Global Economic Policy-Making: A New Constitutionalism?

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It has become fashionable in the burgeoning literature on globalisation to proclaim 'the end of history',[1] that we live in a 'borderless world',[2] the nation-state is a 'historical anomaly'[3] and that corporations will 'rule the world'.[4] Recent visitor to Aotearoa New Zealand, Robert Reich, has predicted a new century where there are 'no national products or technologies, no national corporations, no national industries. There will be no national economies, at least as we have come to understand that concept. All that will remain within national borders are the people who comprise a nation . . .'.[5] State-centred economics, law and government have, it seems, been transcended by a 'new global order' which is irrepressible, irreversible and inevitable. Fans want to move the process faster. Critics seek ways to mitigate its effects. There are no alternatives. Resistance to globalisation is futile.

This paper challenges such representations as simplistic, misleading and disempowering. Rather than focusing on the erosion of state authority it offers a positive assessment of what states can still do—not from any desire to defend the state, but because it is necessary to clarify where the power to make policy and law is located before we can identify how those decisions can be opened to contest.

This in no way denies that very significant inter-connected changes are affecting economic, political and social relations around the world, with important flow-on effects for policy and law. The degree of economic integration and inter-dependency is far greater now than during the Keynesian era. While statistically the levels of international trade, foreign investment and immigration are similar to those in the early twentieth century,[6] this is more than a cyclical reversion. There are qualitative differences in the form and intensity of global economic integration between then and now. Flows of finance capital are more technologically integrated and deterritorialised, and often operate through financial products whose value is unrelated to actual currencies. Transnational production is more horizontally and vertically integrated, with enterprises

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1 Francis Fukuyama, *The End of History and the Last Man*, Avon Books, New York, 1992

2 K. Ohmae, *The End of the Nation State. The Rise of Regional Economies*, The Free Press, New York, 1995; see also *The Borderless World: Power and Strategy in the Interlinked Economy*, Harper, New York, 1991.

3 R. Mansbach, 'The Realists Ride Again: Counter Revolution in International Relations' in J.N. Rosenau and H. Tromp (eds), *Interdependence and Conflict in World Politics*, Gower Publishing, Aldershot, 1986 p.224.

4 D. Korten, *When Corporations Rule the World*, Kumarian Press, West Hartford, 1995

5 R. Reich, *The Work of Nations: Preparing Ourselves for 21st-Century Capitalism*, Simon and Schuster, London, 1991, p.3.

6 See N. Woods, 'Editorial Introduction. Globalization: Definitions, Debates and Implications', *Oxford Development Studies*, vol.26, no.1, 1998, pp.5-6.

adopting a wider range of organisational and legal forms. Patterns of trade and the relative importance of goods and services have changed significantly. There are new forms of consumption and new modes of generating, transmitting and controlling knowledge. There are also new ecological and socio-economic 'externalities'.

All these developments constrain how effectively and autonomously states (defined here to include the executive, legislature and judiciary) can make policy, pass and enforce laws and regulate. Most governments now seek to nudge, rather than steer, the economic developments which affect them. But that does not mean states are powerless or that globalisation is an orderly, coherent, linear process.

The tensions between globalisation and state-centred policy and law have typically drawn two contrasting responses. The first, traditionalist, line comes mainly from governments and international lawyers. This treats globalisation as an unproblematic extension of international law whereby states voluntarily concede the reduction of their autonomy, but claim their sovereignty remains inviolate. A second, less orthodox approach heralds globalisation as a catalyst for the emergence of a pluralist and non-state-centred system of global governance (in the case of James Rosenau) or global law (Gunther Teubner).

These polarised positions treat the state as either omnipotent or moribund. This paper will argue that the state's role is more contingent in the way it facilitates the globalisation of capital through the transformation of policy and law at the national level and the coordination of policy and law internationally. This bifurcation of sites has begun to produce some serious tensions between the domestic and international jurisdictions. The way these tensions are being resolved suggests that states still have some control over the outcome and that domestic political pressures and judicial responses still play an important role.

'External' Sovereignty

The standard government line on globalisation rests on the Westphalian notion of an international community of sovereign states. Its constitutive principles include mutual respect for each other's sovereignty, non-intervention in each other's internal affairs, consent as the basis of obligation to comply with international law and diplomatic immunity.[7] Fully autonomous and self-determining, these states have the sovereign authority to confer on other actors or agencies the right to exercise some of their powers. Equally, the self-determining state can renege on international commitments, refuse to accept international rulings and withdraw from any agreement at any time on its own terms. It cannot be forced to comply. So long as globalisation is conducted through language and protocols consistent with these principles, governments can reject arguments that their sovereignty is diminished.

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7 For a discussion of the contemporary relevance of this notion see M. Zacher, 'The decaying pillars of the Westphalian temple: implications for international order and governance', in J.N. Rosenau and E-O Czempiel (eds), *Governance without Government: Order and Change in World Politics*, Cambridge University Press, Cambridge, 1992, p.58.

This position is exemplified in a speech by Minister of Foreign Affairs Don McKinnon to the Otago Foreign Policy School in 1996.[8] Globalisation is accepted as a *fait accompli*, with the consequence that:

> states are less able to act independently and that real economic growth depends on a high level of international interaction. No state is an island any more, nor capable of truly autonomous action. But as with any small space, you need rules of behaviour. On the positive side of the ledger there is a growing realisation and recognition of the concept of a global community. New Zealand is playing an active role in this.... [O]verall it is a changed world. The degree of interdependence we see now is unlikely to be reversed.... But let us be optimistic. There is much to look forward to. Increasing interdependence does not mean a loss of freedom and individuality. It does not mean we cease to have choices about our future.[9]

New Zealand's participation in this global community is mediated through the exercise of the state's external sovereignty. McKinnon contrasts internal sovereignty, which is about 'operating with the consent of the people' including public debate and consultation, with external sovereignty which 'is all about the Government, on behalf of New Zealanders, determining and protecting New Zealand's interests abroad.... We work externally to protect interests and values important to us (and to many other countries).' The disjuncture effectively divorces the government's international actions from their impact on domestic policy and law, and quarantines the exercise of external sovereignty within the 'global community' from domestic participation and scrutiny.

Such a distinction is increasingly difficult to sustain. The exercise of external sovereignty, whether seen as an act of state or as Crown prerogative,[10] may have been defensible when international treaties were primarily concerned with military and strategic matters that had little direct impact on domestic policy and law. But international policy and treaty-making has now penetrated deeply into areas that were previously the domain of domestic law. The potential for direct conflict is very real. Reliance on external sovereignty to avoid addressing this potential invites challenges to both the executive's actions and the legitimacy of the relevant international fora.

These concerns are commonly expressed in terms of a 'democratic deficit'. The simplistic solution is to integrate internal and external sovereignty by rendering the executive accountable to domestic political processes. Demands for greater democratic scrutiny of external treaty-making have gained force in New Zealand in recent years, initially led by Sir Kenneth Keith and the Law Commission[11] and supported by interventions from Clerk of the House David

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8 D.McKinnon, 'New Zealand Sovereignty in an Interdependent World', in G.A. Wood and L.S. Leland, *State and Sovereignty. Is the state in retreat?*, Otago University Press, Dunedin, 1997, p.7. The orthodox position was also argued by the Director of the Ministry of Foreign Affairs and Trade legal division in D.MacKay, 'Treaties - A Greater Role for Parliament?', (1997) *Public Sector* vol.20, no.1, p.6

9 McKinnon, p.12.

10 For a discussion of the basis for these see M. Gobbi and M. Barsi, 'New Zealand's Treaty-Making Process: Understanding the Pressures and Proposals for Reform', Ministry of Justice, Draft paper 3, June 1997, pp.7-8

11 New Zealand Law Commission, 'The Making, Acceptance and Implementation

McGee.[12] They gained further momentum during the recent controversy over the proposed OECD Multilateral Agreement on Investment (MAI), with all opposition parties expressing support during 1997 for some greater parliamentary participation in the treaty-making process.[13]

The government's response has been minimalist. On May 1998, following a report from the select committee on foreign affairs,[14] the then Deputy Prime Minister tabled a notice of motion that requires all treaties subject to ratification, accession, acceptance or approval to be presented to Parliament beforehand. They will be accompanied by a National Interest Analysis (NIA) prepared by the government; however the government rejected the committee proposal that this should address the advantages and disadvantages, and any economic, social, cultural and environmental effects of entering or not entering the treaty. Both the treaty and the NIA will be referred to the Foreign Affairs, Defence and Trade Select Committee which can examine them itself or the chair can refer them to another relevant committee. Government cannot sign the treaty until the select committee has reported back or 35 calendar days have expired.[15]

However, these changes were introduced only as sessional orders for a trial period. They are limited to those international treaties where Cabinet's decision to ratify was taken after 17 December 1997. Reference solely to treaties excludes non-treaty commitments like APEC which are clearly intended to constrain future economic policy decisions and play a critical role within the international circuitry of economic policy-making where binding constraints are imposed. The select committee retains full discretion whether to hold an inquiry and, if so, whether to call for submissions which might contest the NIA. Parliament has no right to vote on the treaty and can therefore impose no constraints on the executive. Parliament will not get to discuss a treaty until negotiations are complete and its content finalised. There is no requirement for a parliamentary mandate to negotiate nor for public discussion at any stage. The Official Information Act still gives the government conclusive grounds to withhold information provided in confidence by another government or international organisation,[16] and information considered likely to cause serious economic damage to the New Zealand economy by premature disclosure of decisions relating to entering

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of Treaties: Three Issues for consideration', draft paper, July 1995; *A New Zealand Guide to International Law and its Sources*, NZLCR 34, 1996, p.3. See also K.J. Keith, 'New Zealand Treaty Practice: The Executive and the Legislature' (1964) 1 *NZULR* p.272.

12 See *NZ Herald*, 1 Nov. 1996 and 'Treaties and the House of Representatives', Annex D to *Report of the Standing Orders Committee on its Review of the Operation of the Standing Orders*, 1996, I.18B; See also Ministry of Justice, (Briefing Paper for the Minister of Justice), Oct. 1996, p.51.

13 Matt Robson MP (Alliance) and Ken Shirley MP (Act) both placed private member's bills in the ballot which would subject treaties to formal parliamentary process. Hon. Mike Moore (Labour) presented a paper to the foreign affairs select committee proposing new rules to increase Parliamentary and select committee scrutiny.

14 *Inquiry into Parliament's Role in the International Treaty Process. Report of the Foreign Affairs, Defence and Trade Committee*, 1997.

15 Notices of Motion, 28 May 1998.

16 Official Information Act 1982, sec.6(b)(ii).

overseas trade agreements.[17] There is no attempt to address the authority under Treaty of Waitangi of the colonial government making unilateral commitments on behalf of its Treaty partner.

The proposed process falls far short of the scrutiny demanded for domestic legislation, regulations or even policy. As a result ministers, who hold office in the short-term, retain the power to lock future governments into pursuing, or refraining from, a particular set of policies, activities or goals. There is clear potential for conflict between commitments by the executive in the international arena and domestic policy and law. Even if there were effective parliamentary and public scrutiny, the potential for conflict between these commitments and future government policies and laws would remain. The fall-back argument is that state sovereignty allows governments to not sign, withdraw from, renege on or alter any international commitments. The examples examined later in this paper put these claims to the test.

Global governance and global law

The sovereignty argument adopts a state-centred perspective on globalisation. It assumes that global economic policy and law are the exclusive sphere of international agencies and inter-governmental agreements. At the other extreme, an increasing number of international relations and some legal theorists argue that non-state systems of law are emerging through globalisation and render the already-dubious traditional concepts of law and government obsolete.

James Rosenau contrasts the unitary image of state-centred *government* with a pluralist concept of *global governance*. This spans formal and informal, international and domestic, state and non-state sources of power, policy-making and regulation.[18] It brings together diverse sites that transcend the territorial boundaries of the state. These develop at different paces and operate through varying forms. Shared commitment to consistent principles, norms, rules and procedures means that all actors, agencies and agreements act in a regular and patterned way. This provides coherence and the sense of an organic whole.[19]

A variant on this is Gunther Teubner's concept of 'global law without a state'. Teubner argues that diverse sectors of civil society (such as multi-national enterprises (MNEs), professions or international employers and employees), faced with globalisation, organise their own 'global law' in relative insulation from the state, official international politics and international public law.[20] This law is produced by 'highly technical, highly specialized, often formally organized and rather narrowly defined, global networks of an economic, cultural, academic or technological nature'.[21] It constitutes a legal order in its own right that depends on neither political nor institutional support. It addresses conflicts that are inter-systemic rather than inter-national. Its approach is flexible and pluralist,

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17 Official Information Act 1982, sec.6(e)(vi).

18 J. Rosenau, 'Governance, Order and Change in World Politics', in Rosenau and Czempiel (eds.), p.1 at p.4.

19 Rosenau, p.8.

20 G. Teubner, '"Global Bukowina": Legal Pluralism in the World Society', in G. Teubner (ed.) *Global Law Without a State*, Dartmouth, Aldershot, 1997, p.4.

21 Teubner, p.7.

operating through values and principles instead of the structured and rules-based system of state law. The lack of global enforceability is compensated for by the flexibility to adapt to rapidly changing circumstances. Because global law is neither the creation of, nor dependent on, the official legal order it becomes extremely difficult for national politics and international institutions to intervene in global economic transactions or multinational organisations.

Teubner describes *lex mercatoria* or 'the transnational law of economic transactions, as the most successful example of global law without a state'.[22] Contractual arrangements, such as international business transactions, standardised contracts and model contracts create an institutional triangle of contracting, legislation and adjudication. The legislators are the economic and professional associations, and network of international organisations, that contribute to and participate in these processes. The judiciary is the various arbitration and dispute settlement tribunals. The 'system' is pluralist, fragmented and lacks institutional linkages; but this leaves it fluid enough to grow and change with the exigencies of the global economy.

There is considerable evidence of the multi-layered polity on which Rosenau bases his claims of global governance. Transnational enterprises (TNEs) by definition exist supra-nationally. Their inherent flexibility, gross turnover and superior access to finance, technology, skills and economies of scale make them larger and more powerful than many of the national economies in which they operate. Razeen Sally suggests the TNE is 'not only the key economic and commercial actor in structures of international production, but it is also implanted in the institutional arrangements of nation-states, as well as subnational and supranational regions'.[23]

Finance capital flows through what some have termed a nonterritorial 'region' that is nevertheless integrated, operates in real time and exists alongside the territorially-defined spaces called national economies.[24] International financial institutions like the International Monetary Fund and World Bank set conditions that severely constrain the policy options for deeply indebted countries. Regional economic integration agreements also set the parameters for their members and can assume an existence independent of the sum of their parts.[25] There are even transborder administrative and legal jurisdictions that integrate parts of different countries for economic and regulatory purposes.[26] Overlaying these are binding multilateral instruments like the General Agreement on Tariffs and Trade (GATT)

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22 Teubner, p.3.

23 R. Sally, 'Multinational enterprises, political economic and institutional theory: domestic embeddedness in the context of internationalization', *Review of International Political Economy*, vol.1, no.1, 1994, pp.161, 162.

24 J.G. Ruggie, 'Territoriality and Beyond: problematizing modernity in international relations', *International Organization*, vol.47, no.1, 1993, pp.139, 143.

25 These range from federations of states, such as the European Union, to binding regional agreements like the North American Free Trade Agreement (NAFTA) and inter-governmental commitments like the Asia Pacific Economic Cooperation forum (APEC).

26 For example, the Transmanche Euroregion links Kent, Calais and three parts of Belgium, the Singapore-Johor-Riau Triangle integrates parts of Singapore, Malaysia and Indonesia.

and related agreements that now operate under the umbrella of the World Trade Organisation (WTO) with their own enforcement mechanisms.

More subtle contributions to global governance come from economic organisations like the OECD, rich countries' clubs (primarily the Group of 7), the credit rating firms (especially Moody's and Standard and Poor's), globally-linked neo-liberal think-tanks (like the World Economic Forum and Mont Pelerin Society), and transnational accounting and consultancy firms (such as Price Waterhouse, CS First Boston, Ernst Young). These are complemented by networks of academics, consultants, advisers and officials who cross-fertilise ideas and implement their common agenda across the globe.

These diverse entities, instruments and actors play a major role in the development of international economic policy and law. They create a climate conducive to, and expectant of, certain commitments and outcomes. They can be influential, and even definitive, in securing change. Sometimes they even exercise autonomous policy and regulatory powers. But they cannot ultimately deliver without the cooperation, or at least the acquiescence, of states.

The evidence for Teubner's 'global law without a state' is less convincing. Peter Muchlinski assessed Teubner's claims that a 'proto-legal' phenomenon is emerging within the organisation of MNEs, on the assumption that global law would at least require consistency and generality of practice, transnational application, and a sense of binding duty among both those to whom it applies and those not directly affected.[27] Teubner identifies contracts governing the interaction between staff, and between different elements of an enterprise, as possible examples of intra-corporate 'global proto-law'. Muchlinski suggests these might equally be described as management practices. Similarly, company codes of conduct which appear like quasi-law may be just another public relations exercise. Muchlinski agrees that codes of conduct across industries or firms could have more claim to proto-legal status. But even this usually rests on recognition by official law through implied terms of consumer contracts, as evidence of standard industry practice when assessing a duty of care in tort, or as the basis for official codes.

Muchlinski finds more substantial evidence of the leverage exercised by MNEs over the development of substantive laws that govern commercial practice. Contractual standardisation is frequently modelled on the practices of major firms, as are the standard terms developed by the international trade associations and agencies like the International Chamber of Commerce (ICC) in which MNEs play a dominant role. Early MNEs effectively created the applicable international investment regimes through contracts between themselves and the local rulers, insisting on protection of property rights against confiscation and external arbitration to resolve disputes.

There is also abundant evidence of their role as a powerful and concerted lobby in the development of national and multilateral regulatory regimes. The degree of influence differs between sectors and industries, and on whether MNEs speak with a single voice on an issue. Some have secured institutionalised roles

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27 P. Muchlinski, '"Global Bukowina" Examined: Viewing the Multinational Enterprise as a Transnational Law-making Community', in Teubner, (ed.) p.79.

in the decision-making process of their home states, notably in the US,[28] Japan and the European Union. Collectively, MNEs have a formal presence in international fora where global economic policy and law is made, such as the APEC Business Advisory Council (ABAC) and the Business and Industry Advisory Committee (BIAC) at the OECD. In all these examples, however, it is not the MNEs that formally create policy and law. That is still the role of states, either through customary practice or formal instruments.

Rosenau and Teubner fall into the trap of many international relations theorists of trying to construct a coherent global order. In doing so they over-state the stability of the 'system', the unanimity of the participants and the extent to which economic policy and law have converged. My empirical work on diverse sites of global policy and law suggests the situation is more complex and fragile. The so-called 'global economy' is multi-faceted. Each element—such as foreign investment, trade, finance capital, transnational enterprise, information technology flows, financial institutions, regional agreements or international consultancies and think tanks—has its own dynamics.[29] Each exhibits different degrees of autonomy from state intervention nationally and internationally. Each provokes a different response from states, institutions and economic actors, and forms of resistance from those it adversely affects. Each therefore has different implications for the policy, regulatory and legal framework of the state and raises different possibilities for contest.

Their counterparts who advocate critical engagement with globalisation seek an equally ordered and systematic mode of response. International lawyer Richard Falk, for instance, argues that globalisation as a process is inevitable,

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28 As a *quid pro quo* for approving the fast-track process for trade negotiations, the US Trade Act 1974 established a system of trade advisory committees which provide 'public' input into the US negotiating position. This 'public' has been confined to the business community who gain privileged access to information, documents and key officials. A key player is the United States Council for International Business [USCIB] comprising 300 MNCs, service companies, law firms and business associations. It is allied to the International Chamber of Commerce and International Organization of Employers and officially represents US business positions in the main intergovernmental bodies. Its mission is to 'advance the global interests of American business both at home and abroad'.

29 The leverage exercised by the International Monetary Fund, the World Bank and the Asian Development Bank, for example, poses quite different issues and arguments from concerns over the power and liability of transnational enterprise. These differ, in turn, from the impact of unregulated capital flows and questions about the appropriateness and effectiveness of re-regulation. The think tanks, consultancies and networks that seek to construct an ideological consensus are different again. The diverse participants in these processes have specific objectives which they pursue with varying degrees of power. Corporate strategies and operational practices vary enormously. States frequently engage in forum shopping depending on which institution's decision-making processes, agenda and status best serves their interests. Some take apparently contradictory positions on the same issues in different fora. The objectives of some players coincide, reflecting different styles of capitalist expansion, different cultures of law, language and human relations, different strategic objectives and ideological or religious beliefs. International agencies themselves have organisational agenda and legitimacy requirements which create turf battles over issues and strategies.

but its form is not. In place of globalisation-from-above he argues for a process of globalisation-from-below that challenges both state-centred and market-oriented paradigms. This would require an 'ideological posture that is comparably coherent to that being provided by various renditions of neo-liberalism, and that could provide the social forces associated with globalisation-from-below with a common theoretical framework, political language and programme.'[30] Falk's quest for coordination and coherence begs the question of who would determine that framework, language and programme. Recent experience suggests that global movements, notably on environmental and development issues, are dominated by Western NGOs. The old and recent history of resistance, and my own empirical work, suggests that challenges to globalisation historically in its imperial and colonial form and today are still largely localised, with some loose coordination internationally. Locking this into the straight-jacket of a global civil society working to a unified counter-ideology seems more likely to neutralise rather than enhance the prospects of an effective contest.

A new constitutionalism

How, then, do we position the state in the making of global economic policy and law? Numerous, sympathetic empirical studies of structural adjustment over the past decade insist that the state has far from withered away.[31] Instead, it is responding to the needs of capital in a different way. Less sympathetic accounts reach a similar conclusion. Gramscian scholar Robert Cox, for instance, argues that welfare interventionism, which was overseen by the state, performed an important role in legitimating and supporting capitalism when it operated mainly at the national level. The state has played a similar role in overseeing the domestic transition to neo-liberalism and facilitating the reorganisation of capitalism internationally.[32]

At the domestic level, this transformation or 'structural adjustment' has broadly coalesced around the policy agenda known as the 'Washington consensus'. Internationally, this agenda has been reflected in the rapidly expanding menu of state-sponsored economic agreements, organisations and arrangements. In the past decade the ideological hegemony of post-Cold War neo-liberalism has become quite explicit. For example, the *Declaration on the Contribution of the [WTO] to Achieving Greater Coherence in Global Economic Policymaking* in 1994 noted that achieving harmony between 'the structural, macroeconomic, trade, financial and development aspects of economic policymaking . . . falls primarily on governments at the national level' but argued that international coherence was important to increasing these policies' effectiveness. '[T]he interlinkages between the different aspects of economic policy require that the international institutions

30 R. Falk, 'Global Civil Society: Perspectives, Initiatives, Movements', *Oxford Development Studies*, vol.26, no.1, 1998, pp.99, 105.

31 R. Bates and A. Krueger, *Political and Economic Interactions in Economic Policy Reform*, Blackwell, Oxford, 1993, pp.462-3; and generally, S. Haggard and R. Kaufman, (eds.), *The Politics of Economic Adjustment*, Princeton University Press, New Jersey, 1992.

32 R. Cox, *Approaches to World Order*, Cambridge University Press, Cambridge, 1996.

with responsibilities in each of these areas follow consistent and mutually supportive policies'. WTO ministers mandated the Director-General of the WTO to review the responsibilities and mechanisms for cooperation among the Bretton Woods institutions of the World Bank and IMF 'with a view to creating greater coherence in global economic policymaking'.[33] Ironically, just as this hegemony is reaching its height the 'Washington consensus' is being challenged as inappropriate and damaging by leading players within the global economic arena—illustrating, once more, that nothing is forever.[34]

In a world supposedly committed to competitive deregulated markets and reduced state power, the desire for order, coherence, coordination and even convergence seems paradoxical. It is explained as a rational strategy that maximises the benefits from global capitalism and minimises the undesired externalities. These arise partly from market forces and the difficulties facing states in regulating global economic activity. But there is also potential for distortions as self-interested actors seek to intervene. Hence, the need to facilitate and protect deregulated global markets through agreed global rules, with mechanisms for resolving disputes and where necessary enforcing rights. There is a corresponding need to manage non-economic externalities in ways that do not disrupt the equilibrium of market forces. These may achieved through various configurations of parties using a range of modalities and fora. But they are underpinned / constrained by the global economic policy framework.

For example, the plethora of bilateral, regional, plurilateral, multilateral investment agreements follow a common set of core principles and a standard formula, with some variations in the detail.[35] *National treatment* requires signatory governments to treat the investors of other parties to the agreement at least as favourably as their own, and therefore possibly better. *Most favoured nation (MFN) status* prevents a signatory from discriminating between investors of other parties and requires them to give to all the best treatment it gives to any one. This can be limited to non-discrimination between countries which are party to the agreement, or be unconditional and apply to any other agreement under which the signatory has MFN obligations. *Transparency* requires full disclosure to other parties of the rules, policies, practices, procedures and decisions which relate to the subject of the agreement.

'Investment' is broadly defined. Investors' rights are protected from expropriation and nationalisation. Most agreements allow governments to reserve certain activities, sectors, policies or laws from coverage, although they cannot opt out of their commitments on expropriation and nationalisation. These reservations are usually subject to 'standstill', meaning they cannot be added to, and to the expectation of 'rollback' or their reduction and elimination over time. The objective is not to change the country's laws, but to codify them so they

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33 Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN / FA III-2, p.1.

34 See R. Stiglitz, chief economist of the World Bank, speech in Helsinki, Finland, 7 January 1998, www.worldbank.org.

35 During the 1980s and 1990s there was a particularly rapid growth in the number and coverage of bilateral investment treaties [BITs]. According to UNCTAD by June 1996 nearly 1160 had been completed, two-thirds of these in the 1990s.

cannot subsequently be made more restrictive. Provision is usually made for exit, after due notice is served.

Many agreements also make provision for dispute resolution. Rather than working through their parent state, investors are increasingly given standing to enforce agreements themselves. Settlement or adjudication of disputes generally involves international arbitration.[36] The preferred fora is the International Centre for the Settlement of Investment Disputes (ICSID), established by the World Bank specifically to deal with disputes between states and private foreign investors.[37] ICSID awards must be enforceable under the participating state's domestic law.[38]

Canadian critic of NAFTA and the proposed MAI Tony Clarke has described such agreements as Bills of Rights for TNEs. Investors achieve a status equivalent—arguably superior—to not only citizens, but to nation-states. States and this privileged private category known as 'investors' are treated equally. Private property rights are guaranteed against direct or indirect expropriation, sometimes even when public order breaks down.[39] Senior personnel of an investor are granted quasi-diplomatic status that is immune from many normal immigration rules. Investors are empowered to call a foreign government before a supra-national forum for breaching the agreement and to demand enforcement of any consequent award in that state's domestic courts. In the case of the draft MAI this quasi-Bill of Rights would be entrenched—governments promise not to withdraw for an initial five years, and if they do subsequently withdraw, to continue applying the rules to existing investors for a further fifteen years, irrespective of the policies and laws a new government may wish to pursue.

David Schneiderman of the University of Alberta describes this as a new constitutionalism which in form and substance mirrors many features of the old.[40] Almost all these agreements contain a pre-commitment strategy that binds future generations of citizens to certain pre-determined institutional forms and policies. They are difficult to amend. They often include binding enforcement mechanisms. But they serve a different constituency, conferring privileged rights of citizenship on corporate capital, while constraining the power of the nation state and the democratic rights of its citizens. These agreements variously defer to national laws, supplement them and replace them, in a continuous dialectical relationship. In the process, tensions and conflicts arise between the old constitutionalism and the new.

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36 Sometimes an agreement will specify the use of the UN Commission on International Law's model arbitration rules [UNCITRAL); see Convention for the Recognition and Enforcement of Foreign Arbitral Awards, (UN) (binding) 1958.

37 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965. The International Chamber of Commerce's Court of Arbitration is also sometimes used, but that deals mainly with private international disputes.

38 In New Zealand see the Arbitration (International Investment Disputes) Act 1979.

39 This issue remained unresolved when the MAI negotiations broke down in October 1998.

40 D. Schneiderman, 'Investment Rules and the New Constitutionalism: Interlinkages and Disciplinary Effects', paper to the Consortium on Globalisation, Law and Social Sciences, New York, April 1997.

Conflicting constitutionalisms

This approach offers a mid-point between the state-centred Westphalian model and non-state global governance and law by recognising the active role of the state in facilitating the links between the global and national. There is still a risk of over-stating the coherence of the process and viewing current developments as linear and determinist. But that is mitigated by recognising the potential for discord as the old constitutionalism is confronted by the new.

One key to understanding the implications of globalisation for domestic policy and law is how states have responded when these conflicts arise. The following examples suggest a combination of factors affects the outcome: the geo-political and economic power of the particular state, the extent of dependence on international capital, the policy inclination of the incumbent government, the willingness of the judiciary and parliament to diverge from the executive and the potency of domestic oppositional forces.

The first example involves a conflict between the investor protection and dispute resolution provisions of NAFTA and the Mexican constitution.[41] As with many Latin American countries, Mexico's 1917 constitution embraced the 'Calvo doctrine'.[42] This entitled foreign investors to national treatment (non-discrimination), but not to better treatment than local investors. The 'Calvo clause' made Mexican national law the only applicable law and the domestic courts the only forum for settling investment disputes. This was intended to ensure that foreign creditors did not secure greater rights than local creditors in claims against the state. NAFTA's investment chapter directly contradicted this by giving foreign investors stronger rights to compensation for expropriation enforceable in international trade tribunals.

The conflict was resolved by formally and informally amending the domestic Constitution. Mexico's President Salinas guaranteed that NAFTA would not be subject to constitutional attack and enacted a Law Regarding the Making of Treaties which empowered the state to negotiate international treaties with enforceable dispute settlement mechanisms.[43] Provision for redistribution of rural lands for collective use under Article 27 of the Mexican Constitution was also radically altered in 1992 to permit individual property holding, relax limits on the number of acres that could be held and extend legal capacity to enter joint-ventures. Opposition to these new land laws was widespread in rural Mexico, most notably in the civil war waged by indigenous peoples and peasants in Chiapas through the Zapatista Liberation Army.

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41 *Ibid.*

42 See M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press, Cambridge, 1994, pp.11, 89, 123.

43 Schneiderman, *op cit.* fn. 40, A. Cânavos, 'Introductory Note', *International Legal Materials*, vol.31, 1990 p.391 and J. Daly, 'Has Mexico Crossed the Border on State Responsibility for Economic Injury to Aliens? Foreign Investment and the Calvo Clause in Mexico after NAFTA', *St Mary's Law Journal*, vol.25, 1994, pp.1147-1193.

The Mexican government's capitulation could be attributed to its relatively weak economic bargaining position, demands from the US government and international financial institutions as conditions for debt refinancing, and the need to maintain the confidence of foreign investors on whom Mexico's open economy now depends. But previous Mexican governments have taken different policy positions; they even seriously threatened a moratorium on the repayment of foreign debt in 1982. This suggests that domestic factors were also important. By the 1990s a new administration committed to neo-liberalism was in control and was determined, with US support, to lock in that regime.[44] Their ability to rewrite the Constitution was assisted by a corrupt political system. While the Constitution has been changed, however, many Mexican people remain committed to the old Constitution—some to the extent of supporting armed resistance. Coupled with the failure of the economic policies to deliver the promised wellbeing, the long-term survival of the new constitutionalism is far from guaranteed.

In the second example similar contradictions have been left unresolved. A bilateral investment treaty (BIT) between Canada and South Africa was signed on 27 November 1995. This contains provisions on property rights, takings and compensation[45] which conflict with the painstakingly negotiated, and deliberately open-textured, provisions for restoration of lands in the South African Constitution.[46] The property rights rule in the Constitution cannot impede measures for affirmative action to redress past discrimination. Compensation provisions are relatively lenient, distinguishing between non-compensable regulation of property and compensable expropriation for purposes including land reform. However, the BIT makes no such distinctions and no reservations against takings are listed in the agreement. The agreement also contains a more onerous expropriation and nationalisation clause than the Constitution. This means that Canadian foreign investors would be treated better than local investors; standards of compensation would also differ. The South African Constitutional Court has final authority to interpret the property rights clause under the BIT.

Judicial interpretation of the constitutional provisions on land will be a sensitive domestic issue that would require political and ethical judgements from the Constitutional Court. If a dispute arises under the BIT before the domestic interpretation of the Constitution is settled the Court will have to weigh additional considerations of South Africa's international obligations and the message it wants to send foreign investors and governments. The Court might resist interpretations that modify the spirit of the Constitution. Equally, it might succumb to pressures to conform with emergent international standards and to harmonise the property rule with the investment rule, so far as that can be done. Any judicial rewriting of the Constitution could damage the legitimacy of the

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44 See P. Krugman, *Pop Internationalism*, MIT Press, Cambridge Massachusetts, 1996, p.165.

45 These are common to almost all Canadian BITs, as well as to NAFTA and the draft MAI.

46 Schneiderman, *op cit.* fn. 40. At the time of writing in April 1997 Schneiderman noted the BIT had not yet been proclaimed in force.

Court and provoke a volatile response that impedes the extension of neo-liberal policy and law in the medium term.

The Philippine Supreme Court faced a similar dilemma in 1994 and essentially reinterpreted domestic constitutional provisions to comply with the government's new international commitments.[47] Like many countries emerging from colonial and foreign economic domination, the post-Marcos Constitution of the Philippines had positively embraced economic nationalism. Section 19 of the Declaration of Principles and State Policies in the Philippine Constitution says 'The State shall develop a self-reliant and independent national economy effectively controlled by Filipinos'. Further principles say the Congress shall 'enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos'. In granting rights, privileges and concessions covering the national economy and patrimony, the State 'shall give preference to qualified Filipinos' (section 10). Section 12 says the State 'shall promote the preferential use of Filipino labor, domestic materials and locally produced goods, and adopt measures that help make them competitive'.

In late 1994 the Supreme Court of the Philippines was asked to strike down a Senate motion to ratify the accession to the WTO on the grounds that it was unconstitutional. The Court found in favour of the government almost three years later. The case centred on two main issues. The first was whether the parity provisions and national treatment requirements of the WTO agreements contravened the Constitution. The Court accepted the defence contention that these principles were merely aids to interpretation. Those parts of the Constitution which espoused economic nationalism had to be read in relation to other parts, which the court selectively identified and creatively interpreted.[48]

The second issue was whether the provisions of the Agreement and Annexes would limit, restrict or impair the exercise of legislative power by the Congress or the judicial authority of the Supreme Court. The Court observed that the Constitution contained explicit commitments to 'generally accepted principles of international law'. Invoking orthodox external sovereignty arguments, it noted the self-limiting nature of state sovereignty enabled the executive to sign, and Congress to ratify, such agreements and that the WTO recognised all members' sovereign equality.

The Court insisted its sole concern was whether the Senate had 'gravely abused its discretion amounting to a lack of jurisdiction'. It was not there to review the wisdom of the President and Senate in joining the WTO, nor to pass upon the merits of trade liberalization as a policy. Yet that is patently what happened. The judgement began:

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47 *Tanada and others v. Angara and others*, Republic of the Philippines Supreme Court, Manila, 2 May 1997, per Panganiban J.

48 For example, when quoting one of the original Constitutional Commissioners, Bernardo Villegas, that 'economic self-reliance does not mean autarky or economic seclusion', the Court conveniently ignored the remainder of the quote: 'Independence refers to the freedom from undue foreign control of the national economy, especially in such strategic industries as in the development of natural resources and public utilities'; *Tanada v Angara*, p.44.

> Liberalization, globalization, deregulation and privatization, the third-millennium buzz words, are ushering in a new borderless world of business by sweeping away as mere historical relics the heretofore traditional modes of promoting and protecting national economies like tariffs, export subsidies, import quotas, quantitative restrictions, tax exemptions and currency controls. Finding market niches and becoming the best in specific industries in a market-driven and export-oriented global scenario are replacing the age-old "beggar-thy-neighbor" policies that unilaterally protect weak and inefficient domestic producers of goods and services. In the words of Peter Drucker, the well-known management guru, "Increased participation in the world economy has become the key to domestic economic growth and prosperity."

and concluded in the 'Epilogue':

> Notwithstanding objections against possible limitations on national sovereignty, the WTO remains as the only viable structure for multilateral trading and the veritable forum for the development of international trade law. The alternative to WTO is isolation, stagnation, if not economic self-destruction. Duly enriched with original membership, keenly aware of the advantages and disadvantages of globalization with its on-line experience, and endowed with a vision of the future, the Philippines now straddles the crossroads of an international strategy for economic prosperity and stability in the new millennium.[49]

Opting to endorse this line could be seen as pragmatic realism on the part of the Court. The WTO had been operating for two years, with the Philippines government as an active participant. Parallel commitments had been made in other fora such as APEC, which the government had hosted with great fanfare just six months before. Even before the East Asian collapse, the Philippines was effectively beholden to the World Bank, Asian Development Bank and IMF and, like Mexico, a captive of the need to maintain investor confidence. Also like Mexico, the government was dominated by a political and economic elite who had converted to neo-liberalism.

In effect, the Supreme Court opted to repeal the nationalist economic principles of the Philippines' Constitution. The newly-elected government has announced a review of the constitution in 1999, intended to remove those provisions. But they were drafted in a period of fervent hostility to dominance by foreign powers and TNCs and retain strong domestic support. They will not be easily given away. Indeed, the government and the Supreme Court have faced ongoing pressure. Against a backdrop of widespread civil disruption, the Court subsequently struck down, on technical grounds, a decision to deregulate domestic oil prices agreed to with the IMF.[50] The government was forced to withdraw the price rise. Like Indonesia and Russia, domestic pressures succeeded in forcing the reconsideration of what are often portrayed as watertight IMF demands. This suggests that popular politics, the need for courts and governments to retain some domestic legitimacy, and the potentially disastrous local consequences of imposing these policies and laws are all potential fetters on global policy and law.

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49 *Tanada v Angara*, p.4 then p.72.

50 *Tatad v Secretary of the Department of Energy*, Republic of the Philippines Supreme Court, Manila, 5 November 1997.

What would happen if domestic courts or Parliament stood firm in asserting state sovereignty and refused to concede to the new constitutionalism? That dilemma currently faces the government of India. Several states have filed an original jurisdictions suit against the Union of India on its accession to WTO on the principal ground that this violates the basic structure of the Indian Constitution, in particular federalism, fundamental rights and the sovereignty and unity of India. Although the suit was filed soon after ratification, it has yet to come up for hearing. The reticence of the previously activist Indian judiciary may reflect a nervousness about the separation of powers and external sovereignty; but it is also politically consistent with their prevarication in the litigation against Union Carbide over Bhopal.[51]

The Indian courts may have been reticent, but the Parliament and the people have not been. The Trade-Related Intellectual Property Rights Agreement (TRIPS) negotiated during the GATT Uruguay Round, and in particular the patenting of seeds and agricultural chemicals to agribusiness like Cargill, have been extremely controversial in India and provoked massive protests. The TRIPS agreement gave developing countries until 2000 to comply, except for national treatment and MFN obligations. They were also exempted until 2005 from providing product patents in areas which were not currently patentable under domestic law. This particularly upset pharmaceutical and agribusiness TNEs who, in return, secured a special provision to protect their interests: Article 70 required such governments, from 1 January 1995, to provide a 'means' for receiving applications for pharmaceutical and agricultural chemical patents, and a mechanism for granting exclusive marketing rights for five years to those applicants where patent applications had been accepted in another WTO country.

The Indian government was initially willing to deliver what other WTO members demanded in complying with Article 70. In March 1995 it issued a Presidential Ordinance that would provide a means to receive such applications and grant exclusive marketing rights, and introduced a bill into Parliament to enact the ordinance into law. This Bill lapsed when Parliament was dissolved in May 1995. The government then administratively directed the Patent Office to continue receiving applications and keep the old applications without disposing of them. This was conveyed to the Parliament in response to a parliamentary question, one of the mechanisms available for formal notification. Between 1 January 1995 and 15 February 1997 some 1339 applications were received and stored.[52]

The US, later joined by the EU, said this was not enough. In July 1996 they asked the WTO to establish a disputes panel to determine whether India was in breach of its obligations under Article 70.[53] (A similar dispute with Pakistan was settled bilaterally.) Upholding the complaint the WTO panel found that Article 70.8(a) required India to establish a 'mailbox' for applications and allocate filing

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51 See J. Cassels, 'The Uncertain Promise of Law: Lessons from Bhopal', *Osgoode Hall Law Journal*, vol.29, no.1, 1991, p.1; Permanent People's Tribunal on Industrial Hazards and Human Rights, 'Beyond Bhopal', Pesticide Trust, London, 1994.

52 C. Raghavan, 'WTO panel rules against India on TRIPS', *Third World Economics*, no.169, 16-30 September 1997, p.4.

53 Complaint by the US on Patent Protection for Pharmaceutical and Agricultural Chemical Products: violation of TRIPS articles 27, 65, 70, WT/DS50, July 1996

and priority dates to them through legislation. The panel also said it was a legitimate expectation that patents would be granted over matters which, at the time the application was lodged, were not patentable and that those applications would be given priority. India appealed. The WTO Appellate Body upheld the panel's finding that India had failed to preserve the novelty of an invention and filing and priority dates because the mailbox lacked a 'sound legal basis'. It was left to the Indian government to decide how to give it that effect. The Appellate Body disagreed that the 'means' had to eliminate all reasonable doubt about whether the application might be rejected or invalidated in the future. It also rejected the application to TRIPS of the 'legitimate expectations' argument, saying this had been developed in the quite different context of non-violation disputes relating to trade in goods. The WTO required the Indian government to comply with its ruling within eighteen months or face severe retaliatory action.

This dispute highlights the tensions between quasi-judicial supranational fora and the domestic courts. The Appellate Body in this case explicitly considered Indian law and concluded there was no guarantee that the administrative instructions would survive a legal challenge.[54] Its findings were therefore intended to ensure enforcement of an agreement which might well be struck down in the Indian domestic courts. These WTO disputes processes are widely seen to lack legitimacy. Strong criticism of them as non-transparent, undemocratic and run by the majors in the interests of their TNEs has led to calls at the WTO ministerial meeting in Geneva in May 1998 from US President Clinton, supported by the WTO Director-General Ruggiero, for a more transparent process.[55] The three member dispute panel in this case was chaired by the former TRIPS negotiator for Switzerland, a country with a strong chemical and pharmaceutical industry.[56]

In April 1998 the Indian government announced an agreement with the US to comply within 15 months. But what if the Parliament refuses to pass the legislation or popular opposition makes it politically suicidal for government to push the issue? What if the Indian Courts again became activist and declared accession to the WTO unconstitutional? Economic sanctions would probably ensue. But the Indian government, and according to media reports the Indian people, have accepted wide-ranging economic sanctions as the price for demonstrating their nuclear capacity. In such conditions the assertion of national sovereignty is more than academic.

All these examples involve countries which are generally portrayed as powerless victims of the globalisation juggernaut. The record is mixed, and reflects different configurations of domestic and international, economic and political circumstances. How the dominant actor in global economic policy and law, the United States, mediates the tension between the old constitutionalism and the new provides an interesting contrast.

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with a dispute settlement panel established in November 1996; Complaint by the EC on Patent Protection for Pharmaceutical and Agricultural Chemical Products: violation of TRIPS article 70, para 8 &9, WT/DS 79/1, April 1997.

54 C. Raghavan, *Third World Economics*, no.176, 1-15 January 1998, p.13.

55 These speeches are reported on the WTO website at www.wto.org.

56 C. Raghavan, 'WTO panel rules against India on TRIPS', *Third World Economics*, no.169, 16-30 September 1997, p.4.

Article II of the US Constitution empowers the President 'by and with the Advice and Consent of the Senate, to make treaties provided two thirds of the Senators present concur'. However, it is the Congress which under Article 1 §8 has the power to regulate foreign commerce. This authority has been pragmatically circumscribed under the Trade Act 1974 by the so-called 'fast track' mechanism. The Congress periodically grants the President authority to negotiate an international economic agreement on the understanding that Congress will approve or reject it in its entirety and not amend it during the ratification process. Treaties which are not self-executing only become enforceable after incorporation into domestic law. Expiry of fast-track authority often draws threats from Congress not to renew. Ironically, this gives the US government added leverage in negotiations and often determines the deadline for concluding a treaty. For the first time a request for renewal was refused by Congress in 1997.

The US claims the sovereign right to protect its trade interests unilaterally, irrespective of its international commitments. Section 301 of the Trade Act 1974 empowers the President to 'respond to any act, policy, or practice of a foreign country or instrumentality that . . . is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce' by taking 'all appropriate and feasible action within his (sic) power to enforce such rights or obtain the elimination of such act, policy or practice' whether through discriminatory or non-discriminatory action.[57] In addition the President may suspend, withdraw or withhold the benefits of trade agreement concessions to that country or instrumentality and impose duties and other restrictions on their products or fees on their services. The Omnibus Trade and Competitiveness Act 1988 strengthened the existing 301 provisions by creating a 'super 301' authority to identify 'priority foreign countries' that displayed 'major barriers and trade distorting practices' and a 'special 301' provision to deal with violators of intellectual property rights.

The US has been particularly guarded in relation to the General Agreement on Tariffs and Trade (GATT). The President's authority to enter foreign trade agreements under the Tariff Act is explicitly 'not be construed to determine or indicate the approval or disapproval by the Congress of the executive agreement known as the General Agreement on Tariffs and Trade'.[58] The President is expected to seek information and advice from representatives of industry, agriculture and labor.[59]

The Uruguay Round Trade Agreements Act, approved after prolonged public and congressional debate, strongly reasserts US sovereignty. 'No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.'[60] On dispute settlement, no person can legally challenge any action of any US agency for inconsistency with the Uruguay Round agreements.[61] No state law or its application can be declared invalid for

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57 Trade Act of 1974 §2411 (a).
58 §1351(a) 91(A).
59 §1251 (f).
60 §3512 (a)(1).
61 §3512(c).

inconsistency with the Uruguay Round agreements, except in an action brought by the Federal government for the purpose of declaring it so.[62] There are detailed procedures for notification and consultation during a dispute brought at the WTO by or against the US, including identification of the panel members and whether the US Trade Representative (USTR) agreed to them. Where a WTO dispute panel or Appellate Body finds against a US regulation or practice, a detailed process for congressional, private sector and public consultation is required before any action to amend, rescind or modify the rule. There is no requirement to make the rule conform.

Where dispute panel or Appellate Body reports involve action by the US International Trade Commission in relation to antidumping, safeguards or subsidies and countervailing measures, the Commission may be asked to report on whether the Tariff Act permits it to take steps to render its action not inconsistent with the findings.[63] If a majority believe it can be, then it must issue a determination to that effect. The USTR may, after consultation, revoke the offending duty in whole or part. The approach is stricter when an action by the administering authority under the Tariff Act is involved. Significantly, the legislation specifically retains the power of the USTR to initiate an investigation and action under section 301 *et al.*

The benefits of WTO membership are subject to ongoing review. The USTR is required to report annually to Congress in detail on the activities and implications of WTO activities for the US. A five-yearly review is mandated to analyse 'the effects of the WTO Agreement on the interests of the United States, the costs and benefits to the United States of its participation in the WTO, and the value of continued participation of the United States in the WTO'. Detailed procedures are set down for withdrawal.[64]

A major test of the US commitment to new WTO rules came with the recent interim finding of a WTO panel against a US ban on importing shrimps caught by vessels not using turtle excluder devices.[65] The US has announced its intention to appeal. However, it also maintains the right to determine whether or not to alter its policy once the WTO appeal options are exhausted. The US has more choice about this than most other countries—retaliation by the complainants (Thailand, Malaysia, India and Pakistan) is pretty meaningless. But the government still needs to balance domestic pressures, especially from environmental groups and defenders of US sovereignty, against pressures from its TNEs and the economic and strategic arguments for maintaining a credible multilateral rules-based approach to global economic activity. The outcome of such a balancing exercise is far from guaranteed. It is significant that the US Federal Court of Appeals subsequently issued a much narrower interpretation of the relevant law than applied previously, which may effectively resolve the dispute.[66]

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62 §3512(2)(A).

63 §3538 (a)(1).

62 §3535.

65 The measure is based on Section 609 of the US Endangered Species Act.

66 See 'Justice wins skirmish in sea turtle war', *Journal of Commerce*, 15 June 1998, and 'Ruggiero warns against unilateral trade measures', International Centre for Trade and Sustainable Development, Feature Article, web site www.ictsd.org.

Implications for Aotearoa New Zealand

This paper has deliberately focused on overseas examples to illustrate the potential for conflicts and the factors that influence the outcomes. Aotearoa New Zealand is not immune from these tensions. There was strong opposition to the government's claims that international commitments require a move to zero tariffs. The government cited the APEC requirement for a free trade and investment regime by 2010—but failed to add that APEC commitments are non-binding and voluntary. Others have challenged the acceptance of foreign product testing and labelling, overseas qualifications and the maintenance of a virtually unfettered foreign investment regime. Government is presently considering whether foreign education companies supplying services from offshore have the right under the General Agreement on Trade in Services (GATS) to access the new tertiary student tuition vouchers.

There have been strong Maori challenges to the mandate of colonial governments to conclude international treaties which bind the Treaty partner and to confer rights on foreign actors which preclude the Crown from recognising the prior rights of Iwi and Hapu, especially over cultural knowledge and taonga.[67] Maori played a lead role in the unprecedented mobilisation of popular opposition to the proposed OECD MAI. Ironically, had the New Zealand government already signed the MAI, the foreign owners of electricity companies could have sought full market compensation for economic loss caused by the 1998 electricity company restructuring as an action having equivalent effect to an expropriation.[68] Any ICSID arbitration award would have been enforceable domestically—conferring rights not available to local investors affected in the same way and imposing a massive burden on the taxpayer. Opposition to the MAI within Aotearoa and internationally helped avert that possibility.

There are threats of dire consequences if a future New Zealand government reneges on its international commitments, fails to make new commitments or even deviates from the global economic agenda. These are almost certainly over-played. Several years ago, for example, the Alliance raised the possibility of the New Zealand government citing a serious balance of payments problem to allow temporary derogation from its GATT obligations. I was one of those who dismissed the possibility. Yet India has used the special provisions for developing countries with balance of payments difficulties to impose import restrictions despite maintaining significant foreign currency reserves.[69] New Zealand's current account deficit could certainly be considered in crisis at around seven percent of GDP.

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67 *Eg.* International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples: Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, Whakatane, Aotearoa, June 1993; Claim to the Waitangi Tribunal in Relation to Indigenous Intellectual Property (WAI-262)

68 *Multilateral Agreement on Investment. Consolidated Text and Commentary*, Part IV.2, DAFFE/MAI/NM(98), May 1998.

69 B.L. Das, 'The Diktats in the WTO', *Third World Economics*, no.170, 1-15 April 1997, p.15.

Conclusion

This argument militates against suggestions that domestic governments and courts can no longer make choices or that doing so will impose intolerable costs. It does not deny the very real pressures to integrate global economic activity and convergence of economic policy, regulation and law. It recognises that the power of global capital and threats of economic retaliation impose real constraints on state power. It also acknowledges the state as one actor in the global arena, with many other possible sites of contest over policy and law.

But the state retains considerable power. There are still choices, even for highly exposed and economically weak countries. States face a range of competing pressures—foreign and domestic, political and economic. In determining how they reconcile these there is a real potential for contesting not just what the state does, but the nature of the state itself. If governments are seen to act against the best interests of those they claim to represent, people can and do take action; some even revolt. Where courts fail to uphold domestic obligations, they too may face challenges to their legitimacy. At that stage they face the ultimate question of whether state sovereignty has any substance. These considerations have become more potent as systemic failures of the global free market have continued to emerge. The costs of pursuing such policies may become greater than the costs of rejecting them. All things are possible. Global economic policy and the new global constitutionalism are therefore far from irresistible or inevitable.