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Governing the Global Economy through Government Networks

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How can States regulate an increasingly global economy? The litany of threats to State sovereignty is familiar: global financial flows, global corporations, global television, global computing, and global transportation networks. The generally accepted account of how such threats render State borders increasingly permeable and thus State power increasingly feeble conceives of sovereignty itself as a curiously static attribute, as if State power depended on maintaining territory as a hermetically sealed sphere. However, as Abram and Antonia Chayes point out, sovereignty in the post-Cold War and even the post-Second World War world is increasingly defined not by the power to insulate but by the power to participate—in international institutions of all kinds.[1] As globalization literally turns the world inside-out, nationalizing international law and internationalizing national law, the opportunities for such participation expand exponentially. What is new is that the resulting institutions are as likely to be transgovernmental as they are international or supranational. The result is indeed a 'power shift', but more within the State than away from it.[2]

Traditional conceptions of international law and international relations assume that States are the primary actors on the international stage and that States themselves are unitary, opaque, and capable of rational calculation. This is the image that gives rise to familiar metaphors such as billiard balls and black boxes; it is the assumption that feeds critical attacks on the liberal projection of the unitary individual onto the international system. As a unitary actor, the State speaks with one voice through the mouth of the head of state or chief executive. The assumption is not that the chief executive speaks only on his or her own account; on the contrary, he or she may be but a spokesperson for an outcome reached as the result of a complex interplay of domestic institutions and interests. Nevertheless, it is the head of state who is the embodiment and representative of the State in the international system, the gatekeeper for all interactions, both domestic and international.

Furthermore, it follows from this conception of the international system and of States as the primary actors within it that the rules governing international life must be a product of either State practice or negotiation. The resulting rules and institutions are described as being by States, for States, and of States. The paradigm is the multilateral international convention, negotiated over many years in various inter-

[1] Abram and Antonia Chayes, *The New Sovereignty* (Cambridge, Mass.: Harvard University Press, 1996). [2] See Jessica T. Mathews, 'Power Shift' (1997) 1 Foreign Affairs 76.

national watering holes, signed and ratified with attendant flourish and formality, and given continuing life through the efforts of an international secretariat whose members prod and assist ongoing rounds of negotiation aimed at securing compliance with obligations already undertaken and at expanding the scope and precision of existing rules. The rules and institutions described by the traditional conceptions of international law are indeed important for the regulation of international conflict and the facilitation of international co-operation. In short, they are important for the creation and maintenance of international order. However, they apply to part only, and arguably a diminishing part, of the rules and institutions that are generated outside any one national legal system but that directly regulate individuals and groups in both their domestic and foreign interactions.

The conventional debate over globalization and the attendant decline of State power is handicapped by this traditional conception of States and State institutions. In fact, the State is not disappearing; it is disaggregating into its component institutions. The primary State actors in the international realm are no longer foreign ministries and heads of state, but the same government institutions that dominate domestic politics: administrative agencies, courts, and legislatures. The traditional actors continue to play a role, but they are joined by fellow government officials pursuing quasi-autonomous policy agendas. The disaggregated State, as opposed to the mythical unitary State, is thus hydra-headed, represented and governed by multiple institutions in complex interaction with one another abroad as well as at home.

The corollary of the disaggregation of the State in foreign relations is the rise of government networks. Courts, administrative agencies, legislators, and heads of State are all networking with their foreign counterparts. Each of these institutions has the capacity not only to represent 'the national interest' in interactions with its foreign counterparts, but also to act on a subset of interests arising from its particular domestic function that are likely to be shared by its foreign counterparts. The resulting networks take a variety of forms and perform a variety of functions, some of which will be elaborated in the rest of this chapter. But they are all the tangible manifestation of a new era of transgovernmental regulatory co-operation. More broadly still, they define transgovernmentalism as a distinctive mode of global governance: horizontal rather than vertical, composed of national government officials rather than international bureaucrats, decentralized and informal rather than organized and rigid.

Against this backdrop, it is worth returning to the question posed at the beginning of this chapter: how can States regulate an increasingly global economy? The answer is through government networks. When President Clinton called for a co-ordinated institutional response to the burgeoning global economic crisis, he immediately deployed not his Secretary of State, but the Secretary of the Treasury and the Chairman of the Federal Reserve to contact their foreign counterparts and co-ordinate a global interest rate cut. International networks of these officials are already well established. Indeed, in many cases they have formed their own organizations, which bear little resemblance to traditional international organizations. Steadily

growing economic interdependence, at both the macro and micro levels, has forced economic regulators to work with one another transnationally in order to perform their domestic jobs more effectively. They are thus at the forefront of transgovernmental initiatives.

This chapter will focus on two particular types of government networks among financial regulators: central bankers, securities regulators, insurance commissioners, and antitrust officials. The first type are the relatively more formal transgovernmental regulatory organizations (TROs). The members of these organizations are domestic agencies, or even subnational agencies such as provincial or State regulators, in contrast to conventional international organizations, which are comprised primarily, or solely, of nation-States. These transgovernmental organizations tend to operate with a minimum of physical and legal infrastructure. Most lack a foundational treaty, and operate under only a few agreed objectives or by-laws. Nothing they do purports to be legally binding on their members and mechanisms for formal enforcement or implementation are rare. Instead, these functions are left to the members themselves. But despite this informal structure and loose organization, these organizations have had an important influence on international financial regulatory co-operation.

The second type of government network consists of agreements between the domestic regulatory agencies of two or more States. The last few decades have witnessed the emergence of a vast network of such agreements, which effectively institutionalize channels of regulatory co-operation between specific countries. These agreements embrace principles that can be implemented by the regulators themselves. Widespread use of Memoranda of Understanding (MOUs) and even less formal initiatives has sped the growth of governmental networks. Further, while these agreements are most commonly bilateral arrangements, they may also evolve into plurilateral arrangements, offering greater flexibility with less formality than traditional international organizations.

Government networks have many advantages. They are fast, flexible, cheap, and potentially more effective, accountable, and inclusive than existing international institutions. They can spring up virtually overnight, address a host of issues, and form 'mega-networks' that link existing networks. As international actors from non-governmental organizations (NGOs) to corporations have already recognized, globalization and the information technology revolution make networking the organizational form of choice for a rapidly changing and varied environment. In comparison, formal international organizations increasingly resemble slow-moving dinosaurs. Government networks also offer more scope for experimentation. For example, they facilitate the development of potential solutions by small groups of countries, which can then be tested before being adopted more generally in a more traditional multilateral form.

In addition, government networks are comprised of national government officials rather than international officials, which avoids any need for two-level adoption or implementation of international rules. The actors who make the rules or formulate the principles guiding government networks are the same actors who have the power

to enforce them. This attribute of government networks can work to enhance both effectiveness and accountability. Regarding effectiveness, the nature of international regulation increasingly requires States to assume obligations that involve commitments concerning the way in which, and the degree to which, they enforce their own national laws. Implementation of international agreements will thus become increasingly difficult unless the relevant national officials are involved from the beginning. Government networks bypass a great deal of cumbersome and formal international negotiating procedure.

Regarding accountability, government networks certainly pose problems, but are likely to emerge as the lesser of two evils. As domestic political resistance to globalization in many countries triggers a backlash against both existing international institutions and the prospect of new ones, transgovernmental activity by elected or even appointed national officials will seem less threatening than a burgeoning supranational bureaucracy. In Robert Kuttner's dark formulation: '[i]f the Federal Reserve operates domestically at one remove from democratic accountability, the IMF and the World Bank operate at two removes'.[3] More optimistically, government networks tend to be functionally oriented and easy to expand, meaning that they can include any actors who perform similar functions, whether private or public, national or supranational, regional or local. The result is a vast array of opportunities for participation in rule-making by an eclectic mix of actors.

These are rosy scenarios. Government networks also have disadvantages and worrisome features. Most of these fall under the heading of accountability, both domestic and international. First is the concern that government networks reflect technocracy more than democracy, that their purported effectiveness rests on shared functional values rather than on responsiveness to underlying social and political issues. Such concerns spawn a need to build mechanisms for accountability to domestic constituencies in countries participating in government networks. Second, however, is a set of concerns about global accountability: concerns about the politics of insulation and the politics of imposition. On the one hand, many developing countries are likely to see government networks as simply the latest effort to insulate the decisions of the powerful from the input of the weak. On the other hand, other countries, both developed and developing, may see government networks as a device whereby the most powerful countries penetrate the defences of national sovereignty to impose their policy templates on everyone else.

In addition to concerns about accountability, critics of government networks have also charged them with reflecting if not encouraging a minimalist global agenda and displacing traditional international organizations. Both of these claims are overblown and overlook the extent to which government networks can and do coexist with international organizations. The agenda pursued by government networks is generally a transnational regulatory agenda rather than a more traditional agenda devoted to providing global public goods, but they are hardly a *cause* of the asserted decline

[3] Robert Kuttner, 'Globalism Bites Back' (Mar.–Apr. 1998) 6 The American Prospect 7.

in resources allocated to combating global poverty, to human rights, and health care. Moreover, to the extent that they are displacing traditional international organizations, it is either because those organizations have proved relatively ineffective or, more frequently, because government networks are better adapted to a host of contemporary tasks and the technology available to accomplish them. Finally, government networks may be particularly well suited to the exercise of 'soft power', a form of influence and persuasion that requires States genuinely to interact with and learn from each other in a non-hierarchical setting.

Section 1 of this chapter describes the evolution of a number of the most important transgovernmental regulatory organizations in the global economic and financial arena. Section 2 explores the development of less formal bilateral and plurilateral ties, largely between the United States and other countries. Section 3 canvasses problems with existing government networks and sketches their implications for the larger project of global governance.

1. AGENCIES ACROSS BORDERS: TRANSGOVERNMENTAL REGULATORY ORGANIZATIONS

The key identifying feature of government networks is the interaction across borders of government institutions with similar functions and facing similar problems. This interaction is more highly developed in the financial regulatory area than in any other, leading one scholar to coin the term 'international financial regulatory organizations' (IFROs).[4] David Zaring has analysed the common features of these organizations among central bankers, securities regulators, and insurance commissioners and described their evolution and impact.[5] This part of this chapter summarizes his work and elaborates upon it in the general context of more formalized government networks. From this perspective, international financial regulatory organizations are more accurately described as a category of transgovernmental regulatory organizations.

1.1. The Basle Committee on Banking Supervision

Established in 1975 under the Bank for International Settlements (BIS), the Basle Committee is a standing group of the Central Bank Governors of the G-10 countries, Switzerland, and Luxembourg.[6] The Basle Committee exists without a formal

[4] David Zaring, 'International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations' (1998) 33 Texas International Law Journal 281.

[5] Ibid.

[6] Peter Cooke, 'Bank Capital Adequacy' (1991), excerpted in Hal S. Scott and Philip A. Wellons, *International Finance: Transactions, Policy, and Regulation* (2nd edn., Westbury, NY: Foundation Press, 1995) at 232; Joseph J. Norton, 'Trends in International Bank Supervision and the Basle Committee on Banking Supervision' (1994) 48 Consumer Finance Law Quarterly, 415, 417.

constitution or by-laws, and operates without its own staff or facilities. Its founding mandate was a press communiqué, issued by the Bank Governors through the BIS. The BIS itself is a private bank, located in Basle, Switzerland, that is mostly owned by the central banks of twenty-nine countries.[7] It was founded in the interwar period to 'promote the co-operation of central banks and provide additional facilities for international financial operations'.[8] Although the charter membership of the BIS and the Basle Committee overlaps, the BIS does not formally participate in the Committee. None the less, the small staff of the BIS serves as the Basle Committee's secretariat, and the Committee meets four times a year in Basle at the BIS.

The Basle Committee is not an open organization. Membership is strictly limited to the world's most powerful banking States and will likely remain so.[9] Conducting its business in secret, the Committee makes every effort to maintain a low profile. As former chairman Huib Muller observed: 'We don't like publicity. We prefer, I might say, our hidden secret world of the supervisory continent.'[10]

The stated objectives of the Basle Committee are very broad. It describes itself as a 'forum for ongoing cooperation among member countries on banking supervisory matters' that aims to 'strengthen international cooperation, improve the overall quality of banking supervision worldwide, and ensure that no foreign banking establishment escapes supervision'.[11] In practice, the Committee only makes consensus-based 'recommendations', which are then left for the Governors to implement within their own national systems. Even though the Committee derives its formal authority solely from the support of the Central Bank Governors, its recommendations have been implemented by member and non-member countries alike.[12]

The Basle Committee's recommendation-making process exemplifies the distinctive nature of transgovernmental regulatory co-operation. The Committee's 1988 Capital Accord, setting minimum capitalization standards for international banks under the regulatory power of the Central Bank Governors, provides an instructive example. Following several secret meetings, the Basle Committee announced that agreement on a proposal had been reached. A six-month period followed, during which time the Committee accepted comments from private bankers and other interested parties. The final version of the Accord appeared in the summer of 1988, after which time the Governors of the member banks implemented the agreed standards.

[7] *The Bank for International Settlements: A Profile of an International Institution* (Basle: Bank for International Settlements, 1991), at 2.

[8] Statute of the Bank for International Settlements, 20 Jan. 1930, reprinted in *Bank for International Settlements, Basic Texts* (Basle: Bank for International Settlements, 1987), 11.

[9] General Accounting Office, Report to Congressional Committees, 'International Banking—Strengthening the Framework for Supervising International Banks' (Mar. 1994), at 37.

[10] Huib J. Muller, 'Address to the 5th International Conference of Banking Supervisors' (16 May 1988), quoted in Tony Porter, *States, Markets, and Regimes in Global Finance* (New York: St Martin's Press, 1993), 66.

[11] Basle Committee on Banking Supervision, *Annexure C* (1995), para. 3.

[12] For example, Brazil's Central Bank adopted the Basle Accord in Aug. 1994. Scott and Wellons, *International Finance*, at 249.

The drafters of the Accord used simple language in writing the agreement, deliberately avoiding legalese. The use of more informal language is not unusual; the products of Committee agreements are usually short, generally worded documents which, as Peter Cooke has stated, 'do not have, and were never intended to have, legal force'.[13] Furthermore, unlike most treaties or other legal agreements, the 1988 Accord has been subject to frequent amendments since its promulgation and is intended to evolve over time.

Despite their informality and professed lack of authority, Basle Committee members consider the agreements binding, even if they do not 'approach the legal status of treaty'.[14] Given the lack of an independent mechanism for monitoring noncompliance, enforcement is left to the members of the Committee themselves, with pressure from their colleagues. Specific meetings review the implementation and consistency of the agreements. As all member countries have implemented the 1988 Accord's capital adequacy requirements, and countries not party to the original agreement continue to join,[15] the Basle Committee's system of enforcement, however informal, appears to be quite effective. In fact, the adoption of the capital adequacy standards has been so effective that governments did not withdraw their support of the Accord even when many scholars argued that the resulting deceleration in bank lending intensified the recession of the early 1990s in the United States and other industrialized countries.[16] Some members of the United States Congress proposed that the Accord should be scrapped or amended, since it was obviously 'harming' the domestic economy.[17] However, no action was taken on these proposals, demonstrating the degree of autonomy and influence over domestic government that the Basle Committee has achieved.

Why does this system function as effectively as it does? The primary reason for success seems to be the Basle Committee's facilitation of close personal contacts among the Central Bank Governors. The Committee itself acknowledges the importance of its role in this regard, declaring that 'the development of close personal contacts between supervisors in different countries has greatly helped in the handling and resolution of problems affecting individual banks . . . [t]his is an important, though necessarily unpublicised element in the Committee's regular work'.[18] The Basle Committee also seeks to organize and facilitate networking among the rest of the world's central bankers and other financial regulators. The Committee supported the formation of, among others, the Offshore Supervisors Group, the Southeast Asia,

[13] Peter Cooke, Chair of the Basle Committee, quoted in Joseph Jude Norton, *Devising International Bank Supervisory Standards* (London: Graham and Trotman, 1995), 177.

[14] According to Charles Freeland, a member of the Committee. See Freeland, 'The Work of the Basle Committee', in Robert C. Effros (ed.), *Current Legal Issues Affecting Central Banks* (Washington: International Monetary Fund, 1992), 232.

[15] See Scott and Wellons, *International Finance* (3rd edn., 1996), at 249.

[16] See e.g. Robert Litan, 'Nightmare in Basle' (Nov./Dec. 1992) The International Economy 7.

[17] Scott and Wellons, *International Finance*, at 251.

[18] Bank of International Settlements, *Compendium of Documents Produced by the Basle Committee on Banking Supervision* (Apr. 1995), 14.

New Zealand and Australia Forum of Banking Supervisors, and the Caribbean Banking Supervisors Group. Furthermore, the Basle Committee has established links with regulators from other financial sectors through groups such as the Joint Forum, which is discussed below.

The Basle Committee is recognized as a significant player in international financial regulation. It has effectively promulgated binding international standards, even though such standards have at times proved expensive and burdensome for member States. Moreover, it has proved itself competent in developing new principles of banking supervision, such as the 'consolidated supervision' standard adopted in the Basle Concordat, which expands the regulatory responsibilities of member governors beyond territorial borders as a matter of first principle. Most recently, after close consultation with bank supervisors from sixteen developing countries, it has developed and promulgated a set of principles designed to codify the basic 'elements of a sound supervisory system'.[19] It is a key player in the regulation of the global economy. But it is a government network, with few or none of the trappings of a formal international organization. Its attributes as a government network are likely to prove both its strength and its weakness.

1.2. The International Organisation of Securities Commissioners

The International Organisation of Securities Commissioners (IOSCO) is a global network of securities regulators.[20] It has over 150 members, divided among 'ordinary members' comprised of national securities commissions or self-regulatory organizations such as stock exchanges from countries with no official government regulatory agency; 'associate members' comprised of provincial or regional securities regulators when the national regulatory agency is already a member; and 'affiliate members' comprised of international or regional organizations charged with the regulation or development of capital or other organizations recommended by the Executive Committee.[21] Unlike the Basle Committee, membership in IOSCO has not been limited to regulators from prosperous countries, and even includes non-governmental regulators such as private stock exchanges. IOSCO has no charter or founding treaty. It maintains an evolving set of by-laws and has established a permanent secretariat in Montreal.[22] According to its Secretary-General, Paul Guy, IOSCO's goal is to improve the harmonization of securities and futures regulations on the international level.[23] Guy further explains that according to IOSCO, harmonization does

[19] Press Statement, 22 Sep. 1997, http://www.bis.org/press/p970922.htm. The principles themselves can be found at http://www.bis.ord.

[20] See Paul Guy, 'Regulatory Harmonization to Achieve Effective International Competition', in F. R. Edwards and H. T. Patrick (eds.), *Regulating International Financial Markets: Issues and Policies* (Boston: Kluwer, 1992), 291. For an in-depth look at the organization and functioning of the IOSCO, see David Zaring, 'International Law', at 20–31.

[21] For a list of IOSCO members, see http://www.iosco.org/index 4.html.

[22] See Zaring, 'International Law'.

[23] See Guy, 'Regulatory Harmonization', at 291.

not necessarily mean that regulations must be identical;[24] rather, it ensures that the organization has employed a cautious, consensus-based approach. IOSCO monitors members' compliance with agreed standards through informal methods of self-reporting. Like the Basle Committee, membership in IOSCO leads to an element of moral suasion in implementing common standards.[25]

IOSCO has made some notable contributions in the areas of information sharing and enforcement agreements. The 'ancestor' of all reciprocal information-sharing MOUs was issued by IOSCO in 1986 as a 'Resolution on Reciprocal Assistance',[26] and has been signed by forty agencies.[27] The Organisation also created widely used 'Principles for Memoranda of Understanding', which lay down basic guidelines for creating enforcement MOUs for securities law violations.[28] In 1989, IOSCO proposed a resolution calling for members to enter into information-sharing MOUs and adopted a set of principles for the negotiation and implementation of such memoranda.[29] As discussed below, this groundwork, along with a combination of other factors, has led to a whole network of bilateral MOUs that regulate insider trading and information exchange.

However, IOSCO has not achieved the success of the Basle Committee in implementing global standards for securities regulators. Indeed, IOSCO's attempt to develop capital adequacy standards for securities firms failed in 1992, and its efforts in this regard have been abandoned. In addition, many resolutions passed by IOSCO are not implemented at the domestic level. These failures highlight the inability of government networks to exercise any coercive power over their members. They may also reflect wide disparities in the domestic power actually exercised by IOSCO members, some of whom have far more authority to take autonomous domestic action than others. As section 2 of this chapter explains, MOUs concluded between the United States Securities and Exchange Commission (SEC) and its counterparts in other countries frequently stipulate that the foreign agency must have a certain degree of independence from the national legislature.

1.3. The International Association of Insurance Supervisors

The International Association of Insurance Supervisors (IAIS), founded in 1994, is the leading transgovernmental regulatory organization for State agencies that supervise and regulate the insurance industry.[30] It serves primarily as a means for regulators to come together, share experiences, and consider global standards for the

[24] See ibid., at 296.

[25] See Zaring, 'International Law', at 27.

[26] IOSCO Annual Report 1990.

[27] See Michael D. Mann and Lise A. Lustgarten, 'Internationalization of Insider Trading Enforcement: A Guide to Regulation and Cooperation' (1993) 7 PLI/Corp 798.

[28] See generally Michael D. Mann *et al.*, 'The Establishment of International Mechanisms for Enforcing Provisional Orders and Final Judgements Arising From Securities Law Violations' (1992) 55 Law & Contemporary Problems 303.

[29] These MOUs are discussed in detail in Mann and Lustgarten, 'Internationalization'.

[30] See IAIS, 1994 Annual Report; see generally Zaring, 'International Law', at 31–9.

insurance industry. Regulators from sixty-seven countries and seventeen American States belong to the IAIS. The organization works from a governing set of by-laws which cover only eight pages and which 'do not impose legal obligations on members . . .'[31] Its goals, or 'wishes', include 'engender[ing] awareness of common interests' and 'encourag[ing] wide international personal and official contacts'.[32] Similar to IOSCO and the Basle Committee, the IAIS maintains only a tiny centralized bureaucracy, and has subcontracted the role of its general secretariat to the American National Association of Insurance Commissioners.[33]

Since its inception, the IAIS has held two general meetings, both in conjunction with the American National Association of Insurance Commissioners meetings. The IAIS does not yet have the power to promote minimum standards or multinational regulations. It has, however, approved an information-sharing 'recommendation', which has been signed by fifty-one members.[34] Despite its brevity—one half-page in length—it has received acclaim by some insurance regulators. To date, however, the IAIS's main role seems to be the interpersonal one described by David Walsh, an American insurance regulator: '[The IAIS] is a very good vehicle for regulators to get to know one another and develop the kind of relationship where you just pick up the phone and say, "What's going on here?" '[35]

The IAIS is likely to strike many observers as more of a 'talking shop' than a genuine government network. Certainly it does not appear to exercise any kind of power that could be described as 'governmental'. Its value lies in providing regular channels for communication and cross-fertilization among national regulators often seeking to regulate the same entities across national lines, or simply facing the same problems within their national jurisdictions. Within a spectrum of government networks, the Basle Committee would fall at one end and the IAIS at the other. Nevertheless, the IAIS is likely to evolve in ways that will give it more influence over its members and thus eventually power. In the meantime, as this chapter describes below, it at least provides insurance regulators around the world with the possibility of being a 'node' in a more important network.

1.4. Networked Networks

At least in the financial arena, government networks proliferate by joining together in networks of networks. This organizational form is so flexible, cheap, and easy to establish that 'mega-networks' are a natural development. Two prominent examples are the Joint Forum on Financial Conglomerates and the Year 2000 Network.

[31] See International Association of Insurance Supervisors By-Laws.

[32] Ibid. at Preamble.

[33] According to David Zaring, the National Association of Insurance Commissioners in turn delegated the job to an employee, a recent law school graduate. See Zaring, 'International Law', at 35.

[34] See IAIS, 'Recommendation Concerning Mutual Assistance, Cooperation, and Sharing of Information', reprinted in (Summer 1995) IAIS Newsletter 5.

[35] Thomas Ressler, 'International Regulators Hold First Meeting' (4 Apr. 1994) The Insurance Regulator 8.

The Joint Forum was established in 1996 under the auspices of the Basle Committee, IOSCO, and IAIS. It is comprised of senior bank, insurance, and securities supervisors from thirteen countries, with the EU Commission attending in an observer capacity.[36] In a prior, even less formal, incarnation as the 'Tripartite Group', it issued a discussion paper in 1995 on the supervision of financial conglomerates, which urges the development of uniform standards and information exchange, and underscores the need for 'intensive cooperation between supervisors' and their 'right to exchange prudential information'.[37] It has subsequently prepared a number of papers for consideration by its three parent organizations on subjects such as capital adequacy principles and a framework and principles for supervisory information sharing.[38]

Another more specialized example is the creation of the Joint Year 2000 Council by the Basle Committee, the BIS Committee on Payment and Settlement Systems (CPSS), IOSCO, and IAIS. The formation of the Council was welcomed by the G-7 Finance Ministers; its Secretariat is provided by the BIS. Its mission is to encourage the development of co-ordinated national strategies to address the Year 2000 problem, including the development of a global databank of contacts in individual countries covering a wide range of actors in both the private and public sectors; the publication of policy papers on specific Year 2000 issues; and the provision of supervisory guidance on assessing Year 2000 preparations by financial institutions. It acknowledges and welcomes efforts by the World Bank and other international institutions to help address the Year 2000 problem, but is focusing its attention directly on both private and public actors in the global financial supervisory community.[39]

The members of the Year 2000 Council are senior members of the sponsoring networks, including chief financial regulators from Belgium, Chile, Italy, Saudi Arabia, South Africa, Canada, Australia, Finland, France, the United States, Japan, and Malaysia. A member of the Board of Governors of the United States Federal Reserve chairs the Council; the chairmen of the Basle Committee, CPSS, IOSCO, and IAIS are *ex officio* members.[40] The Council has formed an External Consultative Committee that includes representatives from international financial services providers, international financial market associations (International Federation of Stock Exchanges, International Federation of Accountants, International Chamber of Commerce), international organizations (the IMF, the World Bank), financial rating agencies (Moody's, Standard and Poor's), and a number of other international industry associations. The purpose of the External Consultative Committee is to enhance global information sharing about measures being taken to address the Year 2000 problem and to 'coordinate as far as possible actions taken by the public and

[36] See http://www.bis.org/publ/bcbs34.htm. The members of the Joint Forum are Australia, Belgium, Canada, France, Germany, Italy, Japan, The Netherlands, Spain, Sweden, Switzerland, the United Kingdom, and the United States.

[37] 'US Objections Prompt Limited Global Pact on Financial Services' (21 Aug. 1995) 14 (16) Banking Policy Reporter 17.

[38] See http://www.bis.org/publ/bcbs34.htm.

[39] Press Release, Joint Year 2000 Council, http://www.bis.org/press/p980706.htm.

[40] Joint Year 2000 Council Fact Sheet, http://www.bis.org/ongoing/y2kintro.htm.

private sectors'.[41] Finally, the Council has contacted individual countries and collected information from their 'financial infrastructure operators' on the preparation of their systems for the Year 2000 date change, information that is then published in the form of 'country pages' with contact information for regulatory authorities and system operators in each country.[42]

What is absolutely striking about this Council is the speed and sophistication with which it has organized itself. It is a functional network, which addresses itself to the solution of a specific but very important problem. It exercises no actual authority; its principal functions are co-ordination and information sharing. Nevertheless, it has been able to marshal key figures world-wide to create synergies and enhance their individual capacity to address the problem. It offers recommendations to national authorities and provides them with the information necessary to act on those recommendations. And all of this within the time-span of barely six months.[43] It is difficult to imagine the global community doing anything so fast or so effectively through the traditional machinery of international negotiations or even through traditional international institutions.

1.5. Common Features of Transgovernmental Regulatory Organizations

The transgovernmental regulatory organizations described above share a number of common features. Zaring emphasizes their informal charters and by-laws, flexible internal organization, relative secrecy, and status as 'substate actors', meaning that they are composed of State institutions rather than of 'member States'.[44] Their creation is generally *ad hoc*, and they tend to have only minimal structural components such as founding treaties, by-laws, and staff. The extremely limited budgets of these organizations inhibit the development of a strong central or supranational character,[45] and ensure that each retains a highly flexible internal organization.[46]

Members of TROs emphasize the voluntary nature of participation; the agreements reached are generally phrased in non-legal (although sometimes technical) language and are largely the product of consensus. Importantly, the members insist that the agreements reached by these kinds of transgovernmental organizations are non-binding.[47] The resolutions, MOUs, or communiqués agreed on by these orga-

[41] External Consultative Committee, http://www.bis.org/ongoing/ecclist.htm.

[42] Year 2000 Country Pages, http://www.bis.org/ongoing/cpage.htm.

[43] The sponsoring committees of the Council began by organizing a Round Table on the Year 2000 at the Bank for International Settlements on 8 Apr. 1998. The decision to organize the Council was taken at that meeting; all the efforts described in the text were underway by Oct. 1998. Introduction, http://www.bis.org/ongoing/y2kintro.htm.

[44] See Zaring, 'International Law', at 39.

[45] In fact, IOSCO's annual revenues do not amount to $US 750,000; IAIS did not exceed SUS 125,000 in 1994; and while the Basle Committee does not disclose its dues, 'since it does not support a secretariat, they are presumably also minimal'. See ibid., at 43.

[46] See ibid., at 40.

[47] See e.g. Interview with Paul Leder, Deputy Director, Office of International Affairs, SEC, 11 Jan. 1996; as quoted ibid., at 43.

nizations are rarely, if ever, elevated to treaty status by the members of the organization. More often the domestic actors themselves implement agreements, avoiding the need for domestic legislation or ratification. A final, complementary, feature is a general lack of formal mechanisms to monitor compliance—at best the members themselves tend to exercise informal oversight.

Notwithstanding their apparent *ad hoc* formation and self-proclaimed lack of legal force, the members of TROs regard them as generally effective in performing their self-appointed functions. The regulatory agreements they negotiate are pledges of good faith that are self-enforcing, in the sense that each State will be better able to enforce its national law by implementing the agreement if other States do likewise. Zaring notes that the organizations maintain strong 'connections with one another, and have created an interlocking web of financial regulators'.[48]

An important dimension of TRO effectiveness is the 'nationalization of international law'. TROs do not aspire to exercise power in the international system independent of their members. Indeed, the main purpose of TROs is to help national regulators to apprehend those who would harm the interests of their citizens, or otherwise to enhance the enforcement of national laws by co-ordinating efforts across borders or promulgating common solutions to problems which each State already faces within its own borders. The result is an international rule-making process that directly engages national officials and national promulgation and enforcement mechanisms, without formal translation and implementation mechanisms from the international to the national.

2. AGENCIES ACROSS BORDERS: BILATERAL AND PLURILATERAL REGULATORY CO-OPERATION

National regulatory agencies also reach out to their counterparts across borders and co-operate in developing joint, harmonized, or co-ordinated policies and agendas outside TROs. These bilateral and plurilateral agreements between domestic agencies, ranging from highly formalized treaties to completely informal initiatives, comprise a second type of government network dedicated to transnational regulatory co-operation. The impulse to engage in *ad hoc* negotiations or discussions on policy has occurred primarily between bilateral partners, although the success of bilateral agreements encourages bilateral partners to consult additional parties, resulting in plurilateral co-operation. As with TROs, bilateral and plurilateral regulatory co-operation is particularly strong in the financial arena.

2.1. MOUs and MLATs

At the centre of the spectrum of agreements lies the standard building block of the informal international order, the MOU. Transnational regulators sign MOUs as

[48] Zaring, 'International Law', at 45.

non-binding statements of their intent to co-operate in order to address specific regulatory problems. Should concrete ideas or policies result from the negotiations, the regulatory authorities themselves are charged with implementing the decisions in their respective countries. MOUs have proliferated in recent decades, steadily gaining in popularity as a mode of conducting transgovernmental regulatory business.

The comparison between the process of creating MOUs and more formal agreements such as Mutual Legal Assistance Treaties (MLATs) is instructive.[49] Both MOUs and MLATs are, in essence, agreements between regulators in specific and discrete subject areas. The formal distinction is that MLATs are actual treaties; they create legally binding obligations whereas MOUs do not create legal burdens. As a result, creating a MLAT typically involves all the traditional organs of the unitary State model: diplomatic negotiation among State officials, precise and contested drafting of a treaty, and a formal domestic implementation process, such as Senate ratification in the United States, or passage of implementing legislation elsewhere.

The process by which the United States reached the MLAT with Switzerland during the 1970s shows how onerous the bilateral treaty process can be, even for technical matters.[50] Negotiations began in 1967, having previously failed in 1922, 1925, 1938, and 1962. On the American side, several domestic agencies, including the SEC and the State, Justice, and Treasury Departments, initiated the effort. However, the actual negotiations were conducted by high level officials, up to and including the respective ambassadors. After a long and tumultuous process, the accord was signed in 1977, a full decade after the negotiations began. Finally, and to the further frustration of the Justice Department, many of the concessions gained by the negotiators were undermined by the Swiss implementing legislation. It was not until the end of the 1980s that substantial problems with the Swiss MLAT were overcome, in part through a series of MOUs.

Thus, where possible, domestic agencies have sought to avoid the delay and burden of treaty negotiations in favour of quick, less formal, and purportedly non-binding MOUs. Unlike MLATs or other treaties, MOUs are agreed by the regulators themselves, if possible without the involvement of traditional diplomatic actors. MOU agreements are often brief, and drafted in non-legal language. And, perhaps most importantly, MOUs are fast—both in the negotiation process, and in the implementation process, which typically is performed directly by the agency itself, without any involvement of the domestic legislature or other domestic actors.

The growth of MOUs may reflect increased recognition of the general advantages of informal over formal agreements, at least among like-minded regulatory agencies.

[49] See generally Note, 'International Securities Law Enforcement: Recent Advances in Assistance and Cooperation' (1994) 27 Vanderbilt Journal of Transnational Law 635; Charles Vaughn Baltic III, Note, 'The Next Step in Insider Trading Regulation: Internal Cooperative Efforts in the Global Securities Market' (1991–2) 2 Law and Policy in International Business 167.

[50] Ethan A. Nadelmann, *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement* (University Parle, Pa.: Pennsylvania State University Press, 1993), 321–41; Lionel Frei and Stefan Treschel, 'Origins and Applications of the United States–Switzerland Treaty on Mutual Assistance in Criminal Matters' (1991) Harvard International Law Journal 31.

Formal obligations to co-operate on matters traditionally considered to be at the heart of domestic authority raise prickly issues of sovereignty and public policy. It will often be better simply to agree on a general framework for co-operation and to let the pursuit of common functions and purposes, and deepening interpersonal relationships, take care of the rest. No obligations devolve upon the State as a whole, only upon specific regulatory entities participating in horizontal governance networks.

Examples of areas in which regulators have taken the MOU route include securities regulation,[51] commodities regulation,[52] antitrust,[53] environmental regulation,[54] and health policy.[55] In some cases the development of MOU-networks has been explicitly supported by national legislation. For example, in the 1980s, the SEC proposed legislation authorizing it to investigate suspected violations of United States securities laws in foreign countries, while permitting foreign securities officials to do the same in the United States.[56] One purpose of this legislation was to promote the exchange of information through MOUs.

Of course, use of one or the other type of bilateral agreement is not limited to particular subject-matters; MOUs and MLATs may be used interchangeably and are also often used together. For example, after the Swiss MLAT was signed in 1977, the

[51] See Brad Begin, 'A Proposed Blueprint for Achieving Cooperation in Policing Transborder Securities Fraud' (1986) 27 Vanderbilt Journal of International Law 65; Paula Jimenez, 'Comment, International Securities Enforcement Cooperation Act and Memoranda of Understanding' (1990) 31 Harvard International Law Journal 295. See also Mark S. Klock, 'Comment, A Comparative Analysis of Recent Accords Which Facilitate Transnational SEC Investigations of Insider Trading' (1987) 11 Maryland Journal of International Law and Trade 243.

[52] In June 1995 the US Commodities Future Trading Commission and Italy's Commissione Nazionale per la Società à la Borsa signed a mutual assistance agreement entitled 'Memorandum of Understanding on Consultation and Mutual Assistance for the Exchange of Information'. The MOU authorizes US and Italian regulators to request and obtain accessed information contained in each other's files, take statements from persons subject to each other's jurisdiction, and obtain documents regarding futures trading (Aug. 1995) 11 International Enforcement Law Reporter 318. In May 1995 the Mexican National Banking and Securities Commission and the USCFTC negotiated a MOU to facilitate the exchange of information and improve the enforcement of laws and regulations related to the futures and options markets in the United States and Mexico.

[53] See Nina Hachigian, 'Essential Mutual Assistance in International Antitrust Enforcement' (1995) 29 International Lawyer 117, 138.

[54] See James D. Vieregg *et al.*, 'Cross-Border Environmental Law Enforcement' (20 Oct. 1994) ALI-ABA Course of Study: Criminal Enforcement of Environmental Laws, C964 ALI-ABA 455.

[55] For example, in Nov. 1991 the US Food & Drug Administration participated in an International Conference on Harmonisation, which included drug regulators and pharmaceutical manufacturers from the EC, Japan, and USA (the countries which account for the vast majority of drug production, research, and development). The FDA agreed to accept data collected in foreign clinical tests and explored the possibility of developing common standards. David W. Jordan, 'Note, International Regulatory Harmonization: A New Era in Prescription Drug Approval' (1992) 25 Vanderbilt Journal of Transnational Law 471; see also Rosemarie Kanusky, 'Comment, Pharmaceutical Harmonization: Standardizing Regulations Among the United States, the European Economic Community, and Japan' (1994) 16 Houston Journal of International Law 665.

[56] The International Securities Enforcement Cooperation Act, S. 2544, 100th Cong., 2d Sess. (1988). On 19 Nov. 1988, Congress adopted a less comprehensive version of S. 2544, the Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. § 78 (1988).

United States and Swiss securities agencies negotiated a separate MOU to share information regarding insider trading investigations. The additional agreement was necessary because insider trading was not a criminal violation under the Swiss Penal Code, even after conclusion of the formal treaty, and thus insider trading fell outside the scope of the MLAT.

2.2. Informal Initiatives

Informal initiatives lie at the opposite end of the bilateral agreement spectrum from MLATs. The joint survey of the internal management and financial controls of several international securities firms undertaken jointly by the SEC and the British Securities and Investments Board in July 1995 provides one example of such an initiative. The two regulatory agencies sought to co-operate to improve the supervision of securities firms' foreign affiliates in the light of problems recently experienced by Baring's Bank. It was the first joint initiative to assess the global activities of international securities firms, although the SEC and SIB agreed on a joint statement for the supervision of derivatives activities in March 1994.[57] This joint exercise of investigatory authority creates a kind of voluntary horizontal governance, linking two agencies that exercise the requisite hierarchical authority over the individuals and groups within their territorial and extra-territorial jurisdiction, but not forming a supranational source of coercion. Such initiatives differ from MOUs more in degree than in kind; they are likely to be *ad hoc* and addressed to a specific problem. However, they reflect a deep level of trust and comfort in working together on the part of the participating agencies.

In another informal initiative, the SEC has created an international institute for securities market development. The institute 'is part of [the SEC's] continuing effort to assist foreign countries with developing capital markets that are critical to a dynamic free enterprise system. The SEC has been particularly generous in supplying technical help to many Eastern European countries.'[58] Such efforts may represent a distinctive and new form of foreign aid, perhaps partially compensating for the steep decline in more traditional forms of aid. Allowing national agencies to administer aid on a functional regulatory basis further contributes to their autonomy in transnational relations.

Another example of an informal initiative arises in the area of derivatives regulation. The SEC, the CFTC, and the UK's Securities and Investments Board have established a joint statement of co-operation on derivatives,[59] consisting of a seven-point programme that includes information sharing and creation of more uniform

[57] 'U.S.–U.K. Initiate Assessment of Supervision of Foreign Affiliates' (Aug. 1995) 11 International Enforcement Law Report 319.

[58] Stewart J. Kaswell, 'SEC Chair Breeden Underscores the Importance of the Rule of Law' (Summer 1992) ABA International Law News 5.

[59] 'SEC, CFTC, UK Regulators Issue Statement on OTC Derivatives Oversight' (16 Mar. 1994) International Business & Finance Daily, D9.

standards.[60] This initiative coexists with more formal initiatives by the Basle Committee and IOSCO, both of which have issued guidelines for derivatives users that encourage companies to implement standards of internal risk management rather than external, SEC-style regulation.[61] At least one observer argues that such transnational co-operation promises more effective regulation than would Congressional action rooted in the extraterritorial application of strict derivatives oversight.[62] From a process point of view, what is striking is the plethora of different ways in which government networks can be used to achieve a particular regulatory goal.

3. REGULATING THE GLOBAL ECONOMY THROUGH GOVERNMENT NETWORKS: IMPLICATIONS AND PROBLEMS

What are the implications of government networks? At the most general level, they offer a new vision of global governance: horizontal rather than vertical, decentralized rather than centralized, and composed of national government officials rather than a supranational bureaucracy. They are *potentially* both more effective and more accountable than traditional international institutions, at least for some purposes. They simultaneously strengthen the power of the State and equip State actors to interact meaningfully and innovatively with a host of other actors. These include public actors at the supranational, subnational, and regional levels, private actors such as corporations and NGOs, and 'mixed' actors that are privately organized but increasingly perform public functions. Further, government networks are optimally adapted to the technology of the Information Age, existing more in virtual than real space. Finally, as the form of governance changes, function is likely to follow suit, enabling government networks to deploy resources away from command and control regulation and towards a variety of catalysing and supporting roles.[63]

Yet government networks trigger both suspicion and anxiety. The suspicion is of a burgeoning global technocracy, insensitive to political choices driven by more than functional considerations and unresponsive to existing mechanisms of democratic governance at the national or international levels. The anxiety is a function of many of the same network attributes that are positively evaluated above. As any feminist who has battled 'the old boy network' will quickly recognize, the informality, flexibility, and decentralization of networks means that it is very difficult to establish

[60] See Thomas C. Singher, 'Regulating Derivatives: Does Transnational Regulatory Cooperation Offer a Viable Alternative to Congressional Action?' (1995) 18 Fordam International Law Journal 1397, 1465–8. [61] Ibid. [62] Ibid.

[63] The public management section of the OECD (called PUMA) has launched a major regulatory reform initiative that operates through a 'regulatory management and reform network'. A major focus of reform efforts is the shift away from 'command and control regulations' to a wide range of alternative instruments, many of them market-based or relying on self-regulation incentives. For an overview of this programme, see the PUMA website at http://www.oecd.org/puma/regref/work.htm. In the United States similar work has been done under Vice President Al Gore's 'Reinventing Government' initiative.

precisely who is acting and when. Influence is subtle and hard to track; important decisions may be made in very informal settings. As Martti Koskenniemi argues in his contribution to this volume, giving up form and validity is ceding fundamental constraints on power.[64]

At this stage, systematic empirical observations of government networks are so limited that both camps can see what they want to see, or at least what they are primed to look for. Existing networks differ in many ways, both within and across issue areas; even where the literature is fairly extensive, as in the documentation of new forms of financial regulation, it is often quite technical and silent on questions such as accountability. Further, different government networks have different relationships with existing international or supranational organizations. Similarly, their members have a range of different relationships with various national supervisory bodies such as legislative committees. Both international lawyers and political scientists could usefully engage in case studies and systematic research across issue areas.

At this stage of the analysis, a review of some of the principal criticisms of government networks that have been advanced in print and in public audiences, together with some tentative responses, may help guide future research agendas. This section distils three such criticisms: lack of accountability; promotion of a minimalist and exclusionary policy agenda; and marginalization and displacement of traditional international organizations. After reviewing each critique, I set forth some initial responses, many of which will also pose questions for further study.

3.1. A New Technocratic Élite

The sharpest criticisms of government networks emphasize their lack of accountability. According to Philip Alston, if [Slaughter's] analysis 'is correct . . . , [i]t implies the marginalisation of governments as such and their replacement by special interest groups . . . It suggests a move away from arenas of relative transparency into the back rooms . . . and the bypassing of the national political arenas to which the United States and other proponents of the importance of healthy democratic institutions attach so much importance'.[65] Antonio Perez, identifying a related argument about networks among national and international bureaucrats in Abram and Antonia Chayes's *The New Sovereignty*, accuses them of adopting 'Platonic Guardianship as a mode of transnational governance', an open 'move toward technocratic elitism'.[66] And Sol Picciotto, who also chronicles the rise of government networks but from a more explicitly critical perspective, argues: 'A chronic lack of legitimacy plagues direct international contacts at the sub-State level among national officials and

[64] Koskenniemi, chapter 3.

[65] Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalisation' (1997) 8 European Journal of International Law 435, 441.

[66] Antonio Perez, 'Who Killed Sovereignty? Or: Changing Norms Concerning Sovereignty In International Law' (1996) 14 Wisconsin International Law Journal 463, 476.

administrators'.[67] He attributes this lack of legitimacy to their informality and confidentiality, precisely the attributes that make them so attractive to the participants.[68]

Such charges are much easier to make than to prove. To begin with, concerns about accountability assume that government networks are developing and implementing substantive policies in ways that differ significantly from outcomes that would be reached as the result of purely national processes or of negotiations within traditional international institutions. Although reasons exist to accept this premiss with regard to policy initiatives such as the 1988 Capital Accord adopted by the Basle Committee,[69] it is less clear regarding other networks, even within the financial arena. Network initiatives are theoretically subject to the normal political constraints on domestic policy-making processes once they have been introduced at the domestic level. Arguments that they circumvent these constraints rest on the presumed ability of national officials in the same issue area to collude with one another in ways that strengthen their respective positions *vis-à-vis* bureaucratic rivals or legislative overseers back home. This presumption is often contested by experts in the different fields of financial regulation and requires further research on a case by case basis.

More generally, many government networks remain primarily talking shops, dedicated to the sharing of information, the cross-fertilization of new ideas, and the development of common principles based on the respective experiences of participating members. The power of information is soft power, persuasive rather than coercive.[70] It is 'the ability to get desired outcomes because others want what you want'.[71] Specific government institutions may still enjoy a substantial advantage over others due to the quality, quantity, and credibility of the information they have to exchange.[72] But in giving and receiving this information, even in ways that may significantly affect their thinking, government officials are not exercising power in the traditional ways which polities find it necessary to hold them accountable for. We may need to develop new metrics or even new conceptions of accountability geared towards the distinctive features of power in the Information Age.

A second and related response raises the question whether and when direct accountability is necessary for legitimate government. Some domestic institutions, such as courts and central banks, are deemed to act legitimately without direct accountability. Legitimacy may be conferred or attained independent of mechanisms of direct accountability—performance may be measured by outcomes as much as by process. Insulated institutions are designed to counter the voters' changing will and

[67] Sol Picciotto, 'Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism' (1996–7) 17 Northwestern Journal of International Law and Business 1014, 1047.

[68] Ibid., at 1049.

[69] Ethan B. Kapstein, *Supervising International Banks: Origins and Implications of the Basle Accord* (Princeton: Department of Economics, Princeton University, 1991).

[70] Robert O. Keohane and Joseph S. Nye Jr., 'Power and Interdependence in the Information Age' (1998) 77 Foreign Affairs 81, 86.

[71] Ibid.

[72] See ibid., at 89–92 (discussing 'the politics of credibility').

whim, in order to garner the benefits of expertise and stability and to protect minorities. Many of the policy arenas in which government networks are likely to be most active are those in which domestic polities have agreed that a degree of insulation and expertise is desirable. Thus, it is not automatically clear that the transgovernmental extension of these domestic activities poses legitimacy problems.

A third response is: 'accountable compared to what?' The presumed accountability or lack thereof of government networks must be contrasted with the accountability of international organizations on the one hand and NGOs on the other. International organizations are widely perceived as being accountable only to diplomats and international lawyers, which helps explain their relative disrepute in many countries. And accountable to whom? The United Nations suffers from the perennial perception that it is answerable primarily to its own bureaucracy; the International Monetary Fund and, to a lesser extent, the World Bank are widely seen as fronts for the United States; European Union institutions have been in crisis over a purported 'democracy deficit' for much of this decade; the World Trade Organisation draws populist fire for privileging free trade, and hence the large corporate interests best positioned to benefit from free trade, over the employment, welfare, environmental, and cultural interests of large numbers of voters.[73]

NGOs hardly fare better. Although they must routinely sing for their supper and thus depend on their ability to persuade individual and institutional contributors of the worth of their activities, many, if not most, are single issue groups who target a particular demographic and political segment of society and may well wield power quite disproportionate to the number of their supporters. Further, their contributors rarely have any direct control over policy decisions once the contribution has been made, or, equally important, any means of ensuring how their contribution was spent.

In this context, government networks have a number of potential advantages. First, they are composed of the same officials who make and implement regulations domestically. To the extent that these networks do actually make policy, and to the extent that the policies made and subsequently adopted at the national level differ significantly from the outcome of a purely domestic regulatory process, it is reasonable to expect that other domestic political institutions—legislators, courts, or other branches of the bureaucracy—will extend their normal oversight functions to transgovernmental as well as domestic activities. Alston rejects this claim as excessively optimistic, arguing that all the organs of the State have been significantly weakened

[73] Consider the following passage from political scientist Henry Nau, which sounds virtually the same themes as Alston's critique of government networks: 'Whose political interests [are] being served by international institutions? Realists said State interests, but the major States today are democracies and consist of many societal and special interests that do not reflect a single government, let alone national interest. Critics of international institutions suspect that these special interests, especially corporate and bureaucratic élites with stakes in globalization, now dominate international organizations and use them to circumvent democratic accountability.' Nau, 'Institutional Skepticism', Letter to the Editor (Summer 1998) 111 Foreign Policy 168.

by globalization and the neo-liberal economic agenda that has accompanied it.[74] That, however, is a separate argument, which is considered separately below. It is also an argument with far broader implications: if the State is really so weakened, then the prospects of enhancing the accountability of any of the important actors in international life are slim indeed.

A promising development that suggests that State institutions with a more directly representative mandate are not yet dead is the growth of legislative networks: links among those national officials who are most directly responsible for ensuring bureaucratic accountability. In some areas, national legislation has been used to facilitate the growth of government networks.[75] In others, such as human rights and the environment, national legislators are increasingly recognizing that they have common interests. In the European Union, governments are increasingly having to submit their European policies to special parliamentary committees, who are themselves networking.[76] The result, according to German international relations scholar Karl Kaiser, is the 'reparliamentarization' of national policy.[77] In addition, legislative networks can be used to strengthen national legislative institutions. For example, the Association of African Election Authorities was founded in 1997. It is composed both of government officials and leaders of NGOs directly involved in monitoring and assisting elections.

Other examples include legislative networks contained within international organizations, as discussed further below. These networks allow the regulators or parliaments of weak States to participate in global governance, and thereby serve the functions both of setting a good example for fragile institutions and of lending their strength and status to the organization in question. The OSCE Parliamentary Assembly, for example, has played an important role in legitimizing Eastern European parliaments by monitoring elections and including parliamentarians in all OSCE deliberations. The controversy surrounding the OSCE's rejection of a Belarussian delegation in July 1997 demonstrates that membership in the Assembly has become a symbol of governmental legitimacy.[78]

A final response to the accountability critique is that the critics are missing a more significant point about the changing nature of power itself. Government networks are far better suited to exercising 'soft power' than 'hard power'—that is, the power flowing from an ability to convince others that they want what you want rather than an ability to compel them to forgo their preferences by using either threats or rewards.[79] Soft power rests much more on persuasive than coercive authority, a base

[74] Alston, 'Myopia of the Handmaidens', at 442.

[75] MOUs between the SEC and its foreign counterparts, for example, have been directly encouraged and facilitated by several United States statutes passed expressly for the purpose. Faith T. Teo, 'Memoranda of Understanding among Securities Regulators: Frameworks for Cooperation, Implications for Governance' (1998), 29–43 (ms on file with author, Harvard Law School).

[76] Shirley Williams, 'Sovereignty and Accountability in the European Union', in Robert Keohane and Stanley Hoffman (eds.), *The New European Community* (Boulder, Colo.: Westview Press, 1991).

[77] Karl Kaiser, 'Globalisierung als Problem der Demokratie' (Apr. 1998) Internationale Politik 3.

[78] Aleksandr Potemkin, *Session of OSCE Parliamentary Assembly ends in Moscow*, ITAR-TASS News Agency, 9 July 1997.

[79] Keohane and Nye, 'Power and Interdependence', at 86.

that may in turn require a capacity for genuine engagement and dialogue with others. To the extent that government officials seek to persuade but then find that they must in turn allow themselves to be persuaded in their interactions with their foreign counterparts, what should mechanisms of accountability be designed to accomplish?

If a judge, or a regulator, or even a legislator, learns about alternative approaches to a problem facing him or her in the process of disseminating his or her own country's solution, and views that solution more critically thereafter, is there an accountability problem? The answer is likely to be that an accountable government does not seek to constrain the sources of knowledge brought to bear on a particular governance problem, but rather the ways in which that knowledge is acted upon. Fair enough, but many government officials will think and act differently as a result of their participation in transgovernmental networks in ways that we cannot, and arguably should not, control.

3.2. A Minimalist Global Agenda

A second major critique of government networks is that they instantiate a radically scaled-back global policy agenda. Alston observes that the formulation of the transgovernmental policy agenda focuses on issues that are essentially spillovers from the domestic policy agendas of the industrialized world, leaving out global poverty, malnutrition, human rights, refugees, the persecution of minority groups, and disease.[80] On a superficial level, he is right. The formulation of the policy agenda in my own previous writing on transgovernmentalism and in an article by Michael Reisman[81] who makes a number of similar points does focus more on the extension of a national regulatory agenda than on more traditional international issues. In this sense the 'real new world order', to quote from my own work, is more about the globalization of national regulatory problems and solutions than the extension of traditional international institutions that was apparently initially envisaged by George Bush.

But that is a rhetorical flourish, a point advanced as provocatively as possible. Alston is making a more important point, arguing that the transgovernmental regulatory agenda is *displacing* the traditional internationalist agenda of providing public goods to solve international collective action problems. That is a much more serious charge, but it confuses the symptoms with the disease. How can the emergence of transgovernmental regulatory networks addressing domestic policy issues that have become globalized be adduced as a *cause* of declining interest in an older but perennial set of international problems? Frustration with international bureaucracy, doubt about the value received for money already spent, neo-liberal economics as a (dubi-

[80] Alston, 'Myopia of the Handmaidens', at 439.

[81] Michael Reisman, 'Designing and Managing the Future of the State' (1997) 8 European Journal of International Law 409.

ous) domestic solution that in many countries is projected on to the national sphere, the converse crisis of the social democratic (liberal, in the United States) welfare State—surely these are the real culprits. The resulting issues demand introspection and innovation, on all our parts.

More generally, the problems Alston identifies are best addressed at the level of changing domestic State preferences. It is national officials who must be motivated to renew their commitment to the global public issues he identifies. They must also be convinced that at least partial solutions to problems such as poverty, disease, famine, human rights abuses (including women's and children's rights) are achievable and worth pursuing on a global rather than a purely national scale. Focusing on networks of national government officials, many of whom are grappling with these problems within their own countries, is a sensible strategy for pursuing this agenda, and possibly the optimal strategy. Even if traditional international institutions are the best mechanisms for implementing a revived maximalist global agenda, a question addressed in the next section, it is States and thus government officials who must set and fund that agenda.

3.3. Displacing International Institutions

The third critique of government networks is that they are displacing international institutions. Alston makes this charge by again equating government networks with the values of globalization and then lamenting the impact of those values on international organizations.[82] However, a broader critique along the same lines emerges not only from the contrast that I and others have drawn between traditional liberal internationalism and transgovernmentalism, but also from the perception that government networks offer some States a way of escaping or circumventing undesirable aspects of international organizations. In particular, government networks can be seen as a way of avoiding the universality of international organizations and the cumbersome formality of their procedures that is typically designed to ensure some measure of equality of participation. Members of a government network can pick and choose new members, establish tiers of membership, or simply design procedures that ensure that power is concentrated among some members. Networks that fit this description fuel fears that their members are engaging in a politics of insulation from the global community.

These are genuine and potentially serious concerns that may well be warranted in respect of some government networks at least some of the time. But at this level, the debate is too general to have much bite. The charges of insulating powerful States at the expense of weaker States will have to be demonstrated and rebutted in the context of specific networks. The much larger point, however, is that the apparent opposition between government networks and international organizations is likely to prove a false dichotomy. Transgovernmentalism represents an alternative paradigm of

[82] Alston, 'Myopia of the Handmaidens', at 444.

global governance, but, like all paradigms, its purity is quickly stained in practice. Further, continuing to frame the debate in these terms will obscure an extraordinary set of opportunities to design new hybrid forms of governance that build on network concepts as well as on more traditional modes of organization.

In some issue areas, a real choice is emerging between regulation through government networks and through either existing or new international organizations. In international antitrust regulation, for example, the United States is actively pushing for transgovernmental co-operation, albeit under the auspices of the Organisation for Economic Co-operation and Development, rather than intergovernmental harmonization through an organization like the World Trade Organisation or the United Nations or a new international antitrust authority.[83] In such cases the claim that government networks will displace international organizations carries weight, although the international organization risking displacement will not be a promoter of the global agenda that champions of traditional international organizations appear to have in mind. Nevertheless, the outcome of such debates will depend on the relative merit not only of the institutional values fostered by competing institutional forms (speed, flexibility, and policy autonomy versus universality, formality, and deliberation), but also by the substantive regulatory outcomes each form is supposed to promote in the issue area in question (mutual recognition versus harmonization).

In many other issue areas, however, government networks will exist alongside or even within international institutions and are very likely to complement their functions. The NAFTA environmental enforcement network, for instance, is an example of a 'nested network', in which a government network implements the agenda of an international organization that is at least semi-traditional. Networks of national officials operating within the World Intellectual Property Organisation, at least for the purposes of negotiating new approaches to international intellectual property regulation, offer another example. The real research questions will ultimately involve efforts to determine which organizational forms are best suited to which governance functions. It may even be possible to develop a principle of global subsidiarity, designed to facilitate the allocation of functions between international organizations and national officials operating within government networks, or some combination of the two.[84] In the meantime, the threat of competition from government networks

[83] According to Spencer Weber Waller, '[Transgovernmental] [c]ooperation is currently in vogue because it *increases* national power. Substantive harmonization and true international antitrust law, in contrast, promise the diminution of both national lawmaking and enforcement power. Not surprisingly, the United States, although the current leader in pushing for cooperation, is the most reluctant harmonizer on the international scene.' 'The Internationalization of Antitrust Enforcement' (1997) 77 Boston University Law Review 343, 378.

[84] As a starting-point, one might argue that co-operative networks of national regulatory officials can and should focus on the issues which they are best equipped to address—the extension of their domestic policy briefs. International institutions should address those issues which either no one State is adequately equipped to address or which fail to be addressed at all at the national level, either as a result of collective action problems, or because of other reasons for resistance.

will add the spur of competition to salutary efforts to reform existing international organizations.

A final critique of government networks implicates an idea, and perhaps an ideal, of internationalism: a distinction between international and domestic politics that is embodied in and protected by a conception of national sovereignty. However much their agendas now address issues once of purely domestic concern, international organizations still operate in a self-consciously international space. They employ independent international bureaucrats, whose loyalty is supposed to shift away from their national governments. And when they convene meetings of relevant national officials, as they frequently do, those officials are at the very least wearing dual hats, formally representing their governments in external affairs. As a result, the resolutions or even rules adopted can be resisted at the national level as being external and imposed.

One of the major advantages of government networks, at least from the perspective of those who are often frustrated by the difficulty of ensuring compliance with international rules and norms, is that they directly engage the national officials who have the power to implement domestic policy changes. As a result, the policies they adopt, implement, or at least promote are much harder to combat on grounds of national sovereignty. From a theoretical perspective, government networks straddle and ultimately erase the domestic/international divide. But from the perspective of some governments, such as the Mexican environmental officials participating in the North American Free Trade Agreement (NAFTA) 'environmental enforcement network', the result is a politics of imposition that is but the latest face of imperialism, or at least hegemony.

This critique must also be contextualized. In many international issue areas, such as human rights or environmental regulation, or even many types of financial regulation, the point is precisely to penetrate national sovereignty. The policy decisions that are the subject of international concern are being made at the domestic level. Conversely, rules and principles being adopted in the international or transgovernmental sphere are supposed to shape governments' relations with their own systems. Further, these goals are often shared by many domestic actors. Thus, to say that government networks are particularly effective at penetrating the face of national sovereignty and defusing opposition based on the 'imposition' of foreign or international rules and institutions is as likely to be praise as censure.

3.4. Advantages of Government Networks: Bringing the (Disaggregated) State Back In

The danger in responding to specific criticisms is always that of losing sight of the forest. In this case, much of the critique of transgovernmentalism betrays reflexive hostility and poverty of imagination—a defensive attachment to a liberal internationalist agenda that champions international organizations either as ends in themselves or as the only means to achieve transcendent policy goals. For many, even

those who share the underlying policy goals, this agenda is nothing more than yesterday's *status quo*: the welfare State at home, international bureaucracy abroad. Transgovernmentalism may in some cases be associated with other policy agendas, such as neo-liberal economics. But it also reflects the rise of an organizational form as a mode of adaptation to a host of factors, from technology to the decline of inter-State conflict, that cannot be wished or argued away. It is a choice, of course, whether to celebrate or lament this development. But here again, the choice even to frame transgovernmentalism as an issue offers numerous advantages that its critics apparently have not stopped to ponder.

First, and most important, transgovernmentalism is all about bringing the State back in as an important international actor. As emerges repeatedly in Alston's analysis, his underlying concern is the decline of State power. He argues: 'Several parallel developments are working to reduce the powers of the state, of national legislatures, and of international organisations, while private power (that of corporations rather than NGOs) is taking up even more of the slack left by the emergence of the minimalist state.'[85] This has certainly been the conventional wisdom for much of the past decade. But a new consensus is emerging on the importance of a strong State. Gerard Helman and Steven Ratner began by pointing out the terrible consequences of 'failed States', an argument that was reviled for its neo-colonial overtones in suggesting international substitutes for domestic State power, but that can be read equally as highlighting the importance of a well-functioning State.[86] Stephen Holmes has followed suit with his diagnosis of the disasters flowing from 'weak-State liberalism' in the former Soviet Union.[87] And as Alston himself acknowledges, even the World Bank is recognizing 'that the backlash against the state . . . has gone too far'.[88]

The point of presenting transgovernmentalism as a 'new world order', in contrast to the claims of liberal internationalists who seek to devolve power ever upward to international organizations and 'new medievalists' who predict or even call for the demise of the Westphalian system, was to argue that State power was disaggregating rather than disappearing. State actors are exercising their power by different means and through different channels. Alston is quite right to claim that this is a partial image—'one . . . layer out of a much more complex set of strata'.[89] But singling out this layer is a reminder that the State is not standing still. Further, thinking about global policy issues—in all areas—in terms of networks of State actors that compete with, complement, and even bridge the gap to networks of supranational, subnational, and private actors opens the door to a host of new ways in which State actors can address global problems.

A final example is in order. The arrest and requested extradition of General Augusto Pinochet from Britain to Spain to stand trial for crimes against humanity

[85] Alston, 'Myopia of the Handmaidens', at 442.

[86] See e.g. Gerald Helman and Steven Ratner, 'Saving Failed States' (1992–3) 89 Foreign Policy 3.

[87] Stephen Holmes, 'What Russia Teaches Us Now' (July–Aug. 1997) American Prospect 30; see also Grigory Yavlinsky, 'Russia's Phoney Capitalism' (May/June 1998) Foreign Affairs 67.

[88] Alston, 'Myopia of the Handmaidens', at 444.

[89] Ibid., at 441.

committed in Chile illustrates the impact of transnational judicial networks. A Spanish judge not only requests the British government to proceed with arrest and extradition under applicable British and European law, but specifically addresses arguments to his British counterparts by tailoring his extradition request to take account of objections raised in an initial judgment blocking extradition by a lower British court. Furthermore, other European magistrates—from France, Switzerland, Belgium, Luxembourg, and Sweden—all quickly voiced their support of the Spanish position by announcing potential extradition requests of their own. Judges in each country have been reinforced in their interpretation of international and domestic law by an awareness of their counterparts abroad, lending substance to the idea of a global community of law. The substance of their achievement in helping to bring a notorious human rights violator to justice might be even greater with the added assistance of an international institution such as the projected international criminal court. But disaggregated State actors, interacting with the political branches but maintaining their own autonomy, have not done so badly.

A second major advantage of government networks concerns the ways in which they can be used to strengthen individual State institutions without labelling the State as a whole as 'weak', 'failed', 'illiberal', or anything else. Networks target specific institutions, imposing particular conditions or at least goals regarding the level and quality of their functioning and often providing direct information and even material aid. The SEC, for example, distributes considerable technical assistance through its network of MOUs with other securities regulation agencies.[90] The criteria for participation have little to do with the political system as a whole and a great deal to do with technical or professional competence. While it may seem odd to praise the act of turning a blind eye to abuses and worse elsewhere in a national political system, the concept of a disaggregated State recognizes that wholesale labels are likely to be misleading and/or counter-productive. States are not unitary actors inside or out; absent revolution, they are likely to evolve and change in complex institutional patterns. Government networks may be exclusionary in various ways, but they are also inclusive in ways that some international organizations cannot afford to be.

On a more theoretical level, Abram and Antonia Chayes argue that 'the new sovereignty' is actually 'status—the vindication of the state's existence in the international system'.[91] They demonstrate that in contemporary international relations, sovereignty has been redefined to mean 'membership . . . in the regimes that make up the substance of international life'.[92] Disaggregating the State makes it possible to disaggregate sovereignty as well, helping specific State institutions derive strength and status from participation in a transgovernmental order. The net cost or benefit of this development will depend on the values transmitted through any particular government network, but no values are inherent in the organizational form itself.

[90] Teo, 'Memoranda', at 23–4.
[91] Chayes and Chayes, *The New Sovereignty*, at 27.
[92] Ibid.

However, the potential to be gained from piercing the sovereign veil and targeting specific institutions is enormous.

4. CONCLUSION

Many international lawyers will not like the message of this chapter. It seems an assault on all that internationalists have laboured so painstakingly to build in the twentieth century. It offers a horizontal rather than a vertical model of global governance, an informal and frequently selective set of institutions in place of formal and highly scripted fora in which each State is accorded an equal voice. Alternatively, government networks may appear trendy but inconsequential—talking shops at best and opportunities for foreign junkets at worst. After all, international institutions have proliferated over the past decades and seem sufficiently robust that at least one noted political scientist has posed the question 'why do they never die?'[93]

In fact, government networks are here to stay and will assume increasing importance in all areas of international life. They are the optimal form of organization for the Information Age. Note the responses to the East Asian financial crisis; amid calls for a new Bretton Woods agreement to craft and implement a new international architecture, the real forum for policy innovation and implementation is the G22. Governmental networks are less likely to displace international organizations than to infiltrate and complement them; they will also be the ideal fora for pioneering initiatives and pilot projects among smaller groups of States. In economic regulation in particular, they develop easily as they are based on shared technical expertise among regulators and the escalating demands of a globalized economy among both the richest States and the most promising emerging markets.

The provenance of current government networks should not limit their applicability, however. They offer an important governance alternative to both traditional international institutions and 'new medievalist' networks of non-State, regional, local, and supranational actors. It is an alternative that can be promoted and used in imaginative ways, from bolstering legislative and judicial networks to 'nesting networks' within existing international institutions and creating standing links between government networks and NGO networks. Such initiatives will simultaneously have to address rising questions of the accountability of transgovernmental actors: how to define it and how to implement it.

Perhaps the sharpest challenge that proponents of and participants in government networks will have to surmount comes from those who see them as the newest blind for the projection of United States power. In its crudest form, the claim is that as international institutions have become too constraining, the United States has moved away from its traditional liberal internationalist agenda and begun promot-

[93] Susan Strange, 'Why Do International Organizations Never Die?', in B. Reinalda and V. Verbeek (eds.), *Autonomous Policy Making by International Organizations* (London: Routledge, 1998), 213.

ing more informal co-operation through government networks which allow individual United States government institutions to play a dominant role. From this perspective, networks are an optimal organizational form only in so far as a United States institution remains the central node.

In contrast to this critique, however, United States policy-makers are beginning to find that in some areas networks create their own demands. In the areas of data privacy and cultural policy, for example, the United States is being excluded from transgovernmental co-operation because it does not have domestic government institutions concerned with these issues. Participation in a transgovernmental network requires a national node, but creation of such a node carries its own implications, and dangers, from the perspective of those who oppose such policy altogether. Thus, just as United States securities regulators encourage the creation of at least quasi-autonomous securities commissions in emerging markets as the price of entry into both bilateral and plurilateral network relations, the United States executive and legislature is facing a similar choice in policy areas more foreign to United States traditions.

Finally, different organizational forms have their own impact on the ways in which power is most effectively exercised. The informality and flexibility of government networks privileges the expertise and superior resources of United States government institutions in many ways. At the same time, however, the absence of formal voting rules or even of established institutional protocols prevents the United States or any other powerful State from actually imposing its will. The dominant currency is engagement and persuasion, built on long-term relationships and trust. United States government officials from regulators to judges to legislators are likely to find themselves enmeshed in networks even as they try to engineer them.

Every age needs its own idealistic vision: the Information Age will celebrate the exchange of ideas over the imposition of ideology. Networks are the medium for that exchange, a medium that, like others before it, will itself become the message. The result will be the effective adaptation of national governments to the growth of networks among the private and semi-public actors they supposedly govern. The State will thus be able to retain its position as a primary locus of political, economic, and even social power in the international system, but shifts in both the organization and the nature of that power will ultimately transform the State itself.