

W. G. HART LEGAL WORKSHOP 2006

*The Retreat of the State: Challenges to Law and Lawyers*

**Institute of Advanced Legal Studies, University of London**

**27-29<sup>th</sup> June 2006**

## **REGULATORY NETWORKS AND GLOBAL GOVERNANCE**

**Sol Picciotto**

**Lancaster University Law School**

### **ABSTRACT:**

There has not been a retreat but a transformation of the state, involving significant changes in both the public sphere of politics and the so-called private sphere of economic activity, and in their modes of interaction, especially law. The privatization of state-owned assets and the reduction of direct state economic intervention have not led to a reduced role of the state but to changes in its form, involving new types of formalized regulation, the fragmentation of the public sphere, the decentring of the state and the emergence of multi-level governance. This has been complemented by the increased salience of 'private' regulation, so that in many ways the apparently private sphere of economic activity has become more public. In fact, there has been a complex process of interaction with a blurring of the divisions between apparently private and public regulation. Despite talk of deregulation there has been extensive reregulation, or formalization of regulation, and the emergence of global regulatory networks, intermingling the public and the private. The transition from government to governance means a lack of a clear hierarchy of norms, a blurring of distinctions between hard and soft law, and a fragmentation of public functions entailing a resurgence of technocracy. The increasingly important role for regulation in global governance undermines the formalist view of law's legitimacy as deriving from national state political structures, and requires new approaches to articulating normative interactions that are more conducive to democratic deliberation, in order to establish the public interest firmly as the prime concern in all forms of management of economic activity.<sup>?</sup>

---

<sup>?</sup> An earlier version of this paper was given at a workshop on *Self-Governance and the Law in Multinational Corporations and Transnational Business Networks* at the International Institute for the Sociology of Law, Onati, in June 2005. I am grateful to the participants in and organisers of that workshop, especially Gerd Winter, for comments. Further comments welcome to [s.picciotto@lancs.ac.uk](mailto:s.picciotto@lancs.ac.uk). This paper is partially based on research conducted as part of a research programme supported by the Economic and Social Research Council under its Research Fellowships scheme, and I am extremely grateful to the Council for the opportunity for an extended period of research and writing.

## **1. INTRODUCTION: FROM GOVERNMENT TO GOVERNANCE**

The term governance has come into increased use, generally to describe changes in governing processes from hierarchy to polyarchy. In international relations theory, it denotes the management of world affairs in the absence of a global government (Rosenau and Czempiel 1992), hence the term 'global governance' has become commonplace. For theorists of the state it refers to the 'hollowing out' of the unitary state, or the decentering of government, and the shift to 'governing without government' (Rhodes 1997).

Two interrelated processes seem to have been involved, over the past 30 years. First, there have been major changes in both the political or 'public' sphere of the state and the 'private' sphere of firms, industry and other social institutions, as well as in the relationships between the two.

The most visible aspect has been the privatization of much of what was previously regarded as the public or political sphere, resulting from the sale of state-owned firms and assets, the introduction of contracting into public arenas, and the delegation of a range of activities (from waste disposal to the running of prisons) to service providers. Conversely, however, there has been a parallel and complementary trend, much less noticed or analysed, in which the apparently 'private' sphere of economic activity has become more public. The corporations and business networks which dominate the so-called 'market', even as they urge a reduction in intrusive state controls, find their activities governed by an increasing plethora of various types of regulation. Indeed, the biggest paradox has been the growth of industry and corporate codes of conduct, the private sector adopting public standards for itself, although this has generally been in response to pressures from their customers, workers and suppliers, and sometimes in order to forestall the imposition of legal obligations (Haufler 2001, Picciotto 2003).

The second and interrelated process has entailed transformations in the international coordination of governance. In the classical liberal model of the international system, states were recognized as interdependent, but coordination was primarily through governments, which had exclusive legitimate powers internally, and were allowed considerable scope to decide how to use those powers to fulfil their international obligations. In this system, national law was the primary form of governing private economic activity, and governments could insulate their internal management of the national economy from external forces and shocks by controlling cross-border flows of money and commodities. However, as the demands on government have become greater, national economic management has become more difficult and complex. At the same time, international economic liberalization since the mid-1970s has entailed the substantial removal of border barriers (tariffs and currency controls), greatly reinforcing the movement towards deeper international economic integration. But this shift towards more 'open' national economies did not create a unified and free world market. Instead, like an outgoing tide, it revealed a craggy landscape of diverse national and local regulations. Trying to deal with these differences has generated an exponential growth of networks of regulatory cooperation, coordination and harmonization. These are no longer primarily of an international character, but also supranational and infranational, frequently by-passing central government. They also reflect and reinforce changing public-private forms, since these regulatory networks are very often neither clearly state nor private but of a hybrid nature. Indeed, a major reason for the growth of corporate and industry codes has been concerns that state-based regulation is ineffective and leaves too many gaps (Haufler 2001, 114-5).

Thus, there has been a movement from the classical liberal international state system, towards one that is often denounced as neo-liberal, but is perhaps better described as post-liberal. The next

section will sketch out some of the main elements of these changes. The third section will analyze three main problematic features of the new landscape: the destabilization of normative hierarchies, the blurring of distinctions between normative forms, and the political problems caused by the fragmentation of statehood accompanied by the growth of technocratic governance. The final section will consider the role of the law and lawyers in managing global regulatory networks, based on a brief overview of some of the main recent theoretical contributions to this question.

## **2. DILEMMAS OF THE POST-LIBERAL STATE SYSTEM**

### *Changing Public-Private Forms and Relations*

The thrust of privatization since the 1980s, led in Europe by the UK followed by others such as Germany and France, entailed the withdrawal of states from direct involvement in economic activity, in particular by sales of state-owned firms and assets. Privatization appeared to be part of a wider move away from state-centred direction of the economy, especially as it was powered by anti-statist ideas and accompanied by much talk of deregulation and free markets. There were indeed pressures and proposals to restructure administrative arrangements in many states, aiming to dismantle state intervention. In practice, however, privatization often tended to produce little if any reduction of state activity, but instead changes in its form, with a shift to indirect provision of services within a regulatory framework (Vogel 1996, Feigenbaum et al. 1998, Prosser 2000). To paraphrase David Vogel (Vogel 1996), the apparent shift to 'freer markets' has meant more rules.

At the same time, as many authors have argued, the character of regulation has significantly changed, away from the top-down hierarchical model of state command, towards more fluid, often fragmented, and interactive or 'reflexive' processes (Ayres & Braithwaite 1992, Scott 2001, Parker 2002, Jordana & Levi-Faur 2004). This involves a mixture of legal forms, both public and private, and an interplay between state and private ordering (Ayres & Braithwaite 1992). Thus, a private legal form such as contract can be used as a tool to achieve both managerial and policy objectives, either when private firms are entrusted to deliver public services, such as refuse collection or hospital cleaning (Vincent-Jones 1998), or even entirely within the public sector if quasi-markets are introduced (Vincent-Jones 1999). This is not to say that such adaptations are always successful. Contracts provide flexibility, but private contract law does not easily accommodate and may undermine the public interest safeguards developed by public or administrative law, for example by shielding service providers from public accountability, perhaps even from legislative changes, and from liability to intended beneficiaries who are not parties to the service contract (Freeman 2000, Collins 1999). On the other hand, public bureaucracies find it hard to achieve genuine responsiveness to individual citizens, although they have tried to do so by adopting a managerial culture of service delivery (corporate plans, customer charters, performance targets, etc.). Hence, some authors have argued that traditional administrative law approaches should be modified and find new ways of applying public norms to private actors (Aman 2002, Freeman 2003).

Furthermore, the increased demands being made on the state have resulted in its fragmentation, as regulatory functions have increasingly been delegated to public bodies or agencies with a status semi-autonomous from central government. Such entities are generally not formally part of the government, and may be constituted as private organizations (Aquino and Bekke in Kooiman 1992), with a mandate either laid down by public law or by private legal forms such as contract, or a mixture of the two. They themselves may deploy a greater variety of forms and techniques of regulation. In the US, which had almost no state ownership and a long tradition of regulation by

independent agencies, there was some criticism of 'command and control' forms of regulation for being excessively legalistic and adversarial (Bardach & Kagan 1982), leading to new debates and theories about regulation and its design (e.g. Noll 1985). This has spread to other countries (notably Australia), and generated debates about new approaches to 'smart regulation' (Gunningham & Grabosky 1998). These build on the seminal work of Ayres and Braithwaite who argued that business regulation should be viewed as an interactive process, involving both firms themselves and civil society actors, with the 'big stick' of the state being a last resort (Ayres and Braithwaite 1992).

Indeed, from this broader perspective of regulation it can be seen that 'private' economic actors also may take on a regulatory role. As Colin Scott has pointed out, this may result from the state adopting a policy of 'deregulation', leaving a void which may be filled by a non-state actor: he cites an official inquiry into New Zealand's telecommunications regime which concluded that 'in the absence of state authority, the privatized company, Telecom New Zealand, had, in effect, become the regulator of the market' (Scott 2001, 337). Thus, private bodies may themselves assume tasks which are of a public character, or entail provision of 'public goods'. The role of private entities may even extend to controlling public as well as private activities, for example bond rating agencies and technical standards compliance certification institutions, both of which assess public as well as private entities (Scott 2002).

#### *Deregulation, Reregulation and Formalization*

Thus, the so-called 'retreat of the state' left a gap which was quickly filled by new institutions and techniques of regulation. In place of administration based on social ties within closed corporate-state bureaucracies, new types of formalized regulation have emerged. These developments have been seen as a shift from the Keynesian welfare state to a 'new regulatory state' better able to deal with the 'risk society' (Braithwaite 2000). Thus, the state having failed to deliver on expectations raised by state-centric models, now has a new role of trying to maintain coherence via steering, since roles previously considered as those of government have been recast as societal problems concerning a variety of actors (Pierre 2000). Influential ideologists have argued for a redefinition of the role of government, to separate 'steering' from 'rowing': politicians should define aims and targets but subcontract delivery, which should be competitive and aim to meet the needs of customers (Osborne & Gabler 1992). More critically, followers of Foucault have argued that the state is a 'mythical abstraction', without either the unity or functionality attributed to it, and suggested a broader understanding of 'governmentality' as involving 'a proliferation of a whole range of apparatuses pertaining to government and a complex body of knowledges and "know-how" about government' (Rose and Miller 1992, 175). In this light, the shift from welfarism to neo-liberalism means, according to Rose and Miller, that 'private enterprise is opened, in so many ways, to the action at a distance mechanisms that have proliferated in advanced liberal democracies, with the rise of managers as an intermediary between expert knowledge, economic policy and business decisions' (ibid. 200).

More broadly, the shift towards new forms of governance may be seen as rooted in the transition from the 'Fordist' model of industrial capitalism, to a post-industrial knowledge economy and learning society. In many ways this entails new processes of socialization of economic activity and de-commodification, as valorization involves far more than the sale of physical commodities. Thus, there has been a shift to 'lifestyle' products and the 'services' economy. At the same time, this has entailed pressures towards re-commodification, as seen in the very concept of the sale of

`services', as well as the increased emphasis on intangible property, or intellectual property rights (IPRs), ranging through trademarks, copyright, patents, and confidential information. While this re-commodification and re-individualization may re-establish the conditions for production and circulation based on exchange, it also requires dense institutional networks to manage the flows of information and remuneration. These institutions and networks are generally of a hybrid public-private character, for example the Rights Remuneration Organizations (RROs) that license activities such as the public playing of music, or the educational use of copyright works.

The emergence of a multiplicity of forms of regulation, and the constant variation, adaptation and experimentation with them, may be seen to reflect the basic modernist dilemma of attempting to govern an increasingly complex lifeworld. This is the conclusion of Michael Moran's study of the emergence of the new British regulatory state, which he describes as a roller-coaster ride of hyper-innovation and policy disasters, 'from stagnation to fiasco' (Moran 2003, 155ff). He analyses in detail the sharp transition from the stagnating traditional British system of government which he characterises as 'club rule', developed in the 19<sup>th</sup> century essentially 'to protect elites from democratic threats' (ibid. 41). This culture of cooperation resting on the gentlemanly ideal legitimized a high degree of independence from state control, based on self-regulation throughout the world of corporate business, banking and finance, and the professions, which became institutionally embedded in 1880-1918, and endured for two-thirds of the last century. However, the class compromises which underpinned this system were weakened by the end of empire and the collapse of social cultures of deference to authority in the 1960s; its transformation was then precipitated by the economic crisis of the 1970s and the ensuing renewed burst of globalization.

Thus, the British story, convincingly analysed by Moran, is one of the transformation of closed communities of self-regulation, in which privatization and the reduction of direct state management have been counter-pointed by a strong shift to the formalization and codification of regulation. His trenchant analysis of privatization argues that the new forms of management of infrastructure services emerged due to the exhaustion of *both* the traditional modes of public operation and of the regulation of private corporations, neither of which provided adequate accountability of managers. Government nevertheless stumbled into and through privatization. Some form of regulation was clearly needed since many of the privatized entities such as the utilities were monopolies, but the Office of Fair Trading (the competition authority) found the task too daunting, and the US regulatory commission model of 'juridified constitutionalism' was rejected as unduly bureaucratic. Resistance to change ensured the persistence of many elements of the club model, and the individual regulators were initially given broad discretion with little public accountability, shielded from politics behind their status as experts. However, this 'expert' decision-making depended on access to information, which the industry managers could control and contest, resulting in conflicts which inevitably became politicized.

This has led to an increasingly formalized regulatory system, with a fragmented but loosely coordinated epistemic community of regulators, whose mainly private negotiations with corporate managers are periodically brought to public attention by a drama or crisis. It has proved very difficult to design an adequate institutional framework enabling public debate of key issues such as the extent of public service obligations and the proper scope of competition, due to the substantial reliance on technocratic legitimation. In telecommunications, the public regulator has been criticized for slowness in requiring the privatized telephone company BT to give its competitors access to its fixed-line network. In the case of the railways, the public regulator-private operator split broke down due to the crisis over safety standards dramatized by successive rail crashes in

2000-1, leading to the establishment of a new type of body in Network Rail. This is a 'public interest company' supposed to 'operate on a sound commercial basis', with instead of shareholders members representing both the rail industry and the public interest (Darling 2002). Similarly, hospitals within the National Health Service are now being organized under Foundation Trusts, a 'strange creation that sits part way between the traditional public and private sectors [and] ... operate as free standing, not-for-profit businesses' (Timmins 2006). They are licensed and supervised by Monitor, a regulator set up as an independent corporate body, and some of their Governors are elected by local residents who may join as ordinary members. Postal services are regulated by the Postal Services Commission, which tries to maintain a balance between the Royal Mail (still state-owned) and private operators, through licensing, price controls, quality standards and network access obligations.

### *Global Regulatory Networks*

As Moran also emphasises, the difficulties facing the transformation of the British state have been exacerbated since it also resulted from the pressures of renewed globalization. Thus, the very machine which was used to push through the drastic restructurings, the strong parliamentary central government, was itself becoming 'hollowed out', with the transfer of significant powers upwards to Brussels, and downwards to Edinburgh and Cardiff. Similarly in other countries, various types of national corporate-state arrangements have also been undermined, although they have followed different trajectories. The relatively formal neo-corporatist institutions which in some countries, especially in continental Europe, tied governments, business and trade unions together in bargaining over wage rates and macro-economic policy could not easily be maintained in a more competitive and fluid world economy.

The attempt to recreate institutions to represent 'organized interests' at the regional level in Europe also failed (Schmitter & Streek 1991, Greenwood 1992). Instead, the EU has evolved into a paradigm of networked governance. From the 1980s, the earlier impetus to supranationalism and integration gave way to the 'new approach' to harmonization of technical regulations (Joerges 1990, Dehousse 1992, Woolcock 1996). This aimed to reduce the role of European legislation to the setting of minimum essential requirements, based as far as possible on performance, leaving it to technical organizations (public, private or hybrid, but anyway usually dominated by industry experts) to specify detailed standards. To complement this, the European Court of Justice developed the principles of mutual recognition and equivalence of standards, to prevent national regulations from acting as a barrier to imports. Nevertheless, the management of the complex interaction of regulation has spawned the growth of comitology (Joerges & Vos 1999), leading to what has been described as the networked state (Castells 1998) or networked governance (Kohler-Koch and Eising 1999).

Hence, as suggested at the beginning of this section, the changes in the public and private spheres and in their interaction also have an international dimension. Economic liberalization has further exacerbated the pressures on the political sphere, which have led to its increased fragmentation and the growth of new regulatory forms. The new types of hybrid public-private regulatory networks often develop in response to the need to govern economic activities that are increasingly internationally integrated and yet take place in very dispersed and diverse geographic and cultural contexts.

Indeed, public functions may more easily be provided in the global sphere by private bodies. They nevertheless face the dual difficulties of partiality towards specific private interests and power-

political interference by governments. Two paradigmatic instances may serve as illustrations: international financial markets, and the internet.

The liberalization of financial flows has certainly created an internationally integrated financial system, but it consists of a maze of networks involving banks and other financial firms, organizations such as exchanges and clearing houses, specialist traders of many kinds, and professionals such as lawyers, with both private associations and public bodies playing regulatory and supervisory roles. Financial markets and transactions are in fact highly regulated, but a large amount of this regulation is generated by and among market participants themselves (Abolafia 1985). For example, the terms of complex transactions in financial derivatives are governed by the standard Agreements drawn up by the International Swaps and Derivatives Association.<sup>1</sup> Perhaps better known is the important role of rating agencies such as Moody's and Standard & Poors in evaluating the credit-worthiness of bond issuers, not only private firms but governments (Sinclair 1999).<sup>2</sup>

Of course, such private regulation is not autonomous, but intersects with more public forms of supervision and control. However, as Tony Porter has argued, international public institutional arrangements have generally been developed only when private governance is absent or weak (Porter 1993).<sup>3</sup> Even then, it often takes the form of 'meta-regulation', or the supervision of the adequacy of private regulation.<sup>4</sup> Thus, for example, the capital adequacy standards developed by the Basel Committee on Banking Supervision (BCBS) have been refined in the so-called Basel II Capital Adequacy Framework which is now being introduced. The BCBS still maintains its basic rule of an 8% ratio of capital to risk-weighted assets, as well as its general standards on definition of capital. However, the new approach in Basel II allows each bank to decide its own risk management system (which are generally based on well-known models), provided it meets specified minimum requirements, and subject to review by the local supervisor of the bank's systems and controls (BCBS 2005, 2). Thus, the BCBS essentially acts as a node of coordination in a network of public-private regulatory arrangements.

Like financial markets, the internet, although highly decentralized and apparently anarchic, is in fact a highly ordered system. Also in somewhat similar fashion to finance, the development of the internet has been substantially driven by the formulation of norms and standards by non-official groups, networks and institutions.<sup>5</sup> Probably most successful has been the Internet Engineering Task Force (IETF), which has been responsible for developing the technical standards that enable

---

<sup>1</sup> ISDA: see [www.isda.org](http://www.isda.org).

<sup>2</sup> A good example of private regulation of the public analyzed by Scott (2002) as discussed above.

<sup>3</sup> This is the reverse side of Colin Scott's point, referred to above, that private governance may emerge when the state retreats.

<sup>4</sup> The term 'meta-regulation' has been applied to national state laws which lay down overarching requirements or standards (for example, for environmental protection) with which more specific industry or corporate codes are expected to comply (Gunningham & Grabosky 1998, Parker 2002). This term has been extended to apply to describe the 'disciplines' laid down by WTO law on national states by Bronwen Morgan (2003), who has described WTO rules as 'global meta-regulation', or rules prescribing how states should regulate.

<sup>5</sup> Even though, as is well known, the internet began as a US military project: for further details see Leiner et al. 2003.

the internet to function and grow. The IETF itself developed in an entirely unplanned way, as a network of specialists, who evolved very non-bureaucratic methods of cooperation, based on principles which later became clarified as: open process, volunteer participation, technical competence, consensual and practical decision-making, and responsibility.<sup>6</sup>

Of course, this work has been greatly facilitated because its subject-matter is specialist and the participants may be said to share a common commitment and understandings and hence form an 'epistemic community' (Haas 1992). However, as Michael Froomkin points out in his fascinating analysis of the IETF and internet regulation (Froomkin 2003), the commitment of the IETF community is not to a closed apolitical technicist task, but to the much broader normative value of ubiquitous global communication (ibid. 810-811). He contrasts the IETF with another key body, ICANN (the Internet Corporation for Assigned Names and Numbers). ICANN was also set up as a private entity, although at the suggestion of the US government, to take over from the IETF the task of managing internet domain names, and it claimed to model its procedures on those of the IETF. However, Froomkin demonstrates that in practice ICANN's methods have been closed and secretive rather than open, and its decisions made by fiat rather than consensus (ibid. 838ff., esp. 852-3), resulting in severe legitimation problems. This he attributes to the greater political and especially economic contentiousness of the subject-matter, as well as ICANN's institutional design failures.

### **3. REGULATORY INTERACTIONS IN MULTILAYERED NETWORK GOVERNANCE**

The previous section has sketched out the tensions in the classical liberal state system which has led to its fragmentation, involving both changes in the nature and interaction of the private and public, and the shift towards networked international coordination. This section will look more closely at three major features of these international regulatory networks.

#### *The Destabilization of Regulatory Hierarchy*

The 'network' metaphor attempts to capture this central feature of governance which distinguishes the post-liberal from the classical liberal system. In the latter, legal rules fell into relatively clear categories and hierarchies, with international law binding states, and national or local law governing legal persons. This made it possible, at least in principle, to determine the validity of rules and to decide which should apply to a particular transaction or activity. In networked governance, the determination of the legitimacy of an activity under any one system of norms is rarely definitive, it can usually be challenged by reference to another system. Indeed, normative systems overlap and inter-penetrate each other. Also, the fragmentation of the public sphere sometimes involves the creation of largely private arenas to which only the more privileged or powerful economic actors have access, resulting in a kind of privatization of justice.

Thus, international law now includes supranational law, which may have direct applicability to legal persons. However, this possibility is not definitive, since the interaction is often indeterminate or problematic. The most developed supranational law is EC law, which was greatly expanded by the ECJ's development of the jurisprudence of 'direct effect' of some treaty

---

<sup>6</sup> See "A Mission Statement for the IETF", Request for Comments 3935, October 2004; available from <http://www.ietf.org/rfc/rfc3935.txt>, accessed 15/2/2005.



provisions and Directives (which formally are addressed to states not legal persons). Yet managing these interactions depends on accommodations between the national-level authorities and courts and those at the EU level, as shown for example in the German Constitutional Court's reservation of *Kompetenz-Kompetenz* in its famous *Maastrichturteil* (Weiler 1995, MacCormick 1995). Importantly, the supranational character of EC law gives private parties (especially firms) a legal basis to challenge national laws and administrative practices which might limit the market freedoms enshrined in EC law.

Supranational law is much less developed globally, at least from the formal viewpoint. Notably, states have taken care to insist that WTO law does not have direct applicability as part of national law.<sup>7</sup> Nevertheless, the WTO's rules impose sweeping obligations (or in WTO-speak 'disciplines') with which national measures must comply. This compliance is ensured both by elaborate monitoring procedures through the WTO's Committees, and in the final resort by binding adjudication through the WTO's powerful Dispute-Settlement Procedure. Although this is formally a state-state procedure, the two most powerful trade blocs have established procedures to give (some) private entities procedural rights to invoke WTO law at national level: in the USA under section 301 of the Trade Act, and in the EC under the Trade Barrier Regulation. These create what has been described as a system of public-private partnerships, so that 'WTO law, while formally a domain of *public* international law, profits and prejudices *private* parties' (Shaffer 2003, 3).

An even starker example of the carving out of a specific and privileged jurisdictional arena is provided by international investment or market liberalization agreements.<sup>8</sup> These give 'investors' (essentially TNCs) a direct right of access to international arbitration if they consider that national laws or administration have contravened the broad non-discrimination and property-protection provisions of the treaty. This basically enables the private rights of a legal person to be used to challenge the public policy decisions of government and state bodies, using secretive procedures modelled on private commercial arbitration. The effect is to destabilize the legitimacy of national laws, even if the outcomes of such arbitrations rarely override national law in any definitive way. The threat of such a claim, which could lead to an award which may run to hundreds of millions of dollars, as well as the cost of defending it, gives foreign investors a powerful weapon especially against poor states.<sup>9</sup> This grant by states to private parties of a right to international arbitration acts

---

<sup>7</sup> The WTO Agreement, art. XVI.4, requires each member state 'to ensure the conformity of its laws, regulations and administrative procedures with its [WTO] obligations'. However, WTO rules are not generally considered to be 'supranational', i.e. to have direct effect as national law (Matsushita, Schoenbaum and Mavroidis, ch.5).

<sup>8</sup> The main type are Bilateral Investment Agreements (BITs), which have been used since 1959, but have developed into a much more widespread network since the 1990s (UNCTAD 2000). The North American Free Trade Agreement (NAFTA), a multilateral agreement between Canada, Mexico and the USA, includes a strong version of such a treaty as its Chapter XI. An attempt to negotiate an ambitious Multilateral Agreement on Investment (MAI) through the OECD collapsed in 1998 (Picciotto & Mayne, 1999).

<sup>9</sup> From 1987 to the end of 2005 some 219 such cases are reported to have been formally initiated, although the number is likely to be understated since there is no obligation to publish complaints. Over 40 of these have been against Argentina, mostly claiming compensation for losses resulting from its decision to abandon the link of the peso with the dollar; so far one of these has been successful, resulting in an award of \$133m, although the Argentine government is attempting to block the award (UNCTAD 2005). On the other hand, a private tribunal rejected a \$970m claim brought against the USA by Methanex, a Canadian company, alleging that Californian gasoline regulations discriminated against methanol which it produced. Cases may be affected by political controversy: for example, Aguas

in effect as a governance mechanism, in which private rights, enforced by an extension of the private procedure of commercial arbitration, may override formal state law (Van Harten 2005).

There has also been a growth of what may be called infra-state regulation, legal and quasi-legal regulatory arrangements, involving both public and private, as well as hybrid, bodies. For example, tax authorities in the main OECD countries have developed procedures for the coordination of taxation of related members of corporate groups (TNCs). These operate under provisions in bilateral tax treaties which authorize information exchange, as well as consultations between the 'competent authorities', for the purposes of ensuring that taxation is in accordance with the treaty. These procedures enable international consultations between the two (or sometimes more) tax authorities and the TNC (or its advisers, usually the large accountancy firms), in particular to debate and negotiate the methodology each firm uses for setting transfer prices for goods and services supplied between its constituent parts. Agreements between the competent authorities, which may relate to individual cases or to more general issues of interpretation of the treaty, have an ambiguous legal status: they may be treated as no more than a statement of intent by and between administrative authorities, although a good argument can be made that they are binding international agreements (Picciotto 1992, 297-9). They clearly have a very hybrid character, with elements of public and private, national and international law.

A major destabilizing factor is the creation of jurisdictions of convenience or 'havens'. These entail a kind of privatization of sovereignty (Palan 2002), in which a legal enclave offering privileges for certain types of private business is created, often designed by lawyers acting as intermediaries between government and private interests. These aim to provide the beneficiaries with a legal refuge or protection from the laws of other states, without needing to relocate in any real sense since they can use the legal fictions of corporations or trusts. Thus, 'flags of convenience', which originated in the 1920s to avoid US liquor prohibition laws, have enabled a large proportion of international shipping to avoid many types of regulation (especially taxation), and to choose the jurisdiction they consider most favourable. The flag states essentially offer a ship registration service, the administration of which may have little or no physical contact with the state itself, being sub-contracted to private firms. Notably, the Liberian International Ship and Corporate Registry is run from Vienna, Virginia USA, which made it possible to continue operation uninterrupted, despite the turbulence and civil war in Liberia which incapacitated the government of that country for a long period. The actual surveys and the issuing of safety

---

del Tunari, a majority foreign-owned firm which had been awarded a concession to run privatized water services in Cochabamba, Bolivia, brought a claim for compensation for cancellation of the concession due to strong local opposition to the privatization and the consequent sharp increases in water charges; in January 2006 the claim was reported to have been withdrawn, although the firm had won the initial jurisdictional stage of the dispute. This was a controversial decision, since by a 2-1 majority the tribunal accepted that the complaint could be brought under the Bolivia-Netherlands investment treaty, even though the main investor was the US firm Bechtel, which created a Netherlands holding company as part of a financial restructuring and for tax reasons following the grant of the concession. This decision, in common with others brought through the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) can be found at <http://www.worldbank.org/icsid/cases/>. An excellent source is *Investment Treaty News* produced by the International Institute for Sustainable Development (IISD) available at <http://www.iisd.org/investment/itn/>.

certificates for ships are done by recognized private classification societies, including the American Bureau of Shipping and Lloyd's Register of Shipping.<sup>10</sup>

Due to long-standing concerns about the safety standards of such 'open registries', led by a long-running campaign by the International Transport Federation (ITF) of trade unions, regulatory networks have emerged to try to deal with low-standard ships and registries, or 'flags of convenience'. A key development has been cooperation between the maritime authorities of Port States. They now deploy sophisticated inspection systems, based on checklists of internationally-agreed standards, deficiency reporting, a computerised database, and the possibility of detention.<sup>11</sup> Thus, the seaworthiness and employment conditions of ships are governed by a variety of regulatory bodies, both public and private, national and international. None of them have definitive jurisdiction, although port authorities can apply the ultimate sanction of detention (Couper et al. 1999, Gerstenberger 2002).

As these examples show, networked governance disrupts the channels of democratic accountability, which in the classical liberal system are through national constitutional structures, ideally parliamentary representative democracy. A number of suggestions have been made to help structure global governance arenas in ways that can facilitate democratic deliberation, insulated as far as possible from private or special interests, and based on principles of accountability, transparency, responsibility, and above all empowerment (Picciotto 2001). This does not mean abandoning existing democratic structures, but suggests that they must be complemented by ensuring transparency and accountability of all arenas and actors playing a regulatory role.

#### *The Blurring of Distinctions between Normative Forms*

A corollary of the erosion of the hierarchical norm structure of classical liberalism has been both the erosion of the public-private law distinction (discussed already above), and a shift from formal law to quasi-legal forms of regulation in global arenas. These are generally referred to as 'soft law', as opposed to formal 'hard law', and include a wide range of types, such as codes, guidelines, declarations, sets of principles, and memorandums of understanding (MOUs).<sup>12</sup> Although not binding law, in practice they often have considerable normative force, as much or more than does 'hard' international law, which in any case mainly relies on consensual rather than coerced compliance.

Such soft law forms may be used in inter-state agreements, which often take the form of declarations or 'proclamations', for example the principles of sustainable development, announced at the conclusion of major international conferences from Stockholm in 1972, to Rio in 1992 and Johannesburg in 2002. From a formal lawyer's viewpoint they may seem to consist of no more

---

<sup>10</sup> See <http://www.lisr.com/>. Ten such bodies have formed the International Association of Classification Societies' (IACS), which in December 2005 adopted a set of Common Structural Rules for ship classification and approval, see <http://www.iacs.org.uk/csr/index.html>.

<sup>11</sup> The first was established by 20 maritime authorities covering Europe and the north Atlantic, based on the Paris MOU (Memorandum of Understanding), for details see <http://www.parismou.org>. This has been followed by Asia-Pacific, Caribbean and Latin American groups.

<sup>12</sup> See generally Shelton 2000.

than fine-sounding rhetoric. However, they are linked to action programmes (in particular 'Agenda 21' adopted at Rio), and their principles may be given substantive effect,<sup>13</sup> or lead to more specific hard-law instruments.<sup>14</sup> Sometimes, this type of instrument is chosen to emphasise the aspirational character of the norms, as with the ILO's 1998 Declaration on Fundamental Principles and Rights at Work, the adoption of which was strongly resisted by the governments of some developing countries. Its impact therefore greatly depends on the effectiveness of the procedures for encouraging and monitoring compliance (Hepple 1999). These may be quite rigorous, for example the implementation of the Recommendations of the Financial Action Task Force (FATF) has been very closely monitored, through 'peer-review' procedures, and 'naming and shaming' jurisdictions which fail to meet the standards.

Secondly, Codes and Guidelines have been developed since the late 1960s to establish standards at the international level addressed directly to firms. Here again, a non-binding form is often deliberately chosen, yet the implementation in practice could be rigorous (though often has not been), and could involve adoption or transformation of the soft law norms into hard law. For example, the Baby-Milk Marketing Code adopted as a Recommendation by the WHO in 1981 has been used as a basis for national legislation in a number of countries, although the main pressure for compliance has come from a sustained and vigorous international campaign.<sup>15</sup> In the 1990s, following a decade or more of pressures by business on states to reduce regulation and dismantle barriers to market access, TNCs themselves began to introduce corporate Codes of Conduct in order to reassure customers and other stakeholders of their adherence to international standards of social and environmental responsibility (Haufler 2001, Jenkins et al. 2002). Firms have generally preferred 'voluntary' codes, stressing the need for flexibility to adapt the norms to the specific characteristics of the business, and the desirability of raising standards by encouragement and self-generated commitment, as opposed to the rigidity and instrumentalism of externally-imposed and bureaucratically-enforced law. Corporate critics and sceptics have countered by challenging the effectiveness of self-selected and self-monitored standards, and have argued that competitive equality requires generally-applicable rules rather than self-selected codes. However, on closer examination it becomes clear that the sharp distinction between voluntary codes and binding law is inaccurate: codes entail a degree of formalization of normative expectations and practices, and may be linked to formal law, both public and private, in various complex ways which may be described as a 'tangled web' (Webb and Morrison 2004), so the question is how they should be articulated (Picciotto 2003).

---

<sup>13</sup> Thus, the Appellate Body of the WTO, in its important decision in the *Shrimp-Turtle* case (1998), in interpreting the provisions of the WTO agreements, took account of the reference to the principle of sustainable development and to the Rio Declaration and Agenda 21 in the WTO Agreement and the WTO Council's Decision on Trade and Environment.

<sup>14</sup> For example, the Montreal Protocol on Substances Depleting the Ozone Layer, and the Convention on Biological Diversity.

<sup>15</sup> A key role has been played by the International Baby Food Action Network (IBFAN) which is a grassroots-based non-governmental organization (NGO), although it has received substantial support from UNICEF. Details on the monitoring of compliance with the Code may be found on its website [www.ibfan.org](http://www.ibfan.org). The early history of this Code was recounted by Chetley 1986, and a more recent account of corporate codes which deals with it in detail is Richter 2001.

Finally, the growth of international regulatory networks linking public bodies at 'sub-state' level has involved the use of novel forms of agreement, especially the MOU. These are often very specific and establish detailed arrangements: for example there is a network of MOUs between regulators of financial markets and exchanges for cooperation in information exchange and other enforcement activities.<sup>16</sup> These also may be stated to be 'non-binding' although in practice compliance may be very effective. In this case, the formally non-binding character is because it is often not clear whether they fall under national or international, public or private law. Under international law, sub-state or non-state bodies are not considered to have the capacity to bind the state or government concerned.<sup>17</sup> In some cases they may be regarded simply as 'private' contracts, if the parties are legal persons: for example, agreements between stock exchanges or futures markets to enable reciprocal trading of products or cooperate in market monitoring and enforcement. Yet they may have a very hybrid character, as with the international tax 'competent authority agreements' discussed above. Equally, agreements which take the form of private contracts may be more appropriately regarded as quasi-public, such as the international construction contracts analyzed by Oren Perez (Perez 2002, 2004).

Generally, the growth of soft law and the blurring of the public-private law divide indicates that the range and depth of international normative coordination no longer fits within the classical liberal model of agreements negotiated by central governments on behalf of states (Reinicke and Witt 2000). Soft law allows regulatory regimes to be developed and applied directly by those involved, rather than through diplomatic channels and foreign offices,<sup>18</sup> and for them to involve a wider range of participants regardless of their formal status as state, public, or private entities. Soft law is not necessarily fuzzy or vague, it is often specialized and detailed;<sup>19</sup> but it does provide greater flexibility for adaptation to change. Equally, it may be ad hoc or particularistic, and lack independent mechanisms for ensuring and monitoring compliance.

### *Functional Fragmentation, Technicization and Legitimacy*

The fragmentation of statehood and the transfer of specific functions to relatively autonomous public bodies is also a further extension of the process of technicization in the modern state. In the traditional Weberian perspective, technocracy is seen as a means merely of implementing policies which have been formulated through political processes. From this viewpoint, the growth of

---

<sup>16</sup> These grew on a bilateral basis in the 1980s, but became coordinated through the International Organization of Securities Commissions (IOSCO), in which the public supervisory authorities agreed the Boca Declaration of 1996, which is intended to augment the MOUs agreed between the (private) exchanges themselves; the Boca Declaration and the lists of MOUs between supervisory authorities are available on the IOSCO website at <http://www.iosco.org/library/index.cfm?section=mou>.

<sup>17</sup> As noted in a leading text on the law of treaties (McNair 1961, 21), the proliferation of agreements between subordinate state agencies, and the great variation in the relationship of such bodies to the central government, makes it hard to determine when such an agreement could be considered to be internationally binding.

<sup>18</sup> However, foreign offices also recognize the need for soft law such as MOUs, to provide a less formal and more flexible means of dealing with detailed and technical matters, or perhaps to provide confidentiality, for example in defence matters (Aust 2000, ch. 3).

<sup>19</sup> I disagree on this point with Abbott and Snidal (2000), who suggest that soft law tends to be less detailed; this rests on their initial definition of 'legalization' with which I also disagree (see further below).

delegation to specialist regulators is a response to the problems of governing increasingly complex societies, by giving greater autonomy to technocratic decision-makers within a policy framework set by government. However, the new forms of governance are more decentralized and interactive, which further exacerbates the legitimacy problems which Weber already identified with the 'iron cage' of bureaucracy when it loses its accountability to social values.

Indeed, functional fragmentation may also be seen as reflecting the broader changes in the nature and relationship of the 'public' and the 'private' sphere which we have been discussing. The transfer of specific public functions to what have been described as 'non-majoritarian' regulators (Coen & Thatcher 2005) is often justified in terms of the need to insulate some areas of decision-making from influence by private special interests and the short-term considerations which dominate electoral politics. Hence, it also reflects changes in political processes, with the breakdown of representative government, which 'public choice' theorists have argued is prone to capture by private interests (Buchanan & Tollison 1984). In place of party-democracy there has been the emergence of what Bernard Manin has called 'audience democracy' (Manin 1997), increasingly based on populist forms of political mobilization. This in turn poses the question of whether the decentralization or fragmentation of hierarchical government based on formal or instrumental rationality, and the shift to networked governance requiring reflexive interactions and based on communicative rationality, may offer a basis for new forms of deliberative or discursive democracy (Dryzek 1990, 1999). The changes in public-private interactions discussed above make it vital to find ways to remodel the sphere of political debate and decision-making. Central to this are questions about the nature of technocratic governance and the basis of its legitimacy.

This is especially relevant to global governance, since much of the activity of international regulatory networks has been generated by technical specialists or 'epistemic communities'. This concept was developed within a neo-functionalist paradigm, to suggest that a stronger basis for international cooperation may be provided by delegating specific issues to be dealt with in a depoliticized manner by specialists deploying scientific, managerial or professional techniques and working within shared universal discourses (Haas 1992). This concept seemed to maintain the Weberian assumption that broad policy goals should be decided politically, so that the delegation should be of practical details of implementation, facilitating the resolution of global policy issues by 'narrowing the range within which political bargains could be struck' (Haas 1992, 378). From this perspective governance networks could be said to strengthen the liberal state system, since they simply entail cooperation between government officials, who can be held accountable by citizens through national state mechanisms (Slaughter 1997).

There is certainly evidence that global expert action networks have been extremely effective in mobilizing and sustaining global governance regimes, for example Canan and Reichman's sociological study of the 'global community' of environmental experts and activists which formed around the Montreal Protocol (2002). Far from being depoliticized, however, such networks often include activists as well as technical specialists; and even if the issues are specialized, the participants share common social values. This seems to be the case, for example, with the computer scientists of the IETF who have developed and maintained internet standards, discussed above. The contribution of technical specialists to international diplomacy is often to help gain acceptance for proposals which are put forward as objective and scientific, although actually carefully calibrated for political acceptability. Indeed, even some liberals such as Anne-Marie Slaughter now seem to concede that global governance networks do raise some accountability

problems, which perhaps requires them to operate as 'a kind of disaggregated global democracy based on individual and group self-governance' (Slaughter 2004, 240).

In this context, the importance of expertise suggests that the dangers of technicism must be addressed. This is especially the case since so many decisions now entail inputs often from different specialist or expert fields, as well as an evaluation from the general public perspective. Technical rationality can operate in an autocratic way, if it seeks to claim a spurious authority. This can be counter-productive, as has occurred in the frequent episodes when it has resulted in a spiral of public mistrust of science, and scientists' despair at public ignorance. To avoid technicism, specialists need to acknowledge the ways in which their techniques rest on formal models based on assumptions which allow them to abstract the specific aspects of an issue or the data with which they are concerned from the entirety and complexity of the issue in the real world. Since the conclusions they can reach based on such assumptions can only have a partial or conditional validity, they should not be treated as determinative of the issue as a whole, but as important contribution towards more general public debates. Scientific responsibility should therefore include cognitive openness and reflexivity (Dryzek 1990, 1999).<sup>20</sup>

#### **4. THE ROLE OF LAW AND LAWYERS IN GLOBAL REGULATORY NETWORKS**

The law and lawyers have played a major role in the construction and management of these globalized regulatory networks. However, this has been analyzed in very different ways.

One influential group of American commentators have discussed the legalization of world politics from an essentially Weberian perspective. They assess the extent of legalization along a spectrum according to three criteria: being based on rules which are regarded as binding, which are precise, and the interpretation of which has been delegated to a third party adjudicator (Abbott, Keohane et al., 404-6). This essentially limits law to formal state law, excluding any hybrid or private forms of governance, and has been criticized as taking a narrow view of law (Finnemore and Toope ). As already mentioned above, the view that 'hard' law provides precise rules, while quasi-legal 'soft' law is more vague or imprecise, does not stand up to empirical analysis. For example, financial market regulations discussed above, whether developed by private bodies such as the ISDA or public ones such as the BCBS, are as detailed as any legislation, but they are formally 'soft' law. On the other hand, from the formalist viewpoint, the WTO agreements rate highly as exemplars of legalization, since they lay down an enormous quantity of formally binding rules, the interpretation of which has been delegated to the WTO's Appellate Body (AB) as an adjudicator. However, the suggestion that these rules are precise and unambiguous is highly dubious, and it can be shown that both the general structure and many of the specific provisions of the WTO agreements raise issues of interpretation which were known to be highly contestable, and indeed were being contested, in the period when the texts were negotiated and agreed (Alter 2003, Picciotto 2005). Furthermore, this perspective fails to capture the multiple forms and roles of law in the multi-level system described and analyzed above, nor the mode of the interaction.

---

<sup>20</sup> Michael Fromkin has provided an interesting account and analysis of the governance of the Internet (mentioned already above), suggesting that the success of the Internet Engineering Task Force (IETF) in terms of both efficacy and legitimacy was due largely to its essentially democratic participative procedures, which he argues is an exemplar of Habermasian practical discourse ethics; in contrast, the Internet Corporation for Assigned Names and Numbers (ICANN) suffered a legitimization crisis, because its operations were secretive and claimed legitimacy from a rigid corporatist representation system (Fromkin 2003).

In contrast, the heterarchical character of regulatory networks has led some theorists to revive concepts of legal pluralism (e.g. Snyder 2000), building on the challenge by earlier versions of legal pluralism to the privileging of state law in the classical liberal paradigm. However, while pluralism may help in drawing attention to the existence and interactions of multiple legal orders, it is prone to the criticism advanced by von Benda-Beckmann that 'talking of intertwining, interaction or mutual constitution presupposes distinguishing what is being intertwined' (cited in Melissaris 2004, 61).

The most sophisticated and complex attempt to establish a conceptual analysis which incorporates a pluralist approach has been that of Santos (1987, 1995). He distinguishes his perspective from that of traditional legal anthropology which conceived different legal orders as 'separate entities coexisting in the same political space', and cogently argues that '[w]e live in a time of porous legality or legal porosity, of multiple networks of legal orders forcing us to constant transitions and trespassings. Our legal life is constituted by an intersection of different legal orders, that is by *interlegality*' (Santos 1995, 473). He suggests that the new legal pluralism is concerned with 'the identification of the three time-spaces of the legal field - the local, the national, and the transnational' (ibid. 117), and uses the metaphor of cartography to suggest that different types of laws are based on different scales, projections and symbolizations, and that social groups become more adept in the types of action suited to the legal order within which they are predominantly socialized (ibid. 465-6). However, his analysis tends to be structural: he conceives of different legal orders as overlapping but mutually exclusive and that 'each legal construction has an internal coherence' (ibid. 473), rather than being internally contradictory. In particular, he argues that the new *lex mercatoria* and the proliferation of business and corporate codes constitute 'the emergence of new legal particularisms' which 'create a transnational legal space that often conflicts with national state legal space' (ibid. 469). Thus, Santos perhaps does not fully exploit the concepts of porosity and interlegality, nor does he explore how legal techniques can be used strategically, and can help to manage the interactions of different arenas and forms of law.

Analysts of regulation have attempted to capture the characteristics of different layers of regulation and their interaction, notably with the concept of 'meta-regulation', discussed above. This kind of approach to regulatory interactions is based in concepts of responsive or reflexive law. As part of the response to the crises of the welfare state, Nonet and Selznick put forward a new modernist paradigm of responsive law, as an evolution from the repressive and autonomous phases of law, and envisaging regulation as an interactive process of developing methods to realize purposes expressed through law and thereby clarifying the public interest (Nonet and Selznick 1978/2001). The concept was taken up in regulation theory notably by Ayres and Braithwaite (1992), seeking to reassert a civic republican tradition in which the layers of social institutions, from the state through industry associations and down to individual corporations, play their different parts in social regulation,<sup>21</sup> lubricated by a two-way flow of public discourse.

An alternative analysis was offered by Gunther Teubner, who argued that the emergence of reflexivity in modern law resulted from the 'trilemma' created by the increased legalization or

---

<sup>21</sup> Sub-titled *Transcending the Deregulation Debate*, the book sought to reconcile the growth of regulation with a reduced role for the state by arguing for an 'enforcement pyramid' (a concept which Braithwaite has consistently championed across many fields of regulation), in which the state should speak softly and carry a variety of both big and smaller sticks.



juridification of the social sphere (Teubner 1983, 1987). For Teubner it is the autonomy of the legal field that generates its autopoietic self-referentiality, but the politicization resulting from increased application of law into social fields creates expectations which require instrumentalization, perhaps through new forms of self-regulation. The pressure for legal regulation to go beyond the limits possible through the autonomous logics of self-reproduction means that it either lapses into irrelevance, or results in disintegration either of the social field to which it is applied or of the law itself, so that regulatory failure is the rule rather than the exception. Thus, in his work on globalization he welcomes the potential it offers for law to become more detached from the political sphere of states, and instead to institutionalise constitutions for autonomous social sectors and the norms which they generate, which he suggests could enable new forms of repoliticization (Teubner 2004). He rightly criticises the view of globalization as an economic process which reduces the prospects of regulation through law, and points to the many new normative forms underpinning globalization, which seek validation through law. However, this systems-theoretical perspective perhaps overstates the autonomy of the ill-defined social sub-systems, and the self-referential nature of 'neo-spontaneous' generation of 'global law without a state', of which *lex mercatoria* is given as an example (Teubner 1997).

Rather, *lex mercatoria* demonstrates how law may mediate transformations of both the 'private' sphere of economic activity and the 'public' sphere of politics, and their interaction. This is explored in the extensive sociological research of Dezalay and Garth, which reveals that the concept of *lex mercatoria* was a strategic move in the competitive struggles between arbitration centres, in which lawyers mediated skilfully between the spheres of political and corporate power to create the new arena of international commercial arbitration (Dezalay and Garth 1995, 1996). Certainly, the learned doctrine of *lex mercatoria*, backed by the neutral authority of the grand European professors which validated it in the eyes of their disciples in the third world, helped to provide a 'middle way' in the postcolonial clashes over the scope of state sovereignty, especially concerning the control of oil; but in practice the legal arbitrations were only one strand (and a minor one) in the broader political negotiations (Dezalay & Garth 1995: 83-91, 313). Rather than creating a purely private legal sphere outside the realm of state law, the two have been deeply entangled, and the authority of law, especially legal concepts of private rights, has been used to counter political notions of state sovereignty in the struggles to reconfigure economic and political power. Thus, as suggested above, it is essential to understand these shifting forms of governance as resulting from strategic moves in contests of power.

A more actor-oriented approach is taken by Bourdieu, who criticizes the confusion in systems theory between the symbolic structures of the law and the objective orders of the legal and other professional fields, in which agents and institutions compete for the right to formulate the rules, 'le droit de dire le droit' (Bourdieu 1986). This is perhaps especially valuable in providing a basis for empirical and sociological studies of the actual practices of lawyering, centring on the practices of interpretation of legal texts, which involves the appropriation of the 'symbolic power which is potentially contained within the text', in terms of competitive struggles to 'control' the legal text (Bourdieu 1987: 818).<sup>22</sup>

---

<sup>22</sup> He suggests that coherence emerges partly through the social organization of the field, and partly because to succeed competing interpretations must be presented 'as the necessary result of a principled interpretation of unanimously accepted texts' (ibid. ). This explains the apparent paradox that, while lawyers spend much of their time disagreeing about the meaning of texts, they often do so from an objectivist perspective. They generally deny that

I suggest that a clearer understanding of regulatory networks, and of the role in them of law, comes from dislodging positivist and instrumentalist views of law. Legalization has certainly been an important feature of the management of economic globalization. Under a formalist view of law, legitimacy is thought to be provided by law because it offers a process for decision-making which is technical-rational: a logical application of precise or unambiguous rules prescribing obligatory conduct, to implement politically-determined aims (Abbott et al.). Yet the interpretation and application of legal rules is not a mechanistic but a flexible process, which allows scope for the overt or covert consideration of social, political and cultural factors, and adaptation to circumstances.

Law therefore plays a key role in global governance not because of its precision, but its flexibility. This provides a possibility to help to accommodate the diversity of local and national social and cultural particularities to the increasingly globally integrated world market, and to manage conflicts resulting from power disparities (Picciotto 1997, 266). However, its failures and crises, of which there are many, result from the design failures which attempt to substitute the legitimacy of formal legal rationality for the political and social legitimacy (and efficacy) which can only come from a broader democratic structures.

## CONCLUSIONS

This paper has argued that the far-reaching changes in both the sphere of politics and that of the economy have further eroded the distinction between the public and private. The transition to a new form of statehood, described as networked governance, certainly poses new political challenges. However, it would be illusory once again to attempt the separation of public and private. What is needed is to develop modes of interaction which can more effectively ensure the primacy of public over private interests in the management of economic activities generally.

Law has an important part to play, but it should not be regarded as a separate sphere through which public standards are applied to control private interests in otherwise closed arenas. Lawyers operate at the interface between state and market, and play a crucial role in accommodating public concerns to private interests. Lawyering entails interpretive practices which mediate between the public standards and values expressed in the wide variety of norms, and the particular activities and operations of economic actors, offering the hope that economic power should be exercised ultimately for the general good. However, this expectation is illusory unless law operates within a broader democratic framework, in which legal practices themselves are also subject to high standards of transparency, accountability and responsibility.

## BIBLIOGRAPHY

Abbott, K., R. O. Keohane, et al. (2000). "The Concept of Legalization." *International Organization* 54(3): 401-419.

Abbott, K. W. and D. Snidal (2000). "Hard and Soft Law in International Governance." *International Organization* 54(3): 421-56.

---

indeterminacy is inherent, and tend to attribute disagreements to bad drafting and lack of clarity in the texts, which are said to create 'loopholes' in the logical fabric of the law.

- Abolafia, M. Y. (1985). Self-Regulation as Market Maintenance. In *Regulatory Policy and the Social Sciences*. R. G. Noll (ed.), Berkeley, University of California Press: 312-343.
- Alter, K. J. (2003). "Resolving or exacerbating disputes? The WTO's new dispute resolution system." *International Affairs* 79: 783-800.
- Aman, A. C. (2002). "Globalization, Democracy, and the Need for a New Administrative Law. Symposium: New Forms of Governance: Ceding Public Power to Private Actors." *UCLA Law Review* 49: 1687.
- Aust, A. (1986). "The Theory and Practice of Informal International Agreements." *International and Comparative Law Quarterly* 35: 787.
- Ayres, I. and J. Braithwaite (1992). *Responsive Regulation. Transcending the Deregulation Debate*.
- Bardach, E. and R. A. Kagan (1982). *Going by the book: the problem of regulatory unreasonableness*. Philadelphia, Temple University Press.
- BCBS (2005), 'International Convergence of Capital Measurement and Capital Standards. A Revised Framework', Basel Committee on Banking Supervision, available from <http://www.bis.org/publ/bcbs118.htm>, visited 15<sup>th</sup> February 2006.
- Bourdieu, P. (1986). "La Force du Droit. Eléments pour une sociologie du champ juridique." *Actes de la Recherche en Science Sociales* 64(sept.): 3-19.
- Bourdieu, P. (1987). "The Force of Law: Toward a Sociology of the Juridical Field." *Hastings Law Journal* 38: 805.
- Braithwaite, J. (2000). "The New Regulatory State and the Transformation of Criminology." *British Journal of Criminology* 40: 222-238.
- Buchanan, J. and R. D. Tollison (1984). *The Theory of Public Choice*. Ann Arbor, University of Michigan Press.
- Canan, P. and N. Reichman (2002). *Ozone Connections. Expert Networks in Global Environmental Governance*. Sheffield, Greenleaf.
- Castells, M. (1998). *The Information Age: Economy, Society and Culture*. Malden, Mass., Blackwell Publishers.
- Chetley, A. (1986). *The Politics of Baby Foods. Successful challenges to an international marketing strategy*. London, Pinter.
- Coen, David and Thatcher, Mark (2005), 'The New Governance of Markets and Non-Majoritarian Regulators', *Governance*, 18 (3), 329-46.
- Couper, A. D., C. J. Walsh, B. A. Stanberry and G. L. Boerne (1999) *Voyages of Abuse. Seafarers, Human Rights and International Shipping*. London, Pluto Press.

- Darling, Alistair (2002). Statement to Parliament by Transport Secretary, Alistair Darling, on Network Rail. Delivered: 27 June 2002. available from [http://www.dft.gov.uk/stellent/groups/dft\\_railways/documents/pdf/dft\\_railways\\_pdf\\_503197.pdf](http://www.dft.gov.uk/stellent/groups/dft_railways/documents/pdf/dft_railways_pdf_503197.pdf), accessed 11<sup>th</sup> April 2006.
- Dehousse, R. (1992). "Integration v. Regulation? On the Dynamics of Regulation in the European Community." *Journal of Common Market Studies* **30**(4): 383-402.
- Dezalay, Yves, and Bryant Garth. (1996) *Dealing in Virtue. International Commercial Arbitration and the Construction of a Transnational Legal Order*. Chicago: Chicago UP.
- Dryzek, J. S. (1990). *Discursive Democracy*. Cambridge, Cambridge University Press.
- Dryzek, J. S. (1999). "Transnational Democracy." *Journal of Political Philosophy* **7**(1): 30-51.
- Feigenbaum, Harvey B., Henig, Jeffrey R., and Hamnett, Chris (1998), *Shrinking the state : the political underpinnings of privatization* (Cambridge, UK ; New York: Cambridge University Press).
- Finnemore, M. and S. J. Toope (2001). "Alternatives to 'Legalization': Richer Views of Law and Politics." *International Organization* **55**(3): 743-58.
- Freeman, J. (2000). "The Contracting State." *Florida State University Law Review* **28**: 155-214.
- Freeman, J. (2003). "Extending Public Law Norms Through Privatization." *Harvard Law Review* **116**: 1285.
- Froomkin, A. Michael (2003) 'Habermas@Discourse.Net: Towards a Critical Theory of Cyberspace', *Harvard Law Review*, **116** (3), 749-873.
- Gerstenberger, Heide, and Ulrich Welke, eds. 2002. *Seefahrt im Zeichen der Globalisierung*. Munster: Westfalisches Dampfboot.
- Greenwood, J., J. R. Grote and K. Ronit, Eds. (1992) *Organized Interests and the European Community*. London, Sage.
- Gunningham, N. and P. Grabovsky (1998) *Smart Regulation: Designing Environmental Policy*. Oxford, Clarendon Press.
- Haas, Peter M. (1992) 'Introduction: Epistemic Communities and International Policy Coordination', *International Organization*, **46** (1: Special Issue on Knowledge, Power and International Policy Coordination), 1-36.
- Haufler, V. (2001) *A Public Role for the Private Sector. Industry Self-Regulation in a Global Economy*, Carnegie Endowment for International Peace.
- Hepple, Bob. (1999) 'A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct.' *Comparative Labor Law and Policy Journal* **20** (3):347-363.

- IOSCO (1991). *The Negotiation of Agreements for the Exchange of Information (MOUs)*, International Organisation of Securities Commissions.
- Jenkins, R., R. Pearson, et al., Eds. (2002) *Corporate Responsibility and Labour Rights*, Earthscan.
- Joerges, C. (1990). Paradoxes of Deregulatory Strategies at Community Level: the Example of Product Safety Policy. In *Deregulation or Re-regulation? Regulatory Reform in Europe and the United States*. G. Majone (ed.). London, Pinter: 176-197.
- Joerges, C. and E. Vos, Eds. (1999). *EU Committees: Social Regulation, Law and Politics*. Oxford, Hart.
- Jordana, Jacint, and David Levi-Faur, Eds. (2004). *The Politics of Regulation. Institutions and Regulatory Reforms for the Age of Governance*. Cheltenham: Edward Elgar.
- Kohler-Koch, B. and R. Eising, Eds. (1999). *The Transformation of Governance in the European Union*. London, Routledge.
- Kooiman, J., Ed. (1993). *Modern Governance. New Government-Society Interactions*. London, Sage.
- Leiner, Barry M., et al. (2003) 'A Brief History of the Internet', available from <http://www.isoc.org/internet/history/brief.shtml>, accessed 15/01/06.
- Loughlin, M. and C. Scott (1997). The Regulatory State. In *Developments in British Politics 5*. P. Dunleavy, A. Gamble, I. Holliday and G. Peele (eds.). Basingstoke, Macmillan: 205-219.
- MacCormick, N. (1995). "The Maastricht-Urteil: Sovereignty Now." *European Law Journal* **1**(3): 259-266.
- Manin, B. (1997). *The Principles of Representative Government*. Cambridge, CUP.
- McNair, Lord. (1961) *The Law of Treaties*. Oxford and London: Oxford University Press.
- Melissaris, E. (2004). "The More the Merrier? A New Take on Legal Pluralism." *Social & Legal Studies* **13**(1): 57-79.
- Moran, M. (2003). *The British regulatory state: high modernism and hyper-innovation*. Oxford; New York, Oxford University Press.
- Morgan, B. (2003). "The Economization of Politics: Meta-Regulation as a Form of Nonjudicial Legality." *Social & Legal Studies* **12**(4): 489-523.
- Noll, R. G., Ed. (1985). *Regulatory Policy and the Social Sciences*. Berkeley, University of California Press.
- Nonet, P. and P. Selznick (2001 2<sup>nd</sup> edition; 1<sup>st</sup> edition 1978). *Law & society in transition: toward responsive law*. New Brunswick, N.J., Transaction Publishers.

- Osborne, D. and T. Gaebler (1992). *Reinventing Government. How the Entrepreneurial Spirit is Transforming the Public Sector*. Reading MA, Addison-Wesley.
- Palan, R. (2002), 'Tax havens and the commercialization of state sovereignty', *International Organization*, 56 (1), 151-+.
- Parker, C. (2002). *The Open Corporation. Effective Self-regulation and Democracy*. Cambridge, CUP.
- Perez, Oren. (2002) Using Private-Public Linkages to Regulate Environmental Conflicts: The Case of International Construction Contracts. *Journal of Law & Society* 29 (1):77-110.
- Perez, Oren. (2004) *Ecological sensitivity and global legal pluralism: rethinking the trade and environment debate*. Oxford: Hart.
- Picciotto, S. (1992). *International Business Taxation*. London, Weidenfeld & Nicolson.
- Picciotto, S. (2001). Democratizing Globalism. In *The Market or the Public Domain? Global Governance and the Asymmetry of Power*. D. Drache (ed). London, Routledge: 335-359.
- Picciotto, S. (2003). "Rights, Responsibilities and Regulation of International Business." *Columbia Journal of Transnational Law* 42(1): 131-152.
- Picciotto, S. (2005). "The WTO's Appellate Body: Formalism as a Legitimation of Global Governance." *Governance* 18(3): 477-503.
- Picciotto, Sol and Mayne, Ruth (eds.) (1999), *Regulating International Business. Beyond Liberalization* (Basingstoke: Macmillan).
- Pierre, J., Ed. (2000), *Debating Governance*. Oxford, OUP.
- Porter, Tony (1993), *States, Markets, and Regimes in Global Finance* (Basingstoke: Macmillan).
- Prosser, Tony (2000), "Public Service Law: Privatization's Unexpected Offspring." *Law & Contemporary Problems* 63: 63-82.
- Reinicke, Wolfgang and Witte, Jan Martin (2000), 'Interdependence, Globalization and Sovereignty: The Role of Non-Binding International Legal Accords', in D. Shelton (ed.), *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System* (Oxford: OUP), 75-100.
- Rhodes, R. A. W., Ed. (1997). *Understanding Governance: Policy Networks, Governance, Reflexivity, Accountability*. Milton Keynes, Open University Press.
- Richter, J. (2001). *Holding Corporations Accountable. Corporate Conduct, International Codes and Citizen Action*. London, Zed Books.
- Rose, N. and P. Miller (1992). "Political power beyond the State: problematics of government." *British Journal of Sociology* 43(2): 173-205.

- Rosenau, J. and E.-O. Czempiel, Eds. (1992). *Governance without Government*, CUP.
- Santos, B. d. S. (1987). "Law, a Map of Misreading: Towards a Postmodern Conception of Law." *Journal of Law & Society* **14**: 279-302.
- Santos, B. de Sousa. (1995). *Toward a New Common Sense. Law, Science and Politics in the Paradigmatic Transition*. Routledge, London.
- Schmitter, P. C. and W. Streeck (1991). "From National Corporatism to Transnational Pluralism: Organized Interests in the Single European Market." *Politics & Society* **19**(2): 133-164.
- Scott, Colin (2001). 'Analysing Regulatory Space: Fragmented Resources and Institutional Design', *Public Law*, (Summer), 329-53.
- Scott, C. (2002). "Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance." *Journal of Law & Society* **29**(1): 56-76.
- Shelton, Dinah (ed.), (2000), *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System* (Oxford: OUP).
- Sinclair, Timothy J. (1999). "Bond-Rating Agencies and Coordination in the Global Political Economy", in Cutler, A. Claire, Haufler, Virginia, and Porter, Tony (1999), *Private authority and international affairs* (SUNY series in global politics; Albany: State University of New York Press), pp. 153-167.
- Slaughter, A.-M. (1997). "The Real New World Order." *Foreign Affairs* **76**(5): 183-197.
- Slaughter, A.-M. (2004). *A New World Order*. Princeton, N.J.; Oxford, Princeton University Press.
- Snyder, F. (2000). Global economic networks and global legal pluralism. In *Transatlantic Regulatory Cooperation*. G. A. Bermann, M. Herdegen and P. L. Lindseth. (eds) Oxford, OUP: 99-115.
- Teubner, G. (1983). "Substantive and Reflexive Elements in Modern Law." *Law & Society Review* **17**: 239.
- Teubner, G. (1987). Juridification - Concepts, Aspects, Limits, Solutions. In *Juridification of Social Spheres. A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law*. G. Teubner (ed.). Berlin, de Gruyter: 3-49.
- Teubner, Gunther, ed. (1997) *Global Law Without a State*. Aldershot: Dartmouth.
- Teubner, G. (2004). Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors? In *Public Governance in the Age of Globalization*. K.-H. Ladeur (ed.). Aldershot, Ashgate: 71-87.
- Timmins, N. (2006). "The need for a recovery regime." *Financial Times*, 3 May.
- UNCTAD (2000). *Bilateral Investment Treaties 1959-1999*. Geneva: United Nations Conference on Trade and Development.

- UNCTAD. 2005. Latest Developments in Investor-State Dispute-Settlement. *IIA Monitor No. 4*.
- Van Harten, Hendrik Hugh Angus (2005), *The Emerging System of International Investment Arbitration*, (Ph.D. thesis, London School of Economics).
- Vincent-Jones, Peter. (1998), Responsive Law and Governance in Public Services Provision: A Future for the Local Contracting State. *Modern Law Review* 61:362-381.
- Vincent-Jones, Peter. (1999), The Regulation of Contractualisation in Quasi-Markets for Public Services. *Public Law* (Summer):1-31.
- Vogel, S. K. (1996) *Freer Markets, More Rules*. Ithaca, Cornell University Press.
- Webb, Kernaghan, and Andrew Morrison. (2004), The Law and Voluntary Codes: Examining the "Tangled Web". In *Voluntary codes: private governance, the public interest and innovation*, edited by K. Webb. Ottawa: Carleton Research Unit for Innovation Science and Environment Carleton University.
- Weiler, J. H. H. (1995), "Does Europe Need a New Constitution? Demos, Telos and the German Maastricht Decision." *European Law Journal* 1(3): 219-258.
- Woolcock, S. (1996). Competition Among Rules in the Single European Market. *International Regulatory Competition and Coordination. Perspectives on Economic Regulation in Europe and the United States*. In W. Bratton, J. McCahery, S. Picciotto and C. Scott (eds.), OUP: 289-321.