulatory networks in the financial services sector. The international mobility of products and investment capital was promoted by the structural adjustment policies of the World Bank and the IMF and entrenched by the quasi-constitutional rules contained in the law of the WTO and bilateral investment treaties, which, by the end of the 1990s, had become almost universal in reach. Second, this was accompanied by the construction of a powerful discursive formation valorizing 'international competitiveness' as a core objective of national economic governance and the associated reorganization of politics around what Philip Cerny and others have called the 'competition state'.[60] And, third, this period saw the emergence of a range of mechanisms and techniques for measuring and ranking the governance quality of different states. These rankings were used to guide the allocation of investment capital and aid in a variety of ways, including via World Bank lending conditionalities.

[60] See, among a large literature, Cerny, 'Paradoxes of the Competition State: The Dynamics of Political Globalization', 32(2) *Government and Opposition* (1997) 251; Cerny, 'The Competition State Today: From *Raison d'Etat* to *Raison du Monde*', 31(1) *Policy Studies* (2010) 5; B. Jessop, *The Future of the Capitalist State* (2002); Fougner, 'The State, International Competitiveness and Neoliberal Globalization: Is There a Future beyond "the Competition State"?', 32 *Review of International Studies* (2006) 165; Pedersen, 'Institutional Competitiveness: How Nations Came to Compete', in G. Morgan *et al.* (eds), *The Oxford Handbook of Comparative Institutional Analysis* (2010) 625.

Taken together, these three elements are usually analysed as mechanisms for sustaining and globally propagating a programmatic neo-liberal policy consensus and entrenching it in apparently objective indicia of governance 'quality'.[61] 'The well-known logic here', in Adam Harmes' words, 'is that capital mobility (through liberalized financial markets and free trade) forces states to compete for transnationally mobile capital by providing the types of neo-liberal policies that investors and corporations demand'.[62] Indeed, many accounts emphasize the degree to which this order was consciously constructed to have that effect: as Harmes and Tore Fougner (and others) have observed,[63] the key features of this system share much with the model of 'competitive federalism' proposed over the course of the 20th century by thinkers such as Friedrich Hayek, James Buchanan, Milton Friedman, Alexander Rustow and Wilhelm Roepke.

So far, so good, but we can begin to open space for a more multilayered interpretation by observing, first, that there are two distinct kinds of constraint at play in this order: on the one hand, the quasi-constitutional constraints guaranteeing mobility rights and, on the other, the practical and perceived constraints that result from competitive pressure itself, which is a practical effect of this quasi-constitutional structure. It is the latter that do most of the work. The first – formal guarantees of mobility rights inscribed in international governance structures – in theory, need only be minimally adequate to generate competitive pressure. And, in practice, they are indeed much less formally constraining than is often acknowledged: as any international lawyer will tell you, the legal disciplines contained in investment treaties, trade treaties, the IMF's Articles of Association and so on are full of conditions, qualification and limitations that offer states considerable room for manoeuvre. The second – the competitive pressures themselves, as mediated through global policy orthodoxies – can indeed be tremendously powerful, but it is important to remember that the particular directions in which they push states are not structurally given. It is true that, at any moment in time, a state or political community faced with capital flight, currency depreciation or a debt crisis will experience this governance structure as a real constraint on its policy freedoms. And during periods in which there is a clearly dominant global policy orthodoxy, this governance structure will often work in ways that entrench it. But this should be seen as a contingent effect of its operation in particular circumstances and a fact to be explained.[64]

[61] For a detailed account of the literature taking this approach, see Lang, 'Performativity and Expertise', in M. Hirsch and A. Lang (eds), *Edward Elgar Research Handbook on the Sociology of International Law* (2019) 122. For similar arguments within the governmentality tradition, see, e.g., Neumann and Sending, *supra* note 57; Löwenheim, 'Examining the State: A Foucauldian Perspective on International "Governance Indicators"', 29 *Third World Quarterly* (*TWQ*) (2008) 255; Fougner, 'Neoliberal Governance of States: The Role of Competitiveness Indexing and Country Benchmarking', 37 *Millennium Journal of International Studies* (2008) 303; Zanotti, 'Governmentalizing the Post-Cold War International Regime: The UN Debate on Democratization and Good Governance', 30(4) *Alternatives* (2005) 461.

[62] Harmes, 'Neoliberalism and Multilevel Governance', 13(5) *RIPE* (2006) 725, at 733.

[63] See, e.g., *ibid.*; Fougner, *supra* note 61.

[64] To be sure, many of those who originally devised competitive federalism saw it in substantive and structural terms as a device imposing a beneficial constraint on the ability of governments to intervene harmfully in the working of competitive markets. Friedrich Hayek, for example, notes that, under this structure, 'certain types of coercion' would simply not be possible and that 'a lot of interferences in economic life will

With the benefit of more than two decades of hindsight, an additional and different dynamic has become clear. As states in different regions of the globe have been enrolled into this order of inter-jurisdictional competition, iterative projects of governance innovation have been set in train as states have experimented with a range of competitiveness strategies. Although these governance experiments have family resemblances, they have led in very different directions. In Eastern Europe, for example, neo-liberal reforms famously began with a radical shock in the form of the rapid adoption of doctrinaire free-market policy prescriptions. The post-communist regimes in these countries understood some of the risks but had internalized neo-liberal criticisms of socialist economic governance and were, above all, in desperate need of industrial capital. As Hilary Appel and Mitchell Orenstein have described, from around the mid-1990s onwards, these countries engaged in a process of 'competitive signalling', adopting iterative liberalizing economic reforms as a way of attracting foreign investment.[65] Some of these policies were those encouraged by the IMF, the European Union (EU) and the European Bank for Reconstruction and Development, but many (such as flat taxes, pension privatization, radical cuts in corporate income tax) were highly experimental and not necessarily favoured by such institutions of global orthodoxy. One result of this dynamic was the adoption in a number of these countries of a variety of avant-garde forms of neo-liberalism that have not, in the main, been promulgated elsewhere. More generally, it contributed to what Gareth Dale and Adam Fabry have shown to be a highly differentiated roll-out of neo-liberal policies across the region.[66]

In Latin America, the early phases of neo-liberalization were similarly doctrinaire, especially in the context of abrupt structural adjustment programmes of the 1980s and early 1990s. This period saw the successful deinstitutionalization of the particular bureaucratic-authoritarian state forms associated with policies of import substitution industrialization and a reorientation of production towards export-oriented agri-mining sectors, financed to a large degree by foreign investment. It was, famously, an economic development strategy that ended up intensifying economic inequalities, creating new forms of political exclusion and mobilizing political resistance. The subsequent 'pink tide' of progressive reforms, which swept the continent from around the 2000s onwards, represented, to be sure, a turn away from neo-liberal policies, at least to some degree. But – and this is the key point – at the same time, it also represented

become impractical'. F.A. Hayek, *The Constitution of Liberty* (1960), at 184; F.A. Hayek, *Individualism and the Economic Order* (1980), at 266. But, in truth, this is a wager on the part of neo-liberal thinkers, reflective of their particular political projects and ideologies, rather than a constitutive formal feature of the work of establishing inter-jurisdictional competition. As Collier notes, it is not at all clear that we should accept this wager without interrogation: 'the political orientations of neoliberal thinkers do not predetermine how their styles of thinking and techniques of government are taken up', nor do the predictions of such thinkers necessarily deserve special deference. Collier, 'Neoliberalism as Critique', *supra* note 8, at 13.

65 H. Appel and M.A. Orenstein, *From Triumph to Crisis: Neoliberal Economic Reform in Post-communist Countries* (2018), ch. 5; see also generally C. Ban, *Ruling Ideas: How Global Neoliberalism Goes Local* (2016); J. Johnson, *Priests of Prosperity: How Central Bankers Transformed the Post-communist World* (2016).

66 Dale and Fabry, 'Neoliberalism in Eastern Europe and the Former Soviet Union', in D. Cahill *et al.* (eds), *The Sage Handbook of Neoliberalism* (2018) 234.

an intensification of the dynamic of governance experimentation associated with the neo-liberal turn.

A variety of new governance-based competitiveness strategies emerged across Latin America, combining strategies of international economic integration with (aspirationally) flexible, local, open-ended and decentralized governance forms. The 'neo-extractivism' of Ecuador and Argentina, for example, combined a continued heavy reliance on agri-mining and energy exports with differentiated social and environmental governance arrangements, including new citizenship rights, corporate social responsibility initiatives and sustainability standards. Brazil's (and others') 'new developmentalism' combined macroeconomic orthodoxy with the strategic promotion of internationally competitive firms (Petrobras, Embraer and the automotive industry via the Innovar-Auto programme), alongside new modes of engagement between the state and civil society, including formal dialogue spaces, participatory budgeting, public policy councils and so on. The result was that neo-liberalism was, and indeed remains, in Thomas Perrault and Patricia Martin's words, 'a mobile project in Latin America'.[67]

Across East Asia – from Malaysia and Thailand, to Indonesia, Singapore, Taiwan, China and elsewhere – there was never the wholesale adoption of Washington Consensus policies in the manner of Eastern Europe or Latin America. But elites across the region did internalize the neo-liberal critique of the social state and did engage in a variety of projects to re-institutionalize state structures in response to the competitive pressures associated with their insertion into global economic circuits. Again, the trajectories set in train were diverse and involved a high degree of local experimentation. In Aihwa Ong's persuasive account, zoning was a key governance technology through which neo-liberalization proceeded across East Asia. States sought to integrate their economies into global value chains through the establishment of a 'galaxy of differentiated zones', such as industrial parks with tailored and flexible regimes of governance facilitating the 'differential insertion of different populations into circuits of global capital'.[68] The state itself was reconfigured as a provider of infrastructure and a trained workforce to multinational firms spatially organized across regional production networks. Isabella Weber's account of China's encounter with neo-liberalization tells a similar story – of elites internalizing the neo-liberal critique of socialist planning but refusing to replace it with another idealized model and instead pursuing a path of incremental and tailored experimentation, on a region-by-region basis, from the transformation of agricultural production, to price reform, to selective and conditional liberalization of trade and investment.[69]

The point here is simply that all this differentiation does not represent a departure from neo-liberalism but, rather, the unfolding of a contradictory and messy process

[67] T. Perreault and P. Martin, 'Geographies of Neoliberalism in Latin America', 37(2) *Environment and Planning A: Economy and Space* (2005) 191, at 191.

[68] Ong, 'Graduated Sovereignty in South-East Asia', 17(4) *Theory, Culture and Society* (2000) 55; see also A. Ong, *Neoliberalism as Exception*, *supra* note 39, especially ch. 4.

[69] I. Weber, 'China and Neoliberalism: Moving beyond the China Is/Is Not Neoliberal Dichotomy', in Cahill *et al.*, *supra* note 66, 219.

of neo-liberalization. Heterogeneity of this sort, in other words, and the dynamics of pluralization that accompany it, should not be analysed as a move away from neo-liberal prescriptions but, rather, as the unfolding of spiralling dynamics set in train by the widespread deployment at the international level of the neo-liberal technique of subjecting governance to competitive order and the reconstitution of states as 'competitive and entrepreneurial market subjects'.[70] It is precisely what we would expect from a system of governance-based inter-jurisdictional competition in which states are re-institutionalized in entrepreneurial terms as 'competition states'.

Moreover, and importantly, the fields of expert knowledge associated with inter-jurisdictional competition – that is to say, expertise about the quality of governance and about how to be competitive – have emerged as highly reflexive domains, characterized by intense internal dynamics of contestation, differentiation and pluralization. The discourse of 'national competitiveness' was from the beginning a rather heterogenous and ambiguous mix of loosely articulated policy ideas, and its polysemous quality was only intensified as it became more influential in centres of political power.[71] As others have described, the 1990s and 2000s saw the development of a field of consultancy expertise advising national policy-makers on locally tailored competitiveness strategies and the catalysing of entrepreneurial strategies of both emulation and differentiation.[72] Over time, accordingly, the range of available competitiveness strategies has broadened, as new dynamics of contestation and innovation have been set in train.[73]

In parallel, practices and techniques of measuring the quality of governance have become newly reflexive, prompting some to posit the 'rise of a reflexive indicator culture'.[74] As Tero Erkkilä and Ossi Piironen recount, this has been evident even in that bastion of global orthodoxy, the World Bank's Worldwide Governance Indicators (WGI) project, whose producers over time moved from a position of optimism, confidence and certainty to an increasing appreciation of the limits of their project and an awareness of the criticisms that it has attracted.[75] One of the World Bank's responses to criticism of the WGI as ideologically one-sided, for example, was to expand the range

[70] Fougner, *supra* note 60, at 324.

[71] Linsi, 'The Discourse of Competitiveness and the Disembedding of the National Economy', 27(4) *RIPE* (2020) 855, at 865.

[72] Davies, *supra* note 39; Fougner, *supra* note 60; Sum, 'The Production of Hegemonic Policy Discourses: 'Competitiveness' as a Knowledge Brand and Its (Re-) Contextualizations', 3(2) *Critical Policy Studies* (2009) 184; Pederson, *supra* note 60; Bristow, 'Everyone's a "Winner": Problematising the Discourse of Regional Competitiveness', 5 *Journal of Economic Geography* (2005) 285.

[73] Sum, *supra* note 72, at 198.

[74] Bhuta, Malito and Umbach, 'Introduction: Of Numbers and Narratives – Indicators in Global Governance and the Rise of a Reflexive Indicator Culture', in N. Bhuta, D.V. Malito and G. Umbach (eds), *Palgrave Handbook of Indicators in Global Governance* (2018) 1.

[75] Erkkilä and Piironen, '(De)politicizing Good Governance: The World Bank Institute, the OECD and the Politics of Governance Indicators', 27(4) *Innovation: The European Journal of Social Science Research* (2014) 344. On reflexivity in the world of indicators, see also generally Desai and Schomerus, '"There Was a Third Man ...": Tales from a Global Policy Consultation on Indicators for the Sustainable Development Goals', 49(1) *Development and Change* (2018) 89; Lang, *supra* note 61.

of data sources on which it drew and, in particular, to include more data sources produced by non-commercial, civil society and southern governmental sources.[76]

A similar trajectory can be seen in what some describe as the move from 'first-generation' composite measures to 'second-generation' dashboard indicators, which eschew single aggregate measures of governance quality in favour of a suite of disaggregated measures covering a range of different elements. Dashboard measures – such as that offered by the Organisation for Economic Co-operation and Development's (OECD) Government at a Glance series – are explicitly an attempt to avoid a system of measurement based on an ideal programmatic model of good governance, instead providing data with which 'a country can assess itself' according to its own standards, 'allow[ing] for nuanced distinctions to be made between … countries, reflecting their distinctive administrative and social traditions'.[77] Furthermore, a dynamic of competition has increasingly emerged between different providers of governance indicators – from the World Bank, to the World Economic Forum and the OECD, to Transparency International, the Ibrahim Index of African Governance and the Bertelsmann Foundation's Sustainable Governance Indicators, amongst many others – with each seeking its own niche, positioning itself in relation to prevailing elite orthodoxy, allying itself to specific constituencies and decision-making centres and seeking to build credibility with particular audiences as well as links to particular kinds of capital. Some see in this (though one must be careful here not to overstate)[78] an emerging dynamic of reflexivization in which alternative measurement technologies develop corresponding with alternative theories of governance and strategies of competition.

The order of inter-jurisdictional competition established in the latter decades of the 20th century, then, can be interpreted as a technology for both inducing and conditioning governance-based competition between states for mobile capital. The key feature of this order, on this view, is that it helps to constitute a new kind of entrepreneurial and reflexive state subjectivity, as theorists of the 'competition state' have documented. It is a technology that does not only impose exogenous constraints on policy autonomy but also reshapes the conduct of statecraft from within, inculcating dynamics of 'continuous improvement', incentivizing governance innovation and valorizing the qualities of flexibility, reflexiveness and adaptability that are characteristic

[76] Probably the most striking example was the inclusion of 12 new data sources for the 2004 report, including three from international organizations (African Development Bank, Asian Development Bank and United Nations Economic Commission for Africa), and six from non-governmental organizations and universities (Bertelsmann Foundation, Brown University Center for Public Policy, the Countries at the Crossroads publication of Freedom House, Fundar, the International Research and Exchanges Board and Vanderbilt University). D. Kaufmann, A. Kray and M. Mastruzzi, 'Governance Matters IV: Governance Indicators for 1996–2004', World Bank Policy Research Working Paper no. 3630, June 2005, at 6, Table 1.

[77] Organisation for Economic Co-operation and Development (OECD), 'Towards Better Measurement of Government', OECD Working Papers on Public Governance no. 2007/1 9OECD (2007), at 3, cited in Erkkilä and Piironen, *supra* note 75, at 354–355.

[78] Erkkilä and Piironen, *supra* note 75.

of market actors themselves.[79] Importantly, and to repeat a point made earlier, while we need to take these aspirations seriously, we should not take them at face value. One of the reasons for describing this dynamic of competitive governance experimentation is precisely to open up its politics to further investigation. How is the capacity to experiment distributed globally? What sorts of experiment count as governance 'innovation' and by what methods is success distinguished from failure? Which populations are made vulnerable as subjects of experimentation and with what consequences? Moreover, what political modalities are precluded, or made more difficult, when government is practised in a reflexive register? I noted above that techniques of reflexivization reduce the potency of 'the social' as an animating principle of collective political action: how is this reflected in the forms of governance produced (and not produced) by the entrepreneurialism of the 'competition state'?

B *Minimizing State-Induced Distortions of Competitive Order*

In this section, I turn to international trade and investment law. The development and expansion of both of these fields is one of the most significant aspects of the neo-liberal transformation of global economic governance. In the field of international trade law, the establishment of the new WTO famously saw the introduction of a wide range of new international legal disciplines, alongside a new strengthened dispute settlement system. In the field of international investment law, similar developments occurred, with the emergence of a network of thousands of bilateral investment treaties providing rights to foreign investors affected by host state measures, alongside an extensive and well-used infrastructure of investor-state dispute settlement to enforce them.

These new developments clearly fit comfortably within an institutional or programmatic understanding of neo-liberalism. The disciplines contained in international trade and investment law are, indeed, external constraints on state's regulatory autonomy, and they do place limits, to some degree, on the circumstances in which states can interfere with the workings of the market or act to the detriment of foreign economic actors. In this section, however, I want to suggest – alongside others who have argued similarly[80] – that some of the most significant elements of these bodies of law can also be productively understood as technologies of reflexivization.

As has been noted by others, neo-liberal thought – especially that strand of thought associated with the Chicago School – brought with it a range of novel analytical

[79] Larner, 'Neoliberalism, Mike Moore', *supra* note 39.

[80] My argument here has particular affinities with Nicolaidis and Shaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government', 68 *Law and Contemporary Problems* (2005) 263 (a reflexive reading of mutual recognition); Nicolaidis, 'Trusting the Poles? Constructing Europe through Mutual Recognition', 14(5) *Journal of European Public Policy* (2007) 682 (similarly but in a European context); Howse, 'How to Begin to Think About the "Democratic Deficit" at the WTO' (2003), available at www.law.nyu.edu/sites/default/files/ECM_PRO_060036.pdf; Sabel and Zeitlin, 'Experimentalist Governance', in D. Levi-Faur (ed.), *Oxford Handbook of Governance* (2012) 169; R. Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness', 108(2) *AJIL* (2014) 211; Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', 107(2) *AJIL* (2013) 295.

methods for evaluating the adequacy of market regulation.[81] One of the most important of these methods is derived from the claim that regulatory objectives should be pursued in ways that as far as possible leave the workings of competitive (market) order undisturbed.[82] This principle leads directly to a two-stage evaluative method: the first stage assesses whether and to what extent the measure distorts or impairs existing conditions of market competition; while the second determines whether there are sufficiently good reasons to do so based on legitimate public policy objectives and whether there are less distortive means of achieving comparable results. I said earlier that the 'desacralization' of the social state involved a process of subjecting state claims to speak and act on behalf of 'collective' values to scepticism, critical questioning, limitation and discipline. This two-stage evaluative method is a means of doing precisely that.

It is one of the distinctive features of neo-liberal global economic governance that, from around the 1980s, this evaluative method was progressively institutionalized within international trade law (and, to a lesser extent, international investment law).[83] As a result, regulatory decision-making was made subject to the critical scrutiny of at least two distinct forms of technical expert practice: mixed legal-economic analysis of a law's potential distortive impacts and expert assessment of the relative efficacy of alternative regulatory methods, given defined regulatory objectives. The result of this process has been complex and not always easily cognisable as 'deregulatory' or 'pro-market'. I illustrate this point using one of the most familiar, but also contentious, aspects of WTO law – namely, the long line of jurisprudence in which states' regulatory measures have been challenged as discriminatory under Article I or III of the GATT, or equivalent provisions in other agreements,[84] and the regulating state has sought to justify its measure under the so-called general exceptions provision in Article XX of the GATT.

This jurisprudence is well known, and I will make just a few observations. While these GATT provisions date from 1947, a crucial set of jurisprudential development began to occur in the late 20th century, which over time brought these provisions close in their application to the two-stage evaluative method, set out earlier. Thus, the GATT non-discrimination principle began to be interpreted much more explicitly as a measure of

[81] Amongst a voluminous literature, for an insightful and accessible account, see Lleras, 'Neoliberal Law and Regulation', in Brabazon, *supra* note 18, 61.

[82] This principle for evaluating state action is a central feature of neo-liberal thought, developed in some depth in early writings through the middle decades of the 20th century. For a useful survey, see, e.g., Biebricher, *supra* note 53, at 46ff.

[83] I have in mind here the incorporation of a form of proportionality analysis into key disciplines of investment law. Separately, Perrone offers a different account of the relation between international investment law and neoliberal legality, which resonates strongly with the idea of desacralisation relied upon here. In his account, international investment law facilitates the contractualisation of investor-state relations in the neoliberal period, as a tool for 'reduc[ing] the relevance of the social in legal reasoning' governing investor rights. Perrone, 'Neoliberalism and Economic Sovereignty: Property, Contracts and Foreign Investment Relations', in Brabazon, *supra* note 18, 43, at 45.

[84] For example, Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) 1994, 1868 UNTS 120.

interference with competitive order: a measure was treated as discriminatory, in other words, where, and to the extent that, it could be shown to modify existing conditions of market competition. While this interpretation has a long history in GATT jurisprudence,[85] it was considerably extended in the Appellate Body's jurisprudence after the creation of the WTO. The non-discrimination norm was explicitly stated to 'provide equality of competitive conditions' for imported products and to 'protect expectations … of [an] equal competitive relationship' between imported and domestic products, and its application came to require quasi-economic analysis of a measure's competitive effects.[86] At the same time, parts of the GATT's general exceptions provision were also reinterpreted to conform more closely to the second stage. Regulatory measures were required to be the 'least trade restrictive' means of achieving the desired public policy objective.[87] In a further development, the language of 'necessity' in Article XX was interpreted to include a *sui generis* proportionality test, falling somewhere between cost-benefit analysis and means-end proportionality.[88] Essentially, the same tests were subsequently read into the corresponding provisions of other WTO agreements.[89]

In the large number of WTO cases, which involve challenges to regulatory measures relating to health, environmental protection, consumer protection or social protection, the Appellate Body has developed an approach to assessing regulatory measures that focuses primarily on ensuring that they are transparent, implemented in a procedurally fair, other-regarding and scrupulously even-handed manner and well-calibrated to risk, and that the competitive distortions that they case are not arbitrary or entirely avoidable. Many examples could be cited.[90] One of the best is the

[85] GATT, *Italian Discrimination against Imported Agricultural Machinery – Report of the Panel*, 23 October 1958, L/833, BISD 7S/60, para 12; GATT, *United States – Section 337 of the Tariff Act of 1930 – Report of the Panel*, 7 November 1989, L/6439, BISD 36S/345, paras 5.11–5.21.

[86] See generally WTO, *Japan – Taxes on Alcoholic Beverages – Report of the Appellate Body*, 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 109, 110; WTO, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products – Report of the Appellate Body*, 5 April 2001, WT/DS135/AB/R, paras 97–98. On the move from non-discrimination as 'anti-protectionism' to non-discrimination as 'competitive neutrality', see A. Lang, *World Trade Law after Neoliberalism* (2011).

[87] GATT, *United States – Section 337 of the Tariff Act of 1930 – Report of the Panel*, 7 November 1989, L/6439, BISD 36S/345, paras 5.25–5.27.

[88] The seminal case is WTO, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef – Report of the Appellate Body*, 10 January 2001, WT/DS161/AB/R, WT/DS169/AB/R. Notably, proportionality analysis also subsequently emerged as a prominent aspect of international investment law as it was applied in the context of compensating foreign investors for harms suffered as a result of regulatory measures – a connected development, even though the analogy is not perfect. Amongst a vast literature, see generally C. Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (2015).

[89] In respect of Article 2.1 of the TBT Agreement, *supra* note 84, see especially WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Appellate Body*, 13 June 2012, WT/DS381/AB/R; WTO, *United States – Measures Affecting the Production and Sale of Clove Cigarettes– Report of the Appellate Body*, 24 April 2012, WT/DS406/AB/R.

[90] The other obvious example would be the equally famous *Shrimp/Turtle* case in which the Appellate Body similarly adopted the view that (quasi-)extraterritorial measures occurring outside a state's jurisdiction were in principle permissible but must be applied in an other-regarding manner, attentive to the differences in conditions in other states, and recognizing that different means of achieving regulatory

long-running dispute between Mexico and the USA regarding US measures seeking to protect dolphin populations harmed by tuna fishing in the Eastern Pacific Ocean (outside US jurisdiction).[91] The first disputes over these measures, brought in the early 1990s before the WTO was created, resulted in two panel decisions that determined that such measures, in which a state seeks to impose its preferred production methods outside its territorial jurisdiction by use of an import ban, were simply not permitted under the GATT. These decisions were unadopted and so were not binding, but the dispute did nevertheless help prompt the USA to redesign its measure, so that it no longer banned imports of non-compliant tuna but, rather, merely established a labelling standard for 'dolphin-safe' tuna.

Almost two decades later, this labelling measure was the subject of a further challenge, this time in the WTO under an analogous provision in the TBT Agreement.[92] The Appellate Body again found against the USA but did so on the basis that the labelling measure imposed differential requirements that were not properly calibrated to the risks posed by different categories of imports. (Some tuna products, in other words, were given access to the dolphin-safe label, even though they did in fact cause some degree of harm to dolphins.) Thereafter, there were two further compliance proceedings, as the USA sought incrementally to modify the regulation to bring it into compliance with its WTO obligations. It lost the first such compliance proceeding but ultimately prevailed in the second, with both the panel and the Appellate Body finally being satisfied that the labelling measure was satisfactorily 'calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean'.[93]

In this episode – and in the numerous others like it throughout WTO jurisprudence – the regulatory disciplines contained in international trade law work critically and reflexively: they work, in other words, by prompting governments to optimize the design of their regulatory measures, by reference to their own (internal) objectives as

objectives may be suitable in different circumstances: WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body*, 6 November 1998, WT/DS58/AB/R. Other illustrative cases include WTO, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, 24 April 2012, WT/DS406/AB/R; WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, 18 June 2014, WT/DS400/AB/R/ WT/DS401/AB/R; and WTO, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, 29 June 2020, WT/DS441/AB/R and Add. 1/ WT/DS435/AB/R and Add.1.

[91] See GATT, *United States – Restrictions on Imports of Tuna – Report of the Panel*, 3 September 1991, DS21/R, DS21/R, BISD 39S/155 (unadopted); GATT, *United States – Restrictions on Imports of Tuna – Report of the Panel*, 16 June 1994, DS29/R (unadopted); WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Appellate Body*, 13 June 2012, WT/DS381/AB/R; WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico – Report of the Appellate Body*, 3 December 2015, WT/DS381/AB/RW and Add.1; WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States – Report of the Appellate Body*, 11 January 2019, WT/DS381/AB/RW/USA and Add.1; WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico*, 11 January 2019, WT/DS381/AB/RW2 and Add.1.

[92] TBT Agreement, *supra* note 84.

[93] WTO, *US – Tuna II (Mexico – Second Recourse to Article 21.5)*, *supra* note 91, para 7.13.

well as to their impacts on others. Technical examination of a measure's competitive impacts becomes a prompt for a further examination of its justifiability, with the degree of the competitive impacts indexing the rigour of that examination. In episodes of this kind, then, international regulatory disciplines appear to work less as a mechanism for deregulation or for the propagation of regulatory orthodoxies and more like a set of techniques for promoting reflexivity of a particular, optimizing kind in the regulatory practice of states.

While it is beyond the scope of this article to examine in detail, it is worth noting in general terms the larger stakes of this dynamic. For one thing, it has important implications for the global distribution of regulatory power. These legal disciplines, and the line of jurisprudence interpreting them, has played an important role in enabling some states – those with large market power as well as high governance capacity measured in reflexive terms – to exert hugely consequential forms of quasi-extraterritorial regulatory power. Such states have not only been authorized to impose substantial compliance costs on external constituencies, but they have also been permitted to exert disproportionate influence over the development of global regulatory standards. There are also, for another thing, implications for forms and modalities of cross-border regulatory interactions: the forms of other-regarding regulatory cooperation favoured by these techniques of reflexivization have deeply shaped such interactions, reconfiguring channels and modalities of influence in profound ways. Finally, the particular legal-technical method for evaluating state measures described in this section has implications for the production and distribution of regulatory credibility and legitimacy. This is because it is a method that subjects some kinds of regulatory measures to more sceptical scrutiny than others – most obviously, those measures that are directly targeted at modifying current conditions of competition within existing markets rather than merely incidentally having that effect. Salient examples of such measures would include development measures to shift a country's position in the historically produced global distribution of comparative advantage, remedial measures to correct the outcomes of highly distorted global markets or industrial policy measures to catalyse 'green' investment currently under-produced given existing conditions of competition.

C *The Internationalization of Regulatory Policy*

A similar story can be told about a third feature of late 20th-century global economic governance – namely, the internationalization of regulatory policy. The term 'regulatory policy' is used to mean different things, but I have in mind here the formation of a new body of state expertise about the management of the regulatory process itself, which emerged from around the 1970s. Regulatory policy, in this first iteration, developed in connection with a variety of critiques of the regulatory cultures of the social state: the prevalence of regulatory capture by vested interests, poor incentive structures within regulatory bureaucracies, the reactivity of most regulatory decision-making, excessive risk aversion on the part of regulators and inattention to economic burdens, the difficulties of reviewing and updating regulation as circumstances change

and the use of regulation as a form of symbolic politics, among others. By way of response to these critiques, a range of regulatory decision-making routines and practices were developed and consolidated during the 1980s, which internalized certain practices of critical self-reflection into the regulatory decision-making process itself. These included cost-benefit analysis, impact assessment, independent regulatory audit, formalized stakeholder consultation, the independence of regulatory process from government, among others. Like the new public management more generally, with which they are closely related, these decision-making practices represented the adoption in the public regulatory domain of a number of the sorts of reflexive internal control systems that had begun to emerge within firm-level organizational structures around the same period.[94] They also represented another way of operationalizing precisely the same core neo-liberal principle as that described in the previous section – namely, that good regulations are those that, 'on balance, bring[] a net benefit to the entire community in the manner least restrictive of market competition'.[95] They are, in a particularly obvious way, an instantiation of precisely the sorts of critical technologies of reflexivization that I described in the first section.

The adoption, and spread, of these practices since the 1990s is primarily a national story, usually told comparatively. But it has also played out across a variety of international spaces. In the early 1990s, for example, the OECD turned its attention to regulatory policy and set itself the task of distilling the core content of this regulatory expertise. In 1995, it adopted what has been described as the 'first international standard on regulatory quality', entitled the OECD's Recommendation on Improving the Quality of Government Regulation as well as a 'reference checklist for regulatory decision-making', consisting of 10 questions that regulators ought to ask themselves during the process of designing regulations.[96] Since then, it has produced a variety of new recommendations, reports and country reviews, as well as, more recently, a flagship index of regulatory quality, the Indicators of Regulatory Quality and Governance. The OECD itself, to be sure, has relatively few levers of power that it can use to encourage the adoption of these recommendations by its members (and even fewer in respect of non-OECD countries), and its influence in the area has been largely indirect.

But, aside from the OECD, other institutions of global economic governance are also active in relation to regulatory policy. Navroz Dubash and Bronwen Morgan report that some aspects of the above regulatory reform programme (primarily regulatory independence) were effectively imposed on some countries through World Bank conditionalities, especially in the context of financing for infrastructure development.[97]

[94] See, e.g., Lobel, 'New Governance as Regulatory Governance', in Levi-Faur, *supra* note 57, 65; Dubash and Morgan, 'The Rise of the Regulatory State of the South', in N.K. Dubash and B. Morgan (eds), *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies* (2013).

[95] Morgan, 'Regulating the Regulators: Meta-regulation as a Strategy for Reinventing Government in Australia', 1(1) *Public Management: An International Journal of Research and Theory* (1999) 49, at 62; Lleras, *supra* note 81.

[96] OECD, Recommendation of the Council on Improving the Quality of Government Regulation, Doc. OCDE/GD(95)/95, OECD/LEGAL/0278, 9 March 1995, at 3.

[97] Dubash and Morgan, *supra* note 93; Dubash, 'The New Regulatory Politics of Electricity in India: Embryonic Ground for Consumer Action', 29(4) *Journal of Consumer Policy* (2006) 449.

The World Bank and the OECD have also begun collecting data on the use of impact assessment, ex-post review, transparency and consultation as part of the process for measuring the quality of governance across more than 180 countries.[98] Separately, WTO law contains a number of disciplines that reflect OECD principles of good regulatory practices (GRPs), and landmark cases have used the functional equivalent of GRP ideas to interpret provisions of WTO law.[99] More recently, there have been moves to incorporate a regulatory policy agenda directly into trade agreements in a far more comprehensive and explicit manner. As a result, a variety of new-generation free-trade agreements include requirements to adopt practices such as regulatory impact assessment and retrospective review, and they include mechanisms for enhancing transparency and cooperation around the cross-border competitive impacts of regulatory decisions.[100] At the level of practice, the WTO's TBT Committee has for many years undertaken a range of primarily information-sharing activities explicitly on the topic of good regulatory practices.

The first phase in the global dissemination of regulatory policy – from broadly Anglo-American origins, through Western Europe and OECD countries more generally, and also through the transition economies of the former Eastern bloc – was associated in practice with an ideological agenda of pro-market regulatory reform focused on the reduction of regulatory burdens. As a result, many of the most compelling accounts of regulatory policy during this period have drawn attention to the the ways in which certain ideological effects are produced through the application of apparently neutral principles of regulatory policy as complex and opportunistic, but durable, effects of a combination of procedural rules, specific techniques of quantification, institutional formations, resource constraints and political context.[101] Quantifying the economic costs to competitiveness associated with new regulations, and requiring them to be transparently taken into account, for example, has been shown to increase the salience of such costs in regulatory decision-making processes. The creation of

[98] For an overview of the World Bank's work in these areas, see https://rulemaking.worldbank.org/; see also De Francesco, 'Transfer Agents, Knowledge Authority, and Indices of Regulatory Quality: A Comparative Analysis of the World Bank and the Organisation for Economic Co-operation and Development', 18(4) *Journal of Comparative Policy Analysis* (2016) 350.

[99] This would take considerable time to explain fully, but particularly obvious examples include the foundational interpretation of 'necessary' in the GATT Article XX in the early GATT cases of GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes – Report of the Panel*, 7 November 1990, DS10/R, BISD 37S/200; the famous interpretation of the *chapeau* to GATT Article XX in WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body*, 6 November 1998, WT/DS58/AB/R; as well as the core principles of both the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) 1994, 1867 UNTS 493 (e.g. Articles 2, 5), and the TBT Agreement, *supra* note 84 (e.g. Article 2).

[100] Good examples of the state of the art in this area include Chapter 28 of the United States-Mexico-Canada Agreement, 1 July 2020 ('good regulatory practices'), available at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between; and Chapter 25 of the Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America and Vietnam, 4 February 2016, [2006] ATNIF 2 ('regulatory coherence').

[101] For one insightful account, see Morgan, *supra* note 94.

independent offices of regulatory oversight weakened democratic control over regulatory processes and heightened the influence of technical experts, especially those trained in particular styles of orthodox economic expertise. Formalized stakeholder consultation helped on many occasions to give greater voice to commercially orientated actors with an interest in reducing regulatory burdens.

The same literature also makes clear, however, that we should not reductively view regulatory policy as a carrier and instrument of particular (neo-liberal) institutional prescriptions. As a suite of country studies has shown over the last two decades, the remarkable diffusion of these regulatory practices has been connected to diverse national trajectories of state transformation and diverse governance arrangements.[102] Across these studies, regulatory policy appears as a set of versatile and mobile technologies, which, in some important sense, invite repurposing and actively engender differentiated application, with heterogenous and often unpredictable results. The creation of independent utilities regulators, to take one example almost at random, can almost entirely depoliticize the process of rate setting in Chile, while being perfectly compatible (ultimately) with the direct renegotiation of rates between provincial governments and concessionaries in Argentina. Reflexive decision-making protocols themselves shift and evolve over time as methodologies are contested and processes are repurposed for this or that end. The regulatory tool of cost-benefit analysis, for example, has been gradually differentiated over time into an entire family of impact assessment methodologies – from traditional cost-benefit analysis to economic impact assessment, environmental impact assessment, social impact assessment, sustainability impact assessment and many others besides. Each of these has myriad variations at the level of specific methodology.

David Levi-Faur and Jacint Jordana have helpfully proposed to conceptualize the effect of regulatory policy in terms of a 'policy irritant' – that is to say, a set of mechanisms for destabilizing established routines and assumptions and for engendering processes of critical self-reflection.[103] It is a useful concept, not just as a way of describing regulatory policy's unexpected effects and open-ended dynamics of evolution but,

[102] All of the most prominent cross-country projects are unequivocal in this respect. See, e.g., Levi-Faur, 'Global Diffusion of Regulatory Capitalism', 598(1) *Annals of the American Academy of Political and Social Science* (*AAAPSS*) (2005) 12; Jordana and Levi-Faur, 'Towards a Latin American Regulatory State: The Diffusion of Autonomous Regulatory Agencies across Countries and Sectors', 29(4–6) *International Journal of Public Administration* (2006) 335; Jordana, Levi-Faur and Fernández, 'The Global Diffusion of Regulatory Agencies: Channels of Transfer and Stages of Diffusion', 44(10) *Comparative Political Studies* (2011) 1343; T. Ginsburg and A.H.Y. Chen, *Administrative Law and Governance in Asia: Comparative Perspectives* (2009); Dubash and Morgan, *supra* note 93; Dubash and Morgan, 'Understanding the Rise of the Regulatory State of the South', 6(3) *Regulation and Governance* (2012) 261; M. Minogue and L. Carino (eds), *Regulatory Governance in Developing Countries* (2006); P. Cook and S. Mosedale (eds), *Regulation, Markets and Poverty* (2007); Martínez, Molyneux and Sánchez-Ancochea, 'Latin American Capitalism: Economy and Social Policy in Transition', 38 *Economy and Society* (2009) 1.

[103] See Levi-Faur and Jordana, 'Regulatory Capitalism: Policy Irritants and Convergent Divergence', 598(1) *AAAPSS* (2006) 191; Dubash, 'Regulating through the Back Door: Understanding the Implications of Institutional Transfer', in Dubash and Morgan, *supra* note 93, 98, at 100 ('[t]his is … to buttress the idea of treating regulatory institutions as a "policy irritant" … that can lead to surprising and unpredictable outcomes that diverge even across different subnational regulators within the same country').

more importantly, as a way of capturing its quality as a set of tools to engender particular kinds of expert reflexivity. These tools are, to paraphrase Deval Desai, mechanisms self-consciously designed to establish a framework for particular kinds of expert reflection over the form, content and purpose of regulation.[104] This should not be confused with a claim that they are ideologically unbiased – the point, rather, is to note their character as reflexive practices that work by creating new and unanticipated opportunity structures and spaces for mobilization and contestation.

This idea of regulatory policy as an 'irritant' chimes well with conceptualizations of regulatory policy produced by the OECD – one of the key international venues for the formulation, legitimation and narrativization of regulatory policy. Through the OECD's work, regulatory policy has increasingly become allied to the language of dynamism and adaptability. As others have noted, the initial work of the OECD in the field of regulatory policy had a discernible pro-market, pro-competition flavour, even if its more obvious ideological overtones had to be toned down to make it acceptable across the entire OECD membership. Over time, however, the narrative has evolved, as reflected in a number of distinct shifts of terminology – first, from 'regulatory quality' to 'regulatory management', and then, to 'regulatory governance'. This linguistic shift explicitly signalled two substantive shifts of focus: away from the quality of particular regulations towards the adequacy of the overall environment and institutional structure in which regulations are made and away from an approach that sees regulatory review and reform as a one-off process to one in which it is understood as a continuous and dynamic process of reflexive learning and revision.[105]

Accordingly, regulatory policy is now presented as a tool for building a systemic capacity for adaptation and continuous change in regulatory systems, through the routinization of technical, empirical and incrementalist styles of learning and revision in regulatory processes. This emphasis is reflected in the key elements that have crystallized as the core of the OECD's regulatory policy agenda: adequate public consultation as part of the decision-making process; the conduct of formal impact assessments of proposed regulatory measures; *ex post* review of the effects of regulation; independent regulatory audit; structured assessments of the costs and benefits of regulation; the use of formalized risk assessment both in the design of regulation and in the allocation of regulatory resources; and the pursuit of a variety of mechanisms of regulatory coordination and cooperation both across government and internationally. I shall return to these developments below.

[104] Desai, 'Reflexive Institutional Reform and the Politics of the Regulatory State of the South', *Regulation and Governance* (2020), available at https://doi.org/10.1111/rego.12336.

[105] See, e.g., OECD, Regulatory Cooperation for an Interdependent World (1994); OECD, Recommendation of the Council on Improving the Quality of Government Regulation, Docs. OCDE/GD(95)/95, OECD/LEGAL/0278, 9 March 1995; OECD, Regulatory Policies in OECD Countries: From Interventionism to Regulator Governance (2002); OECD, Taking Stock of Regulatory Reform: A Multidisciplinary Synthesis (2005); OECD, Guiding Principles for Regulatory Quality and Performance, Doc. C(2005)52 and CORR1, (2005); OECD, Regulatory Policy and the Road to Sustainable Growth (2010); OECD, Recommendation of the Council on Regulatory Policy and Governance (2012); OECD, OECD Best Practice Principles for Regulatory Policy: The Governance of Regulators (2014).

D *Expert-Led Harmonization of Market Regulation*

I turn finally to projects of international regulatory harmonization. As is well known, the last two decades of the 20th century saw the proliferation at the international level of a variety of expert-led projects of harmonization of market regulation. Some of these projects took the form of new model laws or codes developed by international organizations, international professional associations and regulatory networks. The most famous and well-studied examples of this sort of project include those in the fields of competition law,[106] insolvency law,[107] corporate governance[108] and intellectual property.[109] Others took the form of the production of sector-specific international regulatory standards – for example, in the fields of financial services, telecommunications, food safety and health regulation.[110] While some of this work had a much

[106] A range of initiatives to develop and promulgate model competition laws and institutional frameworks have emerged since the 1990s, including a 1993 draft law developed by the Munch Group, a more detailed model law developed by the United Nations Conference on Trade and Development (UNCTAD) in 2007, with subsequent revisions, a range of technical assistance initiatives carried out under the auspices of the UNCTAD, the World Bank and other international organizations and, significantly, the formation of the inter-regulatory International Competition Network in 2001. For one interesting attempt to interpret this activity specifically in relation to neo-liberalism, see Turem, '"The Market" Unbound: Neoliberalism, Competition Laws and Post Territoriality', 19(2) *Journal of International Relations and Development* (2016) 242.

[107] The Asian financial crisis at the conclusion of the 1990s energized efforts to harmonize insolvency law by international financial institutions (principally the World Bank and the International Monetary Fund [IMF]), international professional associations (the International Bar Association and the International Association of Restructuring, Insolvency and Bankruptcy Professionals) as well as international bodies such as the OECD and the United Nations Commission on International Trade Law (UNCITRAL). See generally T. Halliday and B. Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (2009), especially ch. 3.

[108] The same period precipitated similar developments in the field of corporate governance by such bodies as the IMF, the OECD, the World Bank, UNCITRAL and the International Corporate Governance Network, which produced a variety of corporate governance codes, principles and legal models, alongside mechanisms for monitoring and supervision as well as the Global Corporate Governance Forum. For a good summary of these efforts, see Parglender, 'The Rise of International Corporate Law', 98 *Washington University Law Review* (2021) 1765; Gordon, 'Convergence and Persistence in Corporate Law and Governance', in J.N. Gordon and W-G. Ringe (eds), *Oxford Handbook of Corporate Law and Governance* (2018) 28. For an important earlier generation of work, see, e.g., Zumbansen, 'The Privatization of Corporate Law: Corporate Governance Codes and Commercial Self-Regulation', 3(2) *Juridikum* (2002) 32; Branson, 'The Very Uncertain Prospect of "Global" Convergence in Corporate Governance', 34(2) *CILJ* (2001) 321; and Stephan, 'The Futility of Unification and Harmonization in International Commercial Law', 39 *Virginia Journal of International Law* (1999) 743.

[109] Probably the most important development in the key period of the early 1990s was the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) 1994, 1869 UNTS 299. For a different reinterpretation of the classic harmonization story in intellectual property as instead a story of 'maximization', see Wasserman Rajec, 'The Harmonization Myth in International Intellectual Property Law', 62 *Arizona Law Review* (2020) 735.

[110] Key institutions in these sectors include the Codex Alimentarius Commission, the World Organization for Animal Health, and the International Plant Protection Convention, the Basel Committee on Banking Supervision, the International Organization of Securities Commissions, and the International Association of Insurance Supervisors, the International Telecommunications Union and the World Health Organization.

longer history, in general, projects of international regulatory standardization have rapidly accelerated and proliferated since the late 1980s.

For the most part, the work of harmonization has relied heavily on expert work – specifically, the construction and consolidation of transnational expert consensus in and of international organizations and networks. The outcomes of this work of expert consensus building are mixed legal-technical artefacts: guiding principles, best practices, model laws, recommendations and similar voluntary normative instruments. They are, as a rule, non-binding, even constitutively so. As such, they are implemented by way of an elaborate international infrastructure of monitoring and supervision, technical assistance, spaces for sharing experience and best practice as well as processes of cross-jurisdictional mutual review and challenge.

Notwithstanding the non-binding quality of such standards, there have been a number of attempts to leverage other elements of international economic governance to give these standards a binding quality. IMF and World Bank conditionality, for example, has at times been enlisted in the service of particular projects of regulatory harmonization, especially around the late 1990s and early 2000s.[111] Moreover, obligations to use international standards have been incorporated into a number of trade agreements. The WTO's SPS and TBT Agreements require WTO members to use harmonized international standards in certain circumstances – a very significant legal development at the time, though one that has over time probably proved to have less bite than was initially thought.[112] For its part, the TRIPS Agreement represents an unusually high watermark of harmonization in the field of intellectual property, while the General Agreement on Trade in Services' telecommunication reference paper distils certain common principles of pro-competitive telecommunications regulation into a document with (indirectly) binding legal effect.[113] A range of recent bilateral trade treaties include provisions promoting harmonization and, sometimes, the establishment of broadly defined minimum regulatory floors, in a number of the areas listed above.

Evidently, this architecture of international standardization sits very comfortably within a vision of neo-liberal global economic governance as a substantive and programmatic straitjacket disciplining unruly regulatory divergence through the production and dissemination of expert-defined regulatory orthodoxies. But I want to argue here that international standardization also works, in two distinct ways, as a technology for reflexivizing the regulatory process, in the sense used in this article. First of all, there is an important sense in which projects of international regulatory standardization enable and support a larger order of inter-jurisdictional regulatory competition, even as they appear to constrain it by promoting regulatory convergence. This looks paradoxical but, in fact, the logic is straightforward. Any system of inter-jurisdictional competition of the sort described in section 3.A will, sooner or later, lead

[111] See, e.g., Parglender, *supra* note 107, at 1779–1780; Soederberg, 'The Promotion of 'Anglo-American Corporate Governance in the South: Who Benefits from the New International Standard?', 24 *TWQ* (2003) 7.

[112] SPS Agreement, *supra* note 99. For one account of this trajectory, see Howse and Langille, *supra* note 16, especially section F.

[113] TRIPS Agreement, *supra* note 109; General Agreement on Trade in Services, 1869 UNTS 183.

to forms of regulatory competition and associated practices of regulatory arbitrage, which appear harmful to at least some participants.

As a result, demand arises for new rules to determine the boundary between acceptable and harmful forms of inter-jurisdictional competition – a shift in the current 'ground rules' that form the basis of the existing order of inter-jurisdictional competition. A significant part of the work of international standardization is best understood as a response to precisely this demand. The Basel Committee's rules on capital adequacy requirements in the sphere of banking regulation are a good illustration: they do indeed promote regulatory convergence and limit regulatory arbitrage, but they do so in the service of a larger project of global financial sector integration that encourages and promotes other kinds of regulatory competition. Ongoing efforts to develop international standards on anti-base erosion and profit shifting to address tax avoidance and base erosion are another example – that is to say, an attempt to distinguish between harmful and acceptable forms of tax competition and tax arbitrage, with a view to limiting one and facilitating the other. International standards, then, do limit inter-jurisdictional competition in some ways, but they enable it in others and, in that sense, are properly seen not as instruments of regulatory convergence *tout court* but, rather, as part of a larger architecture of governance that sets the guardrails and ground rules for an inter-jurisdictional competitive order in which states are subjects.

Second, it is important to recognize that a large proportion of international standardization activity produces what we might call 'second-order' artefacts. By this term, I simply mean that they are directed less at the substantive content of regulation and more at second-order questions of how regulatory decisions are made or what general characteristics these regulatory systems ought to have. Some international standards, for example, take the form of checklists of issues to be considered in the course of particular kinds of regulatory decision-making. An illustration would be the OECD's early Reference Checklist for Regulatory Decision-Making, which sets out a series of generic questions that regulators should ask themselves;[114] a more specific illustration would be the work of the Codex Alimentarius Commission in setting out some of the issues that food safety regulators ought to consider when conducting equivalence assessments.[115] Other international standards focus on setting out regulatory processes or agreed decision-making protocols, such as the Codex's guidelines for the conduct of risk assessment[116] or standards regarding best practice in impact

[114] OECD, Recommendation of the Council on Improving the Quality of Government Regulation, Docs OCDE/GD(95)/95, OECD/LEGAL/0278, 9 March 1995; see also OECD, APEC-OECD Integrated Checklist on Regulatory Reform: A Policy Instrument for Regulatory Quality, Competition Policy and Market Openness (2005).

[115] Codex Alimentarius Commission, Guidelines for the Development of Equivalence Agreements Regarding Food Imports and Export Inspection and Certification Systems, Doc. CAC/GL 34–1999 (1999); see also more recently Codex Alimentarius Commission, Proposed Draft Consolidated Codex Guidelines Related to Equivalence, Doc. CX/FICS 20/25/7, February 2020.

[116] See, e.g., Codex Alimentarius Commission, Working Principles for Risk Analysis for Food Safety for Application by Governments, Doc. CXG 62-2007 (2007); Codex Alimentarius Commission, Principles and Guidelines for the Conduct of Microbiological Risk Assessment, Doc. CXG 30-1999 (1999; amended 2012, 2014).

assessment.[117] Still others address the general characteristics of good-quality regulatory systems and set out broad 'meta-principles' of good regulatory practice that they ought to follow. Illustrations include the International Organization of Securities Commissions' Objectives and Principles of Securities Regulation,[118] or the Codex's Guidelines for Food Import Control Systems,[119] or even the principles of 'good regulatory practice' contained in recent free trade agreements. And some international standards take the form of templates, with empty areas to be completed, alternative options to be considered and wide variation at the level of implementation left open. Even a document as apparently prescriptive as the United Nations Conference on Trade and Development's Model Law on Competition illustrates this modality, in its combination of generally drafted model provisions, combined with commentaries that illustrate alternative approaches to interpretation and implementation at the national level.[120]

There are many reasons why second-order artefacts are so prevalent in the world of international standardization, but one of them has to do with the nature of consensus-building in an expert context. Although different standards-setting bodies use different decision-making procedures, essentially all are deeply technoscientific in nature: expert working groups are typically central to the process; deliberation takes place largely in a technical idiom; decision-making usually cannot proceed in the absence of expert consensus; and the legitimacy of international standards depends heavily and explicitly on their technical quality.[121] But the practice of generating 'technical consensus' only sometimes involves agreement in the sense of eliminating differences of opinion and approach. It also involves bracketing and deferring differences and treating still others as matters of implementation or legitimate choice. The construction of expert consensus, in other words, is often a process of selectively setting differences to one side, avoiding or deferring hard choices or deploying techniques for making certain differences irrelevant or less salient rather than resolving or

[117] See, for example, the wide range of international standards on impact assessment promulgated by the International Organization for Standardization and even the standards set out by the International Association for Impact Assessment, available at www.iaia.org/index.php, which defines itself as a 'global network on best practice' in impact assessment.

[118] IOSCO, 'Objectives and Principles of Securities Regulation', May 2017, available at www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf.

[119] Codex Alimentarius Commission, Guidelines for National Food Control Systems, Doc. CXG 82-2013 (2013); Codex Alimentarius Commission, Principles for Food Import and Export Inspection and Certification, Doc. CAC/GL 20-1995 (1995); Codex Alimentarius Commission, Guidelines for the Design, Operation, Assessment and Accreditation of Food Import and Export Inspection and Certification Systems, Doc. CAC/GL 26-1997 (1997).

[120] See, e.g., the recently revised Chapter IV in United Nations Conference on Trade and Development, Model Law on Competition (2020), revised Chapter IV, Doc. TD/RBP/Conf.9/L.2, 18 September 2020.

[121] On international standard-setting as a self-consciously techno-scientific mode of governance, see generally Winickoff and Bushey, 'Science and Power in Global Food Regulation: The Rise of the Codex Alimentarius Commission', 35(3) *Science, Technology and Human Values* (2009) 356; Jukes, 'The Role of Science in International Food Standards', 11(3) *Food Control* (2000) 181; T. Buthe and W. Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (2011).

overcoming differences. Such processes are particularly conducive to the production of second-order standards.

For some observers, the second-order quality of many international standards is a sign of their weakness – second-order standards, after all, allow for significant variability at the level of implementation and sometimes do very little to promote substantive convergence. This is true, but it misses another point – namely, that these sorts of artefacts are designed to do different kinds of work on regulators and regulatory systems: not (just) the work of convergence but (also) the work of reflexivizing the regulatory process. Tailorable templates do indeed provide guidance, but they also specifically enable and encourage consideration of, and adaptation to, local circumstances and conditions. Common procedures (such as risk assessment protocols) help to facilitate mutual intelligibility and scrutiny between regulatory systems, providing a basis on which to distinguish 'credible' from 'unreliable' decisions and systems. Checklists encourage self-evaluation on the part of regulators. General principles of good regulatory practice enable discursive processes of justification, reflection and negotiation as different stakeholders argue over the conformity of this or that aspect of domestic regulatory systems with international standards. International architectures for peer review and international oversight that often accompany international regulatory standards enable mutual scrutiny across regulatory jurisdictions. Even the non-binding quality of standards in itself can be said to promote reasoned decision-making above all, given that it provides for the possibility of justified departure as much as rigorous conformity. Whether it is through processes of international monitoring, peer review or even dispute settlement, international standards are often used as reference points for reflexive self-evaluation by regulators, who must either explain how they are in conformity with such standards or justify their departure from them.[122]

Against this backdrop, then, I suggest that the nature and dynamics of international standardization are not fully captured by the common-sense imaginary in which dominant regulatory models orientated around the construction of maximally competitive markets are globally disseminated. Instead, international standardization can also be productively understood as a technique for embedding regulatory systems within specific cultures and practices of expert reflexivity[123] and as another technology through which regulatory decision-making is reconstituted as a technical and reflexive practice – with significant and complex consequences for the evolving distribution, purposes, limits, modalities and targets of regulatory power.

[122] On the central place of reasoned justification for departure from international standards in even the most prescriptive aspects of the regime of international standards, see SPS Agreement, *supra* note 99, Art. 3; TBT Agreement, *supra* note 84, Art. 2.4, and the jurisprudence under them.

[123] For another argument in which international standardization works in a reflexive mode, see Dunn, 'Standards and Person-Making in East Central Europe', in Collier and Ong, *supra* note 8, 173; Strathern, 'Robust Knowledge and Fragile Futures', in Collier and Ong, *supra* note 8, 464.

4 Contemporary Transformations

The main thrust of the argument so far, then, is this. Neo-liberalization, conceived as an ongoing historical process of desacralizing the post-war social state, set in train two related but distinct dynamics of state transformation. First, it was connected with the reorientation of government around the problematic of competitive order: how, in other words, to create the right institutional conditions and 'ground rules' for well-functioning competitive (market) order? Second, it was connected with the reconstruction of the state as a subject of competitive order: this is the state as a reflexive, dynamic, competitive and entrepreneurial actor. These two impulses – sometimes contradictory, sometimes convergent – have helped to generate the heterogenous mix of state formations that currently characterizes the global order. At the risk of reductionism, we can say that the institutional impulse has produced a diverse family of hybridized market formations, recognizably related but without a single institutional core. The reflexivizing impulse, for its part, has largely manifested in two concrete developments: first, the integration of specific regulatory decision-making routines oriented towards regulatory optimization and incremental learning and, second, the generation and deployment of new domains of reflexive state expertise as a way of challenging existing practice, prompting critical self-reflection and thereby promoting competitive innovation. I said at the outset of this article that my aim in offering this rereading of neo-liberal global economic governance is, ultimately, to provide analytical purchase on the contemporary 'post-neo-liberal' moment. In this section, then, I turn to the question of how this reinterpretation of the past helps us to understand the present.

Usually, the idea that we are entering a 'post-neo-liberal' order is accompanied by a claim that neo-liberal policy orthodoxies have lost their appeal. Prevailing ideas about appropriate state-market relations are changing, and state forms are in the process of changing with them. The precise nature of these changes is still unclear – and, indeed, up for grabs – but, at some general level, they involve a much greater acceptance of an active role for the state in enabling and steering the green transition, in midwifing disruptive innovations associated with the fourth industrial revolution and in ensuring the 'geo-economic security' of populations and their vulnerability to various forms of externally induced economic coercion and shocks.

There is no question that such shifts are indeed underway. For example, a number of global developments – instances of economic coercion, the Russian war on Ukraine, post-pandemic disruptions to supply chains – have convinced key states that the risks to critical supply chains associated with economic integration are too great to ignore. Both the USA and the EU are actively working to promote the 'resilience' of their supply chains and seeking to shape investment (and disinvestment) decisions in ways that will likely radically transform the existing geography of transnational production. The tools they are using to do so – export restraints, subsidies, measures to limit technology transfer, strict investment screening, 'friend-shoring' more generally – are precisely those that fell from favour during the neo-liberal period. For another thing, the twin challenges of the climate crisis and the latest digital revolution have also

eroded confidence in existing economic models. The non-interventionist conceptions of the role of the state that underpinned the neo-liberal order appear inadequate in the face of such challenges, and states are increasingly adopting measures – immense governmental assistance programmes and the active promotion of competitive subsidization – that at least constitute a turn away from that order. Finally, these developments have been accompanied by a larger and more general ideological transition in a number of key states, combining a pendulum swing away from 1990s-style economic liberalism in certain major states with a newly powerful public scepticism (on both left and right) of the economic orthodoxies that underpinned the early decades of economic globalization. If, as is commonly argued, the global financial crisis brought with it a general loss of faith in neo-liberal models, perhaps we are only now seeing this loss of faith translated in alternative institutional arrangements and policies.

The shifts are at the same time generating contestation at the international level as a variety of actors seek to reshape global economic governance in light of these shifts. What we are seeing at the level of global economic governance, then, is the early stages of the negotiation of new ground rules for global competition, including new ways of drawing the boundaries between legitimate and illegitimate state action, based on new and emergent state formations and associated interests and ideologies. Anne Orford captures and explains this dynamic with clarity: '[T]he struggle for what counts as the normal relation between state and market has been at the heart of trade disputes and negotiations for at least the past century', and the system of international economic law has 'functioned to embed and transmit ideas about the proper relation between state and market'. We are now in a period, she notes, in which 'normal' is again up for grabs, and a variety of actors are opening up spaces to offer new frameworks to 'differentiate legitimate from illegitimate interventions in the market' and to encode them in institutions and structures of global economic governance.[124] The current period, then, is structurally similar to the period at the end of the 20th century when the 'normal' of the social welfare state lost its purchase and the USA, alongside other key actors at the time, sought to entrench their particular models of state regulation and theories of statecraft into the new architecture of international economic law and governance.

All this sounds right. But building on the argument set out above, I want to suggest that contemporary developments are suggestive of a second, additional, dimension of change – namely, a change in the characteristic techniques, objectives and targets of reflexivization characteristic of the neo-liberal period. If the account set out in section 2 is right, the emergence of neo-liberalism signalled the erosion of the 'self-evidence' of the social as the zone, target and objective of government.[125] For neo-liberal thinkers, the core problem of the social state was its pretension to speak unproblematically on behalf of a mystified 'social'. Neo-liberalization was a process in which the claim of the social state to speak on behalf of the social body, to be animated by socially shared values and to promote the cohesion and health of the social

[124] Orford, *supra* note 14, at 66, 70.
[125] Collier, 'Second Thoughts', *supra* note 8, referring to Rose, 'Death of the Social', *supra* note 38.

body was subject to sceptical re-evaluation and lost credibility. Neo-liberalization, on this reading, was a process of reflexivizing the social – that is to say, institutionalizing practices of self-critical reflexivity in forms of government based on a social principle – and it offered up the competitive process as an alternative principle of government that displaced the question of collective value.

What we are seeing now, I suggest, is a second iteration of this dynamic but with the competitive order as its new target. It is now the self-evidence of competitive ordering itself that is being eroded as an organizing principle of government. If claims to speak on behalf of the social were always at some level mystifications, it is equally true that political projects to build the institutional foundations of competitive order rest on similarly shaky mystifications: specific and often not explicitly justified value choices about the kind of competitive order that is desirable, the proper terms and conditions of competition, the boundaries and limits of competitive dynamics and so on. In this second iteration, then, new and repurposed techniques of reflexivization are turned not upon the (no longer recognizable) social state but, rather, upon the idea and architecture of competitive order itself. This translates into an imperative always to keep the institutional form of competitive order in play, in question and under construction and self-consciously to establish forms that allow for easy reconfiguration.

It is beyond the scope of this article to offer an account of the complex causes, and historical drivers, of this shift. But it is worth noting that precisely the same events that are cited as driving these changes in the institutional story, noted above, are directly relevant here. The rise of the Chinese 'state capitalism', as well as the proliferation of hybrid market forms more generally, has not only eroded US hegemony but also relativized the specific institutional form of US-style market capitalism. Both the climate crisis and new geo-political frictions, for their part, have provided exogenous (material, ecological) grounds for evaluating the adequacy of this or that competitive market order. The race for supremacy in frontier digital technologies has drawn new attention to the different kinds of competition that may be generated by different competitive orders and valorized new conceptions of 'disruptive innovation' as the cornerstone of innovation and competitiveness. The point is simply that the range of contemporary challenges we now face not only exposes the weaknesses of particular policy programmes and orthodox institutional configurations but also more deeply exposes the value choices that are necessarily made in the construction of any competitive order.[126] Competitive order, then, no longer serves as a viable principle for displacing questions of social value, or at least not without some retooling.

This retooling is emergent, and all I can do here is offer one suggestive description of what it might mean, in concrete terms, to 'reflexivize' competitive ordering as a provocation to further reflection and refinement. At the national level, a series of

[126] To elaborate just a little: it is evidently impossible to construct competitive orders without making choices regarding the appropriate conditions of competition, establishing the shared 'rules of the game', distinguishing between harmful and beneficial competition and identifying the proper boundaries between competitive and other forms of social ordering. The mere notion of 'competitive order' does not contain its own answers to this question, and, in practice, they are mostly answered by implicit reference to a specific (and contestable) normative framework.

global shocks and crises have brought into sharp relief a number of weaknesses in the governance capacities of the regulatory state and helped to frame new objectives for the deployment of state regulatory power. If the regulatory state was, at some foundational level, orientated towards the creation of the right institutional foundations of competitive markets, there is an increasing recognition that more targeted regulatory action may be needed to build the capacity within economic systems to both withstand and adapt to shocks. This is visible within a newly prominent discourse on regulatory 'agility' and 'resilience', which focuses on the establishment of agile governance frameworks for domestic markets, both as a way of ensuring their resilience to external shocks and also as a way of enabling and accommodating the sorts of disruptive innovations which are increasingly understood as the source of competitive advantage in a rapidly changing economic and technological environment.[127]

While aspirations to 'agility', 'flexibility' and 'resilience' have in some manner been staples of regulatory policy for decades, they are beginning to be associated with a somewhat recast set of objectives and priorities. This is reflected prominently, for example, in the OECD's work in this area, which has begun centrally to emphasize the need for 'agile regulatory governance' as a way of responding to contemporary global challenges, including climate change and digital transformations.[128] Its paradigm of regulatory agility emphasizes the need for regulators to build 'flexible and adaptive regulatory frameworks' to actively promote innovation-friendly environments and enhance 'systemic resilience'.[129] An example of the former would be the relatively recent innovation of the regulatory 'sandbox', which represents a means of promoting innovation through the establishment of localized, provisional and experimental prototype regulatory regimes in which new approaches can be tested in controlled environments. The paradigmatic example of the latter is the emergence of a new set of regulatory initiatives designed to promote supply chain resilience, not just through the promotion of domestic production but also, more importantly, through the creation of a variety of new mixed public-private mechanisms for monitoring supply chain risks and vulnerabilities and new arrangements to facilitate firms rapidly shifting between sources of supply as needed.[130] What seems to be at stake, then, in these specific usages of 'agility' and 'resilience' is a somewhat recast role for the regulatory state: less the establishment of optimal ground rules for a well-functioning competitive order and more the facilitation of (radical) innovation and (disruptive) competition through ongoing regulatory experimentation and differentiation at the level of those ground

[127] For illustrative products of this discursive environment, see the Agile Nations Charter, agreed 18 September 2021, available at www.gov.uk/government/publications/agile-nations-charter/agile-nations-charter-accessible-webpage-version; see also World Economic Forum, 'Toolkit for Regulators' entitled 'Agile Regulation for the Fourth Industrial Revolution', available at www3.weforum.org/docs/WEF_Agile_Regulation_for_the_Fourth_Industrial_Revolution_2020.pdf.

[128] OECD, Recommendation of the Council for Agile Regulatory Governance to Harness Innovation, Doc. OECD/LEGAL/0464, 6 October 2021.

[129] *Ibid*.

[130] See Indo-Pacific Economic Framework for Prosperity Agreement Relating to Supply Chain Resilience, available at www.commerce.gov/sites/default/files/2023-09/2023-09-07-IPEF-Pillar-II-Final-Text-Public-Release.pdf.

rules as well as the orchestration of a form of resilience based on the rapid adaptation of economic arrangements in response to unexpected shocks.

These shifts are mirrored in a parallel set of changes at the international level as the need to promote domestic resilience and agility gives rise to a demand for frameworks of international cooperation, which are themselves flexible and dynamic. It also entails a shift of sorts, away from a conception of global economic governance as establishing fixed and universal ground rules for a global order of free and fair conditions of competition, towards a conception in which such conditions of competition are increasingly adaptable in light of changing conditions, shocks or unforeseen developments. Thus, for example, within the specific context of trade governance, we are beginning to see experimentation with new, more dynamic legal forms to take the place of the free trade agreement. Traditional trade treaties, especially multilateral treaties, have long been criticized as excessively rigid: too hard to change with existing consensus-based decision-making; too quickly out of date in a rapidly changing world; and unable to respond flexibly to major shocks and disruptions. The slow and rule-bound machinery of formal treaty-based adjudication is similarly criticized as non-responsive or not suitable for a world in which rapid technological and economic change demands constant policy experimentation and rapid cycles of governance innovation. In this context, former US Trade Representative Robert Zoellick has called for new forms of economic diplomacy, which 'aim[] to achieve resilience and foster adaptation', while the WTO itself has called for more attention to the need to strengthen the resilience of both trade governance and the trading system.[131]

As a result, a number of major trading powers – most notably, the USA – have begun to negotiate new more flexible structures for economic cooperation beyond formally binding trade treaties. One of the best examples is the US-led Indo-Pacific Economic Framework, formally launched in mid-2022 and billed as a new type of flexible and open economic arrangement. It is an arrangement built around institutional structures for ongoing cooperation as well as shared high-ambition regulatory standards and interoperable regulatory frameworks, but it de-emphasizes legally binding treaty-based liberalization commitments. Its recently concluded supply chain agreement is said to be 'designed to enable IPEF [Indo-Pacific Economic Framework for Prosperity] partners to work together collaboratively to make supply chains more resilient, efficient, transparent, diversified, secure, and inclusive, including through information exchange, sharing of best practices, business matchmaking, collective response to disruptions, and supporting labor rights'.[132] Another example is the EU-US Trade and Technology Council, a framework for transatlantic cooperation on rules around new technologies, established in June 2021. Other initiatives – still nascent but under consideration – have a suggestively similar orientation. The proposed transatlantic Global Arrangement on Sustainable Steel and Aluminium, for example, which has been under development since 2021, is an initiative designed to facilitate trade in

[131] Zoellick, 'Before the Next Shock: How America Can Build a More Adaptive Global Economy', 101(2) *Foreign Affairs* (2022) 86; WTO, *World Trade Report 2021: Economic Resilience and Trade* (2021), especially section D.

[132] See note 129.

sustainable steel products, again built on a flexible foundation of aligned standards and compatible regulatory systems amongst its partners. And the Group of Seven's Climate Club, launched in late 2022, is another initiative with similar features – an arrangement designed in part to foster new markets in green productions technologies and products, open to members with shared regulatory ambitions. Also illustrative in this context is the recent Australia-Singapore Green Economy Agreement, which foreshadows the construction of dynamic and evolving alliances around high-ambition and compatible regulatory frameworks in the context of the green transition.

Closely related, free trade agreements themselves have undergone significant evolution in a similar direction. The latest generation of free trade agreements are consciously being designed as more dynamic agreements, increasingly focusing on establishing frameworks for ongoing negotiation and cooperation on issues as they arise. One way that this has been happening has been through the incorporation of 'rebalancing' mechanisms, which have begun to play a more central role in the trade policy of both the USA and the EU.[133] These are mechanisms according to which the terms of mutual market access established under trade agreements can be adjusted ('rebalanced') as conditions change in specified ways – for example, as regulatory standards diverge, new competitive distortions are introduced or new national security interests develop. But probably the best illustration is the new emphasis that has been given to regulatory cooperation within trade agreements over the last decade or so.[134] Trade treaties now routinely provide an infrastructure for routinized cooperation and collaboration between regulators across jurisdictions. Such cooperation can

[133] I have in mind here, for example, rebalancing mechanisms such as that contained in Chapter 3 of Title XI (level playing field) of the UK-EU Trade and Cooperation Agreement as well as the USA's new emphasis on rebalancing as a mechanism for solving national security-related (and perhaps other) disputes in the WTO. See, e.g., Statements by the United States at the Meeting of the WTO Dispute Settlement Body, 27 January 2023, section 6, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/january/statements-united-states-meeting-wto-dispute-settlement-body.

[134] A large literature on this important development has emerged since the early 2010s. See, e.g., Steger, 'Institutions for Regulatory Cooperation in "New Generation" Economic and Trade Agreements', 38(4) *Legal Issues of Economic Integration* (2012) 109; Bollyky, 'Regulatory Coherence in the TPP Talks', in C.L. Lim, D. Elms and P. Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement* (2012) 171; Mumford, 'Regulatory Coherence: Blending Trade and Regulatory Policy', 10(4) *Policy Quarterly* (2014) 3; Alemanno, 'The Regulatory Cooperation Chapter of Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences', 18 *JIEL* (2015) 625; Marks, 'The Right to Regulate (Cooperatively)', 38 *University of Pennsylvania Journal of International Law* (*UPJIL*) (2016) 1; Wiener and Alemanno, 'The Future of International Regulatory Cooperation: TTIP as a Learning Process toward a Global Policy Laboratory', 78 *Law and Contemporary Problems* (*LCP*) (2015) 103; Bull *et al.*, 'New Approaches to Regulatory Cooperation: The Challenge of TTIP, TPP, and Megaregional Trade Agreements', 78 *LCP* (2015) 1; Polanco Lazo and Sauve, 'The Treatment of Regulatory Convergence in Preferential Trade Agreements', 17(4) *World Trade Review* (2018) 575; Mertenskotter and Stewart, 'Remote Control: Treaty Requirements for Regulatory Procedures', 104 *Cornell Law Review* (2019) 165; Liu and Lin, 'The Emergence of Global Regulatory Coherence: A Thorny Embrace for China?', 40(1) *UPJIL* (2018) 133; Kauffmann, 'Adapting Regulation to Globalization: A Typology of Approaches to the Internationalization of Regulation', in E. Brousseau, J.-M. Glachant and J. Sgard (eds), *Institutions of International Economic Governance and Market Regulation* (2020); Hale, 'Regulatory Cooperation in North America: Diplomacy Navigating Asymmetries', 49(1) *American Review of Canadian Studies* (2019) 123; Hoekman and Sabel, 'In a World of Value Chains: What Space for

take many forms, but special attention is paid to recognition and equivalence arrangements, which can promote the cross-jurisdictional interoperability of regulatory systems.[135] In addition, trade deals are now often accompanied by various forms of side instruments relating to regulatory matters – from data adequacy determinations, to food safety equivalence decision, to cooperation on banking and financial regulation. While there are many reasons for these developments, they are noteworthy in this context for their legal modalities: regulatory arrangements of this type are highly tailorable to different countries, provisional and revisable, adaptable to new conditions, responsive to novel risks and instabilities and relatively rapidly negotiated (at least compared to treaties).[136]

Finally, there are potential shifts at the level of techniques and practices of reflexivization. In section 3, I noted that the practices of reflexivity characteristic of neoliberal economic governance were those oriented towards regulatory learning and optimization – expert peer review, routinized impact assessment, international judicial processes of rational-sceptical review, measurement and ranking of governance quality. There is an emerging literature on recent developments within the work of international economic institutions which experiment with alternative forms of reflexivity. Desai, for example, describes new styles of reflexive development practice that self-consciously establish 'framework[s] for political contests over the form and content of regulation' and 'explicitly disclaim[] any predetermined content' of the process of institutional reform.[137] Fleur Johns and others have explored recent experiments with the use of the organizational form of the 'policy lab' in international development practice, connecting it with a new style of hyper-reflexive governance built around the iterative development of prototype governance technologies.[138] Others describe a turning inwards of practices of reflexivity and their embedding within international economic institutions themselves. Dimitri Van den Meerssche, for example, has described in some detail the ways in which reflexive techniques of management and decision-making associated with the neo-liberal regulatory state – especially the deformalized managerial technology of risk management – were turned inward on the World Bank itself in ways that self-consciously and explicitly unsettled prevailing interpretations of the bank's limited mandate.[139] In this context, it is also worth

Regulatory Coherence and Cooperation in Trade Agreements', in B. Kingsbury *et al.* (eds), *Megaregulation Contested: Global Economic Ordering after TPP* (2019) 217; P. Mavroidis, *Regulatory Cooperation: Lessons from the WTO and the World Trade Regime*, E15 Task Force on Regulatory Systems Coherence – Policy Options Paper, E15 Initiative, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum (2016).

[135] See, e.g., OECD, Recommendation of the Council on International Regulatory Co-operation to Tackle Global Challenges, Doc. OECD/LEGAL/0475, 10 June 2022, s. III.3.b.

[136] For a survey of these developments and their significance, see, e.g., Lang, 'Global Governance of Regulatory Deference', *European Journal of Risk Regulation* (forthcoming).

[137] Desai, *supra* note 103; see also D. Desai, *Expert Ignorance: The Law and Politics of Rule of Law Reform* (2023).

[138] Johns, 'From Planning to Prototypes: New Ways of Seeing Like a State', 82(5) *Modern Law Review* (2019) 833; see also the special issue on 'New Ways of Seeing Like a State – Change, Critique and Complicity in Global Governance', 33(3) *Law and Critique* (2022).

[139] D. Van den Meerssche, *The World Bank's Lawyers: The Life of International Law as Institutional Practice* (2022).

noting ongoing efforts to embed practices of reflexivity within those international organizations and spaces engaged in making international regulatory standards.[140]

Evidently, each of these developments has its own complex history and politics, which cannot be reduced to a single logic. My aim here is not to provide an explanation of the causes of these developments nor of the specific constellations of actors and interests that are driving it: it will be clear, I hope, that I am not even sure that a system-level explanation is possible. Instead, my aim is to provide an account of the character of contemporary transformations, and, at this level, it seems to me that, in combination, these examples suggest something important about the current moment. In each of these domains, we are seeing an internalization of reflexive principles at the level of global economic governance itself, as the institutional underpinnings of global competition (global markets as well as interstate competition) are themselves made adaptive, dynamic, mutable and, in some sense, provisional. All of them reflect a sense that practising global governance itself entails not only designing and promoting reflexive practices for others but also direct participation in them. They reflect the idea that part of the proper role of global governance is to establish the conditions for its own iterative reconstitution in the context of evolving global problems, even to the extent of continually reopening the possibility of rupture. All can be understood as the sorts of practices and forms that emerge when neo-liberal techniques are reoriented and redeployed to do their work of reflexivization on a new target – namely, the institutions of global economic governance itself.

It may be useful to think of this in terms of the recomposability of competitive (market) order. If the quasi-constitutional architecture of global economic governance was conceived, in the neo-liberal imagination, as the solid foundation on which competitive ordering was built and from which reflexive economic statecraft emerged, now it is that quasi-constitutional architecture that is imagined as problematically rigid and that needs to be made more reflexive, adaptable, dynamic and resilient. If the idea of the 'social' required desacralization then, now it is the mystified notion of 'competition' that is being subject to the same treatment. Thus, practices and structures of global economic governance are themselves being subject to the dynamics of proceduralized self-reflection, provisionality, revisability and adaptability, with the aim of producing a competitive order that is itself self-consciously mobile and adaptable even at the level of its structural foundations. Thus, techniques of regulatory governance are (among other things) oriented towards the production of competitive orders that have the feature of 'recomposability' both in the sense that condition of competition can be readily modified as conditions change and in the sense of encouraging and maintaining an endogenous capacity for disruptive change.

[140] See, most recently, OECD, *supra* note 135, s. III.3.e.

5 Conclusion

My suggestion in this article has been that many international lawyers may need to revisit their understanding of the nature of the late 20th-century neo-liberal transformation of global economic governance. I have offered a reinterpretation of that period, in which neo-liberalization is understood in this context as the historically specific deployment of a set of critical technologies for desacralizing the social state by reference to competitive ordering. These technologies have helped to reconstitute the state as a reflexive and entrepreneurial subject of competitive order and embed it within a reflexivized set of regulatory cultures and expert practices.

This interpretation is offered as a complement to the more prevalent programmatic interpretation in which the neo-liberal is understood as a model of state-market relations and global economic governance functions to normalize and propagate that model. My argument, in other words, is for an interpretation of neo-liberalization that takes account of both its institutional character and its character as a set of techniques of reflexivization as well as the relation between them. This provides us with a more adequate account of the ways in which global economic governance has been centrally involved in the production and global propagation of the regulatory state as a heterogenous and evolving family of state formations.

I have also suggested that this reinterpretation offers us an additional perspective on the present 'post-neo-liberal' moment, in which the regulatory state is itself being retooled in response to a series of shifts – geopolitical, economic, climatic, political and ideological. Where most observers describe this shift in institutional terms, I draw attention to another dynamic, in which new techniques of reflexivization are being trained upon new objects in the service of new aims. Specifically, in the current moment, techniques of reflexivization are turned not upon the (no longer recognizable) social state but, instead, upon the idea and architecture of competitive order itself. This entails a new problematic: not so much the establishment of the fixed preconditions of a well-functioning competitive order but, rather, the constitution of 'recomposable' competitive orders that reflexively establish the conditions of possibility for their own iterative revision, organized in part around discourses of resilience and disruptive innovation. This problematic is new, but it is important to remember that the dynamics that have brought us to this point have been set in train precisely by the success of neo-liberal technologies of government in transforming the practice of statecraft.

A proper exploration of how these dynamics are playing out in contemporary global economic governance will have to wait, evidently, for another day, and as such this interpretation of the current moment remains speculative. Even so, it seems to me to offer an illuminating framework for interrogating the contemporary moment and poses an additional and potentially productive set of questions for exploration. What specific techniques of reflexivization are characteristic of the current moment? How do they differ from prior periods, and what is at stake in these differences? Where, by whom and for what purposes are they currently being deployed and with what effects? What forms of reflexivity are being produced, and precluded, by them? What kind of work on the state is being performed through them, and how are state forms

being variously reconstituted as a consequence? If, as Collier and Ong suggest, forms of global governance are 'delimited by specific technical infrastructures, administrative apparatuses or values regimes',[141] then these questions may tell us something important about the shape and dynamics of the next chapter of global economic governance.

[141] Collier and Ong, *supra* note 8, at 11.