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The Laws of Globalisation

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*'Globalisation presents a challenge to the Rule of Law.'*¹

Introduction

With pineapples and coal, legal and call-centre services, and Australian dollars and Botswana pula slipping endlessly and easily around the planet, the question arises as to what rules, procedures and remedies apply when they collide on the way or cause damage when they arrive.

This article raises questions about the place and role of law under the conditions of globalisation. It identifies four different forms of legal regulation in the globalised economy and illustrates their extent and operation. Significantly, the article is positioned within a model of globalisation which emphasises its economic dimensions, namely the greater movement of goods, services and capital across the borders of nation-states, without dealing with its political, cultural and social aspects. Thus its focus is on international economic law and not on the international law of human rights, though ultimately there are strong connections between the two.

The notion of trading freely across political boundaries is nothing new – it flourished during the Roman domination of the known world, in the Middle East for many centuries, during the nineteenth century under the British empire, in Europe after the first world war, and in other times and places as well. Indeed in comparison with some of these historical situations there is probably less freedom of trade in current times. These days national sovereignty is still a force to be reckoned with, and domestic and treaty regulation is enormously complex (such that what is given in the large print is often removed in the small). Furthermore, even where tariffs and subsidies have been largely abolished, factors of health, security and the environment act as checks on freedom of trade in goods and services. These limitations would have been less apparent in the past.

Nevertheless the current wave of globalisation is distinguished by factors not possible in earlier times. One is the ease and speed of communication, which is now instantaneous in the developed parts of the globe. The liberalisation of capital markets, which again is nothing new in itself, has been dramatically accentuated by the ability to trade and speculate in currency, futures and options at high speed around the world. There is also a volatility and indeterminacy about the modern forms of economic globalisation as whole economic and financial edifices are built on speculation, sentiment and sometimes irrational expectation. Individual fortunes can be made and lost overnight, corpo-

rations can be taken over, merged or bankrupted, and whole nation states can have their economic fundamentals fundamentally altered by currency collapses, hedge funding and capital flight. In all these senses globalisation is indeed a new phenomenon.

Within this vortex it is futile to look to the same sources of law that are found in most domestic legal systems, namely: (i) an elected legislative assembly whose decisions are a primary source of general legal regulation; (ii) courts which render authoritative decisions in particular circumstances; and (iii) executive and administrative agencies involved in the execution and enforcement of the decisions of the primary law-making bodies. Instead attention is given here to four modalities of legal regulation in the international political economy. However, given the limited length of this article, no specific attention is given to the notion of the 'customary international law' of the global economy.

Modalities of global regulation

1. The 'law' of market forces

Economists present the market as a mechanism of regulation deriving from factors such as supply and demand, competition, rational individual choice, freedom of trade and capital market liberalisation. These forces, it is argued, bring discipline and self-regulation into economic activity and are substitutes for the direct application of law and regulation.

As globalisation ideology has its foundations in market economics it displays some hostility to public regulation through state agencies, such as parliaments or regulators, or through international regulation. Instead reliance is placed on the 'law of comparative advantage'. If Australia produces wool efficiently and China does likewise with lawn-mowers, it makes sense for each to specialise in their area of advantage and trade with the other in the two commodities.

This aspect of global law relies on private contract as its regulatory foundation. Cross-border joint ventures, investment undertakings, franchise arrangements and numerous other financial and business ventures are all contractually-based. The law of contract is supplemented by international conventions such as the 1966 United Nations Convention on International Trade Law and the 1980 United Nations Convention on Contracts for the International Sale of Goods. These conventions are designed to reinforce and complement domestic law, although they also restrict democratic policy-making processes by committing governments to arrangements which cannot be overridden by domestic legislation, except at the cost of possible arraignment before the World Trade Organisation's dispute resolution processes.

The resolution of disputes arising out of international contracts is regulated in part by conventions such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. More recently the Hague Conference on Private International Law at a plenary session in 2005 passed the Convention on Choice of Court Agreements which is designed to promote judicial co-operation among signatory states in relation to the recognition and enforcement of foreign judgments on a reciprocal basis.² While these conventions are designed to reinforce principles of private contract law they also form part of the third modality of global law referred to below.

There are private systems in place for resolving disputes as well, for example the rules of the International Chamber of Commerce in Paris,³ which allow contracting parties to refer disputes to arbitration, conciliation and other dispute resolution processes provided by the Chamber. Additionally, there are international bodies providing dispute resolution processes in specific substantive areas, for instance the World Intellectual Property Organisation,⁴ established by the 1967 Stockholm Convention, which provides dispute resolution services in intellectual property issues in terms of its Mediation, Arbitration and Expedited Arbitration Rules.

2. Domestic law and regulation

Globalisation seems to imply a new relationship between law and the nation state. Insofar as it entails a shift of power and decision-making from the public political domain to the private economic domain, this has imposed significant restrictions on the capacity of domestic law-making bodies to legislate and regulate economic activity, or at least has compelled them to incorporate the international trade order into their policy and law-making processes. Yet consistency has never been a feature of modern globalisation and in reality much of its legal infrastructure is found in domestic law.

Here there is a paradox – while globalisation reduces the significance and impact of domestic legal systems in many ways, it also relies on national legislation to attain its objectives. There are numerous examples of this. Domestic law institutions such as parliament and the executive are used to apply and enforce fiscal and monetary policies required by globalisation, to reduce tariffs and eliminate subsidies, and to establish exchange rates and to ratify free trade agreements. Where there is a need for these systems and practices to be binding in domestic law, this occurs predominantly through domestic and not international legal intervention. In some respects the legal aspects of globalisation are a function of the combined actions of national parliaments, public agencies and officials, often acting in tandem across jurisdictions but still retaining ultimate legal sovereignty within their own jurisdiction.

There are countervailing trends to globalisation which are also a product of domestic legal interventions. In recent years developed nations have introduced laws and regulations on security, communications, shipping and other transportation, health, and the movement of refugees and asylum-seekers which undermine some of the assumptions of globalisation. They highlight the continuing power and significance of the law-making and law-enforcing institutions of developed states, sometimes involving a partial retreat from the norms of economic globalisation. These pendulum swings in globalisation are largely a function of local law reacting to domestic politics.

To the extent that domestic law and regulation do uphold the objectives of globalisation, enforcement and dispute resolution occur through national courts and tribunals, as where a private sector entity is allegedly in breach of export controls or a public agency is not complying with legislatively-enshrined treaty obligations. This was illustrated by the well-known Blue Sky case.⁵ There the High Court of Australia had to adjudicate on a contention that, in terms of the Australia-New Zealand Closer Economic Relations Trade Agreement, Australia was under an obligation not to create any legal impediment which would adversely affect the capacity of the New Zealand film and television industry

to compete equally with the Australian industry in the Australian market for the broadcasting of film and television products. Again it was a domestic form of legal determination which resolved this aspect of local globalisation.



3. Multi-lateral and bilateral treaties

There is no shortage of international conventions and treaties which purport to regulate aspects of global economic activity. Apart from those referred to elsewhere in this article, these include the 1994 General Agreement on Tariffs and Trade (GATT), the Uruguay round of negotiations leading to the establishment of the World Trade Organisation (WTO) in 1995, and numerous conventions on commodities such as cocoa, tin and sugar. These international agreements provide principles and procedures designed to bring order, predictability and some degree of reciprocity to trade relations among member states, and to provide dispute settlement norms and processes when there are differences in treaty interpretation or application.

While these are multi-lateral treaties, there has been a discernible shift in Australian policy from multi-lateral to bilateral agreements. In recent years Australia has entered into bilateral trade agreements with Singapore, Thailand and the United States, there is a long-standing closer economic relations agreement with New Zealand, and a bilateral trade agreement is currently being negotiated with China. While bilateral treaties increase the scope for trade in goods and services between the contracting states, they are by definition discriminatory against other states, usually those which are small, undeveloped and vulnerable. This is a source of contemporary criticism of the concept of bilateralism.

Although treaties are not a direct source of law domestically they are usually ratified by national parliaments in order to give them status in the national legal system. There is also a general principle that a state cannot invoke its internal law as a justification for failure to perform a treaty. Thus treaties are intended to have a direct impact on signatory

states. However, as pointed out below, the law of enforcement in this area is of limited practical utility.

Treaties can also establish their own investigative and determinative processes which become in effect sources of law. Thus in terms of Australia's 2005 trade agreement with the United States dedicated forums have been established for considering and dealing with differences over sanitary and phytosanitary issues. These matters will no longer be dealt with solely by Australian customs authorities in terms of domestic quarantine laws and policies but by two bilateral bodies, the Australia-United States Committee on Sanitary and Phytosanitary Matters and the Australia-United States Standing Technical Working Group on Animal and Plant Health Measures.⁶ These bodies include trade and science representatives from both countries and are designed to conduct exchanges with a view to reaching consensus on disputed issues. This constitutes a form of investigation, norm determination and decision-making, in effect a 'law function', but without the formal trappings of other law-making functions. This system provides a foreign entity with a direct domestic involvement in this aspect of the 'law' of globalisation.

As regards enforcement of the treaty law of global economics, the WTO provides extensive dispute resolution mechanisms, including an appellate tribunal, for resolving conflicts between signatory states to the treaty. In effect these decisions establish norms for other parties in similar disputes. The United Nations Commission on International Trade Law (UNCITRAL)⁷ has a 1985 Model Law on International Commercial Arbitration, which has been adopted in more than 30 countries, and conciliation rules for adoption by member nations. These rules can be used by member states, and there can also be enforcement of trade and economic treaties through domestic courts, as referred to in the previous section. Ultimately however enforcement in this domain is as much a function of political and economic muscle as it is of legal norms.

4. International governance and regulation

Generally international organisations do not have compulsory and enforceable jurisdiction over participants in the global political economy. There is thus a limited 'law' capacity in these institutions. While there may be developments in the direction of global governance institutions in the future, politics and power thrive in the absence of enforceable legal norms.

Nonetheless the Marrakesh Agreement on Establishing the World Trade Organisation is a global 'law maker' in that it has developed basic rules and principles in relation to many facets of international trade.⁸ It identifies rules and principles on:

- non-discrimination in trade practices;
- access to markets;
- unfairness in trade;
- balancing trade liberalisation and other societal values;
- special and differential treatment for developing countries; and
- procedural rules relating to decision-making and settlement of disputes.

Multi-lateral treaties emanating from the WTO are expected to uphold these principles, and they are applicable to, and binding on, all members of the organisation. Other sources of law in the WTO include its dispute settlement

reports, acts and decisions of WTO agencies, and the practices and usages of member states.⁹ The WTO thus constitutes something of a de facto international organisation for regulating global trade. However, as mentioned previously, enforcement of conventions has a strongly political flavour, involving reprisals, tit-for-tat and the influence of power, and not the sombre objectivity of independent judges applying objective rules in the court room. At present the WTO constitutes a legal framework for trade negotiations and dispute settlement, and is yet to develop its law functions comprehensively.

Bodies such as the International Monetary Fund (IMF) and World Bank effectively exercise a type of governance over aspects of the global economy, particularly in relation to developing states. This comes about through instruments such as structural adjustment programs (SAPs) which are required by these bodies as a condition of the grant of loans. SAPs incorporate the orthodoxies of the market – reduction of subsidies and tariffs, freeing up of capital markets, floating of currencies, low interest rates, balanced budgets, and so on – into the domestic economies of recipient countries. They have had mixed success in developing states and are open to criticism in respect of the priorities they demand of such countries: that national budgets should first service debt before providing basic services such as health, education and welfare. They are also criticised for their double standards: deficit budgets and extensive agricultural subsidies are found in those countries which are behind the imposition of SAPs on developing countries. This form of governance is seen as being centralised, ideological, authoritarian and biased in favour of creditor institutions. However for recipient national governments it provides a real source of 'law', severely restricting the policy choices of domestic institutions of governance.

Other forms of 'governance' have come about through popular and political pressures which have led to policy changes in relation to the economies of developing countries. One of the realities of many African and Latin America countries is their inability to escape the debt trap incurred through extensive loans intended for development projects, and in some of these countries a major part of the national budget is committed to servicing debt. In the late 1990s and early 2000s, there was a degree of debt forgiveness towards heavily indebted economies. These were essentially unilateral actions motivated by concerns over the short-term viability of these economies and the long term interests of developed countries.

In this context questions have arisen as to whether there could be new forms of legally-based governance of the global political economy. Nation states, unlike individuals or corporations, cannot declare bankruptcy and derive the benefits which flow from it. Thus current (and future) generations cannot break the fetters of their predecessors' debt. This predicament is accentuated by the fact that many foreign loans and aid have been misappropriated by corrupt but unimpeachable leaders, with the effect that projects for which resources were allocated were not completed, or even commenced, and the citizenry is burdened by debt for a non-existent asset. The establishment of an international Bankruptcy Court would allow debtor-nations the same benefits and protections as individuals and corporations, in particular the ability, after a suitable delay, to start life again without the burden of the previous debt.¹⁰

Of course, some writers argue that we have in contemporary globalisation a system of global governance, by institutions such as the World Bank and IMF, but not global government in terms of which those affected by policy choices are involved in the decision-making.

For instance, in his critical text on globalisation, Joseph Stiglitz, former chief economist to the World Bank, argues that globalisation is neither good nor bad in itself, but its evaluation revolves around the institutions of governance which control and shape it.¹¹ The 'Washington consensus' of the World Bank, the International Monetary Fund and the US Treasury, located in close proximity to one another, are not representative, democratic or publicly accountable institutions vis-a-vis those affected by their decisions.¹² Stiglitz calls for the 'democratisation' of the IMF and World Bank in relation to their global governance functions, such that they are representative of and accountable to those affected.¹³

At the end of the day such changes are only likely to emerge from a protracted political struggle. However James Wolfensohn,¹⁴ former President of the World Bank, has argued that the economic imbalance between rich and poor nations is the most serious of the problems facing the contemporary world. If there can be global cooperation on issues of security and avian flu, then there are strong arguments for such attention on the world's most pressing problem. This would inevitably involve a greater 'legalisation' of the global economy.

The global economy and the Rule of Law

The global political economy is a complex and contradictory phenomenon. Law at this level comprises rules, principles, usages and informal arrangements, and generally lacks the institutions required for administration and enforcement.

As Sir Anthony Mason has pointed out, globalisation presents a challenge to the Rule of Law.¹⁵ Ultimately the Rule of Law is about the legal accountability of those who wield power, whether political or economic. It has always been a limited instrument of accountability but in domestic legal systems it has been the driving force behind major successes in bringing bodies to account in a wide variety of circumstances: from prising information out of reluctant governments to finding large manufacturers liable in damages for injuries caused by their products. While the Rule of Law has traditionally revolved around the laws and institutions of nation states some writers suggest that it is slowly but inexorably moving to have a global existence.¹⁶

However the complexity and dimensions of the global economy make legal accountability difficult to enforce, and if there is no enforcement of legal norms there can be no Rule of Law. It is well-known for example, that many transnational companies are financially more powerful than numerous nation states and their ability to move resources within the corporate structure, and to influence weaker governments to do their bidding, ensures that they can operate in a relatively lawless state.¹⁷

The institutional requirements for a global Rule of Law have to be considered in light of the principles and values implicit in governance through law and regulation. Despite its contradictions in practice, globalisation is premised on the privatisation of power and the diminution of public authority in the economic domain. Thus the development of international institutions would require a challenge to hegemonic

ideologies about power, freedom and responsibility. It has always been more difficult subjecting private power to Rule of Law imperatives than it has been to control public power.

Whatever its apparent limitations the normative appeal of the Rule of Law is strong in the global economy. It can serve to contain and restrain power, to impose due process and fairness on decision-making and dispute resolution, to make wielders of power accountable for their actions, and to provide redress to those rights that have been undermined. The principles and procedures it postulates can have a civilising influence on the forces of economics and power of politics. However its development in domestic jurisdictions was a protracted and painful process, and so is it likely to be at the global level.

While law is always a limited societal instrument it can both enable and constrain economic and social developments. Its place within globalisation will ultimately determine the extent to which it benefits or burdens different nation states and different groups within those states. Oxfam has argued that international trade is badly managed at present, both at the global level and at the national level in many countries.¹⁸ Effective global management will require a significant role for legal rules and principles, as well as procedures and remedies for their enforcement.

Class exercise:

Do you agree with the view that, currently, there is global governance without global government? How could such a government operate?

1 Sir Anthony Mason, 'The rule of law and international economic transactions' in Spencer Zifcak (ed) *Globalisation and the Rule of Law* (Routledge, UK, 2005) 121, 128.

2 Australia is a signatory to the agreement, but it has yet to be ratified. See L Boule 'Making litigation attractive internationally' (2006) 8 *ADR Bulletin* 81.

3 See <http://www.iccwbo.org/>.

4 See <http://www.wipo.int/portal/index.html.en>.

5 *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28 (28 April 1998).

6 Australia-United States Free Trade Agreement 2005, Chapter 7.

7 See <http://www.uncitral.org/>.

8 Peter van den Bossche, *The Law and Policy of the World Trade Organisation* (Cambridge University Press, UK, 2005) 39.

9 Ibid 55.

10 Similar considerations have been raised in relation to the liberalisation of capital markets, which has proved a double-edged sword for some developing countries. In particular there has been speculation over the development of an international forum which could regulate hedge funds in circumstances where they serve to destabilise already-vulnerable economies. See generally Ross Buckley, 'The role of the rule of law in the regulation of global capital flows' in Spencer Zifcak (ed), *Globalisation and the Rule of Law* (Routledge, UK, 2005) 140.

11 Joseph Stiglitz, *Globalisation and its Discontents* (Penguin, UK, 2002) 21.

12 Interestingly the 'Beijing consensus' has developed as an alternative to the Washington consensus. Whereas the latter emphasises the need for free financial markets in all respects, the former emphasises the need for maintaining political stability as a pre-requisite to development and democratic reforms.

13 Stiglitz, above n 12.

14 ABC TV, *The 7.30 Report*, 10 February 2004.

15 Above n 1.

16 See, for example, Catherine Dauvergne, 'Refugee Law and Globalisation' in Savitri Taylor (ed) *Nationality, Refugee Status and State Protection* (Federation Press, Australia, 2005) 62, 74.

17 See generally Philippe Sands, *Lawless World* (Penguin, Australia, 2005).

18 Oxfam, *Rigged Rules and Double Standards: Trade, Globalisation and the Fight Against Poverty* (2002).