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Introduction

This paper provides an outline of some of the issues I am dealing with in connection to a research project being undertaken on Global Corporate Citizenship (GCC). This research is in its early stages so what is provided here is preliminary and designed to raise rather more issues than it solves. In particular, I am concerned to deal with what it might mean for companies to be described, or to describe themselves, as Global Corporate Citizens. In the general literature on corporate responsibility there is a move away from companies being described, or describing themselves, as Corporately Socially Responsible (CSR) to them re-describing themselves as Global Corporate Citizens (GCC). I want to ask what is involved in this (self)description as 'citizens'? Can citizenship be applied first to companies and then extended into the global arena in which they operate?

When looking at the actual practices of companies that claim to be either simply *socially responsible* or more recently *corporate citizens*, there is not much difference between them. Much the same 'content', as it were, in terms of the claims to what they are doing or should do, adheres under both titles. So is it merely a matter of words? Does it make any difference that on the one had they claim to be socially responsible or on the other to be global citizens? I will argue that this is a very significant change in terminology that is having, and will continue to have, significant affects that need to be analysed and appreciated. To explore these implications, the following analysis situates GCC in a wider framework of the progressive juridicalization and constitutionalization of the international arena more generally.

From National to Global Considerations

Several important issues follow when considering the fate of political citizenship as claimed in an international context. Traditionally, citizenship pertains to a particular territorially defined and designated polity, one characterized by a 'constitution' of a sort (whether written or unwritten) that lays down a certain *Grundnorm* for that polity (Kelsen 1945 – see below). This defines the rights and obligations associated with citizenship broadly speaking. But what happens in an international context? What does 'globalization' do *to* citizenship or *for* citizenship? Other than undermining the clear link between territory, jurisdiction and citizenship can it inaugurate a different field or domain for citizenly behaviours and activities, one in which, for instance corporations can legitimately claim a new form of global citizenship (Logsdon & Wood 2002, Post 2002, Crane & Matten 2005, Thompson 2005)?

A preliminary issue is whether national legal orders have ever been quite as distinct as they are commonly thought, and one for which the present advent of globalization

represents a radical break. Given an international system of states, their mutual recognition already presumes a certain common terrain of legal communication within which territorial distinctions are marked. Thus 'judicial borrowings' between states are nothing new. And territories themselves are perhaps less about drawing geographical or spatial boundaries than they are about drawing social distinctions between peoples. 'Territory' is primarily a way of dividing up and governing people, not space. In addition, jurisdiction does not necessarily coincide with territory. Jurisdiction is either claimed or designated by a definite act that provides legitimacy and force for juridical undertakings. Take the European Court of Justice for instance (the nearest the EU has to a supreme court). This does not have any inherent jurisdiction either over the territory of the EU states or in terms of some 'natural' defence for the rule of law. Rather it has jurisdiction only in so far as the EU Treaties and similar instruments have conferred jurisdiction upon it in particular areas. It is a creature of the Treaties, and one limited by their embrace. (In commercial and civil matters, EU jurisdiction is handled by the 1968 Brussels Convention on Jurisdiction.) Similarly with the way that some US courts operate extra-territorially, so as to claim jurisdiction over matters that either do not happen on their territory or which take place in another jurisdiction (as in the case of the US Patriot Act and Foreign Corrupt Practices Act, and for companies the Alien Tort Claims Act (ATCA))[i].

One of the contexts in which this issue has arisen is in the debate about the possible emergence of a *Lex Mercatoria* (new merchant law). This refers to a transnational legal order for global markets that has developed outside of national or international law strictly speaking (though it is often thought to be heavily implicated in the latter – e.g. Delaume 1989). MNCs, for instance, have arrived at commercial contracts that they submit neither to national jurisdiction nor to national substantive law. Instead they agree on international arbitration and the application of a transnational common code or law that is independent of any national legal order. This is often thought to be a form of 'global law without a state'. Indeed, for some, this development is at last destroying law's hierarchy – killing the sovereign father (and with it the 'Kings two bodies'), exposing the law's paradoxes and triggering its self-destruction (Tuebner 1997a, p.777). Globalization in thus the harbinger of a truly heterarchical and transjurisdictional legal order (more on this later).

On Citizenship

In the matter of citizenship the classic distinction is between 'status' and 'acts' citizenship. 'Acts' citizenship stresses active engagement or involvement in public affairs and in the public sphere. Such acts invoke a civic virtue. But they are necessarily voluntaristic and behavioural in character, and ultimately represent a 'claim' only. Agents can in principle pick and chose which aspects of citizenly behaviours they wish to uphold or stress. This conception mainly plays on a normative dimension, stressing the ethical aspects of citizenship and liberal 'shared values'.

On the other hand 'status' citizenship invokes rights and obligations determined within the context of a definite polity that are embodied in a clear legal form. They are associated with the democratic exercise of membership, the undertaking of formal duties and obligations, and with legitimacy and accountability. Here the characteristics of citizenship are thrust upon citizens in a 'take it all' fashion. They

have no choice over which aspects to entertain or avoid (e.g. over taxation or mobilization during war).

One context in which this distinction is pertinent, and in which the possible emergence of a different kind of citizenship can be considered, is the growing interest in the idea of 'global corporate citizenship' (GCC) (Logsdon & Wood 2002, Post 2002, Thompson 2005). A small but expanding number of large companies are claiming to be 'good global corporate citizens', particularly MNCs that operate in a number of countries where local production standards are variable or non-existent. In their promulgation of internal standards associated with the ethical, environmental and working conditions associated with their businesses, these companies claim a certain citizenly status. In addition, there are a vast range of organizations that are promoting the idea of GCC: various international and national public agencies, private professional bodies and associations, stock-market indexing and credit rating companies, charitable organizations, religious based organizations, (I)NGOs, and many others besides. A preliminary way of making some sense of this matrix of advocacy, monitoring and scrutiny in outlined later.

But before that it is worthwhile trying to make some preliminary sense of company attitudes towards CRS and GCC (Ward and Smith 2006). This is done in the context of Figure 1.

[Figure 1 near here]

Companies can be divide into those who might think social and ethical values (s&ev) are central for their business activity and those who think these are irrelevant. This is shown along the horizontal axis. On the other hand there is the business and financial rewards dimension to company activity. Do they think that a commitment to s&ev enhances their bottom line or is irrelevant to it, or, perhaps put slightly differently, would the market reward these business for their commitment, or otherwise, to s&ev? This dimension is shown on the vertical axis.

We could begin to place different companies in the four cells marked out by the figure, and what is shown is a preliminary classification. It contains some headings, some sector affiliation and some possible named companies. None of this distribution is meant to be rigorous. It is for illustrative purposes only. The 'Bottom Feeders' would be those that felt a commitment to s&ev to be irrelevant, and that it would have no impact on their financial and business rewards or performance. At the other extreme are those companies that felt s&ev to be vital to their business and that it would have, and indeed does have, a very significant impact on their financial and business performance. These are designated the 'FTSE4Good-ers', named after the FTSE index on which the leading socially responsible companies are to be found (see: < http://www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp>). Between these tow cells lie to 'Cynics' on the one hand and the 'Ethical Traders' on the other.

The former represent those companies who might think that s&ev are basically irrelevant, but that recognize a pragmatic commitment to these is a sensible (if unfortunate) necessity because it does provide financial and business rewards and benefits. Often these are the companies that have experiences a public campaign against their activities (or who wish to ensure against one), and who want to present a

more appropriate public face as a result. From the point of view of those committed to s&ev in business, or who advocate for this, moving companies from this cell to the top left hand side one is the main objective.

Finally, there are the 'Ethical traders' who are fully committed to s&ev but who reap a thin reward from it. In part this would be because the importance of s&ev to business outcomes is not yet fully recognized by the market in these cases. Alternatively, it could be because these companies are small and often inefficiently run[ii].

What Figure 1 does is provide an initial mechanism for classifying company activity in respect to social and ethical values in business. It presents the 'company layer' of the full CSR/GCC picture. Below two further layers to this picture are built up, one dealing with advocacy and scrutiny organizations and the other in respect to the overall governance framework. Before that, let us get back to the issue of citizenship in respect to companies and examine the relationships between acts and status citizenship in this respect. There are several possible ways of linking these two sets of concerns, i.e. status and acts citizenship. Here I pursue these linkages via a discussion of the concepts of 'networks', constitutionalization, and juridicalization. As will be seen, these are not mutually exclusive approaches but overlapping ones.

Networking

The idea of networks has had a central place in analyses of the international system in a number of different contexts (Thompson 2003, chp.7). Recently networks have been directly introduced into the area of the juridicalization and constitutionalization of the international system via Anne-Marie Slaughter's widely read and commented upon book *A New Word Order* (Slaughter 2004; for commentary see, for instance, Berkowitz 2005, Perju 2005 and Mills & Stephens 2005 – and see also Appelbaum, *et al* 2001). In this book Slaughter argues there is a growing international cross-fertilization of legal systems driven by the making of judicial decisions on the basis of considerations and precedents set by foreign courts; what she characterises as an international network of courts, judges, legal scholars and other officials. These networks are producing new forms of judicial reasoning and judgement that are thoroughly trans-national and trans-territorial in character, she argues. But – and here is the interesting and important feature – for her these judgements are made in the context of domestic courts. They are not made by international courts, in which she places little confidence. Thus her approach goes to reinforce the importance of *domestic courts* and *municipal justice* in codifying international law as against international courts and 'global justice'. This emergent global networking system, however, is to be encouraged, she suggests, as an expression of a new global civic society. I return to the specific character of this-- as I see it -- later.

The idea of networking is also salient in terms of how law firms are themselves internationalising (Morgan and Quack 2005). One way is to develop an explicit network model of organization through the formation of a kind of international 'federation of partnerships', gaining access to different national markets though affiliation with overseas firms and gaining expertise in different legal systems on the back of resource and competence exchanges within the extended partnerships. Although this is not a particular strength of how American legal firms have expanded

overseas (they have done this more via M&A activity and branching), the expansion US firms is a key feature of the way the law is internationalising via the spread of US legal norms and practices; it is spearheaded by American law firms.

The question of the progressive constitutionalization and juridification of the international arena has arisen in several functional areas and institutional contexts. The main functional areas are trade/commercial activity, human rights and the conduct of wars/conflicts. The main institutional contexts from the point of view of trade activity are the WTO in particular and the EU. From the point of view of commercial activity involving companies, it is the UN, OECD and various international arbitration bodies that represent the leading institutional thrust, plus activity dependent upon US legal regulation. There is a massive literature on this but I confine my comments to several of the more pertinent aspects that suit the purpose of the research being pursued here.

Constitutionalization

The background features to the 'constitutionalization of the international system' in the economic sphere (the one most pertinent to the idea of GCC) is agued to be a transformation in the nature of liberal internationalism; namely a move away from 'embedded liberalism' towards that of 'neo-liberalism' in the conduct of international trade matters (Howse & Nicolaïdis 2001; Walters and Larner 2004 – actually, what is missing here is a reference to Wilsonian liberalism, which is important in judging the approach of Slaughter referred to above. This is taken up later).

Embedded liberalism – something argued to have characterized much of the post-Second World War period in the 20th Century -- was essentially seen as a *political compromise* between countries, where they gave up the worst excesses of protectionism in exchange for the possibility of some autonomy in the conduct of domestic economic policy making, particularly in the area of macro-economic management. It involved *diplomatic bargaining* between countries to establish compromises on trade policy, as exemplified by the GATT mechanism. The key criterion in international trade talks was that of *non-discrimination* between partners as embodied in the 'most favoured nation' (MFN) clauses of the successive GATT negotiating rounds and treaties (trading terms negotiated with a favoured trading partner should be extended to all other trading partners, i.e. there should be no discriminations between them). Difficult to uphold and police -- and therefore often compromised as it was in practice -- this regime lasted roughly from the early-1950s until the late-1970s when one of its crucial supports – the semi-fixed exchange rates and a *de facto* dollar standard – was abandoned in favour of a flexible exchange rate regime.

This ushered in the period of neo-liberalism as market and competitive solutions were sought for economic problems. The key criterion for negotiations also changed as *obstacles* gradually displaced non-discrimination as the object of policy. This in turn opened up to international scrutiny the *domestic economic characteristics* of trading countries in the context of their *internal regulatory practices* and *the conditions for market access.* Along with this, the emphasis on the market was accompanied by moves away from political bargaining towards the resort to international public and private law as the means to settle disputes. In its wake the GATT (an 'agreement')

was replaced by the establishment of the WTO (an 'institution') to oversee trade matters. The WTO mechanism is one recognized in international law, and its practices are those that have led to charges that trade law is being 'constitutionalized' particularly as its Appellate Body (AB) delivers judgements on appeals over Panel Rulings on trade matters (Cass 2005).

The differences between the GATT and the WTO tend to revolve around the consequences of dispute resolution mechanisms in each case (Howse 2000). Under the GATT a consensus of member states was required in order for dispute rulings to become binding. This involved the creation of a 'positive consensus'. Dispute rulings were drafted with a 'diplomatic vagueness' often expressing an intuitive kind of law, one based on shared experiences and unspoken assumptions. It was driven by a rather cosy bureaucratic and technocratic 'club' culture, based upon shared values and a consensus that supported economic liberalism on essentially pragmatic grounds, and it met in closed session. One feature was that compliance was rather high.

With the WTO, however, dispute rulings are accepted as binding unless all the members – including the winning party – vote *against* its adoption (requiring a more difficult to achieve 'negative consensus'). In addition, determinations of when and how the loosing party must act to implement a ruling are subject to arbitration, and should the loosing party not implement a ruling in accordance with the findings of the arbitrator, retaliation (involving the withdrawal of trade concessions to the loosing party by the winning party) is automatically authorized. Moreover, as noted above, the legal determinations of any Panel (known as a 'tribunal of first instance') may be appealed to the AB (which is a standing tribunal of seven jurists, three of whom sit in each case). The establishment of the AB, then, meant that the relatively 'informal' nature of the previous GATT disputes mechanism was undermined. As an adjudicative institution, separated from the bureaucratic and technical culture, the AB is open to review and scrutiny and embodies contestable legal interpretations where values can no longer be presumed to be shared. In this context economic liberalism became much more of a dogmatic insistence (in a sharp *laissez-faire* style), rather than accepted as a shared pragmatic compromise.

The results of the AB decisions then become precedents and have force of international law, though they were not formally part of the original treaty agreement, and nor are they mandated by any clear political process other than that initiated by the general WTO Treaty signed in 1995 (Broude 2004). A key change is thus with the new liberal technology of rule embodied in the WTO disputes mechanism and the AB, which involves a novel way to adjudicate and enforce obligations in an international economic context (though it tends to mirror the adversarial practices of Anglo-American adjudication -- see below).

Two other elements in this transformation are also worth noting. The first of these involves the shift from what is often termed '*cooperative-competition*' between states towards '*competitive-cooperation*'. The key change is the move of competition to the forefront of the relationships between states in the economic field. Whereas before, states found it efficient and convenient to cooperate between themselves to foster 'limited' and 'managed' competition, or at least to 'accommodate' competition, now the issue is the perceived centrality of competition in the relationships between states, where cooperation between them – such that it is – is afforded a secondary status and

seen as a complement of, or support for, competitive relationships. This means that an 'international common law' becomes necessary to adjudicate disputes between what are now considered to be competing parties: diffuse reciprocity has given way to competition between policy norms. Inter-governmental cooperation in setting up a body like the WTO only goes to further the mechanisms of competitive relationships that it is designed to support, where 'common values' cannot any longer necessarily be presumed or shared.

Of course, the WTO does not involve companies directly since it is an intergovernmental organization settling trade disputes only between governments. However, it involves companies indirectly in that these lobby governments to take up grievances and are often instrumental in pressing for changes in WTO rules (in their favour)[iii]. But a further development is more directly associated with MNC activity. The shift from embedded liberalism to neo-liberalism arises because the integration of the international economy may itself have moved from a position of '*shallow interdependency*' to one of '*deep integration*'. Shallow interdependency involved rather straightforward trade *exchanges* between otherwise relatively 'closed' economies. With the growth of FDI and the operation of MNCs however, deeper integration has occurred. FDI and MNCs 'open-up' domestic economies to international economic pressures in a novel way, so that issues of domestic 'obstacles' to access and the domestic regulatory practices designed to support this become an impediment to trade openness and an object of scrutiny and policy.

What Does Consitutionalization Mean?

There are many definitions of 'constitutionalization' (for an accessible discussion of definitions and issues see Loughlin 2004). Broadly speaking this can be seen as those social practices that constrain economic and political behaviour and that give substance to civic duties and obligations (thus directly implicating 'acts' and 'statuses'). According to Cass (2004) constitutionalization involves six features. These are shown in the vertical dimension to Figure 2. These features include: the involvement of a political community, processes of participation and deliberation in law making, a realignment of relationships between parties (what or who has *comptenz-competenz*), social acceptance and legitimacy, a new fundamental device or 'norm' (*Grundnorm* – Basic Law), and finally new behavioural constraints. In addition, there are several approaches to constitutionalization or areas where it is newly operative. These are shown along the horizontal dimension in Figure 2. They included: institutional and managerial rule making, rights based constitutionalism, judicial norm generation, and transnational or transformational constitutionalization – broadly involving all those networks of judicial reasoning mentioned above (and the one favoured by both Slaughter and Cass).

[Figure 2 near here]

It might be tempting to begin filling in the matrix boxes show in Figure 2 with the idea of GCC in mind, but at this stage I leave this as a possibility to be undertaken after further analysis. In addition, it is not altogether clear at this stage that this is an entirely appropriate framework in the case of GCC, since there is not as yet much specific and *formal constitution building* going on in this area it would seem (as

pointed out below, at the moment it is more like quasi- juridicalization, or *informal* constitution building).

Clearly, any such constitution building in this or any other areas could implicate 'citizenly activities' of a sort. Indeed, one of the interesting points to have emerged from preliminary investigations is that acts and statuses can be appropriately discussed in this context. There are good reasons to be sceptical of the whole acts approach to citizenship leading instead to a stress on the fundamental importance of status as the basis of citizenship. Why is status of such fundamental importance? It is because status citizenship as conferred by law is very difficult to undermine. It provides security against its easy denial. Acts citizenship, on the other hand, is much easier to undermine since it is transitory and ultimately amounts to a claim only: it can be simply denied or ignored (of course, this also makes it easier to invoke). In part this scepticism is also due to the rather loose way 'citizenship' is discussed in the context of sociological and cultural approaches to citizenship. In fact, there is an interesting literature to be explored here, e.g. Ong (1999) and Lowenhaupt Tsing (2005) who take an explicitly ethnographic approach to identifying 'cultural citizenship' as diasporic and emigrant communities spread across the globe creating multiple identities. As yet, however, these have not figured centrally in the discussions of citizenship that I am aware of and the overwhelming approach in a cultural context is still to over emphasise acts and to neglect statuses (as designated by law). However, it may be that genuinely citizenly statuses can be conferred other than by law – through various cultural mechanisms perhaps. At this stage I leave this for further investigation.

On the other hand, in the realm of law there is a strong tradition that emphasises behavioural acts, and this is the basis of a critique of the whole international constitutionalization process from those hostile to it. For instance Rabkin (2004), offers a polemical neo-conservative riposte to this trend which, despite its provenance – or, perhaps, precisely because of it – provides some telling arguments against the notion of international constitutionalization (and the 'pooling of sovereignty' idea which is associated with it in his mind) which on the surface at least seem quite compelling.

But an approach to law known as the pure theory of law, as originally advanced by Hans Kelsen (1945), provides a more theoretically telling account of the possible relationships between acts and status citizenship. Kelsen developed his approach in the 1920s very much in a Civil Law context, though in his 1945 book he argues this can be extended to a Common Law environment. In a long section entitled *Nomodynamics* he discusses the notion of 'norm' as a key constituent in the construction of a positive legal order (pp.111-78). On page 149 he suggests "The judicial decision may also create a general norm." This introduces a section on the role of judicial acts in creating law. For Kelsen there is the original act of the constitution (a political act I think) which creates the realm of the Basic Norm (*Grundnorm*), and then there are various 'subsequent' judicial acts involving lawyering and decisions by judges which create what he calls 'general norms'. These general norms then constitute precedents for subsequent legal decisions. But this kind of judicial act of creating a new individual (but of necessity also general?) norm operates by applying a previously established and higher level norm. In doing this the judge must establish the presence of the conditions of the general norm which are

present in the concrete situation being adjudicated, ascertain the facts that condition and sanction, and stipulate the penalties. In this way these judicial acts are *constitutive* (of law), rather than simply *clarificatory* (of already existing law), or *declaratory* (of verdicts, for instance). And here legal 'acts' are the handmaiden of legal 'statuses', which thereby could provide a rigorous way of reconciling the two aspects of citizenship if pushed further. Of course, this also makes (legal) 'acts' the progenitor of 'statuses'. But it should be noted that this discussion of norms has nothing necessarily to do with 'ethical norms'.

Indeed, Kelsen's development of his 'pure theory' approach was designed to precisely avoid introducing 'moral' issues into the foundation of Law. Normativity for him is a matter of the Law specifying what should be done (an 'ought' process) but one grounded in the validity and legitimacy of certain authorities to 'will' such an activity, not one grounded in their ethical proclivities. Of course, this is the site of a long dispute, and Kelsen was less than consistently clear as to how this is organized and its meaning (for a representative introduction to the state of the debate see Paulson & Paulson 1998; for more recent contributions that follow up on the issues of the role of language acts in constituting law, and their relationship to statuses originally conferred by the *Grundnorm* (an 'is/ought' event) see Bindreiter 2001, van Roermund 2002, and Conklin 2006). Clearly, this requires further theoretical reflection, clarification and elaboration, which I leave for another time.

Of course, this opens up a fresh set of problems in its own right. It has led, for instance, to the idea that a 'global constitution' could be being brought into being precisely as more and more acts of this type are promulgated, indeed as more and more people just talk about it (since speech is an act as well). In the case of GCC, the more companies and others claim to be 'global corporate citizens' the more likely they are to be believed and the more likely this will actually come about in the form of a self-fulfilling prophesy (e.g., in the case of the UN's Global Compact referred to later see in particular McIntosh, Waddock & Kell 2004). In a somewhat different register, this looks like the tactic being used by David Held (Held 2004 -- amongst others e.g. Falk 2000) in calls for a 'new global covenant' and international cosmopolitanism. The constant invocation of such a programme could possibly call it into being if enough are persuaded of its virtue. Here we see, then, a possible consequence of such 'acts speak'.

Juridicalization

It is important to note that not all of the juridicalization of the international is a form of constitutionalization. Constitutionalization is a limited form of the juridicalization of the international sphere, which itself can take many forms and involve many legal and regulatory practices (Grimm 2005, Kelemen and Sibbitt 2005, Levi-Faur 2005). It is centrally associated with international public law. The classic subjects of international public law are sovereign states, not citizens as such, and sovereign states decide for themselves which pieces of international law they accept. Unlike citizens who are subject to the law of the land, even if they disagree with it (see above), states are subject only to that international law they chose to formally ratify. States must give their explicit consent, even in the case of customary international law. And they can in principle pick and chose which parts of treaties or conventions they chose to ratify.

But in addition to this public international law there is, of course, natural and private law (Weinrib 1955). Here is where the question of the juridicalization of the international most controversially arises. A key feature of this process – and the one that takes it into its most developed form – is to see the emergence of a truly global 'private authority' via the establishment of a set of institutions that arbitrate private contracts. Amongst these bodies are the Paris based International Chamber of Commerce, the London Commercial Court, and the International Law Association. In addition, there are a series of intergovernmental organizations like the United Nations Commission on International Trade Law and its Institute for the Unification of Private Law, the International Maritime Organization, the Hague Conference on Private International Law (and many others besides, see Cutler 2003) that operate to codify, unify and adjudicate such private law. The question is what do these amount to and how important are they in the 'global' legal system?

For the likes of Gunter Teubner (1997a, 1997b, 2002) these developments are a key indicator of a wider radical transformation of the international system wrought by the forces of 'globalization'. In Teubner's new world globalization finally breaks the link connecting the law to democratically constituted political discourses and practices. It produces a double fragmentation; cultural polycentrism and functional differentiation. New 'linkage institutions', like those mentioned immediately above, create a new law directly by transjurisdictional operations without being translated into formal political issues. They escape and evade regulatory claims of both national and international law and practice, and form a legal sovereignty of their own. This global law has no legislation, no political constitution, no politically ordered hierarchy of norms. It is a 'polycontextual' law; law with multiple sources displaying no unifying perspective, produced by different mutually exclusive discourses of society. Such a system of recursive legal operations works in terms of more than one code, combining conjunctural and disjunctural operations, connected through transjurisdictional operational networks. It displays a heterarchical multitude of legal orders rather than a clear and traditional differentiation into legislation and adjudication; a plurality of law production comprising a patchwork of ethnic and religious minority laws, rules of standardization, variable professional disciplines, contracting, intra- and inter-governmental rule making, etc. Curbing the abuses of power – by the rule of law in the traditional sense – will not help in civilizing this many headed hydra. Indeed, we must face the impossibility of constitutionalizing this legal multiplicity in the language of legal restraint or the arbitrariness of the sovereign. In the final analysis, there is no sovereign power left.

What to make of this vision? The problem is that it may be little more than an interesting flight of fancy. Even Teubner recognizes that such law – if it exists in a stable and significant form – is always judged against and according to existing legal orders. Indeed, the strong trend in the contexts that Teubner celebrates is towards the Anglo-Americanization of such law (Teubner 1997 a, p.782; Kelemen, & Sibbitt 2004; Levi- Faur 2005, Applebaum, *et al* 2001, Part 4). It is being driven by international legal firms and MNCs who all still have their own strong national organizational patterns and routines. The older and traditional trans-European network of constitutional lawyers and arbitration judges, who found and cultivated a specialist niche in the ICC and Hague Conference arbitration panels, are being displace by new aggressive transnational legal firms under Anglo-American and German legal

dominance. What is more, the empirical evidence suggests that the appeal to such transjurisdictional law in highly limited and marginal, and may even be declining, as MNCs and others seek judicial redress in national courts (Dasser 2001). Gessner, *et al* (2001) thus conclude: "The *lex mercatoria*, at least at the present time, seems to have far greater significance in the minds of legal scholars and sociologists of law than it does for merchants themselves" (p.18)

But whist a strong *lex mercatoria* may not be in the making, there is little doubt that there remains a definite general trend towards a juridification of social, political and economic life, at both the domestic and the international levels. This seems unstoppable. In many ways this also parallels, and indeed, is part of, the 'privatization of authority', something that impinges in the case of those many organizations mentioned above that seek to manage and regulate GCC.

Can a Company be a 'Citizen'?

Can corporate bodies like companies be considered as citizens even of a particular polity, let alone at the international level? They are certainly creatures of law. Companies are incorporated in law as subjects independently of those who own them or work in them. This means, for instance that they can sue and be sued in their own name, independently of those who either work in them or own them. Strictly speaking, then, the shareholder does not 'own' the assets of a company. These are invested in the company itself. The shareholder owns the right to share in the distribution of any surplus generated by the company. Shareholders cannot seize the company's assets at will: there is no unconstrained possession and they have no proprietary entitlement in the company's assets as such. The company owns itself. And the managers are also legally constrained to work in the best interests of the company in the first instance, not the shareholders. The manager's role is to supervise the continued financial and legal reproduction of the firm – to maintain it as a 'going concern' and 'keep the capital intact', etc. Obviously, a different set of legal conditions hold if the company is in liquidation: creditors having prior interest over shareholders in this instance. But even here both creditors and shareholders are similarly constituted as 'claimants' with only a contingent title in respect to the company's assets. What property rights do in this instance, therefore, is attribute no more than a capacity or capability to initiate something (like a claim on the assets of a firm), which guarantees nothing in terms of outcomes but only contingently arranges a series of possibilities for legal disputation and actionable endeavour in the courts (see Thompson 1997 for the implications of these legal points for the democratic control of companies).

In fact, there are several features of the rights that firms can claim that do parallel those of ordinary citizens. The clarification of these is probably easiest to identify in the case of US legal practice since here there is appeal to the Constitution for clarification (Aligada 2006). The distribution of these is shown in Table 1 below.

[Table 1 near here]

Several implications follow from these points. First it shows how claims are a contingent consequence of the status of companies as created by statute law. Companies are always incorporated in a definite jurisdiction. But could this give them

the status of being citizens of the polity in which they are incorporated? Clearly, in some respects it does as indicated in the Table. But what it crucially does not confer are rights associated with 'political citizenship', roughly indicated by those aspects of legal citizenship included in the bottom half of the table. A corporation is a legal 'person' (or subject), but it is a 'fictitious person' or 'virtual person'. Strictly speaking citizenship is a legal status only afforded to *natural persons*.[iv] And natural persons must posses certain attributes to qualify: they have to be cognate beings, able to rationalize and make decisions. It is analytically incorrect therefore to apply the legal term 'citizenship' to anything other than a natural person (it would be like asking whether a dog or a fish, or even a mushroom, can be a citizen). In the normative sense however, there seems no reason why a corporation cannot be considered a normative citizen. That is, the same 'acts tests' can apply to human persons and corporations: a corporation can perform good works, support community initiatives, reduce its deleterious impact on the environment, etc. However, all this just shows how poorly defined the normative dimension of citizenship is. To talk of corporate citizenship in this sense should be recognised for what it really is, no more than a rhetorical strategy --- an attempt to disguise a policy option, or set of options pursued, within a inappropriate discursive category. Recalling what Marx had to say about utopian socialism – that the bourgeoisie want the proletariat to love it – there are no problems with corporations trying to be loveable, but they should be loved for the right reasons! To call this 'citizenship' is a confusion of categories. We need a new category here, or perhaps an older one – namely corporate social responsibility (CSR). That is probably an adequate one to describe the normative aspects of 'lovesick' companies!

Thus the approach adopted here parts company with what could be termed the 'organizational-ethical' approach to corporate citizenship (Matten &Crane (2005), Moon, Crane & Matten (2005)). This approach stresses a normative and ethical notion of citizenship to the neglect of its legal and positive definition. It celebrates an extended vision of the corporate social responsibility agenda, very much driven by a commitment to 'ethical acts' and participation by companies in fulfilling – or taking over -- civic duties in the name of their 'values'. This is considered in a basically 'domestic context', where deliberative democracy occupies a key role in pushing the normative agenda. Apart from the comments already made earlier about the shortcoming of this approach in respect to category mistakes and the dangers of a lack of attention to status aspects of citizenship, it also invests too much in the idea of *deliberation* to the detriment of *substantive* notions of democracy (deliberative norms refer to democratic aspects of activity such as transparency, due process, the representativeness of participants, etc.: substantive norms refer to rule of law, genuine contestation and compromise over policies and outcomes, separation of powers, including, crucially, an independent judiciary, freedom of the press, etc.). For deliberative democracy, 'procedure' is everything in terms of democracy, just as this now animates the commitment to a certain conception of citizenship by the corporate 'organizational-ethical' approach (see also Mills & Stephens (2005) who are rightly concerned about the lack of a commitment to substantive democracy in Slaughter's networking model of global judicial civic virtue).

In an overt international context, of course, it is convenient to underplay the status aspects of citizenship because these just cannot operate there in the same way that they might in a domestic context; there is no obvious substantive polity with the administrative or governing capacity to establish and enforce citizenship rights and

obligations. Instead we have a range of organizational bodies that have arisen to claim, advocate and monitor GCC aspect of MNCs business practices as they see them. These are not inconsequential in practice, and they *may* have a genuine impact on the nature of *some* international businesses in a CSR context (Thompson 2005). When faced with this combination of actual organizations, Figure 3 explores a preliminary way to categorise them. It illustrates the distribution of those bodies designed to advocate for and monitor the GCC activities of companies. Two types of political objective are shown (democratic sovereignty and social justice) and two types of regime (communitarian and cosmopolitan). Representative organizations that fit into each of the cells are also illustrated. A task for future research would be to add further examples so as to build a robust picture of the importance of each cell and the types of bodies that fit into them. This will also involve drawing a clearer distinction between those organizations of advocacy and those of monitoring, which are rather run together here. What Figure 3 does is to provide another 'layer' to the multi-level governance structure of CSR/GCC.

[Figure 3 near here]

But does a lot of the activity centred around what these organization do amount to 'constitutionalization' by the back door? Are we seeing an informal, unrecognised, almost surreptitious emergence of global constitutionalizing creeping up on us unnoticed as these organizations go about their business of advocating and promoting GCC?

Take the UNs Global Compact as an example. This was launched in 2000 as Kofi Annan invited the corporate world to join the UN in a partnership to advance the agenda of corporate citizenship. This involves a set of ten principles (not rules) associated with the usual issues of social responsibility: human rights, working conditions, environmental preservation, anti-corruption, etc. As of October 2006 there were 3689 signatories, 2900 of which were companies. These are voluntary codes of course and there is no enforcement mechanism. It is often described as an enabling and learning network (see McIntosh *et al* 2004). And this initiative has encouraged a set of other similar initiatives by the UN to engage the private actors in various forms of sponsorship for responsible behaviour (e.g. Principles for Responsible Investment). But there are issues over the nature of such a 'partnership' with private businesses, which the UN Department of Legal Affairs has been at pains to address (*Guidelines on Cooperation Between the UN and the Business Community*, July 2000). The UN is an intergovernmental body that has a clear status in international law. MNC are aggregations of resources and a jumble of national holding companies with no clear status in international law. So what exactly is the UN doing forging partnerships with these agents who thereby agree to adhere to its principles? A good deal of this is couched in quasi-legal language. And whilst there is a precedent for the UN to engage with civil society actors like NGOs, these are closely scrutinized (even regulated) in terms of their representativeness, their geographical location, organizational structure, etc. No such scrutiny is involved with partner companies. Anyone can join from anywhere.

Somewhat similar issues arise in the case of the OECDs Principles on Multinational Companies, though the OECD is not a recognized agent in international law. But its principles have a semi-official status. Each member state has a National Contact Point

charged with ‘enforcing’ the principles. This delegated agency is usually located in a government office (in the UK in the DTI). It can hear complaints against companies initiated by a number of actors, including accredited trade union bodies, employee associations and NGOs. However, companies cannot be sanctioned because, rather like the principles of the Global Compact, the OECD principles are also voluntary. They only involve moral suasion. The NCPs can, however, call for arbitration, and such meetings are conducted in a quasi-legal manner, though lawyers are not involved in the actual process. Information suggests, however, that lawyers are involved in the run up to any arbitration, providing advice and suggestions for strategy and tactics.

The point about these and other mechanisms that could be discussed here is that they smack of ‘constitutionalization’ by the back door. They would seem to involve, at least in part, an evolving semi-formal system of customary commercial law addressing issues traditionally associated with global corporate citizenship. They might thus be viewed as ‘acts’ that are thereby conferring ‘statuses’ that were either not intended or for which there is no proper legitimate authority.

The ‘Good Citizen’

A number of leading firms involved in the GCC movement claim to be ‘*good* global citizens’. What, then, is meant by the idea of a ‘good citizen’? Étienne Balibar (2004) suggests the good citizen is one that forsakes a more central or ‘primary’ allegiance or identity for a ‘secondary’ identity based upon the allegiance to a nation state. S/he is one who forsakes their *community* for a *citizenship*. And in particular, the ‘good’ citizen is one who ‘undoes’ their relationship with a ‘pervious’ realm of identity formation based upon a ‘community’ to join a new *national community or forum*, which itself confers a *citizenship* status as discussed above. Then, and only then, can the individual join their *new* community.

Thus this idea of a good citizen implies a distinction be drawn between community -- and allegiance thereunto -- and a citizenry allegiance; between status as a member of a community and status as a member of a national forum or citizenry. (Note here that both the act and the status are combined and conferred in such a single move?)

Clearly, this idea draws on a distinction between what might be called primary identity (PI) and secondary identity (SI). PI is assumed to be based upon attributes like class, sex, religion, familial position, regional of local association, linguistic grouping, ethnic status, etc., i.e. something ‘primary’ about existence. SI, on the other hand, is assumed to be based on national, civic or ‘public community’ attributes. I wonder whether this provides a basis – at least in part -- for distinguishing between the cultural emphasis on acts citizenship and the more political notion of status citizenship? Acts citizenship would seem to more close emerge from that activity associated with primary identities, while status citizenship would seem to be more closely associated with secondary identities.

What is the relationship between PI and SI? To be a good citizen requires the *subjugation* of the PI statuses to those of the SI statuses. Thus, in a way, the PIs are *folded into* the SIs; they (the PIs) become recognized and legitimized only by being registered first in the form of SIs statuses. In a sense this reverses the order of the

Identities: ‘first’ a citizen, ‘subsequently’ (also?) a member of a linguistic, ethnic or sexual ‘community’, etc. As might be expected, however, this is the site of a major resistance. The PIs resist being subjugated and integrated into the SIs. And this can take a long time to come about, and could be reversed (is being reversed?) as, for instance, transterritiorial religious fundamentalisms re-emerge in the modern world (Thompson 2006).

This idea of the good citizen casts a particular shadow over, or into, the space of sovereignty. The ‘bad citizen’ – one who takes to be a citizen *just in name*, who cannot cast of the bonds of their primary community perhaps – undermines sovereignty by being cosmopolitan, trans-national, extra-territorial in their allegiances or identities. It is the good citizen who *confirms* sovereignty.

Many of these observations could illuminate the idea of the good *corporat*e citizen, but in this case in a reverse manner. It is the good global corporate citizen who would seem to precisely cast off the burden on the national arena to become footloose and cosmopolitan.

Networks and International Liberalism Again

But what about Slaughter’s rather less systematic approach to networks in this area? I have tried to situate her approach in terms of Figure 4, which adds a final ‘layer’ of governance, this time with respect to the global level. Whilst, again, this is a preliminary specification, the point in that Slaughter’s approach is very much driven by an ‘American’ cultural view of how constitutional and legal matters are to be treated. Given the division of Figure 4 into ‘popular’ and ‘constitutional/republican’ forms of democratic processes on the one hand, and the institutionalization of politics into ‘representative’ and ‘governmental’ forms on the other, her ‘networks of elites’ would fall into the ‘constitutional/republican- governmental’ cell.

[Figure 4 near here]

One could distinguish this, in particular, from a more popular but representative option, which might be characterized as another form of the World Government approach (involving deliberative law making by some form of popular assembly). In fact, this is close to the Wilsonian liberal view from which Slaughter is a pains to distance her own approach. Wilsonian liberalism (named after the US President in the 1920s) is one that attempts to replicate domestic courts at the international level; to project domestic law and institutions onto the international plane. It stresses the spread of education and liberal democratic values so as to establish institutions to resolve international disputes peacefully; encouraging domestic public opinions to restrain governments’ war-like tendencies. Under this regime, there is no world supreme court enforcing a monolithic international law. (One might reflect on the fate of this doctrine with the challenge of post 2001 -2003 US foreign and defence policy). In contrast, Slaughter’s own approach is what might call ‘liberal realist’ one.

Interestingly, there is an alternative proposal for how one might better govern the WTO in particular -- but which could be extended in principle to the international juridical system more generally -- which does not rely upon the operation of elite networks to secure some semblance of international ‘social legitimacy’. This is the

'stakeholder model' initially proposed by Richard Shell (1995). In the context of the WTO this would open up the disputes settlement mechanism to a wider set of stakeholders through an extension of standing rules to formally included private parties, as well the incorporation of various social, ethical and environmental norms within WTO law, such that stakeholders could actually use the WTO system to enforce such norms against Member States. Clearly, this would involve significant reforms in international law and its dispute settlement procedures, but it would help to widen the values and interests beyond the single minded focus on liberalizing trade to included things like distributive justice, human health and safety and environmental concerns. In Figure 3, this option is placed in the 'popular-democratic/governmental-institutionalization of politics' box of the matrix.

Which of these 'options' is either feasible or desirable in an international context? There are good reasons to have reservations about Slaughter's approach if this is a reasonable way of characterizing it. It neglects substantive democratic considerations in its emphasis on unrepresentative elites and displays many 'blind spots' about the undemocratic operation of domestic law and judges (particularly as in the USA). Again, it is procedural in character rather than concerned with administrative capacities, legitimacy and accountability. So far the neglected option is that given the name 'intergovernmentalism' in Figure 4; situated in the 'representative-constitutional/republican' box. The WTO is the illustrative organizational instance of this, the practices of which have been critically discussed above. But this was because of the tendency written into its particular organizational form that has lead to an 'over-constitutionalization' of its operations (Howse & Niolaïdis 2001, Broude 2004). One consequence of this is that intergovernmentalism is now neglected in international relations discussions; it is looked upon as the poor cousin, the least favoured and least relevant form of international governance in a so called 'globalized world' However, intergovenmentalism (sometimes called 'multilateralism') has much to recommend it, particularly -- as shown above -- in that it is national courts and national judicial arenas that continue to hold the key to the actual way adjudication is working in the current international legal environment (something also stressed by Slaughter herself). It offers at least an indirect form of accountability, via the way that intergovernmental bodies are staffed and controlled.

Conclusions

Are we witnessing the emergence of a nascent common law of international trade – if not a new *Lex Mercatoria* then a new form of international law? In the case of trade law there are signs of this (Wield 2000). The same regulatory measures are coming into existence within the jurisdictional reach of more than one trade regime (NAFTA; EU; WTO) which may even adjudicate simultaneously. There is considerable overlap and convergence in the material law of dispute settlement in these trade regimes, sometimes emerging egregiously by mutual adoption, sometimes jurisprudentially as in case law covering discriminatory internal regulation ('the removal of obstacles') or taxation. There is a general strengthening of private parties in all regimes, which are allowing and encouraging private party dispute resolution in a whole range of areas (even the WTO suffers from this as private actors can find ways to manipulate the system to reach adjudication under the guise of intergovernmentalism). This may not yet amount to full constitutionalization but may be enough to warrant the epitaph of an emergent common field of international trade law. What remains of considerable

concern however, is that a surreptitious ‘constitutionalization’ could be evolving almost unseen within the interstices of international common law associated with the ‘voluntary regulation’ of MNCs and other agencies.

However, if this is emerging, it is important not to over-exaggerate its significance and extent. Additionally, the key to understanding this is to see it in terms of its impact on domestic judicial review and national municipal law, rather than as something necessarily transnational in character. And just as international public and private law continues to retain its municipal reference points so too with the actual establishment of trade law amongst and between intergovernmental organizations and trading blocs (Duina 2006). Just because these regimes may be adopting similar formal legal precepts and protocols does not mean that the variable ways of operationalizing these are all the same. These vary in their application as between blocs – heavily dependent upon their existing legal cultures with which they interact -- where their ‘meanings’ are adapted and folded into existing practices and frameworks.

Finally, on the question of ‘citizenship’ this looks to be an inappropriate category to deploy in an international context. And this is not just a matter of nomenclature; it has significance that corporations cannot be considered as global citizens. It means that the attention must be politically directed back into the domestic arena, and onto multilateral inter-governmentalism once again.

FINANCIAL AND BUSINESS REWARDS	COMMITMENT TO EHTICAL VALUES IN BUSINESS: Irrelevant	Essential
Strong	**'CYNICS'** **Energy Co's, Extractive Industries, Wal-Mart, Mc Donalds**	**'FTSE4Good-ers'** **Novo Nordisk, Lefrage, BP, GlaxoSmithKline**
Weak	**'BOTTOM FEEDERS'** **Ryanair, Hedge funds**	**'ETHICAL PRODUCERS'** **Fair Trade Co's, Organic producers, Small co-op banks**

Figure 1: Company Attitudes Towards CSR/GCC

Figure 2: Features and Forms of Constitutionalism

Approaches to constiutional-ization	Institutionalized managerialism and rule making	Rights based constitutional-ization	Judicial norm generation	Transnational and transformational constitutionalization
Features of constitutionalization				
Political community				
Processes of participation and deliberative law making				
Realignment of relationships				
Social acceptance and legitimacy				
New fundamental norm (‘Grundnorm’)				
Behavioural constraints				

Figure 3: Sorting Out GCC Advocacy Organizations

POLITICAL OBJECTIVE	TYPES OF INTERNATIONAL REGIME: Communitarian (closed borders)	TYPES OF INTERNATIONAL REGIME: Cosmopolitan (open borders)
Democratic Sovereignty	OECD/ WB	W.E.F. ICGN WBCSD
Social Justice	UN-GLOBAL COMPACT	(I)NGOs

Note: WB = World Bank; WEF = World Economic Forum; ICGN = International Corporate Governance Network; WBCSD = World Business Council for Social Development; (I)NGOs = International Non-Governmental Organizations.

Figure 4: Governance Regimes for Global Legal Order

		TYPE OF DEMOCRACY	
CHARACTER OF INSTITUTIONAL-IZED POLITICS		Popular	Constitutional/ Republican
	Representative	**WORLD GOVERNMET** (Deliberative, law making constitutional assembly to develop and authorise new international legal order**)**	**INTERGOVERN-MENTALISM** (**WTO)**
	Governmental	**STAKEHOLDING** **(INGOs)**	**SUPRA-NATIONAL NETWORKS of ELITES**

Table 1: CORPORATIONS CLAIMS ON FORMAL 'LEGAL CITIZENSHIP' (USA)

They can claim the following:

a) equality of protection and treatment
b) trial by jury
c) protection from unreasonable searches and seizures (e.g. of property)
d) protection from takings without compensation
e) the exercise of due process
f) non-discrimination.

They cannot claim the following:

a) protection against self-incrimination (i.e. the prevention of a witness from testifying against him-self or her-self);
b) that corporations and their officers are the same 'person' (thus corporations are separate from their officers -- whereas there is no analogously similar claim that can be made by 'natural person)
c) claim certain protections whilst abroad
d) they cannot command a vote, or exercise any of the political consequences that follow from this capacity.

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[i] The ATCA was passed by the first US Congress in 1789 and was initially designed to tackle piracy on the high seas. Formally it still gives US federal courts jurisdiction over "any civil action for a tort only, committed in violation of the law of nations or a treaty of the United States". It can be read as giving US courts jurisdiction over non-criminal abuses that occur anywhere in the world, so long as the alleged wrong would violate international law (A-M. Slaughter & D.L. Bosco 'Alternative Justice' < http://www.globalpolicy.org/intljustice/atca/2001/altjust.htm>). As of 2006 there had been 36 corporate ATCA cases initiated in the US mostly over alleged human rights abuses by companies. But not a single one of these had by then been formally adjudicated on. (Baue, B. 'Win or Lose in Court' < http://www.globalpolicy.org/intljustice/atca/2006/06winlose.pdf>).

[ii] It should be noted that this figure pertains to the possible effects on performance and bottom line financial considerations of attitudes towards e&sv only. It does not illustrate the overall financial performance of companies. For instance Ryanair is a highly profitable company despite it appearing as a 'bottom feeder' here.

[iii] In fact, companies are absolutely central to the way the WTO functions and has evolved. See, for instance, Sell (2003) for a fascinating account of how the WTO was influenced by American companies in particular over the TRIPS Agreement and the copyrighting of intellectual property.

[iv] There may be some partial exceptions to this norm. For instance, the Lord Mayor of London is not an elected official but an appointed one. And he or she speaks and votes for City (commercial) interests in the governance/government structure of the City of London. In addition, in Hong Kong, there are special representatives of certain commercial interests who can vote in the legislature, who are not exactly elected by a constituency, but, in effect, appointed by it. However, these tend to be marginal cases, ones either of an historical anomaly with little real power, or arrangements designed to deal with very limited and unusual situations.

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