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Interdependence, Globalization, and Sovereignty

The Role of Non-Binding International Legal Accords

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Introduction

The “Asian financial crisis” of the mid-1990s not only had a global dimension in its causes and consequences but also, and ultimately more important, had long term implications reaching far beyond the realm of global finance and economics to affect political and social dynamics around the world.² It fueled intense debate about the benefits and drawbacks of globalization and the ability of existing structures of governance, including international financial institutions, to prevent future crises. Yet the concept of globalization remains elusive, despite widespread use of the term and recognition of its growing importance not just in foreign but also domestic policy-making. Globalization often is simply asserted without being defined or at best it is described as a continuous increase of cross-border financial, economic and more recently social activities. If, however, globalization is understood as merely a *quantitative* change in the volume of cross-border activity, its full consequences may not be fully captured nor will policy-makers be able to consider its implications.

This chapter posits that globalization represents a more fundamental change, a *qualitative* transformation of the international system with lasting implications for the public and private sectors alike, including changes in the nature of the legal processes and structures that shape the relationships and interactions among states. This qualitative transformation can be exposed by drawing an analytical distinction between the concept of economic interdependence, which

2. See James D. Wolfensohn, *The Other Crisis*. Address to the Board of Governors, Washington, D.C., October 6, 1998; Morris Goldstein, *The Asian Financial Crisis : Causes, Cures, and Systemic Implications*, (1998) *Policy Analyses in International Economics* 55; Eddy Lee, *The Asian Financial Crisis: The Challenge for Social Policy*, International Labour Office (1999); John Wong, *China's Economy and the Asian Financial Crisis*, (1998) EAI Occasional Paper No. 4.

characterized international relations for four decades after World War II and globalization, which has come to dominate the debate during the last decade. Economic interdependence can be seen to have narrowed the distance between sovereign nations and necessitated closer macroeconomic coordination among public sector actors (governments). In contrast, the principal drivers of globalization are in the private sector, i.e. firms that operate at the microeconomic level. This difference requires us to reconsider conventional forms of inter-state cooperation that were appropriate for the management of economic interdependence.

Traditional forms of international law-making through treaties and custom (hard law), the principal instruments formalizing inter-state cooperation, are less appropriate to shape the relationships of the various actors that are an integral part of globalization, reflecting the changing roles in the emerging global system of states, the private sector, and civil society organizations such as NGOs. Indeed, scholars of international law and international relations recently have expressed doubt about the continued utility of traditional methods of international law-making in the new global environment.³ Building on these criticisms and on the conceptual distinction between interdependence and globalization, this chapter sets forth a conceptual framework for the growing importance of non-binding international legal instruments (NBILAs) or so-called “soft”⁴ law. Following Koh’s concept of the “transnational legal process”⁵, we

3. See Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995); Steven R. Ratner, *International Law: The Trials of Global Norms*, (1998) *Foreign Policy*, 65-80; Edith Brown Weiss, *The New International Legal System*, in *Perspectives on International Law* 63-82 (Nandasiri Jasentuliyana, (ed.))(1993); Michael Reisman, *Designing and Managing the Future of the State*, (1993) 8 *Eur. J. Int’l L.* 410-420; Peter M. Haas et al., *Institutions for the Earth: Sources of Effective International Environmental Protection* (1993).

4. The term ‘soft’ law is controversial among international lawyers. Herein it corresponds to the framework of the project and means normative agreements that are not legally binding, in contrast to Bernhardt, who denominates them “rules, which are neither strictly binding nor completely void of any legal significance.” Rudolf Bernhardt,

understand soft law and its participating non-state actors as critical catalysts for and constituent elements of successful transnational cooperation and the creation of international norms that are crucial for a further development of a true international/ transnational society.⁶ Thus, NBILAs are not necessarily an alternative to international hard law or inter-state cooperation, but they can and often do represent the first important element in an evolutionary process that shapes legal relationships among and between multiple public and private actors, facilitating and ultimately enhancing the effectiveness and efficiency of transnational policy-making.

Both grand schools of international relations theory, (Neo-) Realism and (Neo-) Liberalism, would reject the suggested possibility of change in the interests and identity of nation-states. Drawing on the distinction between interdependence and globalization, however, this chapter argues that globalization requires and induces change in the interests and identity of states, promoting greater cooperation. Indeed, it shows that, short of a backlash against globalization, states will have little choice but to agree to pool their sovereignty to exercise public power in a global environment now mostly shaped by private actors.

Finally, a purely structural perspective could conclude that under conditions of globalization a state's identity and interests are best served through transnational cooperation rather than territorial defense or even offense, while a focus on the process through which such cooperation is achieved might lead to a negative conclusion if the process fails to meet the most

Customary International Law, (1984) 7 Ency. Pub. Intl. L. 61, 62. Important in this context are that NBILAs can take a wide variety of forms, and most importantly, are not subject to national ratification.

5. Harold Hongju, *Transnational Legal Process*, (1996) 75 *Nebraska L. Rev.* 1; Harold Hongju Koh, *Why Do Nations Obey International Law?* (1997) 106 *Yale L. J.* 2599. See also Philip C. Jessup, *Transnational Law* (1956).

6. See Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, (1998) 92 *Am. J. Int'l L.* 367, 383.

basic criteria of popular legitimacy and accountability.⁷ The essay concludes that NBILAs thus are important not only to facilitate cooperation in a world of globalization, but that the open and transparent integration of non-state actors in global cooperative venues is essential to enhance the legitimacy of transnational policy- and law-making processes, providing a crucial foundation for the emerging global civil society without which globalization cannot be sustained.

A. From Interdependence to Globalization

The concepts of interdependence and globalization often are used interchangeably; many studies characterize globalization as the “the intensification of economic, political, social, and cultural relations across borders.”⁸ Such a broad quantitative characterization may seem appropriate at first because it embraces the features usually associated with the general concept of globalization while avoiding the details, yet the definition also could apply to the term interdependence. Are the two concepts identical? Is globalization merely an “intensified version” of ever-increasing interdependence? How can globalization then be responsible for the qualitatively-significant transformation processes, the “epochal shift”⁹ that scholars and policy makers claim is taking place?

7. Karl Kaiser, *Transnational Relations as a Threat to the Democratic Process*, (1971) 25 *Int'l Org.* 706-720; Robert A. Dahl, *A Democratic Dilemma: System Effectiveness versus Citizen Participation*, (1994) 109 *Pol. Sci. Q.* 23-34; David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (1995), David Held, *Democracy and Globalization*, (1997) 3 *Global Governance* 251-268; Anthony McGrew, *The Transformation of Democracy? Globalization and Territorial Democracy* (1997); Jürgen Habermas, *Die postnationale Konstellation und die Zukunft der Demokratie*, (1998) 7 *Blätter für deutsche und internationale Politik*. 804-817.

8. Hans-Henrik Holm and Georg Sorensen, *Whose World Order? Uneven Globalization and the End of the Cold War* (1995) 4.

9. *Id.* at 6.

The central features of important and recent structural changes in the international system¹⁰ demonstrate that the two concepts are not interchangeable. In his seminal analysis, Richard Cooper was the first to offer a comprehensive theory of interdependence according to which liberalization of international trade and capital flows rendered nation-states increasingly vulnerable and sensitive to each other.¹¹ This process had two effects: first, interdependent countries were obliged to adjust their domestic economies to the fact of openness and interdependence.¹² Second, to cope with their mutual interdependence and increasing vulnerability, nation-states saw a need to create international institutions or regimes that provided a rule-based framework to manage their relations and generate a capacity for the joint management of macroeconomic policy, a systemic feature that became known as “embedded liberalism”.¹³

Two aspects related to interdependence are significant for the present analysis. First, interdependence was structured and managed largely by functionally equivalent public entities (states) and often lacked the flexibility and dynamism that characterize today’s global

10. See David Goldblatt et al., *Economic Globalization and the Nation-State: Shifting Balances of Power*, (1997) 20 *Alternatives* 269, 270.

11. Richard Cooper, *The Economics of Interdependence* (1968); see also Robert O. Keohane and Joseph S. Nye, Jr., *Interdependence in World Politics*, in *Power and Interdependence: World Politics in Transition* (1977).

12. Some even have argued that steadily increasing public expenditures for social security and other transfer payments became inevitable with growing openness. See David Cameron, *The Expansion of the Public Economy*, (1978) 72 *Am. Pol. Sci. Rev.* 1243-1261; Dani Rodrik, *Has Globalization Gone Too Far?* (1997).

13. John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, (1982) 36 *Int’l Org.* 195-231.

interactions among private actors.¹⁴ Second, and in light of more recent discussions on the benefits of globalization and the degree to which this process is reversible, interdependence is not the product of some higher force, but the result of deliberate political choices of nation-states supported by broad segments of their constituents.¹⁵

In contrast to economic interdependence, globalization is a process structured for the most part by private actors.¹⁶ It is a corporate-level phenomenon that commenced during the mid-1980s as companies responded to the heightened competition brought about by the deregulation and liberalization of cross-border economic activity. New and cheaper technologies, especially in the area of information and communication, permitted the integration of a cross-national dimension into the organizational structure and strategic behavior of individual companies.¹⁷ The growing amount of cross-border movement of increasingly intangible capital, such as finance, technology, information, and the ownership and control of assets, has enhanced corporate competitiveness and created a cross-border web of inter-connected nodes in which

14. Thus all major steps toward a more open world economy, such as the GATT negotiations, have been rather lengthy and full of setbacks. See WTO, *International Trade Trends and Statistics* (1995); Paul Bairoch, *Economics and World History: Myths and Paradoxes* (1993) 40.

15. Peter Dombrowski, *Haute Finance and High Theory: Recent Scholarship on Global Financial Relations*, (1998) 42 *Mershon Int'l Studies Rev. (Suppl. 1)* 1-28; Eric Helleiner, *States and the Reemergence of Global Finance: From Bretton Woods to the 1990s* (1994).

16. It is important to note that private actors are not only corporations, but interest groups, NGOs, knowledge institutions, etc.. They also have taken advantage of these developments and begun to restructure themselves on an international or global scale.

17. OECD, *Technology and Globalisation in Technology and the Economy: The Key Relationship* (1992); François Chesnais, *Technological Cooperation Agreements between Firms*, (1988) 4 *STI Rev.* 52-119; Luc Soete, *Technology in a Changing World: Policy Synthesis of the OECD Technology and Economy Program, MERIT/TEP* (1991).

value and wealth are generated. Interdependence thus was an important causal precondition for globalization without being identical to it.¹⁸

Data on global private sector activity, while not comprehensive, substantiate the emergence of global corporate networks and signal a qualitative transformation of the international system. There is little doubt that foreign direct investment (FDI), international trade, and cross-border financial flows have increased during the last two decades. More significant, however, is that their nature and geography also have changed and that other transnational economic linkages have grown in importance. Foreign direct investment, for example grew during the 1960s and 1970s in close correlation with tangibles such as world output and trade, but from 1985-95 it expanded at an annual average rate of 16 percent compared to 2 percent and 7 percent for output and trade, respectively. Controlling for the opening of both China and the former Soviet bloc, which attracted almost no investment prior to 1985, the share of foreign direct investment going to the developing world actually dropped. FDI in the developing world, generally focused on resource, labor-intensive and greenfield investments, remains an element in international economic activity, but it has been dwarfed by cross-investments in the OECD and a few emerging markets, concentrated on mergers and acquisitions in high value-added, knowledge, and R&D-intensive industries. The growing importance of corporate alliances and collaborative agreements, a variant of cross-border corporate organization adopted by companies that need cash or prefer arrangements of a less binding

18. For a more detailed discussion, see Wolfgang H. Reinicke, *Global Public Policy: Governing without Government?* (1998).

nature, confirm this shift. Not only have such alliances grown dramatically during the last decade, but the overwhelming majority have been concentrated in the OECD area.

These changes have qualitative implications for international trade, which increasingly is being structured by FDI and international alliances. The OECD estimates that about 70% of current world trade is accounted for by intra-industry and intra-firm trade, both closely tied to global corporate strategies and neither having much to do with the standard textbook case of comparative advantage.¹⁹ The dramatic growth of cross-border capital flows during the last decade is a well-established fact, but here too the advent of securitization and the institutionalization of savings in the mid-1980s represent a qualitative transformation of financial intermediation and its risks, facilitating the implementation of global corporate strategies while at the same time giving foreign entities access to domestic financial markets. The market for derivative instruments, in particular, has led to an explosion and heightened volatility of cross-border capital flows, evidenced by the fact that the combined annual value of global trade and FDI in 1995 was equal to only six days of turnover on the global foreign exchange markets.²⁰

Though incomplete, these data confirm that international economic activity during the last decade largely has reflected internal and cross-border restructuring of corporate activities throughout a product's life cycle, enabling corporations to draw on and serve geographically

19. Reasonable data for intra-firm trade exist only for the United States, but in 1995 approximately 40% of total U.S. trade comprised off-market trade. Governments continue to register these internal transfers because they cross borders, not because they are traded. Reflecting on the growing incidence of mergers and acquisitions, the OECD reminds us that such investments "may represent nothing more than a change of ownership, with no effect on resource allocation between the two countries." OECD, *Globalization of Industry: Overview and Sector Reports* (1996) 46.

20. *Id.*

expanding markets.²¹ This is achieved either through the absorption of foreign capital stock into an already existing corporate structure and internalization of economic activities that were formerly conducted on the open market or through alliances such as long term supplier agreements, licensing or franchising contracts entailing transfers among legally-independent corporate entities without full exposure to market forces. The process of corporate restructuring has become an ongoing process as most corporations are now able to adjust quickly to changing political, social and economic framework conditions. Globalization thus represents the emergence of a single integrated economic space cutting across political spaces and driven by the organizational logic of corporate industrial networks and their financial relationships.

To sum up, the widespread practice of equating globalization with interdependence can be misleading because globalization of corporate activity increasingly takes place in distinct institutional structures detached from the traditional economic relations among nation-states. In fact, although geographical differences in the effects of globalization remain²² one can argue that global corporate networks are increasingly independent from nation-states.²³ Whether this

21. OECD, *Financial Market Trends* (1996) 15; Thomas Hatzichronoglou, *Globalisation and Competitiveness: Relevant Indicators*, (1996) STI Working Paper 5, OECD/GD (96).

22. Obviously, the globalization of corporate activity depends on the specific sector. In addition, globalization until now largely has been limited to the OECD world. In fact, some scholars argue that the term globalization is a misnomer; the best alternative has been proposed by Michael Zürn's concept of denationalization. Michael Zürn, *Does International Governance Meet Demand?* InIIS-Arbeitspapier Nr. 4-5 (1997). This is not to say that other regions will remain excluded. In fact, there is evidence that at least some non-industrialized countries are increasingly part of this process (Petrella 1996: 77). In addition, some scholars have found, that "[...] the institutional and ideological legacies of distinctive national histories continue significantly to shape the core operations of multinational firms based in Germany, Japan, and the United States. [...] recognizable and patterned differences persist in the behavior of leading MNCs." Louis W. Pauly and Simon Reich, *National Structures and Multinational Corporate Behavior: Enduring Differences in the Age of Globalization*, (1997) 51 *Int'l Org.* 3, 25.

23. As Riccardo Petrella recently put it, "the growing globalization of the economy is eroding one of the basic foundations of the nation-state, i.e. the national market. . . . what is different today from thirty years ago is that the

implies that multinational, transnational or global corporations should be characterized as “footloose and stateless”²⁴ or even “global corporate leviathans”²⁵ remains highly controversial.

This chapter cannot claim to offer a general definition of economic globalization because the data remains incomplete. Clearly, reality is more complex and the borders between interdependence and globalization are blurred. As will be shown, however, the key features of globalization presented above warrant examining their impact on the sovereignty of nation-states and the restructuring of the international system, including the role of international law.

B. Globalization: A Challenge to Sovereignty?

Much has been written on the challenge that globalization poses to sovereignty,²⁶ but, as indicated by the debate on interdependence, the fact that economic integration weakens the sovereignty of nation-states is nothing new. Two specifications of globalization and sovereignty provide useful foundations for this study.²⁷ First, neither globalization nor interdependence

national economy is no longer the name of the game.” Petrella, Riccardo, Globalization and Internationalization. The Dynamics of the Emerging World Order, in: Robert Boyer/ Daniel Drache (eds.): *States against Markets. The Limits of Globalization* (London/New York, Routledge), pp. 62-83, at 67.

24. Wade, Robert, Globalization and Its Limits: Reports of the Death of the National Economy are Greatly Exaggerated (1996), in: S. Berger/ R. Dore (eds.) *Diversity and Global Capitalism* (Ithaca, N.Y., Cornell University Press), pp. 60-88, at 79.

25. Petrella 1996 at 74

26. See, e.g. Kenichi Ohmae, *The End of the Nation-State* (1995); Vincent Cable, *The Diminished Nation-State: A Study in the Loss of Economic Power*, (1995) 124 *Daedalus*; Jean-Marie Guehenno, *The End of the Nation-State* (1995); Matthew Horsman and Andrew Marshall, *After the Nation-State* (1994); Joseph Camilleri and Jim Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (1992); Philip G. Cerny, *Globalization and the Changing Logic of Collective Action*, (1995) 49 *Int'l Org.* 595-625; Richard Falk, *Will Globalization Win Out?*, (1997) 73 *Int'l Aff.* 123-136; Held, *supra* n. 6; Rodrik *supra* n. 11.

27. A comprehensive and broad discussion of the concept of sovereignty is not possible in this chapter and, indeed, two recent analyses argue that sovereignty in itself is not a coherent concept and therefore cannot be defined. See J. Bartelson, *A Genealogy of Sovereignty* (1995) and C. Weber, *Simulating Sovereignty: Intervention, the State and*

challenge the formal or legal sovereignty of a state – only other states can. Globalization instead challenges the *operational* sovereignty of a government, that is, its ability to exercise sovereignty in its conduct of public policy. Second, states, according to John Hoffman, live a “double life”²⁸ with sovereignty having two dimensions, an internal and an external. The *internal* dimension is the relationship between the state and civil society. Following Max Weber, a government is internally sovereign if it enjoys a monopoly of the legitimate power over a range of activities, including economic ones, within a given territory. That power is embodied in the domestic legal, administrative, and political structures and principles that guide public policies. Internal economic sovereignty takes effect when governments collect taxes or regulate private sector activities. The practice of sovereignty therefore can be described as “the highest, original – as opposed to derivative – power within a territorial jurisdiction; this power is not subject to the executive, legislative or judicial jurisdiction of a foreign state or any foreign law other than public international law.”²⁹

The *external* dimension of sovereignty refers to relationships among states in the international system, defined by the absence of a central authority. Countries exercise external economic sovereignty when, for example, they collect tariffs and alter their exchange rates. Economic interdependence poses a challenge to this external dimension of sovereignty. Responding to the challenge, governments largely followed the principles of liberal economic internationalism, endorsing the incremental reduction of their external economic sovereignty by

Symbolic Exchange (1995). See also John Hoffman, *Blind Alleys. Can We Define Sovereignty?*, (1997) 17 *Politics* 53.

28. Hoffman, *id.* at 54.

29. Ruth Lapidoth, *Sovereignty in Transition*, (1992) 45 *J. Int'l Aff.* 325, 327.

lowering tariff barriers and capital controls. The reductions were structured around a set of international norms and standards, including in most instances the principle of reciprocity, embedded in international regimes such as the GATT, the IMF, and the OECD that formalized state adherence and assured their compliance.³⁰

The concept of external sovereignty loses much of its significance when examining the implications of globalization. Global corporate networks are posing challenges instead to a state's internal sovereignty, by altering the spatial relationship between private and public sectors. The organizational logic of globalization induces corporations to seek the fusion of multiple, formerly segmented national markets into a single whole that subsumes multiple political geographies. As a result, governments no longer have a monopoly of the legitimate power over their territory, undermining the operability of internal sovereignty. The rising incidence of regulatory and tax arbitrage is a telling indicator that the monopoly has ended.

By no means does globalization imply that private sector actors are always deliberately undermining internal sovereignty. Rather, they follow a fundamentally different organizational logic. Political systems, at least in their contemporary form as nation-states, are boundary maintaining systems.³¹ Indeed, their legitimization, internal and external, is derived from the ability to maintain boundaries. Markets, although initially relying for their creation on political power, do not depend on the presence of boundaries. The spatial symmetry between the 'public' and the 'private' upon which internal sovereignty depends is disappearing. Governments,

30. Stephen D. Krasner, (ed.), *International Regimes* (1983).

31. Friedrich Kratchowil, *Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System*, (1986-7) 39 *World Politics* 27-52; Niklas Luhmann, *Territorial Borders as System Boundaries*, in *Cooperation and Conflict in Border Areas* 235-245 (Raimondo Strassoldo and Giovanni delli Zoti, (eds.))(1982).

continually bound by territoriality, cannot project their power over the total space within which production and consumption organize themselves. Globalization thus integrates along the economic dimension and simultaneously fragments along the political.

The fact that political fragmentation threatens only the operational aspects of internal sovereignty in no way minimizes the challenge. The threat to a government's ability to exercise internal sovereignty implies a threat to the effectiveness of democracy. Individuals may continue to exercise their formal right to vote, but the power of that vote to shape public policy decreases with the decline in operational internal sovereignty. Persistent weakness in internal sovereignty will cast doubt on democratic institutions, ultimately challenging formal sovereignty. It is an important factor in the declining trust in democratic institutions, giving governments no choice but to respond.

C. Policy Responses

The responses of nation-states to the pressures of globalization for the most part fall into two broad categories. First, some governments adopt essentially interventionist strategies that reemphasize the territorial nature of state jurisdiction, in the hope of regaining control over the economic and social environment. Alternatively, governments may simply rely on existing structures and processes of international cooperation, including the use of international law, as practiced when managing external sovereignty. Neither of these responses is likely to generate the expected results.

1. Offensive and Defensive Intervention

Those who consider globalization a threat may take measures of defensive intervention, such as the reinstatement of tariffs, non-tariff barriers, and capital controls, or they may force companies to reorganize along national lines. If economic nationalism fails to arouse broad popular support, its political counterpart -- territorial secession and partition -- may do so.³² Alternatively, governments may pursue an offensive strategy of predatory competition, subsidizing national champions and encouraging competitive deregulation. Such states may become 'global competitors', seeking to entice corporations to operate within their own territory. Offensive intervention has become popular as a political tool, as some countries attempt to broaden the reach of their internal sovereignty to match the economic geography of global corporate networks.³³

The term commonly used to describe offensive intervention is "national competitiveness" and in many industrialized countries it shapes the domestic debate on important structural reforms in economic and social policy.³⁴ Nation-states, taking this concept for granted, seek to

32. Increased calls for greater regional autonomy or even territorial secession and partition in the hope of regaining internal sovereignty is a political strategy that has become popularity during the past decade.

33. Two of the more prominent examples are California's attempt to tax resident companies on a global basis and the Helms-Burton-Act. See David M. Shamberger, *The Helms-Burton Act: A Legal and Effective Vehicle for Redressing U.S. Property Claims in Cuba and Accelerating the Demise of the Castro Regime* (1998), 21 *Boston Col Internat and Comparative Law R* 497-537 and Viveca Novak (1993), *Tilting at Taxes: Foreign Governments are Screaming Bloody Murder over California's Insistence on its Right to Tax Multinational Corporations on a Share of their Global Income*, in: *Nat J* 25:1972-5 Ag 7.

34. John Zysman, and Laura Tyson, *American Industry in International Competition: Government Policies and Corporate Strategies* (1983); Laura D'Andrea Tyson, *Who's Bashing Whom: Trade Conflict in High-Technology Industries* (1992); Lester C. Thurow, *Head to Head: The Coming Battle among Japan, Europe, and America* (1992); Edward N. Luttwak, *The Endangered American Dream: How to Stop the United States from Becoming a Third World Country and How to Win the Geo-Economic Struggle for Industrial Supremacy* (1993).

offer the best environment for FDI and production to generate economic growth and employment, or subsidize national corporations in their struggle for international market shares. The political reality is of states as competitors, at least in rhetoric, although the results of deregulation and subsidization for the sake of national competitiveness remain uncertain and unpromising.³⁵

Neither defensive nor offensive intervention bodes well for the future of international relations. Protectionism by one country or a region invites retaliation and jeopardizes the path of deeper integration. Subsidizing an industry with the sole purpose of gaining (a temporary) competitive advantage also diverts scarce public funds from important public policy goals. Although competitive deregulation may not lead to disintegration, it defeats the original purpose of the policy because a fully deregulated market further reduces a government's internal sovereignty.³⁶ Extraterritorial regulation also undermines deeper integration because other states usually retaliate against such dictates. Finally, redefining political geography through partition only gives the appearance of greater control of policy. Partitioning a country focuses exclusively on the external dimension of sovereignty and in no way insulates governments from the challenges of globalization. If anything, it makes them more vulnerable.

These approaches re-emphasize territoriality as an ordering principle of international relations, a condition that integration tried to overcome and the end of the Cold War appeared to have secured. All are at odds with globalization and will succeed only if the achievements of

35. As Paul Krugman has put it, "it could result in the wasteful spending of government money supposedly to enhance U.S. competitiveness. Second, it could lead to protectionism and trade wars. Finally, and most important, it could result in bad public policy on a spectrum of important issues." Paul Krugman, *Competitiveness: A Dangerous Obsession*, in Paul Krugman, *Pop Internationalism* (1996) 18.

36. Karl Polanyi, *The Great Transformation. The Political and Economic Origins of Our Times* (1944, 1957).

interdependence are reversed. To some this possibility seems remote, but the popularity of interventionist policies has increased considerably since the early 1990s with political opportunists taking advantage of the public's fear concerning declining internal sovereignty and advocating greater economic nationalism and/or closed regionalism. Unless an alternative can be found, governments may be forced to rely on interventions to halt the loss of internal sovereignty and further erosion of confidence in democratic institutions. A strategy to resolve the dilemma of "fragmented sovereignty"³⁷ while preserving the benefits of globalization and interdependence must re-align the political with the economic geography, something which can only be achieved by overcoming public policy responses based purely on territory.

2. Traditional International Cooperation and International Law

If governments want to shape globalization rather than merely react to it, they must operationalize internal sovereignty in a non-territorial context. Forming a global government is one response, but it is unrealistic because it would require states to abdicate their sovereignty in a formal sense. It is also undesirable for reasons of accountability and legitimacy: there presently exists no "transnational public space" where political discourse -- one important pillar of a global civil society -- could be organized, including mechanisms of public control over international policy-making.³⁸ Finally, while global government may be a technocrat's answer to the

37. Wolfgang Streeck, Public Power Beyond the Nation-State: The Case of the European Community, in *States against Markets in The Limits of Globalization* (Robert Boyer and Daniel Drache, (eds.)) (1996) 299, 300.

38. See Ernst-Otto Czempiel, Governance and Democratization, in *Governance without Government: Order and Change in World Politics* (James N. Rosenau and Ernst-Otto Czempiel (eds.))(1992) 250-71; James N. Rosenau, *Governance in the Twenty-First Century*, (1995) 1 *Global Governance* 13-43; Oran R. Young, *Anarchy and Social*

shortcomings of territorially-based approaches to public policy, it could not match the dynamism of transnational economic and social networks, legal and illegal alike, that have emerged with globalization; nor is there any reason to believe that a global government is better equipped to manage the technical complexities and speed of evolution of public policy at the beginning of the twenty-first century.

Thus for many observers a more adequate answer is to continue strengthening the structure of multilateralism, development of which is seen in the rising number of international institutions and organizations.³⁹ In this context, the present significance of international law is without doubt one of the preminent achievements of the post-war international system.⁴⁰ These forms of inter-state cooperation have their roots and robustness in the management of external sovereignty, i.e. the management of interdependence. International hard law instruments have been the most important element in the cooperative processes.⁴¹ State action has largely

Choice. Reflections on the International Polity, (1978) 30 World Politics 241-263. Arguably, the investiture of a global government also would require a strong (hegemonic) power that no longer exists. In recent history, at only one point in time was a single nation-state, the United States, strong enough to assume the role of a world government, i.e. by the installation of the Bretton Woods system that to a large extent reflected American visions of a post-war world. Today, even taking into account the US hegemonic position on some issues, no nation-state that can easily and generally dominate world politics. Therefore, a possible attempt to enlarge state power to implement a world government could be pursued only by force, an undesirable option.

39. Michael Zürn, Does International Governance Meet Demand? (1997) In IIS-Arbeitspapier Nr. 4-5; Harold K. Jacobson et al, National Entanglements in International Governmental Organizations, (1986) 80 Am.Pol.Sci.Rev. 1.

40. Although nearly all observers agree that there is growing international cooperation, the reasons for this development remains highly debated between (Neo-) Realists and (Neo-) Liberalists, as well as proponents of critical theory such as social constructivist or reflectionist theorists. The present analysis does not go into the debate both because of the already existing vast literature on that question and, more importantly because, as it is argued below, the framework of interaction between nation-states is so rapidly and profoundly changing that much of the discussion of the 1980s and the early 1990s becomes redundant. For a good overview over the current debate about the reasons for and the possibilities of international cooperation see David A. Baldwin (ed.), Neorealism and Neoliberalism (1993).

41. This does not imply that states utilize only hard law instruments in cooperative processes, although treaties and custom are the preferred means. So-called international regimes could also rely on NBILAs as important instruments.

precipitated and structured the processes and the instruments, notwithstanding the growing importance of non-state actors and international organizations in inter-state negotiations and law-making.⁴² The importance of international hard law can be seen not only in the number of international treaties and agreements, but also in the increasing impact of international law on peoples' lives.⁴³

There nonetheless continue to be major obstacles in the way of establishing a system of international law comparable to the legal systems of nation-states, in which all "courts, agencies, and other formal organs of dispute settlement or rule application are all more or less coordinated in an integrated and hierarchical legal system . . ." ⁴⁴. In fact, it seems that the development of international law represents merely a patchwork. The uncoordinated division of labor among existing international institutions and organizations reflects this dilemma and uncovers the extensively-discussed gaps and loopholes in the system of international law and multilateralism.⁴⁵

The advent of globalization has revived the agenda the issue of developing a system of global governance that is efficient, effective and legitimate when compared to that of modern

42. Brown-Weiss, *supra* n. 2 at 65.

43. David Held, among others argues that individuals increasingly are affected by international law, in some cases appearing as subjects of international law. Held (1995) *supra* n. 6 at 101. As politics increasingly is uncoupled from the nation-state, the mechanisms of democratic control realized in democratic nation-states are undermined. Concerning the ongoing debate on individuals as subjects of international law, Hedley Bull noted as early as 1977 that "opinion appears to have moved decisively against the doctrine of the nineteenth-century positivists that international law (in Oppenheim's words) is a 'law between states only and exclusively'", but that "[i]t is widely held that individual human beings are subjects of international law [. . .]." Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (1977), 145; see also Werner Levi, *Law and Politics in the International Society*, Sage Library of Social Research No. 32 (1976), 111-115.

44. Mark W. Janis, *An Introduction to International Law* (2nd ed. 1993) 7.

45. Zürn, *supra* n. 38 at 34

nation-states. If one accepts the notion of the diminishing importance and significance of nation states, it becomes important to conceive of a system that acts as the principal institutional mechanism through which internal sovereignty can be applied and enforced at the global level. Some have proposed the emergence of a ‘cosmopolitan democracy’, an encompassing system of international law that includes individuals and groups, with fundamental individual rights guaranteed by supranational judicial authorities above the national legal framework.⁴⁶

This perspective, appealing as it is, appears overly broad and optimistic, given the historical evolution of the international system and international law. It also would take time to develop such an order.⁴⁷ More specifically, a number of theoretical and operational concerns throw considerable doubt on the ability of the traditional system to respond adequately to the growing demand for cooperation compelled by globalization and to the changing characteristics and complex nature of managing internal sovereignty in a transnational context.

First, the inter-governmental instruments, regimes and organizations that were used to promote economic interdependence (external sovereignty as global policy issues) may not be appropriate to manage globalization (internal sovereignty as global policy issues). The issues for which cooperation is sought are likely to be more complex and highly contentious, embedded as they are in history and culture. Thus, in contrast to the management of interdependence, which promoted a widely accepted paradigm of free trade and reciprocal reduction of tariff barriers, globalization challenges policy makers to develop common standards on issues such as non-tariff

46. Held (1995), *supra* n. 6.

47. Held’s work still serves an important purpose in rethinking classical theories of democracy that were designed for modern nation-states and that have come under increasing pressure with the internationalization and globalization of politics.

barriers, heretofore the exclusive prerogative of nation states,⁴⁸ in the face of national idiosyncracies and perceptions of the public good.

Second and related, the management of interdependence and expansion of the international legal system was largely structured by functionally equivalent nation-states, while globalization has been driven primarily by non-state, especially corporate actors. Given this development, the management of internal sovereignty in a non-territorial context is likely to require considerable interaction among functional opposites (nation-states and private actors) at the global level and may necessitate a reconsideration of conventional models of cooperation in light of the different modes and cultures of organization and communication that characterize the public and private sectors.

Third, recent scholarship has argued convincingly, contrary to the assumptions of (Neo-) Realism and (Neo-) Liberalism, that states' interests as well as their identities are not static and exogenously created⁴⁹ but are "socially constructed products of learning, knowledge, cultural practices, and ideology"⁵⁰ shaped over a long period of time. This work acknowledges, in principle, the possibility of change in states' interests and identities, but also recognizes the obstacles, noting that "notwithstanding the growing importance of non-state actors in world

48. Cooperation on internal sovereignty issue areas can result in joint gains, but in general these gains will be much harder and take longer to achieve. The case of labor standards provides an example. In general, a common set of labor standards can provide a joint gain, excluding as it does the possibility of regulatory arbitrage by multinational corporations, but complex considerations of political culture and history can pose obstacles in the process of cooperation.

49. Otherwise, it would be hard to explain peaceful change in the system. See Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, (1992) 46 *Int'l Org.* 391-425; Alexander Wendt, *Collective Identity Formation and the International State*, (1994) 88 *Am. Pol. Sci. Rev.* 384-396.; Emmanuel Adler, *Seizing the Middle Ground: Constructivism in World Politics*, (1997) 3 *Eur. J. Int'l Rel.* 319-363.

50. Koh (1996), *supra* n. 4 at 20.

politics, states remain jealous of their sovereignty and so may resist collective identification more than other actors.⁵¹ It thus is not readily apparent that existing state-dominated structures and institutions of cooperation, including the formulation of treaties and custom, can easily respond to let alone ‘absorb’ the set of issues involved in managing internal sovereignty in a manner that would resemble socially constructed outcomes.

The emergence of internal sovereignty as a global policy issue exposes existing shortcomings in negotiating, implementing, and monitoring international hard law.⁵² First, legal and international relations scholars widely agree that hard law-making usually entails a slow and costly process, involving exhaustive negotiation processes between top-levels of national bureaucracies. These processes are not effective and flexible enough to accommodate the public policy demands emanating from highly adaptive and responsive global corporate networks, which require a constant reassessment of the structures that govern them.⁵³

Second, international treaties are based on consensus of the negotiators. Their content thus tends to reflect a narrow and often lowest common denominator not necessarily responsive to complex and interdisciplinary global challenges like environmental protection and labor market regulation. Moreover, most treaties classify states as either member and non-member. Such rigidity does not favor regime development, let alone success, because it excludes a priori

51. Wendt (1994), *supra* n. 48 at 385.

52. For more extensive analysis see Peter H. Sand, *International Cooperation: The Environmental Experience*, in *Preserving the Global Environment: The Challenge of Shared Leadership* (Jessica Tuchman Mathews (ed.))(1991); Chayes and Chayes, *supra* n. 2.

53. Technological progress is so rapid in the international financial markets and banking that regulators find it difficult to keep pace with changes and the challenges they pose to existing regulatory frameworks. See Dombrowski *supra* n. 14 at 8; Reinicke *supra* n. 17.

those that are financially or technically unable to comply and those who disagree with the fundamental treaty obligations.

Third, the effectiveness of international cooperation through treaties is usually delayed because of the requirement of parliamentary ratification,⁵⁴ although states have adopted ameliorative techniques such as provisional treaty application and delegated law-making (to supranational regulatory authorities or agencies). While helpful, these techniques cannot cure the underlying problem and in some cases have created new ones. First, provisional application does not resolve the need for a ‘fast-track’-device to manage a continuously changing policy landscape. Second, delegated law-making empowers institutions that lack the legitimacy and accountability of their national counterparts, results in a democratic deficit, and fosters the growing political resistance to globalization.

Fourth, globalization fundamentally alters the prospects and possibilities of compliance, potentially leading to a higher incidence of defection from international agreements. In many cases it is no longer sufficient to ask whether states are willing, but if they are able to comply. In some issue-areas nation-states cannot fulfill treaty obligations because the objects of regulation are highly mobile and act on a transnational scale. According to Chayes and Chayes, “[t]he problem [of involuntary defection] is even more acute in contemporary regulatory treaties. Such treaties are formally among states, and the obligations are cast as state obligations. . . . The real object of the treaty, however, is not to affect state behavior, but to regulate the activities of

54. It usually takes the International Labor Conference two to three years to agree to a new labor standard which is then subject to national ratification before it is legally binding. Assuming states are willing to ratify the new standard, it usually takes another two to three years before it enters into force.

individuals and private entities”⁵⁵ Lack of capacity is not limited to developing countries; in some issue areas, e.g. banking regulation, money laundering, dual-use trade, and terrorism, it affects members of the industrialized OECD-world. Although Louis Henkin argues from established empirical facts that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time,”⁵⁶ this assertion may well be disproven by the advent of globalization and the challenges it creates, creating a new source of conflict between nations.

In sum, traditional international law and interstate cooperation associated with the management of interdependence are unlikely to be effective, efficient, or legitimate instruments to respond to the public policy challenges of globalization, although improvements have been made in hard law-making. Global environmental treaties often now include selective incentives, differential obligations or are regionalized to become more open and flexible,⁵⁷ although there may be good reason to reject a regionalized approach.⁵⁸ More importantly, it is doubtful whether these and other adjustments will be able to establish the degree of inclusiveness, support and legitimacy that is required for the sustained and successful management of internal

55. Chayes and Chayes, *supra* n. 2 at 14.

56. Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd ed. 1979), 47.

57. Sand *supra* n.51 at 241-50.

58. In the case of labor standards, for example, “from the ILO’s perspective, one thing is clear. We strongly feel that: (1) there should be a body of international labor standards (or social charter) agreed on by all parties concerned; and (2) at a time when the world economy becomes ever more integrated, a regionalization of standards (i.e., different minimum standards for different regions or cultures) must be avoided at all cost.” Heribert Maier, *International Labor Standards and Economic Integration: The Perspective of the International Labor Organization*, in *International Labor Standards and Global Economic Integration* (Gregory K. Schoepfle and Kenneth A. Swinnerton, (eds.))(1994) 11.

sovereignty. Hard law often does not offer the required ‘process openness’ many global policy issues need to achieve acceptance and compliance by all participants. Instead, successful global governance of internal sovereignty beyond the nation-state must transcend the governments and politics of nation-states to take on a much wider meaning in terms of participating actors and levels and structures of interaction.⁵⁹ Traditional international hard law and inter-state cooperation must be complemented by a more incremental and evolutionary approach that acknowledges and incorporates the qualitative differences between interdependence and globalization,.

Legal scholars sometimes distinguish the ‘international law of coexistence’ and the ‘international law of cooperation’.⁶⁰ As a pillar of interdependence, the ‘international law of cooperation’ is understood as the “development of an international law expressing the need for *states* to cooperate in order to attain objectives beneficial to all.”⁶¹ Under conditions of globalization, the ‘international law of cooperation’ has gained in importance, but it can succeed only if international law can move beyond its narrow focus on states. It must adopt and employ broad and flexible legal structures and processes that facilitate the social construction of states’

59. See Rosenau and Czempel *supra* n. 37. There is no widely accepted definition of global governance, but the statement of the Commission on Global Governance describes global governance as “the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflict or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interests.” Commission on Global Governance, *Our Global Neighborhood* (1995), 5. James N. Rosenau adopts an even broader definition: “global governance is conceived to include systems of rules at all levels of human activity – from the family to the international organization – in which the pursuit of goals through the exercise of control has transnational repercussions.” Rosenau, *supra* n. 37 at 13.

60. Wolfgang Friedmann, *The Changing Structure of International Law* (1964).

61. Charles Leben, *The Changing Structure of International Law Revisited*, (1997) 8 *Eur. J. Int’l L.* 399, 401.

interests in order for them to establish and exercise internal sovereignty at the global level. As is shown in the following discussion, NBILAs make an important contribution to the emergence of such structures and processes.

D. Global Public Policy and the Role of NBILAs

There is growing if scattered evidence that state and non-state actors have begun to experiment with the idea of global public policy that aims, inter alia, at the active integration of non-state actors in all phases of the policy-making process. The evidence includes an increasing reliance on NBILAs, which provide a certain legal framework and sense of obligation for the multiple and functionally-different parties involved. This section proposes a more systematic involvement of non-state actors, highlights some of the challenges that are likely to arise if policy makers choose to rely on such an approach, and points to the crucial role that NBILAs will have to play in operationalizing the concept of global public policy.

1. Toward Global Public Policy

The concept of internal sovereignty and the perceived needs of national constituencies within countries are in constant flux, depending on a wide variety of factors including overall economic conditions, changing external circumstances, and technological and scientific evolution, all of which serve to impact on the politics of public policy. Second, what is and what is not perceived to be in the public interest not only varies across time but also across countries, reflecting differences in levels of economic development, historical experiences, and cultural

norms and values. Recent debates on human rights and labor standards provide a telling example.⁶² As a result, implementing internal sovereignty globally cannot succeed merely by ceding sovereignty to supranational authorities or by negotiating more sophisticated treaties. Global public policy is becoming a process of collective identity formation,⁶³ and as a result the processes and forms of cooperation, critical elements through which actors interact shaping each other's identities and interests, must be adapted. The politics of global public policy must become more inclusive and participatory, a proposition that appears difficult to realize given the continuing importance of formal sovereignty and the emphasis of nation-states on the principles of territoriality and non-interference.

This has created something of a paradox. On the one hand, states remain eager to preserve their formal sovereignty and thus are reluctant to cede formal power and sovereignty to other levels of governance, making the goal of sustained international law-making hard to achieve. On the other hand, states will be required to demonstrate a high degree of cooperation in order to maintain their internal sovereignty, that is to rationalize their very existence vis-à-vis their constituents. By elevating internal sovereignty to the rank of a global policy issue, globalization challenges the international system to manage and resolve this second, equally important determinant of states' overall identity. States can no longer afford to exhibit a singular

62. The classic economic debate on public goods is in this sense too narrow because public goods are not only items that are produced to internalize externalities and market inefficiencies but also reflect the political choice of regulation and redistribution of a society. "[T]he idea that state policy should or even can be based on a single criterion of maximizing efficiency is demonstrably false . . . to maintain the loyalty of the majority of its citizens - a necessary condition for political security, legitimation, etc. - the state is called on to provide economic security." Susan Strange, *Protectionism and World Politics*, (1985) 39 *Int'l Org.* 233, 236. On labor standards see Jan Martin Witte, *Globalisierung, nationalstaatliche Handlungsfähigkeit und Demokratiedefizit: Globale demokratische Ordnungspolitik zur Regulierung internationale Arbeitsstandards*, Diplomarbeit, Faculty of Economics and Social Sciences at the University of Potsdam (1998).

63. Wendt, *supra* n. 48 at 388-91.

systemic identity seen in the preservation of external sovereignty, must rely on the international system to achieve internal sovereignty as well.

Cooperation, as advocated by (Neo)Liberals, thus is no longer just a means to the end of managing external sovereignty but becomes an end in itself or, in other words, anarchy is no longer just the outcome of, but also the cause for, state interests in the international system. “As the ability to meet corporate needs unilaterally declines, so does the incentive to hang onto the egoistic identities that generate such policies, and as the degree of common fate increases, so does the incentive to identify with others.”⁶⁴ Given this, the prospects for inter-state cooperation and compliance are better under conditions of globalization than under economic interdependence. This by no means eliminates the problem of free-riding but it can facilitate the establishment of incentive-based structures and rules to reduce it.

The social origins of state interests necessitates the systematic and sustained integration of private profit and non-profit actors in the process of global public policy- and law-making to facilitate the formation of collective transnational identities to sustain cooperation. Such an integration can be achieved by recognizing that governance, a social function crucial to the operation of any market economy, does not always have to be equated with government. Accordingly, a global public policy would de-link some operational elements of internal sovereignty (governance) from its territorial foundation (the nation-state) and hierarchical institutional environment (the government).

To implement such a strategy, policy- and law-makers could invoke the principle of subsidiarity, but use the concept in a broader sense than it is used in the context of the European

64. *Id.* at 389.

Union, the Tenth Amendment to the U.S. Constitution, and other federalist structures. The “sub” in subsidiarity normally is used in a functional sense to refer to any actor or institution that is well-positioned to support the operationalization of internal sovereignty. *Vertical* subsidiarity delegates policy- and law-making to other public sector actors, in the case of interdependence and globalization to multilateral institutions.⁶⁵ As discussed above, however, these traditional forms of cooperation through inter-state bargaining, application of international hard law, and the establishment of intergovernmental organizations do not suffice. International bureaucratic structures cannot eliminate the organizational disparities between public territorial hierarchies and the private non-territorial networks that globalization has exposed. Global bureaucracies lack the dynamism, agility, and knowledge base that characterizes global economic and social networks. Adaptive and intelligent public policy systems to form the core of identity and interest formation in the context of globalization will only arise if policy makers are prepared to make extensive use of *horizontal* subsidiarity, that is, if they delegate or outsource some aspects of public-policy making to non-state actors such as business, NGOs, foundations, and other interested civil society participants.

There are numerous reasons why the integration of private actors can further global public policy-making. Five are listed here: *first*, it offers selective incentives for private actors. They have a direct stake not only in the outcome of global public policy, but also in the success of the network itself. By participating in the policy making process these actors can contribute to and influence global regulatory policy such as the setting of norms and standards, reducing

65. The changing roles and mandates of the WTO, the World Bank, and the IMF, which now are beginning to deal with good governance, financial regulation, and environmental standards, suggest that they are becoming increasingly involved in matters of internal sovereignty.

transaction costs and simplifying the system itself for all involved. *Second*, the process of global public policy-making can be propelled and advanced by reducing information asymmetries between regulators and regulated. Already a problem at the national level, information asymmetries have increased considerably in the wake of globalization. *Third*, better information, knowledge, and understanding on the part of the non-state actors with regard to increasingly complex, technology-driven, and fast changing public policy issues will produce a more efficient and effective regulatory process. *Fourth*, private sector and NGO participation will generate greater acceptability and legitimacy of global public policy and transnational law-making.⁶⁶ *Fifth*, and related, horizontal subsidiarity creates a real international community, a true global civil society, by encouraging mutual learning systems and openness to change among different systems of public policy, currently one of the biggest obstacles in establishing internal sovereignty at the global level.⁶⁷ It could therefore serve as a catalyst for collective identity

66. Participation alone is unlikely to solve the problem of the democratic deficit that is inherent in international as well as transnational relations. Research is urgently needed on the question of whether or not the integration of non-state actors can result in a more legitimate process of transnational policy- and law-making. Arguably, the integration of private actors can lead to greater transparency and openness of international processes and establish forms of deliberative negotiation processes, providing elements of a participatory democracy in which all parties that have a stake in the issue can become involved. Cox argues that “[t]here is a meaning of democracy that could be built upon such a development of civil society – a “participative democracy”, the organization of civic life upon the basis of a variety of self-governing groups that deal with the whole range of people’s substantive concerns.” Robert Cox, *Globalization, Multilateralism and Democracy* (The John W. Holmes Memorial Lecture) Providence, Academic Council on the United Nations System Reports and Papers, 1992-2, 7. Ansgar Klein and Rainer Schmalz-Bruns, *Herausforderungen der Demokratie. Möglichkeiten und Grenzen der Demokratietheorie*, in *Politische Beteiligung und Bürgerengagement in Deutschland. Möglichkeiten und Grenzen*, (Ansgar Klein and Rainer Schmalz-Bruns, Rainer (eds.))(1997) 35; see also our conclusion.

67. Anne-Marie Clark, *Non-governmental organizations and their influence on international society*, (1995) 48 J. Int’l Aff. 507-525; Jackie Smith, *Global Civil Society?* (1998) 42 *The American Behavioral Scientist* 93-107; Jeffrey J. Seagall, *A First Step to Peaceful Cosmopolitan Democracy*, (1997) 9 *Peace Rev.* 337-344; John Boli and George M. Thomas, *World Culture in the World Polity: A Century of International Non-Governmental Organizations*, (1997) 62 *Am. Soc. Rev.* 171-190.

formation, the most imminent precondition for an international society based on common norms and values to come into existence.⁶⁸

The wisdom of placing private and public interests under the direction of the same institution may be questioned. The public's interest could be neglected, as suggested by the limited experience with mixing public and private regulation at the national and regional levels. The deficiencies of mixed regulation should and can be addressed, however. Greater transparency can be achieved by establishing strict principles of disclosure-based regulation guaranteeing other groups sufficient access to ensure that their interests are adequately represented. Second, corporations must facilitate such public-private partnerships by improving their own internal control and management structures. The better these inside controls, the lower the risk of market failure and the need for outside regulation.⁶⁹

2. NBILAs and Global Public Policy

To garner credibility and trust, and eventual success, global public policy networks must be embedded in an international legal context. Here NBILAs can and do play a crucial role in establishing public-private partnerships – the institutional foundation of global public policy networks. NBILAs are thus understood as tools that state and non-state actors chose to strengthen and sustain the operability of internal sovereignty in a non-territorial space. The fact

68. Oscar Schachter, *The Decline of the Nation-State and Its Implications for International Law*, in *Politics, Values, and Functions: International Law in the 21st Century. Essays in Honor of Professor Louis Henkin*, (Donald K. Anton, et al, (eds))(1997) 11, 18-19.

69. See Reinicke (1998) *supra* n. 17.

that NBILAs, in principle, permit the integration of all interested parties in a process of transnational law-making, is one of their major advantages compared to the structures and politics of traditional hard law-making.⁷⁰ Moreover, NBILAs do not require the ceding of formal sovereignty. As such, they provide a potential answer to the paradox mentioned above. In fact, for the foreseeable future, most legal arrangements that structure and facilitate the practice of internal sovereignty transnationally are likely to be of a non-binding nature, because the international system -- with a few exceptions such as the global commons -- continues to be “fully determined” as far as external sovereignty is concerned, thus leaving little room for formal or legal internal sovereignty to take hold.

The application of soft law measures, in contrast to traditional treaties or customary law, and the formal inclusion of non-state actors in the process of transnational law-making, is highly controversial. Critics argue that the concept of international soft law itself is flawed and has no legal meaning. Other have charged that it contributes to a further blurring of the differences between policy and law, which leads to a “trivialization” of the latter,⁷¹ but “today all but the most doctrinaire of scholars see a role for so-called soft law.”⁷² In fact, as this volume demonstrates, NBILAs are used with increasing frequency, instilling, as Chinken says,

70. For detailed case-studies, see Reinicke id. For a classical example of private-public partnership, the International Labor Organization, though not yet always successful its approaches towards multinational codes of conducts and social labeling, provides an interesting model of international cooperation. See Jennifer L. Johnson, *Public-Private Convergence: How the Private Sector can Shape Public International Labor Standards*, (1998) 24 *Brooklyn J. Int'l L.*; Robert Kyloh, *Governance of Globalization: ILO's Contribution*, (1996) ACTRAV Working Paper; ILO (1997): *ILO, Standard Setting and Globalization: Report of the Director-General to the International Labor Conference*, 85th Session (1997).

71. Levi, *supra* n. 42 at 176.

72. Ratner, *supra* n. 2 at 67.

“expectations about the future behavior and attitudes of international actors that provide some stability within the system while maintaining flexibility.”

This perspective fits well with the framework we provide. NBILAs are necessarily an end in themselves, but can be a helpful tool to initiate global public policy and a process of transnational law-making. While critics assert that soft law has no binding force and therefore no real impact, a perspective that considers NBILAs a part of an evolving process of interests and identity formation in the context of global public policy making comes to the opposite conclusion. Given the often contentious nature of the issues over which cooperation is sought, *anything other than* non-binding agreements would deter states and non-state actors from participating in the cooperative venues, precluding the possibility of informal and formal cooperation.

From a technical perspective, NBILAs display certain characteristics that overcome some of the drawbacks of international hard law.⁷³ *First*, NBILAs usually are flexible and therefore can adapt to a fast changing and technology driven environment that is characteristic of globalization. *Second*, they are open to all interested parties. Though important in the long-run, inability by a party to comply is not a critical barrier to entry. This avoids the fatal in-or-out mechanism of most legally binding agreements.

Third, NBILAs are open to transnational private actors that could not participate in the making, implementation and enforcement of hard law because for the most part they are not

73. See Brown-Weiss, *supra* n. 2 at 71-73; C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, (1989) 38 *Int'l & Comp. L. Q.*, 850-866; ASIL, *A Hard Look at Soft Law: A Panel*, (1988) 82 *Proc. Am. Soc. Int'l L.* 371-395; W. Riphagen, *From Soft Law to Ius Cogens and Back*, (1987) 17 *Vict. U. Wellington L. Rev.* 81-99.

recognized as participants of the global public space.⁷⁴ *Fourth*, NBILAs in general exact lower transaction costs for all parties involved.⁷⁵ *Fifth*, as was already mentioned above, NBILAs may well represent a first step on the path to legally binding agreements.⁷⁶ Their evolution into treaties or custom can lead to the very reconstruction of states' interests discussed above.

NBILAs are not a panacea to solve all the complex public policy challenges arising from globalization, but they do represent an important tool in bridging the growing divide between global private networks and public hierarchies constrained by territoriality. The use of NBILAs will not always leads to the 'hardening' of non-binding agreements. In some issue-areas, including international bank regulation and supervision, any agreements may well have to remain non-binding, assuming of course they can produce the expected results. Given the technology-driven nature of financial markets and their instruments, and the ease with which all participants cross territorial boundaries, it is unlikely that hard legal agreements can deliver on the commitments they entail. To the contrary they may provide a false sense of security until a financial crisis erupts exposing their outmoded nature, further complicating and increasing the cost of resolution.⁷⁷ For other issue areas, as Dinah Shelton states in this volume "it may be that some of the norms will enter into the corpus of customary international law, as has happened

74. To be sure, private actors participate to a large scale in agenda-setting and sometimes in the negotiation of multilateral treaties. And yet they are far away from having any formal and significant legal status. Whether one supports or rejects this status quo is not the issue here. The point here is that to date NBILAs offer the only way through which private actors can included in the process of global public policy.

75. Brown-Weiss, *supra* n. 2 at 73.

76. The use of such agreements "whether termed, for example, recommendations, guidelines, codes of practice or standards, are significant in signaling the evolution and establishment of guidelines, which ultimately may be converted into legally binding rules." Malcolm N. Shaw, *International Law* (4th ed. 1997) 93.

77. For a case study on financial markets, see Reinicke, *supra* n. 17, chapter 3.

with rights contained in the Universal Declarations of Human Rights.” Whatever the ultimate outcome, these norms and values associated with an emerging “global civil society“ cannot be imposed as part of a state’s identity but must evolve in an inclusive, participatory and transparent manner for which NBILAs provide the appropriate starting point.

NBILAs and traditional hard law therefore are not mutually exclusive, but instead represent two cornerstones of the possible range of obligations chosen by multiple public and private parties in an effort to establish and maintain internal sovereignty at the global level. Seen from this perspective some NBILAs are a first step in an evolutionary process of cooperation that leads to more binding arrangements culminating in formal treaties.

3. Transnational Legal Process and Global Public Policy

Non-state actors play a transformative role that changes the interests, identities and thus incentives of state actors such that they are willing to enter more binding legal obligations. As Wendt has shown, “when states interact, much more is going on than [IR schools such as] realism and rationalism admit”.⁷⁸ Harold Koh, along with Wendt and other constructivist IR scholars, argues that state behavior is conditioned not merely by rational self-interest, determined by the nature of the international system itself or narrow even nationalist domestic interests.⁷⁹

78. Wendt, *supra* n. 48 at 394.

79. For a constructivist view of international relations and identity and interest formation see Wendt *supra* n. 48 and Adler, *supra* n. 48.

Rather an explanation of why nations obey international law “must . . . account for the importance of interaction within the transnational legal process, interpretation of international norms, and domestic internalization of those norms as determinants.”⁸⁰ Koh characterizes the transnational legal process theory as “the theory and practice of how public and private actors including nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals, interact in a variety of public and private, domestic and international fora to make, interpret, internalize, and enforce rules of transnational law.”⁸¹

Accordingly, international law-making and the observance of law itself is a constructivist social activity, with feedback effects modifying domestic law, reshaping domestic bureaucracies, and changing the attitudes of domestic decision-makers, all of which influence the interests and identities of nation-states.⁸² Linking horizontal subsidiarity and NBILAs appears to have all the major advantages and characteristics needed to initiate and sustain such a transnational legal process on a sustained basis. It is nontraditional (there is no barrier between domestic and international, public and private international law), non-statist (not only nation-states are actors), dynamic (in terms of its evolution through different domains), and normative (law shapes and guides future interactions).⁸³

80. Koh (1997), *supra* n. 4 at 2634.

81. *Id.* at 2626.

82. Note, that Koh’s characterization of a transnational legal process at least with respect to participating actors is quite similar to the notion of global governance adopted by the Commission of Global Governance: “Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflict or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interests.” Commission on Global Governance *supra* n. 58 at 2.

83. Koh (1996), *supra* n. 4 at 2.

In addition, by integrating private actors, inter-societal links are established that over the long-run can ease the complex negotiation processes where different cultural norms and values are involved and overcome national bureaucratic resistance and inertia that are likely to play an important when internal sovereignty needs to established a non-territorial context.⁸⁴ Global public policy also can have a normative character as it leads to new interpretations of existing rules and their internalization back into domestic law to shape future interactions between states and private actors. Going one step beyond Koh, transnational legal processes in the context of global public policy not only influence ‘why nations obey’ but also challenge private actors to do the same.

84. Wolfgang H. Reinicke, *Deepening the Atlantic: Toward A new Transatlantic Marketplace?* (1996).

E. Conclusion

Global public policy and the application of NBILAs should not be seen as substitutes for hard law and more traditional forms of intergovernmental cooperation but as supplements responding to a changing global environment that has elevated a growing number of domestic public policy issues to the level of the international system. They also are catalysts for the development of a more inclusive and encompassing international society based on common norms and values. In the longer term, the critical challenge for NBILAs is to build a framework of law- and policy-making that is as effective, efficient and legitimate comparable to the modern democratic nation-state. This can only be achieved, as Alex Wendt correctly notes, if it induces collective identity formation in functional policy-areas, “since without changes in identity, the most we can expect is behavioral cooperation, not community”⁸⁵ -- a precondition for managing internal sovereignty at the global level.

And yet the *process* by which internal sovereignty is sought at the global level may not encourage greater cooperation. More specifically, though not yet a universal phenomenon, internal sovereignty in most countries presumes popular sovereignty, i.e., public policies that are legitimized at regular intervals through democratic elections and subsequently are accessible by interested parties. Decoupling the process and practice of internal sovereignty from its territorial base creates a risk of loss of accountability and legitimacy.⁸⁶ In some cases, this may be qualified when an international agreement is

85. Wendt, *supra* n. 48.

86. Recently there have been attempts to reconstruct democratic theory in this context, i.e. thinking of democracy beyond territorial borders. These theories are not fully developed and need further research.

subjected to national ratification by the legislative branch, but evidence suggests that the pressure on national legislatures to acquiesce to an internationally negotiated agreement are often considerable.

Global public policy and the use of NBILAs present some democratic potential by offering direct channels of participation to private actors in policy-making and implementation. This, arguably, can enhance democratic principles and procedures as civil society actors have a direct stake in the process. Moreover, many of them interact across territorial borders, providing a ‘transnational public space’ through which political discourse can be structured and common interests and identities of nation-states and societies be shaped.⁸⁷ This further promotes the formation of a transnational civil society, in its roots already identifiable.⁸⁸ Finally, the process of interaction between civil society actors and their impact on public policy-making and implementations, lends legitimacy to the process and increases accountability and accessibility especially when compared to current international decision-making structures.⁸⁹

Some important qualifications remain, however, regarding the use of horizontal subsidiarity and NBILAs to enhance democracy in new governance mechanisms. *First*, it must be ensured that all parties that have an interest in the issue at stake have access to

For critical evaluations and new approaches see Held supra n.6; Jürgen Habermas, *Deliberative Politik – ein Verfahrensbezug der Demokratie*, in: *Faktizität und Geltung*, (1998) 349-398; . McGrew, supra n.6.

87. A related concept can be identified in Ernst-Otto Czempiel’s notion of ‘societal regimes’ through which society can participate in foreign policy. Societal regimes, he argues, “could fill the space between nations.” Cooperation among private organizations could establish patterns of a pluralistic society. Czempiel supra n. 37 at 268-269. The proposition that continued interaction can shape interests and identities of nation-states and societies is informed by Alexander Wendt’s state-centered constructivist approach. Wendt, supra n. . Of course, the idea of discourse and debate in a transnational space can also be traced back to Habermas’ notion of deliberative democracy. Habermas, id.

88. See Smith, supra n. 66.

89. Jackie Smith concludes in her study on global civil society, that transnational social movements “can generate social capital that is crucial to democratizing the global political process” Id. at104.

the process to avoid a particular policy agenda being captured by a single powerful private interest group. *Second*, NGOs and other civil society organizations are not always accountable to a broader constituency.⁹⁰ Participation in a global public policy network may and should require that they adopt a set of minimum standards of transparency and disclosure. Finally, many civil society actors, especially from developing countries, presently lack the resources to participate in global public policy networks. Multilateral institutions such as the World Bank should ensure their access to global networks and thus empower them through financial, technical and knowledge assistance. In this context, capacity-building refers to non-state actors as well as nation-states.

This chapter has presented a conceptual framework in which NBILAs present an important constituent element of all facets of global public policy from facilitating the initiation of cooperation to enhancing compliance by strengthening the possibilities of monitoring and prospects enforcement. Horizontal subsidiarity has been shown to be a starting point of what Harold Koh called the transnational legal process, a process of interaction, interpretation, and internalization of transnational norms into domestic legal systems, during which “repeated compliance gradually becomes habitual obedience.”⁹¹ As ‘facilitators’ of global governance, NBILAs first respond to the need for greater flexibility in a rapidly changing global environment; second, they lower the barriers for entry into cooperative arrangements, barriers that emerge from varying cultural norms and values as well as different perceptions of what is and is not in the public interest; and third, they provide for openness, accountability and thus legitimacy.

90. Jessica T. Mathews, *Power Shift*, (1997) 76 *For. Aff.* 50-66.

91. Koh (1997), *supra* n.4 at 2603.

In discussing the challenges of globalization some scholars have focused on the growing relevance of non-state actors and international organizations in new structures of global governance, effectively breaking up the traditional policy monopoly of nation-states including on a formal/ legal basis.⁹² Others disagree, arguing that the new world order does not imply “a shift away from the state – up, down, and sideways – to supra-state, sub-state, and, above all, non-state actors.” Rather states are increasingly disaggregated into their functional parts cooperating with their counterparts in other states, “creating a dense web of relations that constitutes a new transgovernmental order.”⁹³ This essay argues for a synthesis of the two approaches. Few would doubt that for the foreseeable future nation-states and their bureaucracies will remain the most important actors in the structure and organization of global governance and yet, by delineating the specificity of the challenge of globalization, it has been shown that enlarging and strengthening the traditional system of multilateralism and international hard law will not suffice as a response. Instead, by engaging non-state actors in the formulation and implementation of global public policy through the establishment of global public policy networks and a reliance on NBILAs, states can enhance their ability to establish internal sovereignty at the global level. Whether these networks ultimately evolve into more traditional forms of international cooperation cannot and should not be determined a priori. To the contrary, it is the open ended nature of NBILAs that creates incentives for participation and interaction.

In this context, multilateral institutions such as the World Bank can perform a crucial role in providing a platform for global public policy networks to convene.

92. Mathews, *supra* n. 89.

93. Anne-Marie Slaughter, *The Real New World Order*, (1997) 76 *For. Aff.* 183, 197.

Notwithstanding the continued need to improve their openness and accountability, such institutions offer more overall legitimacy than the private sector, an NGO, or a single country.⁹⁴

Probing further into the future, including the future of the nation-state itself, one must recognize that if globalization is to continue it will end the nation-state's monopoly over internal sovereignty, formerly guaranteed by territory. This result does not have to have the grave consequences that many predict. On the contrary, if internal sovereignty is to be realized through a global public policy that requires political elites to dissociate themselves to some degree from territory and support the creation public-private partnerships that can respond dynamically and responsively to the challenge of governance, globalization becomes an opportunity to renew outmoded structures and institutions. Whether and for how long this evolving hybrid is called a nation-state should be of little concern. As Martha Finnemore writes, "there is nothing inevitable or immutable about the state-as-actor that our theories have traditionally taken for granted. States are continually evolving. They take on new tasks and create new bureaucracies to carry out those tasks. Since, in an important sense, state *are* what they do, these changes in state function at some level change the nature of the state itself."⁹⁵ The administration of sovereignty has changed many times over the centuries and the nation-state is a relatively recent form of governance. It has no claim to perpetuity. While the territorial state may eventually become redundant, the principles and values that govern democracies should not. Steps should be taken now to support the notion of global public policy so that society will be better equipped to respond to the demands of globalization.

94. Wolfgang H. Reinicke, *Global Public Policy: A Vision for Multilateralism in the 21st Century*, mimeo, World Bank (1998).

The international legal context will have to adapt to these changes, too, providing new venues for the organization of governance and civil society. Wilfried Jenks remarks given as early as 1967 apply more than ever: "A legal system in which the judicial process is unresponsive to the groundswell of the world convulsion of our time cannot fulfill the primary function of providing an orderly framework for inevitable social change."⁹⁶

95 Martha Finnemore, *National Interests in International Society* (1996), 13.

96. C. Wilfred Jenks, *Law in the World Community* (1967).