THE CHANGING NATURE AND ROLE OF SOFT LAW IN INTERNATIONAL ECONOMIC LAW AND REGULATION

From state-centric to globalist paradigm

by

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ABSTRACT

This study examines the changing nature and role of "soft law" in international law. Focusing on international 'economic' soft law and regulation, the study contends that the transformation of international economy and politics in the 1980s have culminated in a paradigm shift in the international economic soft law and regulation changing both its nature and role. The leading "state-centric" paradigm of 1960s and 1970s has been replaced by a dual "globalist" paradigm, which consists of two sub-paradigms: the "non-state actor" and the "hegemonic state".

The "non-state actor" paradigm refers to a non-state normative order, centred on the regulatory role of non-state actors. This paradigm has gained ground to (i) meet business need for flexible and efficient legal instrument, (ii) respond on a voluntary basis to 'societal expectations'. The "hegemonic state" paradigm, on the other hand, indicates a move from soft law and de-regulation to hard law and re-regulation. The major reasons for this move are to facilitate the expansion of market economy and to accomplish the creation of a disciplined global market through bilateral and multilateral legalisation as well as through international economic institutions. Yet, this tendency of re-regulation has it is argued often been obscured by the dominant market-centred vocabulary, which promotes a pluralistic, hybrid and informal rule-setting and implementation model.

On the whole, this study recognises that soft law may represent an opportunity for the normative development of international law by assuming an authoritative, interpretative or complementary role. Soft law can also promote a more participatory and democratic rule-making. The study nevertheless holds that in the foreseeable future the trend towards soft, voluntary, informal, and decentred regulation may have adverse effects on the already weak normative structure of international law, blurring further its normativity threshold by incorporating political and economical elements in a contextual and deformalised way.

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LIST OF ABBREVIATIONS

CSR	Corporate Social Responsibility
EU	European Union
FDI	Foreign Direct Investment
G7	Group of 7 (US, UK, Germany, France, Japan, Italy and Canada)
GATT	Global Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILO	International Labour Organisations
ILR	International Law Reports
IMF	International Monetary Fund
IEIs	International Economic Institutions
ISO	International Organization for Standardization
MAI	Multilateral Agreement on Investment
MNE	multinational enterprise
NAFTA	North American free Trade Area
NIEO	New International Economic Order
NICs	Newly Independent Countries
NIEO	New International Economic Order
NGO	non-governmental organization
OECD	Organization for Economic Cooperation and Development
OSCE	Organization for Security and Cooperation in Europe
SAP	Structural Adjustment Program
TNC	transnational corporation
TRIM	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Program
UNGA	United Nations General Assembly
WB	World Bank
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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1 INTRODUCTION

The present study aims to analyse the changing nature and role of soft law with a focus on international economic law and regulation. The purpose and interest in analysing these changes is to assess the impacts of the rise of informal, non-state normative structures in the 1980s on the normative development of international law in general and international economic soft law in particular.

There is a general understanding that ever since the foundation of the United Nations (UN) the scope of the international normative order has continuously expanded. International law now governs issues which up to the 1960s and 1970s were either considered as strictly *internal* affairs of each nation or did not exist at all on the international agenda. Examples are abundant. Prior to 1945, the primary concerns of international law were rules of conduct of diplomatic relations and immunities, the adjustment of territorial sovereignty and the regulation of war. Along with these 'traditional' domains, international law is today engaged in regulation of, among others, international organisations, international economy, social, technological and scientific development, economical and human development, human rights, environment, and nuclear energy.

The international normative order has not only expanded in terms of scope, but also in terms of "actors" that exercise influence on the formation, interpretation and implementation of these international obligations. As the large amount of literature published in various scientific disciplines frequently reminds us, states are not any longer alone on the international scene. Recent changes in international economics, politics, and technology, commonly referred as "globalisation" together with the end of the Cold War have had consequential effects on the structure of international relations. In parallel to the expansion of market economy, privatisation and deregulation promoted by international economic institutions, the role of "non-state actors"[1] has rapidly been transformed. It is now maintained that a substantial body of international

[1] The concept of "non-state actors", as it is used here, refers to those entities, which are relevant to international law in terms of participation in the normative process without being a state or inter-state organisations. This study focuses on particularly two of them, namely multinational enterprises and non-governmental organisations.

rules is not derived from the formal law-making institutions of international law. Accordingly, as a result of this process, the possibility of states to exercise control over the content of international law has diminished considerably. Apart from states, international organisations, formal and informal technical bodies, Treaty Bodies within the UN system, international conferences on various subject-matters as well as a wide range of non-state actors, including multinational enterprises (MNEs), non-governmental organisations (NGOs) are today involved in shaping international normative order.

However, the traditional mechanisms of international law making, i.e., the list of sources of international law enumerated in Article 38 of the Statue of the International Court of Justice, have not evolved at the same rate as the expansion of its scope and proliferation of its actors. It is increasingly held that in the face of the multiplicity of law-making processes in 'contemporary' international law, the understanding, according to which Article 38 sources of law exhaust the methods of international law-making has proven inadequate. This is obviously a challenge for the relevancy and legitimacy of international law.

Soft law emerged in the post-war period as a result of the structural shortcomings of public international law, caused mainly by the extension of its scope, actors as well as the changing international power structure. The substantive adjustment of the 'old' international legal system to the new post-colonial realities (i.e. the increasing number of sovereign states, changing power balance in international arenas, in particular in the UN General Assembly, etc.) has resulted in the growing number and the widening role of international organisations. The search for a new international law and economic order has two important consequences; both of them have boosted the discussions and use of soft law. They are

(i) The increasing use of vague and open-ended bilateral, regional and multilateral treaties, which has been a direct result of the enlarging scope of international law. The term soft law indeed was initially used to describe the "soft" provisions of legally binding instruments made by states, inter-state and international organisations.

(ii) The need to establish new regulatory frameworks for new institutional and decision making arrangements and producers to change some existing rules as well as to create new rules in areas where no rules then existed.

As should be expected, such changes in the legal and institutional framework raise questions about the legal status and character of the declarations and resolutions of international organisations, especially those of the UN General Assembly, which has no power of adopting binding rules for states. Thus, the concept of soft law has been suggested by many as an explanation of such "quasi-legislative" activities of international organisations, which is sometimes described as the "grey areas" of international norm-making.

To put it differently, soft law and instruments in the post-war period emerged from multiple sources and needs. The unifying characteristic of these diverse kinds of soft law and instruments is that they all have been authored by states or inter-state organisations solely for the use and benefit of states. Interesting to note that during this period, in round numbers between the 1950s and 1990s, the concept of soft law has been both recognised and refused as a normative concept through the optic of a state-centred understanding of law. The explanation of this orientation lies in the fact that for most of the history of international law, states have been regarded as the sole legitimate subjects.

However, since the end of 1970s, we have witnessed an increasing globalisation of international economy involving the removal of market constraints – the liberalisation of trade and investment, privatisation and the deregulation of labour and capital markets. At this point a discourse and a set of policies, practices and institutions associated with neo-liberal ideology, the superiority of market economy, minimalist state and self-regulation has, challenging the state-centred and sovereignty-based notion of law, gained ground. The significant changes in state-market relations, which have characterised the contemporary era, are particularly evident in the perception of non-state 'law' making. Indeed, the normative agenda of globalisation has centred heavily on the regulatory role of non-state actors in standard setting and implementation. It is argued that law making, adjudication and enforcement in globalisation is no longer a monopoly of states; a wide-range of non-state actors play significant roles in this emerging process of law-making, which is more dynamic, fluid and responsive. No doubt, the proliferation of soft law has largely been a result of a pluralistic, hybrid and informal rule-setting model used to legitimate a decentred normative development. The last two decades have witnessed a turn from government, formal international legislation, legal rules, public authority and institutions to governance, "open-ended"

legalisation with a "differentiated obligation", informal norm-like acts of private entities, private authority, and private or hybrid regimes.

It would be wrong, however, to regard this apparent transfer of regulatory authority from state to non-state actors as the only trend fuelled by a decentred, deregulated and privatised conception of law-making promoted by the neo-liberal globalisation. This process has not involved only a move from hard power structure and hard legalisation towards soft institutionalisation and formal/informal soft law. What has also occurred is a parallel, complementary and seemingly contradictory process of legalisation, which consists of both soft and hard regulation, *re*-regulation and the hardening of previously soft law and soft institutionalisation through bilateral and multilateral agreements as well as through the decisions and practices of international economic institutions. Hence, the rolling back of the state in certain areas of the economy ("re-regulation") and the freeing-up of markets ("de-regulation") have gone hand in hand with the strengthening of the already existing soft legalisation to protect, for example, certain types of property rights, international trade and investment.[2] Indeed, in the last few decades there have been more multilateral agreements and multilateral institutions addressing more areas of policy than ever before[3] to such an extent that some scholars even argue that we are currently experiencing a "rejuvenation of international law"[4] and "a move to law in international relations"[5].

The nature, characteristics and role of international economic soft law and regulation from the 1960s till today, have been re-defined. This re-definition will be examined here through describing a paradigm shift, which took place some time in the second half of the 1970s. The study contends that the leading paradigm in international economic law during the 1960s and 1970s was "state-centric". To better conceive its characteristics, this paradigm will be exemplified through the "New International Economic Order" (NIEO). In the beginning of the 1980s the state-centric paradigm was displaced by the

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[2] Utting, Peter, *Rethinking Business Regulation "From Self-Regulation to Social Control"*, UN Research Institute for Social Development, Paper number: 15, September 2005, p. 9

[3] Raustiala, Kal, *Sovereignty and Multilateralism*, 1 Chicago Journal of International law (2000) 2, p. 401

[4] Simpson, Gerry, *The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power*, 11 European Journal of International Law (2000) 2, p. 439

[5] Goldstein, Judith; Kahler, Miles, Keohane, Robert, O., and Slaughter, Anne-Marie, *Introduction: Legalization and World Politics*, 54 International Organization (2000) 3

dual "globalist" paradigm, which consists of two sub-paradigms, namely, "non-state actor" and "hegemonic state". The dual globalist paradigm became worldwide dominant in the 1990s. The "non-state actor" sub-paradigm is examined through the examples of the so-called new "*lex mercatoria*" and corporate social responsibility (CSR) while the "hegemonic state" paradigm will be exemplified through the evolution of GATT/WTO regime.[6]

International economy is obviously not the only field that soft law is employed by states, international organisations or non-state actors. Soft law is also widely used in the area of, among others, environment, human rights the law of the sea, the law of international water courses, nuclear energy, air law and outer space activities, and communications. Most of these domains are among the new domains of international law, including international economy, which used to be a matter of exclusively domestic regulation until the foundation of the UN. The focus of this study is on the characteristics of the evolution of soft law in the area of international "economic" law and regulation due to the fact that international economic law is a domain, which cuts across most of the subjects embraced by international law. As Jackson puts it, today, "90 per cent of the legal development in international law work is in reality international economic law in some form or another".[7] Thus, seen from this angle, to focus on soft law development in international economic law and regulation will help the reader to build up an overall picture of the changing nature and role of soft law in international law.

Then, why does this study concentrate on the "softness" in international economic "soft" law and regulation? One specific reason for choosing to examine soft law is that the formation of soft law is frequently policy-based and is therefore a legal form that more openly incorporates politics. The word policy can mean several things. However, as Falk points out, the concept of policy, in the first place, functions as a code word for politics.[8] Therefore, soft law, by allowing policy concerns to be externalised more

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[6] GATT/WTO refers to both the General Agreement on Tariffs and Trade (GATT), and its successor, the World Trade Organisations (WTO).

[7] Jackson, J. H., *Global Economics and International Economic Law*, 1 Journal of International Economic Law (1998) p. 8

[8] Falk, Richard, A., *The Place of Policy in International Law*, 2 Georgia Journal of International and Comparative Law (1972) p. 29

easily, facilitates tracing the interconnection between international relations, international law and economy.[9] A second and more essential motivation to choose to examine the development of soft law is that the conceptual and practical evolution of soft law is closely associated to developments that occurred in international relations. In the 1990s, in parallel with the restructuring state/society, public/private, politics/economy relations, the term soft law has increasingly been used to describe norms adopted by non-state entities. Thus, the changing nature and role of soft law in the international economy provides a suitable example to illustrate the blurring boundaries between the public and private spheres as well as the detachment of law from the state indicating the tendency towards a decentred and pluralistic development of international economic law.

1.1 Methodology

The first point that should be clarified about the 'method' employed in this study is that the study does not subscribe strictly to a particular method in the field. Of course it is so, if "method" is understood as a special form of procedure, a technique that is employed by a specific theory in international law, such as 'positivism' or ''international legal process' as a standpoint to create an 'external', 'objective' voice that outdistance the author's preferences. To put it differently, this study does not aspire to dissociate itself from its subject to attain pretended neutrality. Its agenda is to question the validity, development and effectiveness of the international legal system in the case of economic soft law.

That said, the study employs different 'languages' to convey its agenda. For instance, it criticises positivism that understands law as rules backed up by centrally organised sanctions and international law basically as "rules". Nonetheless, it recognises that international law is still largely shaped and constrained by state power and emphasises the importance of defining legal validity. It questions sovereignty as a 'legal theory'. Yet it underlines its emancipatory potential against the current development towards a "hegemonic international law" (HIL), which refers to the abandonment of the idea of the equality of states and the replacement of existing norms with new rules of norms,

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[9] The theme of the relation between policy, law and economy is elaborated in section 3.5.2

which recognise inequalities of power and its rules are indeterminate whose vagueness benefits the hegemon.[10] On the other hand, the study does not subscribe to an idealistic discourse about the constraining capacity of legal formalism for the tendency towards establishing HIL, but it regards the neo-realism and deformalisation tendency as aiming to create a policy-dependent and instrumental international law for the benefit of HIL. Likewise it does not endorse enthusiastically the view that states are and *should* stay the only subjects of international law yet it indicates the existence of the neo-liberal agenda that lies behind the dominant criticism of the concept sovereignty and legal/political consequences of the withering away of the nation-state.

Some may hence find that the 'methodological position' of this study is somewhat eclectic and self-reflective. It may well be the case. However, the preference of method in this study does not merely reflect a rational choice among the different methods with a critical perspective. Nor does it look for inhabiting a middle ground between contesting approaches. It partly reflects a necessity that arises from its subject, which involves both the conceptual framework of soft law (i.e. theory) and the impacts of the changing functions of soft law on the nature of international law (i.e. practice). Thus, the study is not convenient to accommodate the conventional distinction between theory and practice. But also and perhaps more importantly, the present study may be read as a 'political act' inviting the reader to deconstruct the status quo legitimation of the current 'political regulation' of the societal developments through concentrating on the role of conceptual change and the normative structuring of soft law. The language (i.e. method) of such an act requires looking into different approaches, theoretical endeavours and methods to be able to describe what have been overlooked or obscured and what have been highlighted or given prominence to and then evaluate the things that have been found in a normative manner to find out "why". Perhaps mostly in such instances the reader may feel the presence of critical theory even though not in its pure form if there is any such.

As Bell points out, the label critical theory is generally associated with the Critical Theory of the Frankfurt School though lately it is also associated with postmodernism. However, it would be more accurate to say that the label critical theory is a "broad

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[10] Vagts, Detlev, F., *Hegemonic International Law*, 95 The American Journal of International Law (2001) 4, p. 843-845

discursive umbrella" under which there can be found even polarised positions.[11] At any rate, critical theory has been a valuable instrument for the present study especially where the partiality of the theorists and the structure of societal relations are critically discussed.[12]

As will be shown in this study, the increasing tendency to use soft law, regardless of whether state or non-state originated, is explained on the basis of its flexibility, speediness, voluntarism and realism. Mörth for instance argues that the concept of soft law has been in circulation "in close connection with real-world events and process".[13] To some extent, this understanding can be seen as the enhanced regeneration of a depoliticised legal pragmatism that has been a dominant spirit since the Second World War, which has partly been responsible for the diminishing interest in legal theory during the same period. The intellectual and theoretical disinclination of international legal academic discipline in the post-Second World War has indeed been a cause of concern for a number of scholars. Kennedy, among others, explains the pragmatic sprit of the post-war period with a pragmatism that arose from the 'move to institutionalism', which has also resulted in the refusal of formalism in favour of pragmatist/managerial account of international law. This is paradoxical, because international law seems to have developed: more rules, more rule-observance, in a wider variety of subject matters than ever before. At the same time in the discipline of international law, there has been no noticeable interest in the philosophical dimension of these changes. In the words of Kennedy, "the 'increasingly independent world' seemed to require management, not reconstruction", and as a result, most of the international law courses in law faculties "were about the *management* of international life, about the process and the avoidance of 'politics' ".[14] In a similar vein, Purvis observes that the post-Second World War pragmatism "sought to incorporate the modernist insights of Legal Realism (which set

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[11] Bell, Duncan, S. A., *The Cambridge School and World Politics: critical theory, history and conceptual change*, available at http://www.theglobalsite.ac.uk.

[12] For further reading on method and critical theory, see Kennedy, David, *A New Stream of International Law Scholarship*, 7 Wisconsin International Law Journal (1988); Purvis (1991); and Koskenniemi Martti, *Letter to the Editors of the Symposium*, 93 American Journal of International Law (1999) 2.

[13] Mörth, Ulrika (ed.), *Soft Law in Governance and Regulation*, Edward Elgar: Cheltenham, UK, 2004, p. 4

[14] Kennedy, David, *International Legal Education*, 26 Harvard International Law Journal (1985) p. 369-370

itself in opposition to legal formalism, emerged during the 1930s) into international law, to make legal argument contextual". As a consequence of this strong rejection of formalism and a near-total disregard of theory, most scholars have confined themselves to the legal analysis on international law material.[15] Unfortunately, with the neo-realist revival in the end of 1970s the refusal of theory on the basis of dynamism, pragmatism and practicality seems to have gained new grounds. Under the intellectual/ideological weight of the American realist school, which has been very influential on the legal academic life in the post-Cold War period, international law has been reduced to instrumentality, which has made 'theory' a marginalised occupation".[16] This study however intends to be concerned with the risk of relegating theory in the context of an increasingly deformalised international law. It will discuss the risks and dangers of putting forward soft law in the name of producing a fast, flexible and effective solution to international problems.

Now a few words on the 'language of objectivity' while undertaking legal research. Considering that the "structure of international law reflects that of international relations",[17] it is important for international lawyers to examine what impacts the changes that have taken place since the 1980s may have on the structure of international law. However, this is a complicated task. A major reason for this difficulty is that the transformation of international relations is not an enclosed process and these changes are clearly influenced by the intellectual dominance of the liberal ideological and economic agenda. Anther reason and somewhat ironically, such a 'scientific' assignment requires *objectivity* from international lawyers. He or she needs to put aside his/her subjective or ideological preferences to be taken seriously and then only without that subjective bias they should analyse a process, which is in fact deeply political and biased. This is perhaps partly due to the necessity of being 'scientific' that is frequently seen to be the same thing as 'neutral'. The downside of this, of course besides its

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[15] Purvis, Nigel, *Critical Legal Studies in Public International Law*, 32 Harvard International Law Journal (1991) 1. See also, Hueck, Ingo, J., *The Discipline of the History of International Law –New Trends and Methods on the History of International Law*, 3 Journal of the History of International law (2001)

[16] Koskenniemi, Martti, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge University Press: Cambridge, 2004, p. 1

[17] Friedmann, Wolfgang, *The Changing Structure of International Law*, Stewens&Sons: London, 1964 in 'Preface'

impossibility, is the risk to "neutralise critique, silently giving a helping hand" to the dominant ideology.[18]

There are also additional difficulties that arise from the structural weakness of international law. In order to investigate any change or process not only in law, but also in any discipline, it is pre-required to have certain *solid* (i.e. virtually settled, not much debatable) basic premises on which a sound comparison and/or assessment could be possible to make. However, there is no such a possibility to acquire a solid base as to public international law. Even today, the question whether "international law is really law?" [19] attracts much attention of not only from strictly "realist" minds but also from a larger audience. This is mainly due to international *law*'s perpetual oscillation between law and politics as well as its often imprecise boundaries with international relations, ethics, and private international law.[20] One particular difficulty of this impreciseness/closeness that most researches conducted in international law might face is the employed vocabulary. For instances, the boundaries of international law and international relations are at times too close to avoid employing normative vocabularies that have been created outside traditional public law, such as "private regime" or "multiple legal regimes". Moreover, when examining the legal character of soft law, the above-described problematic gets further complicated, especially in the cases where 'informal' soft law and institutions are discussed. The reason for confusion and misconceptions are related to the interdisciplinary elements that the research on soft law embraces. As discussed throughout the thesis, if one is not strictly subscribed to the

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[18] I owe an apology to Koskenniemi for rephrasing his critique about the understanding of methodology of the editors of the "Symposium on Method in International Law" (Koskenniemi, 1999, p. 353).

[19] Austin John, *The Province of Jurisprudence Determined*, Weidenfeld and Nicolson: London, 1954 (published first in 1863)

[20] John R. Bolton, the former US Ambassador to the United Nations, states that "it is hard to imagine a more desperately tedious-sounding topic than whether 'international law is really law". Nonetheless, throughout in his widely discussed article, he does not refrain from engaging enthusiastically in answering the question. According to Bolton, "international law is not law; it is a series of political and moral arrangements that stand or fall on their own merits, and anything else is simply theology and suppression masquerading as law" (Bolton, John, R., *Should We Take Global Governance Seriously?*, 1 Chicago Journal of International Law, 2000, p. 48). Bolton further agues that the problem about the 'legality' of international law arises from exporting the concept of 'law' wholesale as used domestically into international affairs. Bolton eventually gives his own definition of law as follows: "We understand 'law' to be a system of commands, obligations and rules that regulate relations among individuals and associations, and the sources of legitimate coercive authority in society" (*Ibid.* p. 1-2). Certainly, one could find an element of confusion, in this approach, between the normative quality of international law with the problem of its effectiveness and enforcement.

positivist school, which divides norms into two definitive categories as 'legal' and 'non legal', it is hardly possible to be always on the 'right side' of the fence. This 'complaint' may possibly remind the reader of Kenneth Abbott's call for a "joint discipline" to narrow down the gap between international law and international relations theory.[21] While this study has in principle found no reason to object to employing an interdisciplinary vocabulary it would nonetheless object to such a 'bridge' when it is used as a passage to reduce law to merely a policy choice for the hegemonic powers.[22]

Yet, even though the examination of the normative and ideological aspects of the relation between international law and international politics could be considered as 'unsafe', such an undertaking is still tempting. This is so, because this examination may open up many intriguing possibilities not only for a renewed debate on the dynamics and potential of the new forms of international law making but also and perhaps more broadly, for the prospect of reviewing the history of international law to seize the continuities, discontinuity, ruptures and restorations between past and present and to re-conceptualise its relation with 'international society'.

All things considered, the storyline of the present study evidently has a weak ending for those, who wish to see a constructive description of the role of international law in international affairs and world justice. Admittedly, the lack of such an affirmative attitude (or a "problem-solving theory") may be disappointing. However, this should rather be explained by the 'natural' limits of law to deal with social needs, which unavoidably demand not only normative questions but also political discourse. For, not many 'legal positions' are purely the productions of law even though, as Koskenniemi puts it, "they are all equally amenable to being dressed in it".[23] Considering this, it can be concluded that international lawyers should not content themselves only and solely with a critical attitude towards the international system but they should do so from the perspective of the idea of law as the expression of the 'social'.[24] Any further insistence

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[21] Abbott, Kenneth, W., *Modern International Relations Theory: A Prospectus for International Law*, 14 Yale Journal of International Law (1989)

[22] See Koskenniemi, Martti, "Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations" in Byers, Michael (ed.), *The Role of Law in International Politics*, Oxford University Press: New York, 2002

[23] Koskenniemi, Martti, *From Apology to Utopia*, Cambridge University Press: New York (2005) p. 570.

[24] *Ibid.* p. 612

on the role of law would venture to develop into some form of utopia (or philosophy) albeit certain illusions may emphatically be considered worth to care for.

1.2 Analytical categories

As the words paradigm and paradigm shift are central in the thesis it is crucial to look a little closer on how they are understood and used as analytical categories in this thesis. A paradigm can be interpreted as representing a way of seeing something. In that sense paradigm is closely related to the widely used concept of discourse. There are many uses and interpretations of the concept, but Foucault has defined discourse as the sum of the exchanges of ideas in a specific context and time.[25] In the same line of reasoning discourse can be seen as a complex and continuous struggle over the definition and meaning of problems where the dominant ideas sorts out or defines what is normal, wrong, valuable and worthless and creates a general consensus over an ongoing economic, social or political process. Thus, what the concept captures is that people (including lawyers) live and experience within discourse in the sense that discourses impose frameworks, which limit what can be experienced or "what the meaning of experience can encompass, and thereby influence what can be said and done".[26] Thus, discourse, likewise paradigm, as it is interpreted here, is also understood to have this exclusive or monopolistic character.

However, law cannot merely be reduced to a discourse. Law is more of a practice. On the intimate connection of discourse and practice, Foucault argued that madness, sexuality and criminality do not exist in a pure unmediated form, but they are produced by various techniques and procedures. Practices are created by and persist through the discourse, and discourse is generated and works through the power relations within and between the practices.[27] Recognising both the discursive and practical characteristics of law, this thesis understands the word of paradigm as a notion that includes both discourse and practice.

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[25] Foucault, Michael, *The History of Sexuality. An introduction*, Volume 1. Penguin Books: London (1976)

[26] Purvis, Trevor and Hunt, Alan, *Discourse, Ideology, Discourse, Ideology, Discourse, Ideology*, 44 The British Journal of Sociology (1993) 3, p. 485

Another key notion in this thesis is the notion of "paradigm shift", which refers to the occurrences of significant changes or transformations from one fundamental set of assumptions. The shift is often driven by an agent of change and a shift frequently entails major discontinuities. As it is well known, in 1962 Thomas Kuhn argued that scientific advancement is not evolutionary, but rather is a "series of peaceful interludes punctuated by intellectually violent revolutions", and in those revolutions "one conceptual world view is replaced by another".[28]

Most proponents of globalisation argued that various entities, groups, organisations at all levels, i.e., local, national, international, and transnational, are developing new norms to fit the new social and economic needs. These mostly non-state or hybrid norms are regarded as "living law". Duncan Kennedy impressively conceptualises the legitimating rhetoric of the "living law". He identified a transformation of law from the social "is" to the adaptive "ought", which occurred around 1900. This was a transformation mainly based in the alleged need to develop new forms of law to fit the new social needs and to provide a basis for changes in the particular direction the dominant forces favoured.[29] This study can also be read from this perspective, as trying to capture the transformation of the 'social' around 1980 as such, by tracing the passage from "is" to "ought" in the rhetoric of globalisation. The shift between two opposite paradigms that this study depicts and the factors that are responsible for this shift, in particular globalisation, can be read at least at two levels; as "is" and "ought". The "is" is descriptive. It describes what *is* there out there; technological progress, the rise of MNEs and so forth. However, the "is" is not apt as only being "is". The interpretation of "is" through the lenses of the dominant discourse which refers to the values, or system of thought, in a society that are most standard and widely held at a given time,[30] leads to the adaptive "ought" for the practice of law, where a social analysis 'identifies' the multiple sub-state and supra-state normative orders that are operating in a 'globalised'

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[27] Foucault, Michael, *Discipline and Punish. The Birth of the Prison.* Penguin Books: London (1977)

[28] Kuhn Thomas, *The Structure of Scientific Revolution*, University of Chicago: Illinois, 1996, p. 10

[29] Kennedy, Duncan, *Two Globalizations of Law and Legal Thought: 1850-1968*, 36 Suffolk University Law Review (2002-2003) 3, p. 651

[30] Masterman, Margaret, "The Nature of a Paradigm" in Lakatos, Imre and Musgrave, Alan (eds.), *Criticism and the Growth of Knowledge*, Cambridge University Press: Cambridge, (1970) p. 59

world "to provide a basis for changes in the particular direction". Thus, how one perceives the "is" depends very much on what discourse one looks through.

Discussions on globalisation and the presumptions associated with it, such as the decline of the state and global governance, can (and should) therefore be read at two levels. At one level, this discussion serves to describe the factors that smoothed the path to the paradigm shift this study examines; thus it is descriptive. At a second level, it outlines globalisation and the related themes as a consensus creation process, whose language prescribes how it *ought* to be perceived and accepted; thus it is prescriptive. The examination of the changing nature and role of soft law with a focus on international economic law and regulation examines consequently how the discourse on globalisation acts upon and within the practice of international economic soft law.

To exemplify; we understand and interpret the world's affairs, consciously or not, through the angle of a discourse that is dominant in a particular domain. For instance, the way the majority of people, whether professionals or laymen, saw and understood international economy in the post-world war period was quite different than how they understood it in the post-Cold-War period. The practice in this specific case is the particular form of international law related to a particular discourse. Some particular discursive circumstances give rise to a particular legal practice, forming a legal paradigm. This legal paradigm stays there as long as long as its underlying conditions prevail.

1.3 Research limitations

This study contends that the dominant paradigm in the international economy and international economic law during the 1960s and 1970s was "state-centric". One reason for that this law being state-centric was the need to restructure the national economies destroyed in the aftermath of World War II. Another reason was related to the emergence of new states as a result of decolonisation process and the related rise of the ideology of "Third Worldism". However, by the end of the 1980s, with the rise of neo-liberal ideology and its emphasis on the minimalist state and market economy and the collapse of socialism, the state-centric' paradigm vanished from sight suddenly. Instead a new dual paradigm labelled here for convenience "globalist" became the dominant paradigm. This shift included a shift in both the discourse on international economics as

well as a change in the practical structure of international law including a clear prescription for deregulation, privatisation and the liberalisation of trade and investment regimes, which has resulted in the transfer of economic and regulatory power from state to MNEs and international economic institutions.

This study holds consequently that the perception and use of soft law has considerably changed with these different paradigms in terms of their characteristics, actors and functions. By depicting these paradigms through illustrating them with chosen examples displaying the basic elements of each paradigm, this study intends to demonstrate the changing nature and role i.e. practice of soft law in international economy. Four examples will be used. One example will be assessed in relation to the "state centric" paradigm and three examples will be assessed in relation to the dual globalist paradigm. The examples given in relation to the state centric paradigm is the NIEO. The NIEO, which had a very strong emphasis on the centrality of the state, was the dominant mode of international economic, political and legal debate in the 1960s and 1970s. NIEO influenced greatly the perception of the economic and political situation of those days as well as the factors that led to that in the immediate years following the World War II.[31] However, it should be noted that the NIEO reflects rather the position of the so-called "Third World". In the economically more developed world the emphasis on the centrality of state took rather a different form, which today is known as the 'welfare state'. Compared to the NIEO, this model is less convenient to illustrate the nature of international economic soft law due to the fact that it reflects to a lesser extent the tension between developed and developing countries, which shaped the essence of soft law in the framework of the UN.

The "non-state actor" sub-paradigm, which together with "hegemonic state" sub-paradigm composes the "globalist" paradigm, is assessed by two examples: *Lex mercatoria* and the international standards of CSR. The former represents a "bottom-up" non-state soft law, the latter represents a "top-down" initiative referring to the origin of the rules. A bottom-up initiative is an example where the idea of the regulation came from the actors that are regulated and the top down initiative is an example where

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[31] Waelde, Thomas, W., *A Requiem for the 'New International Economic Order*, 1 The Internet Journal of the Centre for Energy, Petroleum and Mineral Law and Policy (1995) p. 2, available at http://www.dundee.ac.uk/cepmlp/journal/html/Vol1/vol1-2.html

the idea of the regulation came from another source than the regulated actors. *Lex mercatoria* refers to an "*a*national system of general principles, customs and rules spontaneously referred to, elaborated and followed in the framework of international trade and commerce".[32] Since this set of norms, which occupies a particular position in between private and public international law, is allegedly generated by a worldwide merchant constituency through the conduct of cross-border economic transactions, is examined in this study as an example of "bottom-up" regulation. The international standards of CSR, on the other hand, have been dealt with as an example of "top-down" model of non-state soft law. The reason of considering CSR as a 'top-down' model is that despite the fact that CSR codes are actually 'voluntary' and self-regulatory, the adoption of them is mainly driven by a regulatory impulse arisen from external public pressure. Then again, as for the state-centric paradigm, many other examples of each of these sub-paradigms can be found. However, *lex mercatoria*, which is suggested to be "the most successful example of global law without state",[33] represents the characteristics of self-regulatory private soft law development more thoroughly than other comparable examples, such as International Organization for Standardisation (ISO) regimes, which display rather a hybrid nature. CSR is the most well-known and rapidly growing example of the so-called "top-down" model. Besides, it illustrates the interaction between the normative activities of state and non-state actors more comprehensively than other such examples, like most internal rules of corporate governance.

The last example that is selected to assess the hegemonic state sub-paradigm of the global dualist paradigm is the evolution of the GATT/WTO system in the 1990s. As will be shown, in parallel to the changed roles of the three main institutions of the Bretton Woods institutions (i.e., the IMF, the World Bank and the GATT/WTO) in the 1980s and 1990s, the degree of institutional legalisation of these organisations has also hardened. Since the WTO is considered as the principal international institution for the

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[32] Fortier, Yves, L., *The New, New 'Lex mercatoria', or, Back To the Future*, 17 Arbitration International (2001) 2, p. 122

[33] Teubner, Gunther, "Global Bukowina: Legal Pluralism in the World Society" in Teubner, Gunther (ed.) *Global Law Without a State*, Dartmouth: UK&USA, 1997, p. 3

management and regulation of the process of economic globalisation,[34] the evolution of the GATT/WTO system is thought to reveal the basic elements of the process, in which non-state soft regulation and the deepening hard legalisation under international economic organisations and bilateral treaties have gone hand in hand to establish the rules for a disciplined liberalism.

1.4 Outline

Chapter 2 examines the concept of soft law in international law in a period in round numbers between 1950 and 1990. This was a period during which soft law emerged and evolved essentially to respond to the demands and practices of states. Section 2.2 looks at the various definitions of soft law by classifying it into three broad categories as "treaty soft law", "non-binding soft law", and "non-state soft law". The section recognises that although much of soft law is incorporated within non-binding instruments, an increasing number of treaties contain provisions that are not intended to create precise obligations. In other words, the section argues that the criteria used to identify soft law should not be based only on the binding or non-binding character of the instrument, but also on the nature and specificity of the obligation states undertake. Section 2.3 deals with "treaty soft law" which as used here, refers to treaties, especially framework and umbrella treaties, the substantive provisions of which tend to be merely hortatory or programmatic as well as treaty provisions that do not create a precise obligation. Section 2.4 looks at "non-binding soft law", which applies both to those instruments in 'non-legal forms', such as the resolutions and declarations of the UN General Assembly, and non-binding soft law that is part of a multilateral regime such as mechanisms established under various multilateral treaty to perform the role of authoritative interpretation of the terms of a treaty or to provide the detailed rules and technical standards required for implementation of some treaties. Section 2.5 seeks to demonstrate the factors that create a continuum between hard and soft law in a comparative way. Section 2.6 focuses on the reasons for adopting soft law in inter-state relations. This section also concerns the identification of the conditions and issue-areas

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[34] See for instance Van den Bossche, Peter and Alexovicova, Iveta, *Effective Global Economic Governance by The World Trade Organization*, 8 Journal of International Economic Law (2005) 3, p. 667

in which the reasons of adopting soft law may vary and thus may have different or even opposite effects on the normative development of soft law. Section 2.7 overviews the historical evolution and theoretical obstacles for recognising soft law within the framework of traditional sources of international law. Section 2.8 focuses on the basis and nature of 'hard' and 'soft' obligation. Section 2.9 addresses two interrelated questions: Is soft law eventually destined to become hard law? And second, under what circumstances can soft law be converted into hard law?

Chapter 3 sets the conceptual stage for the analysis of the paradigm shift in international economic soft law and regulation. Section 3.2 defines economic law, regulation and self-regulation as the key concepts of introducing soft law into international economic law and regulation. Section 3.3 sets up two alternative paradigms in international economic soft law and sketches out the paradigm shift from state-centric to a dual globalist paradigm. Section 3.4 describes the state-centric' paradigm while section 3.5 portrays the dual globalist paradigm. Section 3.6 assesses the role of the doctrine of state sovereignty as a legal concept and the principle of sovereign equality in international economic law and their functions in the examined paradigm shift. Section 3.7 examines the legal status of non-state actors focusing on the role of MNEs and NGOs within the international economic law making process.

Chapter 4 identifies the factors that paved the way for the examined paradigm shift. Section 4.2 analyses globalisation as both a consensus creating and market-led integration processes that has been responsible for the paradigm change in international economic soft law. Section 4.3 briefly surveys the 'inevitability' discourse in the context of technological and economic determinism. Section 4.4 examines the nature of the changes in state-market relations that have characterised the contemporary era of globalisation and economic liberalisation. Section 4.5 discuses the concept of global governance as a form of hybrid institutionalisation that accelerates the deformalisation of international law and assesses whether and to what extent global governance fills the institutional gaps for a global polity that a global economy allegedly demands.

Chapter 5 examines the New International Economic Order (NIEO) as an example of the state-centric paradigm. Section 5.2 overviews the economic and ideological conditions and perception underlying the NIEO as well as its main sources. Section 5.3 introduces the scope of the NIEO and discuses its legal nature. Section 5.4 deals with

the evolution of the NIEO and subsequent regulatory activities that come out from the NIEO or were produced to counter it. Section 5.5 examines the reasons for the rather sudden disappearance of the NIEO from international scene. Section 5.6 looks at the lasting influence of the NIEO as a state-centric model and evaluates the pros and cons of this model.

Chapter 6 examines the evolution of the 'new' *lex mercatoria* interpreted as an example of the "non-state actor" paradigm. While it is true that especially from a more traditional/sceptical perception *lex mercatoria* could merely be read as belonging to private international law, a growing number of scholars tend to classify it as a new category of (transnational) rules, which emanate from non-state authority, permeating public international law through various international instruments, such as the NAFTA, the ICSID and BITs, in which the dispute resolution provisions of *lex mercatoria* emerge. Section 6.2 defines *lex mercatoria*, as an example of "bottom-up" regulation, which is, as it is claimed by its proponents, solely based on contractual elements to sustain itself as a normative order. The section also traces origins and evolution of *lex mercatoria*. Section 6.3 describes briefly the institutional components of the new *lex mercatoria* focusing mainly on the commercial custom and international arbitration. Section 6.4 is centred on the issue of the autonomous character of *lex mercatoria* and discusses it in the context of legal pluralism. Section 6.5 examines *lex mercatoria*, the "global capital's own law"[35] in the normative and ideological context of self-regulation and relates it to the blurring boundaries between public and private spheres. In the conclusive remarks, *lex mercatoria* is considered in relation to the state-centric approach to provide a comparative outlook by linking *lex mercatoria* with the NIEO.

Chapter 7 deals with the evolution of international standards of "corporate social responsibility" (CSR) and perceive it as a "top-down" example of the "non-state actor" paradigm. Section 7.2 explains the origin of the concept not solely with the rising power of MNEs or the lack of international legal framework regulating the activities of MNEs, but also and particularly with the neo-liberal rationality, which considers CSR as an example for the emerging private normative order. It then gives a short account of the evolution of CSR and describes its substantive content and normative context. Section 7.3 overviews the institutional framework of CSR dividing it into three groups based on

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[35] Santos, Boaventura de Sousa, *Toward a New Legal Common Sense*, Butterworths, 2002, p. 208

the regulatory bodies: national and international public initiatives, NGOs and MNEs and shows the nature of the increasing interactions between them. Section 7.4 assesses CSR within the context of self-regulation, which is characterised by the concepts such as 'customer orientation', 'efficiency', 'flexibility', and 'market' and considers the pros and cons of such an approach. It further discusses the complexities of self-regulation and external regulations and the role of soft law in these two types of regulation. In the conclusive remarks, CSR is comparatively related to both the NIEO and *lex mercatoria* in order to demonstrate their mutually exclusive and complementary elements.

Chapter 8 exemplifies hegemonic state paradigm by the evolution of the GATT/WTO system. Its purpose is to show that international economic law and regulation in the post-1980s has evolved not only towards a non-state, informal, soft, and self-regulatory normativity, but also towards a complementary harder law and strengthening institutionalisation. Section 8.2 discusses the concept of hegemonic international law and illustrates the interrelation between international law and politics focusing on the concept of balance of power. Section 8.3 proposes a framework to explain that the shift from state-led to market-oriented neo-liberal economic policies in the post-1980s does not only involve de-regulation and economic liberalisation, but also re-regulation processes. Section 8.4 overviews the institutional framework and mechanisms of the increasing legalisation and re-regulation of international economy. It focuses on the evolution of the Bretton Woods institutions from relatively soft law character with specific and limited assignment to a hard law with a rather extensive scope. Section 8.5 examines the exclusive role and growing importance of the WTO as a main regulatory device of economic globalisation. Section 8.6 describes the evolution of the GATT/WTO dispute settlement process as an example of hard law development. Section 8.7 compares the evolution of the GATT/WTO with the NIEO and illustrates in what ways such hard law development may be consistent with the simultaneously present non-state normativity.

Chapter 9 analyses the relationship between the state-centric and globalist paradigms in relation to the development of international economic soft law and regulation. Section 9.2 presents an overview of the structure of the state-centric and globalist paradigms and underlines the context in which the paradigm shift occurred. Section 9.3 examines the discourse formation and practices of the state-centric paradigm and looks into the legal and practical outcomes of this paradigm. Section 9.4 deals with the significance of the

end of the Cold War and globalisation for the paradigm shift. Section 9.5 depicts the discourse formation and practices of the globalist paradigm and looks into the legal and practical outcomes of this paradigm. Section 9.6 presents the key elements of soft law developments in the state-centric paradigm and non-state-actor sub-paradigm and deconstructs deregulation discourse by linking it with the concept of disciplinary liberalism.

Chapter 10 summarises and reflects on the possible practical and theoretical development of soft law in international law in general and international economic soft law in particular. Section 10.2 summarises the underlying findings of the thesis. Section 10.3 speculates on the evolution of soft law both in the economic sphere and international law generally. Finally, section 10.4 offers the final words of this study.

2 THE CONCEPT OF "SOFT LAW" IN INTERNATIONAL LAW

2.1 Introduction

An issue of major importance in the post-World War II era has been whether "soft law" is a normative category of international law, and if so, whether such a category is desirable or/and unavoidable as well as in what ways this "soft law" may have an impact on the normative development of international law. Before turning to examine the evolution of soft law in international economic law in the subsequent chapters, this chapter aims to discuss the role of soft law in international law in general with an ambition to place the discussions surrounding its normative quality, functions and nature within the traditional framework of international law-making. The reason for this is the observation that the increasing complexity of the processes by which international law can be created today is no longer adequately captured simply by reference to Article 38 of the Statute of Permanent Court of International Justice. In order to investigate the role of soft law as an element in international law-making, the chapter addresses a number of issues: the "definition of soft law", "reasons for adopting soft law", whether "soft law is a challenge to the normative structure of international law", "the legal nature of the obligations that soft law implies" and lastly, "the interplay between hard and soft law".

Article 38 of the Statute of Permanent Court of International Justice, drafted after the First World War, is generally accepted as containing a list of the sources of international law.[36] Since then, however, international law has radically changed as a result of several

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[36] Sources of international law are the materials and processes out of which the rules and principles regulating the international community are developed. Article 38(1) of the Statute of the "Permanent Court of International Justice", the international court of the "League of Nations" established in 1922 is, as it was, preserved in the 1946 Statute of the "International Court of Justice", which is the principal judicial organ of the United Nations. Article 38 reads as follows: "The Court shall apply: 1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States. 2. International custom, as evidence of a general practice accepted as law; 3. The general principles of law recognized by civilized nations; 4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary

convergent factors. The Second World War, the Cold War, the growing and intensifying international activities following the foundation of the UN, the decolonisation process, and calls for a new international economic order in the 1970s, have in particular been significant for this change. Increased heterogeneity of the "international society" caused by the decolonisation process has influenced the international law system to the extent that the whole philosophy and foundation of the UN System has been marked by it. The development of the principle of the "equality of sovereign states" can alone exemplify this influence. Moreover, during the post-war period, the scope of international law has incomparably widened through the inclusions of new subject matters, such as international economy, human rights, and the environment. It is also argued that in the post-1945 period, and especially with the end of the Cold War, international organisations have had a dramatic impact on the institutionalisation of public international law by changing the mechanisms and reasoning behind its making, implementation, and enforcement. Besides, unlike traditional international law prior to World War II, which only affected states, the rules articulated by international organisations with a global reach, such as the UN and the WTO, affect not only states but also individuals through the making of multilateral treaties and the day to day application and interpretation of institutional law, thereby blurring the lines between intra and inter-state law-making.[37] Likewise, the advances of sciences and technology have eroded traditional distinctions between domestic and international affairs and created new or deepened common interests and multiplied common actions among states.[38] By the same token, non-state actors have exercised various degree of authority in the generation of rules- and decision-making as well as implementation and compliance assessment in connection with their increasing role especially in the domains of the global political economy, the environment, and human rights. As a

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means for the determination of rules of law. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto" (http://www.worldcourts.com/pcij/eng/documents/1920.12.16_statute.htm).

[37] On the role of international organisations as law makers and dispute settlers, see Alvarez, José, E., *International Organizations as Law-makers*, Oxford University Press: New York, 2005

[38] For a general illustration of the reciprocal influence of science, technology and international law, see Lachs, Manfred, *Thought on Science, Technology and World Law*, 86 American Journal of International Law (1992) 4

result, it is argued, the allocation of power and authority in the international system has also significantly changed.[39]

Since international law is predominantly based on and grows out of the international relations, the above-mentioned structural changes in international relations have had a number of substantial consequences on international law: (a) International law has become a more complex and multifaceted system mainly as a result of the enlargement of its scope; (b) as "interaction between states has become both more frequent and more penetrating"[40] the interdependency between states has also increased. In the words of Friedmann, international law has been transformed from the international law of "coexistence" governing essentially diplomatic inter-state relations, to the international law of "co-operation", expressed in the growing number of international organisations and the pursuit of common human interest.[41] (c) International law has been forced to accommodate to the changes created by globalisation in order to respond to the growing demand for fast, flexible, discretionary, and *ad hoc* regulations, as well as to reflect the post-Cold War power relations more accurately.

Mainly associated with these developments, a new range of international legal commitments that either lack the requisite normative content to create enforceable rights and obligations or do not fall into the "traditional" categories of "treaty" or "custom" or "general principles of law", has gained unprecedented currency. It is therefore argued that since the norms of 'contemporary' international law can be created in many new ways that can no longer be adequately captured solely by reference to the traditional categories of custom and treaty, there is hence a need to reassess the traditional sources and subjects theory of international law.

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[39] Gamble, John King and Ku, Charlotte, "International Law –New Actors and New Technologies" in *International Law: Classic and Contemporary Readings*, Ku, Charlotte and Diehl, Paul F. (eds.), Lynne Reinner Publisher: London, 2003, p. 505

[40] Van Hoof, G. J. H., *Rethinking the Sources of International Law*, Kluwer Law and Taxation Publishers: Deventer, 1983, p. 66

[41] Friedmann (1964) p. 85

2.2 Defining soft law

Dupuy notes that the term "soft law" was coined by Lord McNair, likely in the beginning of the 1970s.[42] However, just as for the recognition of the existence of such a normative category, there is not a generally accepted definition of "soft law". There is no denying that any conceptualisation of the rules of international law in terms of 'hard' versus 'soft' law is inherently problematic. Indeed Gold has discouragingly stated: "Almost as many definitions of soft law can be found as there are writers about it".[43] As discussed below, such a great variety of opinions about the conceptualisation of soft law, the ambiguity surrounding its crucial characteristics as 'legal' norms and the complexity involving the identification of soft law are attributable, at least partly, to the nature of the international law-making, which is essentially decentralised and frequently implies varying degrees of normativity.[44] Yet, despite the apparent challenge arising from this 'infinity' in regard to its definition, it is still possible to identify three broad categories of soft law: "treaty soft law", "non-binding soft law", and "non-state soft law". It is nonetheless important to note that an increasing number of scholars understand soft law as a combination of various elements that these three categories display, at least partly due to the coexistence of divergent constituents of soft norms and instruments. The reason for examining soft law in three categories is the understanding that as a 'legal' concept soft law necessarily exhibits a degree of relative normativity

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[42] Dupuy, René, Jean, "Declaratory Law and Programmatory Law: From Revolutionary Custom to "Soft Law' " in Akkerman, Robert, J., Sijthoff: Leyden (eds.), *Declarations on Principles. A Quest for Universal Peace*), 1977, p. 252. The history of norms and instruments of "soft law" character actually goes back to a very early stage of international law. However, "it relatively rarely gave rise to international controversies of considerable intensity. This (...) might be due partly to lesser significance of the controversial questions involved. But it was also due to the common criteria and common values among the members of the international community of States of that time [which actually meant almost solely European countries [I.A.O.]; and consequently, to the common understanding of the character of their commitments (Sztucki, Jerzy, "Reflection on International 'Soft Law'" in Ramberg, J., Bring, O. and Mahmoudi, S. (eds.), *Festskrift till Lars Hjerner: Studies on International Law*, Norstedts: Stockholm 1990, p. 557). Those contractual instruments were named as "gentlemen's agreements", "memoranda of understanding" or "joint communiqués" (Chinkin, Christine, "Normative Development" in Shelton, Dinah (ed.) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford University Press: New York, 2003, p. 26).

[43] Gold, Joseph, *Interpretation: The IMF and International Law*, Kluwer Law International: The Hague/London/Boston, 1996, p. 301. Elsewhere Gold gives his own definition as follows: "The intended vagueness of the obligations that it imposes or the weakness of its commands" exposes a norm's softness (Gold, Joseph, *Strengthening the Soft International Law of Exchange Agreements*, 77 American Journal of International Law (1983) 414).

[44] See sub-section 2.7 in this chapter.

both at the level of law-creation modes and content. It is therefore important to demonstrate in what ways the normative assertions of the aforementioned definitions converge and compete, and in what ways these different categories of soft law may have a cumulative effect or may counteract each other.

In the first category, labelled here for convenience "treaty soft law", the term soft law is used to describe treaties and treaty provisions, which are legally binding, nonetheless do not lay down precise obligations on state parties that can be enforceable by an international court or other international organ. Baxter for instance holds that norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between states but do not create enforceable rights and duties may be described as soft law.[45] Scholars holding such view maintain that "the conclusion of an agreement in treaty form does not ensure that a hard obligation has been incurred".[46] As follows, though formally binding, some treaties or treaty provisions may be soft in the sense that they do not involve clear and specific legal commitments nor impose real obligations on the parties in the way "hard law" does. In such cases, the vagueness, indeterminacy, or generality of a treaty or treaty provision may deprive these instruments of the character of "hard law". This is however not one and the same that such "soft" treaties or "soft" treaty provisions are "non-binding", because as stated in Article 26 of the Vienna Convention on the Law of Treaties, as a legal *form*, treaties are always binding upon the parties.[47] From this perspective, as discussed in the following section in detail, treaties and treaty provisions may be either hard or soft, or both. Thus, in this category, it is the *content* of the treaty or treaty provision which is determinant of whether a treaty or treaty provision is hard or soft, not its form as a treaty. Obviously, the distinction between "hard" and "soft" treaties or treaty provisions is not clear cut. Yet, the character of the dispute resolution process may reveal whether a treaty or treaty

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[45] Baxter, R. R., *International Law in "Her Infinite Variety"*, 29 International and Comparative Law Quarterly (1980), p. 549. Elsewhere, Baxter explains why he prefers to use the term "international agreement" instead of "treaties". Accordingly, the term "treaty" in its technical meaning as used in the Vienna Convention on the Law of Treaties, is legally 'binding' upon the parties. Avoiding this term, Baxter essays to open a possibility to include *all* 'agreements' regardless whether they are legally binding or not, such as "political treaties" (*Ibid.* p.550).

[46] Chinkin (2003) p. 25

[47] Article 2 (1)(a) of the Vienna Convention on the Law of Treaties defines a treaty as follow: "An international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whether its particular designation".

provisions are hard or soft law: if a treaty is subject to compulsory adjudication in cases of non-compliance it can be inferred that the rules of this treaty lay down precise, thus, *enforceable* legal obligations. Hence, on this account, contrasted with "soft enforcement"[48] or "dispute avoidance", the existence of "hard enforcement", which is characterised by compulsory binding settlement of disputes, appears as a feature that may reveal whether the treaty at issue is hard or soft.

Second category, an alternative view of soft law, here labelled "non-binding soft law", focuses on the contrast between "binding" and "non-binding" instruments.[49] According to Thürer, for instance, soft law refers to international norms and instruments that are deliberately non-binding in character but still have legal relevance, located in the "twilight between law and politics".[50] In a similar way, Francioni holds that international norms and instruments that fall outside Article 38 of the Statute of the ICJ are "soft law".[51] When soft law is used in categorical contrast to "binding" law, this implies that treaties by definition are always hard law because treaties are binding upon state parties. In this understanding, the treaty form becomes conclusive of binding obligation. In other words, if the form of an international instrument is that of treaty it can then not be soft law and vice versa. Thus, as opposed to the first category of definition, the decisive factor in this understanding of soft law is the *legal form* and not the content of the international instruments. Soft law in this category (i.e., non-binding soft law) may be adopted either as an alternative to treaty law-making or exist as a part of a multilateral treaty-making process. When used as an alternative to treaty law model, soft law instruments do not constitute part of a legally binding regime nonetheless they aspire to have some normative significance and hold some element of law-making intention. Such non-binding instruments may take a number of different

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[48] "Soft enforcement" refers to either non-binding conciliation before an independent third party or non-binding compliance procedure that aims to find an agreed solution rather than to engage in adversarial litigation or claims for reparation. Soft enforcement characteristically evades issues of responsibility for breach, and relies on a combination of inducements or the possibility of termination or suspension of treaty rights to secure compliance (Boyle, Alan, E., *Reflections on Treaties and Soft Law*, 48 International and Comparative Law Quarterly, 1999, 4, p. 909).

[49] The term 'international instrument' mainly refers to treaty, convention, agreement, protocol, declaration, guidelines and codes of conduct.

[50] Thürer, Daniel, *Soft Law* in Encyclopaedia of Public International Law (2002), 4th edition, p. 452

[51] Francioni, Francesco, "International 'Soft Law" in Lowe, A. Vaughan and Fitzmaurice, Malgosia (eds.), *Fifty Years of the International Court of Justice, Essays in Honour of Sir Robert Jennings*, Cambridge University Press: NY, 1996, p. 167

forms, including resolutions of the UN General Assembly; codes of conduct, guidelines and recommendation of international organisations, such as the OECD Guidelines for Multinational Enterprises; and declarations and final acts of international conferences, such as the Rio Declaration on Environment and Development. As said above, non-binding instruments do not always represent an alternative mode of law-making to treaty; they may also constitute an integral part of a multilateral treaty-making process. In the latter case soft law is a part of a multilateral treaty-making process even though such soft law norms, decisions and standards are legally non-binding. It is often so because they emanate from bodies that have not been endowed with the power to adopt mandatory texts, but only recommendations, as in the case of decisions of Conference of the Parties (COP) under various multilateral environmental agreements.[52] COPs, nonetheless elaborate and adopt guidelines, rules or procedures that are needed to put flesh on the bones of the several of treaties or protocols'[53] key provisions, as in the cases of the Vienna Convention for the Protection of the Ozone Layer/Montreal Protocol[54] and the UN Framework Convention on Climate Change/the Kyoto Protocol.[55]

Fundamentally different from the previous two categories, the third definition of soft law, labelled in this study "non-state soft law", involves a structural shift between "law" and '"non-law", which is, it is argued, to be manifested in the increasingly blurred boundary between the public and private domains and in the growing pluralism of

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[52] On the role of the role of Conferences of the Parties in Multilateral Environment Agreements -based law-making, see Brunnée, Jutta, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15 Leiden Journal of International Law (2002) 1

[53] The term 'protocol' refers to an agreement governed by international law that amends, supplements, or clarifies a treaty or other broad international agreement.

[54] For instance, the terms of the non-compliance procedures were first set out by the Decision II/5 of the 2nd meeting of the Parties in December 1990 and was subsequently revised and then incorporated by amendment as an annex IV in the Protocol in Copenhagen in 1992 (available at http://ozone.unep.org/Publications/MP_Handbook/Section_2DecisionsArticle_8/decs-non-compliance_prodecure/Decisions_II-5.sthml).

[55] See for instance the reporting guidelines for national communication decided by the COP. The basis for reporting and review under the climate change regime is established in Article 4 of the UNFCCC, which requires all parties to prepare national communications according to common reporting guidelines agreed by the COP. These non-binding "FCCC reporting guidelines" have been revised three times, each time specifying in more detail the information that parties must include in their reports and how this should be presented, with the aim of improving the comprehensiveness, accuracy, transparency and comparability of the date provided (Yamin, Farhana and Depledge, Joanna, *The International Climate Change Regime*, Cambridge University Press: UK, 2004, p. 332).

sources and subjects of international law. It is commonly asserted that one of the most significant developments in the process of globalisation has been the rise of non-state actors and their consequent participation in international rule- and policy-making as well as implementation processes. The rapidly enhanced role of non-state actors in both formal and informal law-making institutions has, as claimed, resulted in the increasing heterogeneity of and pluralism in the modes of law making as well as in the decrease in the control of states over the content of international law.[56] Many scholars, like Reisman, have characterised such "non-state law-making" modes as "privatisation and democratisation" of international law and suggested replacing the traditional division of 'hard law' and 'soft law' with "state-made law", which refers to the law that is produced in arenas to which only state representatives have formal access, and "media-made law", which refers to the 'law', which is produced within a much larger and more open 'law-making' process that is transmitted through multiple electronic and print channels.[57] Or as some others have suggested replacing this 'old' division with "formal soft law", which is primarily defined within the inter-state/governmental realm, and "non-state soft law", which is confined to those norms and regimes that rely on the participation and recourses of non-state actors in the construction, operation, and implementation.[58] Hence, according to this thinking, governmental authority is in the non-state soft law either completely absent or does not play a constitutive role.[59] However, as may be expected, the legal status of the instruments adopted by non-state actors causes much controversy for the reason that if norm-like activities of non-state actors should be classified as soft law or some sort of law, it involves a paradigm shift in the subjects and sources theory of international law. It also implies a decline of the public/private distinction, and therefore requires to be wrapped in a larger context of the tendency of *deformalisation* of international law.

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[56] Reisman, Michael, W., "The Democratization of Contemporary International Law-making Processes and the Differentiation of Their Application" in Wolfrum, Rüdiger and Röben, Volker (eds.), *Developments of International Law in Treaty Making*, Springer: Berlin, 2005, p. 21

[57] *Ibid.*

[58] Kirton, John, J. and Trebilcock, Michael, J. (eds.), *Hard Choices, Soft Law*, Ashgate: UK, 2004

[59] Kirton and Trebilcock (2004) p. 9. Shelton, on the other hand, takes a more 'cautious' track. According to the writer, the norms adopted by non-state actors can be classified as soft law mainly because of two reasons: First, these norms are predominantly designed to influence states conducts and policies. Second, as is argued, with the increasing globalisation, 'transnational entities' that make their own rules (i.e.,

Against this background, it can be argued that the binary line between binding and non-binding instruments as hard and respectively soft law is not clear-cut: treaties often include soft obligations while non-binding instruments may contain more detailed and precise provisions. By the same token, both types of instruments may have compliance procedures and supervisory mechanisms. Moreover, they do not stand in isolation from each other. Quite contrary, soft instruments are frequently used either as a precursor to hard law or as a supplement to treaties to fill in gaps in them and, in that sense hard and soft law often interact with each other. Such interaction between hard and law creates a continuum rather than enclosed categories.[60] This study employs the term of soft law to refer to both "treaty soft law" and "non-binding soft law". The reason for the preference of a 'broader' definition of soft law is, as already pointed out, that in evaluating the importance of soft law, account must be taken of the various ways in which soft law can be made and that in exploring the potential and influence of soft law, attention has to be given to the interaction between different types of soft law as well as between hard and soft law in various forms. On the other hand, this study does not deal with the so-called "non-state soft law" as a part of the normative structure of international law, but examines it as both a means and product of the deformalisation of international law resulted from a paradigm shift occurred in the process of globalisation, which has, many argue, fundamentally transformed boundaries between public and private and diminished the nation-state's regulatory power and autonomy.

2.3 "Treaty" soft law

The concept of "treaty soft law" refers to treaties and treaty provisions that do not intend to create firm obligations despite their legally binding form and that are

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'self-regulation') enter into normative relations and instruments that "look much the same as state-adopted norms" (Shelton, 2003, p. 4)

[60] It is held that that norms (or legalised institutions) may have a particular set of characteristics, which are frequently defined along three dimensions: (i) *obligation*, which refers to a rule or commitment that is legally binding upon states or other actors; (ii) *precision*, which refers to rules that are clearly define the conduct they obligate, authorise, or prescribe; and (iii) *delegation* refers to the granted authority of third parties to implement, interpret, apply the rules and to resolve disputes (Abbot, Kenneth W.; Keohane, Robert O.; Moravscik, Andrew; Slaughter, Anne-Marie, and Snidal, Duncan, *The Concept of Legalization*, 54 International Organization [2000] 3, p. 401). Hence, hard law describes legally binding obligations that are precise and delegate authority for interpreting and implementing the law while soft law lacks one or more of these three dimensions to a varied degree (*Ibid.* p. 421).

imprecise (in language) or flexible (in context), consequently lacking peremptory character. As mentioned above, according to Article 26 of the Vienna Convention on the Law of Treaties, treaties are legally binding upon the parties. However, treaty, as a *legal form*, does not necessarily indicate the existence of a "hard law" if it is accepted that "hard law" is not only about a *legal form* but also about *enforceability* (i.e. the presence of an enforceable legal obligation).[61] This point was also made by Baxter, who argued that some treaties are soft in the sense that they impose no real obligations on the parties.[62]

Indeed, a growing number of treaty and treaty provisions do not include immediate obligations for the parties; instead they merely develop programmes of actions, as it in the examples of European Social Charter (1961) and the UN Covenant on Economic, Social and Cultural Rights (1966), urging or merely advising the parties to "seek to", "make effort to", "promote", or "avoid".[63] Such soft law provisions included in treaties are often nothing more than strong recommendations for the contracting parties and the content of such a treaty itself may often be nothing more than a declaration of intention as in the example of the 1979 Convention on Long-Range Transboundary Air Pollution. More and more often, states conclude treaties to consult together, to open negotiations, to settle certain problems by subsequent agreement, or "to develop the best policies and strategies" in a rather 'conventional' way (i.e., treaty form), especially in areas such as environment or economic/social development.

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[61] It is interesting to note that the binding quality of treaties is historically a new concept. According to the classical understanding of sovereignty, it was utterly reasonable that a sovereign was supreme and this supremacy could not be surrounded. Spinoza, for instance, objected to the idea that international treaties could bind sovereign states. Accordingly, treaties last so long as the cause, which produced it. When this enticement is no longer there, it is the right of either contracting party to disengage itself from obligation (Spinoza, *Tractatus Theologica-Politicus*, P.III, 11 cited in Lauterpacht, Hersch., *Spinoza and International Law*, 8 British Year Book of International Law, 1927, p. 94). It is also interesting to note that the rule of *pacta sunt servanda* that many scholars tend to recognise as the 'fundamental norm' of is not highly valued by Spinoza. Lauterpacht distinguishes three main features in Spinoza's doctrine of international relations: (i) the broad assertion that the mutual condition of states is that of states of nature with all its implications; (ii) the absence of any obligation to observe treaties; (iii) the notion that the state in its dealings with its neighbours is not bound by the cannons of morality and good faith (*Ibid.* p.92-93). Lauterpacht also draws our attention to the influence of Spinoza on Hobbes' political theory and his views on international relations (*Ibid.* p. 95-96).

[62] Baxter (1980) p. 549

[63] Weil (1983) p. 414

Not very different from the aforesaid techniques, some treaty provisions may lay down the undertakings more of a political bargain than legal commitments. The United Nations Framework Convention on Climate Change (UNFCCC) provides some good examples of such techniques. According to Article 4.7 of this Convention, the commitments undertaken under the UNFCCC by developing countries are conditional on performance of solidarity commitments by developed countries to provide funding and transfer of technology.[64] As Boyle observes, such treaty provisions are almost impossible to breach, therefore they are not normative and cannot be described as creating rules in a legal sense.[65]

The conclusion of a treaty may also aim to create a framework for everyday cooperation as well as develop further international rules that are stricter. This is particularly true of the so-called framework or umbrella conventions, which refer to a new international legislative method, according to which a first agreement has to be reached on the principles of common action, while the setting of more precise rules and standards are to be agreed on in subsequent protocol(s) and annexe(s). The UNFCCC once again provides a good example of such a legislative method. In the words of Boyle, the UNFCCC does impose some commitments on the parties,[66] but its core articles, dealing with policies and measures to tackle greenhouse gas emissions, are so cautiously and obscurely worded and so weak that it is uncertain whether any real obligations are created.[67] In this sense, the UNFCCC, likewise the 1985 Vienna Convention for the Protection of the Ozone Layer (and the subsequent Montreal Protocol), should be seen as a declaration of policy rational for the subsequent (Kyoto) protocol, which sets out greater specificity and more precise obligations.

In a similar way, some treaty provisions may provide guidance to the interpretation, elaboration, or application of hard law, or demands to continue negotiations in order to

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[64] Article 4.7 of the UNFCCC reads: "The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties".

[65] Boyle (1999) p. 907

[66] For instance, the principles found in Article 3 prescribe how the regime for regulating climate change is to be developed by the parties. It also calls for negotiation of the Kyoto Protocol.

[67] Boyle (1999) p. 907

conclude a new or further/detailed agreement in order to work out a permanent agreement or to give effect to a previous treaty.[68] For instance, Article 135 of the Treaty of Rome, which established the European Economic Community, required that a subsequent agreement on freedom of movement for workers from Member States had to be concluded.[69]

The so-called "political treaties", which refer to those treaties that are concluded with no expectation of effective enforcement, are traditionally classified as legal soft law. The name of 'treaty' in such international agreements may only be a camouflage for a soft instrument. By these 'treaties', states enter into alliances, or agree to co-ordinate their military action, or declare the neutrality of an area, or lay out their agreed policies for the future. The 1974 Agreement on the Prevention of Nuclear War between the U.S. and the Soviet Union and the Yalta Agreement[70] are the most quoted two examples for this type of treaty. Baxter also points out that a state party to such an agreement is often not under a legal obligation unless the treaty in question contains territorial or similar dispositive terms.[71]

International treaty is one form, among many, that states use to express their commitments in a given policy area. Then, why do states prefer the treaty form, instead of choosing a "non-binding form", when they do not intend to be bound by enforceable treaty obligation? The answer likely lies in the fact that by choosing the treaty form, which is legally binding, states reinforce "the credibility of their commitments, expand

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[68] Chinkin names such treaty provisions "elaborative" soft law (Chinkin, 2003, p. 30).

[69] "Subject to the provisions relating to public health, public security or public policy, freedom of movement within Member States for workers from the countries and territories, and within the countries and territories for workers from Member States, shall be governed by agreements to be concluded subsequently with the unanimous approval of Member States" (http://europa.eu.int/abc/obj/treaties/en/entr6e.htm#Article_135)

[70] Baxter (1980) p. 550. Although the Yalta Agreement was published in US Treaties in Force, the State Department declared that "the US regards the so-called Yalta Agreement as simply a statement of common purposes by the heads of the participating states and (...) not as of any legal effect in transferring territories" (35 Dept. State Bull. 484 (1956), cited in Schachter, Oscar, *The Twilight Existence of Nonbinding International Agreements*, 71 The American Journal of International Law (1977) 2, p. 298.

[71] *Ibid.* A refusal of a state to come to the aid of another under the terms of an alliance or the withdrawal of a State from a political or military pact cannot be subject to a legal dispute but political or perhaps economical. On the other hand, Lauterpacht considered that the Yalta agreement "incorporated definite rules of conduct which may be regarded as legally binding on the state in question" (Oppenheim, 1948, p. 788).

their available political strategies, and resolve problems of incomplete contracting".[72] As Lipson puts in, "treaties are a conventional way of raising the credibility of promises by staking national reputation on adherence".[73] In other words, "the more formal and public the agreement, the higher the reputational costs of non-compliance".[74] However, it should be remembered that by framing the agreement in the formal legal status states do not restrict only their sovereignty but they impose the same restriction on the other state parties in order to gain from the counter-promises of others or/and to manifest their normative commitment.[75]

To sum up, there is no denying that much of soft law is incorporated within non-binding instruments. However, as already pointed out, it should equally be recognised that the 'hard' or 'soft' nature of obligation defined in a treaty or treaty provision cannot necessarily be identified on the sole basis of the formally legally binding character of the legal instrument. One must recognise that in many cases, the "softness" of the instrument corresponds to the "softness" of its contents and its form.[76] Therefore, the criteria used to identify soft law should also take account of the nature and specificity of the obligation that states parties undertake.

2.4 "Non-binding" Soft Law

As discussed in the previous section, treaties, either bilateral or multilateral, are the most formal commitments that have full international legal status. Nonetheless, treaty is not the only form that states use to govern their relations. States can choose from a wide variety of forms to express their commitments, obligations and expectations. These 'alternative' forms include "informal arrangements", such as tacit agreements, in which

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[72] Abbot and Snidal (2000) p. 422

[73] Lipson, Charles, *Why are some international agreements informal?*, 45 International Organization (1991) 4, p. 511

[74] *Ibid.*, p. 508

[75] It is commonplace to examine different approaches to international legal commitments dividing them into two general categories as "rationalist" and "normativist" (constructivist). Accordingly, while the former approach maintains that states enter into contracts to promote their interests, the latter underlines that states choose formal agreements, which embody shared norms and understanding, to manifest their normative commitment.

[76] Dupuy, Pierre-Marie, *Soft Law and the International Law of Environment*, 12 Michigan Journal of International Law (1990-1991) p. 429

obligations and commitments are implied or inferred but not openly declared, and oral agreements, in which bargains are expressly stated but not documented as well as joint declarations, final communiqués, statements and ministerial conferences.[77]

There is no doubt that many of these instruments do not possess the precise characteristic of law in terms of formality and enforceability. Nor are they drafted in the form of legally enforceable instruments. It is also true that such "soft law" instruments are often no more than political pronouncements. Yet, these soft law instruments are either drafted and signed by the representatives of the states or voted for by them, and consequently, may still possess some degree of normative significance. For instance, as discussed in section 2.6 in detail, some of such instruments, especially U.N. General Assembly resolutions, may provide evidence of the legal practice of nation states or they may generate expectations regarding future behaviour.

As viewed above, non-binding soft law is a multi-faceted concept. It does not only present alternatives to treaties, but also it is sometimes used to complement them. In other words, some non-binding soft law instruments, decisions and standards can constitute a part of a multilateral treaty-making process in various ways. For instance, they may be a first step in a process eventually leading to conclusion of a treaty as it was the case in the United Nations Environment Programme (UNEP) Guidelines on Environmental Impact Assessment,[78] which were subsequently incorporated in the 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context.[79] Other non-binding soft law instruments may be used as mechanisms for authoritative interpretation or strengthening of the terms of a treaty, as in the example of

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[77] Lipson notes that despite the fact that these informal agreements differ in form and political intent, legal scholars rarely distinguish among them (Lipson, 1991, p. 502).

[78] "Goals and Principles of Environmental Impact Assessments", adopted by decision 14/25, of the Governing Council of UNEP of 17 June, 1987

[79] The Convention, which entered into force on 10 September 1997, sets out the obligations of Parties to assess the environmental impact of certain activities at an early stage of planning. It also lays down the general obligation of States to notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across boundaries (http://www.unece.org/env/eia/documents/conventiontextenglish.pdf).

the "General Comments of the Committee on Economic, Social and Cultural Rights under the International Convention on Economic, Social and Cultural Rights".[80]

Another important related role of non-binding soft law as part of a multilateral treaty-making process is to provide the detailed rules and technical standards required for the implementation of treaties. Such decisions,[81] operational directives of the multilateral development institutions, and technical and legal standards developed by legal and technical bodies frequently function in giving hard content to the overly-general and open-textured terms of especially framework environmental treaties. Decisions of COPs under various environmental treaties and technical standards adopted by various legal and technical commissions established within a treaty framework, as in the example of Legal and Technical Commissions established by Article 165 of the Convention on the Law and the Sea can exemplify this role. The rational behind adopting such non-binding rules and standards through various organs and bodies established under various institutions of multilateral regimes is the possibility to easily change or strength as scientific understanding or as political priorities change.

2.5 Gradual continuum between hardness and softness of norms

All things considered, it is possible to conclude that the "treaty" and "non-binding" soft law categorisation is neither absolute nor exempt from objections. Nor does this categorisation intend to draw a sharp distinction between those soft law instruments that create legal rights (and/or obligation) and those, which do not create *any* legal rights and/or obligations. Rather it lays its emphasis on the often-present gradual continuum between lesser and higher degree of normative specificity. In sum, the criteria used to identify "soft law" cannot solely be based on the formal character of a legal instrument

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[80] At the invitation of the UN Economic and Social Council, this Committee, which is a treaty body, has adopted general comments on various issues to assist states in fulfilling their treaty obligations. Although these comments and recommendations adopted by various UN treaty bodies are not legally binding on the parties, it is nonetheless difficult to ignore them due to their often precise and detailed contents.

[81] It is nonetheless important to note that certain decisions of international organisations are legally binding upon state members. For instance, Article 25 of the UN Charter states that the Members of the UN "agree to accept and carry out" the decisions of the Security Council in accordance with the UN Charter. Likewise, the decisions of the IMF on the maintenance or alteration of exchange rate or depreciation of currency and the authority of the International Civil Aviation Authority to adopt binding standards for navigation or qualifications of flight personnel also exemplify the binding character of the decisions that international organisations can have.

in which the norm at issue is integrated, but on the nature and specificity of the obligation that state parties undertake.

Figure 1 gives an overview of the most frequent set of characteristics of this gradual continuum. The three arrows illustrate that several factors play a role as determinants in defining the degree of the legal obligation (as well as compliance pull). The top placed arrow illustrates *form* as being one of the most defining factors as regard to the degree of hardness of an instrument. Accordingly, if the norm is included in a non-binding instrument, it should be considered presumptive evidence of the 'soft' nature of the norm. On the other hand, the form should not be the only criterion used to identify soft law, but the content of the norm, i.e., the nature and specificity of the obligation whether or not it is included in a treaty, should also be taken into consideration. Hence, the arrow placed in the middle depicts the factors related to the *content* of the norm at issue. It shows that the existence or absence of a concrete and explicit legal intention is a determining element on the legal nature of the concerned norm. The intention of the parties related to the degree of bindingness may be inferred from, among others, the wording of the norm (i.e., precise rules that define the conduct they require, authorise, or prescribe often indicate the existence of hard law) and the existence of certain mechanisms, such as "escape clause" that enable state parties to decide over the content of the legal obligation. Yet, as Dupuy observes, it should be recalled that there are examples where the content of a non-binding instrument has been precisely defined and formulated that, aside from the precaution of using 'should' instead of 'shall' to determine the obligation of the parties, some of its provisions could be easily integrated into a treaty.[82] The lowermost arrow indicates the degree of compliance; whether a norm has self-executing effect in domestic system and whether it set up mechanisms for monitoring, dispute settlement and enforcement. As a result, these observations suggest that the identification of soft law often requires a case-by-case examination in which a variety of factors are to be carefully considered. This is especially true for treaties that contain provisions with evasive prescriptions. And also, in some cases there can be made no clear-cut distinction between hard and soft law, but accept a degree and gradation.

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[82] Dupuy (1990-1999) p. 429

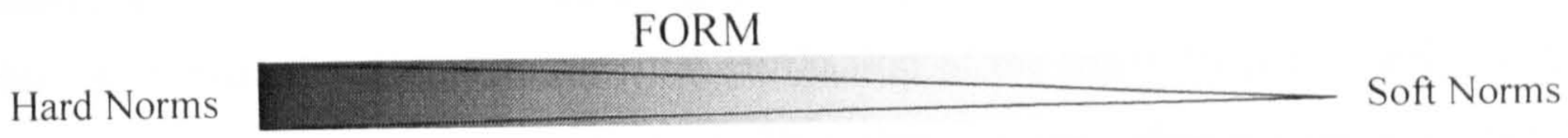

Figure 1. Gradual continuum between hardness and softness of norms

Source: Author's original formulation

2.6 Reasons for adopting soft law

Soft law is often explained on the basis of the shortcoming the "traditional" sources of international law to respond to the needs of a rapidly changing world, which requires fast, flexible, adaptable/effective, and participatory "normative" solutions. It is obvious that *formal* international instruments, such as treaties, are often more detailed and time-consuming due to the could-be problems in (i) defining legal obligations, (ii) monitoring, and (iii) non-compliance procedures, which demand a long, slow and costly process. This complexity of a formal international instrument is sometimes named as the *contracting cost*.[83] Moreover, after the final approval of a treaty, there is often

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[83] For an overview of different types of "contracting costs", in both 'pre' (such as negotiation) and 'post' (such as managing and enforcing commitments) agreement processes, see Abbott and Snidal (2000) p.434

additional procedure of incorporating the treaty into the national legal system, as national constitutions often require the ratification of the treaty by parliament if not by the complicated process of referendum. This phase is also often a slow and complex process. Besides, if the government cannot obtain the necessary majority, this would prevent the state concerned from becoming a party to the treaty completely. On the other hand, it is rare that the domestic legal systems require non-legal international agreements to be submitted for parliamentary approval. Not surprisingly, therefore, whenever it suits, the governments prefer legally non-binding soft law instruments, over which they have a conclusive control without the risk of domestic legislative involvement, and which does not need a lengthy process of approval. The responsibility of the implementation for such non-binding instruments is political rather than legal.[84]

The slow-down 'deficiency' of democracy is hardly a new issue. Already in 1748, Montesquieu, in his celebrated *On the Spirit of Laws*, drew attention to the fact that decisions in democracies are often time-consuming compared to, what he then called, 'monarchical' and 'despotic' forms of government. However, as Montesquieu did not fail to add, the 'practicality' of by-passing the democratic control mechanisms set up within a national legal system comes with a price. The other side of the coin is weak legitimacy. For, in modern international life, international regulations have increasingly become influential on domestic law and consequently on the daily life of people. Therefore, the avoidance from the liability of domestic control can be proved to be more costly, not only in terms of accountability/legitimacy deficit, but also in terms of the "depoliticisation" effect in the long run.

In certain new policy areas, such as environmental protection, states may be in a "learning" phase, during which they may not be yet prepared to bind themselves legally nonetheless are willing to adopt and test certain rules and principles, as in the example of "The Forest Declaration" adopted in at the 1992 Rio Conference on Environment and Development, entitled "A Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest".[85]

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[84] Bothe (1980) p. 90

[85] For the Rio documents in general, see *International Legal Material*, 31 (1992) p.818 *et seq.*

Soft law has relative advantages over hard law in the cases of re-negotiation and elaboration by being comparatively less costly. Due to the uncertainty of the future in issue areas such as economy and environments, states may be reluctant to make long-term and inflexible bargains. The changing political, economical or technological circumstances may oblige for flexible solutions. In such cases, states may use both forms of soft law (i.e. "treaty" and "non-binding") to capture the potential gains from co-operation and limit the possible losses. Different techniques may be used to create treaties, which are able to cope with uncertainty such as: limited duration, imprecise formulation of legal obligations, complete or partial withdrawal provisions, exceptions, and escape clauses. Another technique to capture potential gains from co-operation and limit the possible losses is to use non-legal soft law agreements. These agreements may be precise but since they are legally non-binding, they are more easily renegotiable and less costly to abandon than treaties.[86]

"Soft provisions/clauses" in a treaty may also exist in order to leave the state parties room to decide how to interpret and implement the treaty provisions.[87] According to Gruchalla-Wesierski, the possibility to retain discretion over the content of obligation constitutes the subjective aspect of soft law. Thus, vagueness leaves to each state to define the content of the legal obligation.[88] For instance, treaty provisions involving

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[86] For a detailed account of 'uncertainty' cause, see Lipson (1991) p. 518 *et seq.* and Abbott and Snidal (2000) p. 441 *et seq*.

[87] The "margin of appreciation" doctrine can be seen as another device serving for the same purpose. The doctrine is based on the idea that each country has the right to decide how to apply international treaties obligations to make them suitable for each State's own circumstances and societal constrains and expectations. The doctrine "initially responded to concerns of national governments that international policies could jeopardize their national security" (Benvenitsi, Eva, *Margin of Appreciation, Consensus And Universal Standards*, 31 International Law and Politics, 1999, p. 845) while it has nowadays been used in non-security areas such as human rights, allocation and management of national resources etc. For a detailed analysis of the use of the doctrine in the decisions of the European Court of Human Rights, see Brems, Eva, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 Heidelberg Journal of International Law [ZaöRV], (1996) p. 240 and Arai-Takahashi, Yutaka, *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR*, Intersentia: Antwerp; Oxford, 2002

[88] Gruchalla-Wesierski, Tadeusz, *A Framework for Understanding "Soft Law"*, 30 McGill Law Journal, (1984) p. 49. Soft law obligation also has an objective aspect named by the author as the 'exigibility', which means that compliance may be required with the objective part of the obligation, which is enforceable. Logically, of course, the sanctions available to enforce the objective element will depend on whether the soft law is legal or non-legal (*Ibid.* p.40). The author also adds that the State parties may have an *escape clause* (or opting-out provisions) which allow the bound party to determine when the obligation is exigible (*Ibid.* p.49). For example, the 1963 Nuclear Test Ban Treaty contains such a clause. Accordingly, "Each Party shall in exercising its nationals sovereignty have the right to withdraw from the

economic and social rights, such as the "International Convenant on Economic, Social and Cultural Rights" and the "European Social Charter", do often not lay down what legal responsibilities state parties precisely undertake. According to Alston, the indeterminacy as to their normative implications is a major shortcoming of the existing international arrangements for the promotion of respect for economic rights is the vagueness of many of the rights as formulated in the Convenant.[89] On the other hand, it can be argued that the legal nature of rights does not indicate their validity but their applicability. Several rights embodied in the International Convenant on Economic, Social and Cultural Rights for instance, cannot be invoked in courts because of their programmatory or political nature. However, they may still be deemed legally binding if they create legal obligations to their state parties.[90] For, the validity of law does not necessarily imply its 'completeness' in the meaning that the rules of law provide a solution to any given problem in any given situation. Needless to say, this point is far from being settled. While for instance Georgiev maintains that the general and indeterminate nature of rules do not influence their validity even though they may permit different and contradictory interpretations and, political arbitrariness,[91] Morgenthau argues that if rules are not enforced in case of violation the validity of the rules in question are highly doubtful.[92]

In a similar way, in a world of sovereign states with divergent interests, as often pointed out, it may be difficult to agree on legal rules. The divergence between states in terms of legal/cultural tradition, economic development level, ideology, and readiness for a

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Treaty if it decides that extraordinary events, related to the subject matter of this treaty, have jeopardized the supreme interests of its country" (14 U.S.T. 1313, T.I.A.S. No.5433, 480 U.N.T.S. 43).

[89] Alston, P., "No Right No Complain About Being Poor" in Eide, Asbjørn and Helgesen, Jan (eds.), *The Future of Human Rights Protection in a Changing World: essays in honour of Torkel Opsahl*, Oslo: Norwegian University Press, 1991, p. 86. Koskenniemi defines normativity of international rules as follows: "rules can be opposed to and applied against the subjective political will and behaviour of states." (1990), p. 8.

[90] Scheinin, Martin, "Economic and Social Rights as Legal Rights" in, Asbjørn, Eide, Krause, Catarina and Rosas, Allan (eds.), *Economic, Social and Cultural Rights*, Martinus Nijhoff Publishers: Netherlands, 1995, p. 41. Yet some scholars claim that if lack of precision, and generality of the terms of the agreements are too indefinite to create enforceable obligations, these agreements should be presumed to be non-binding (See, Schachter, 1977, p. 297).

[91] Georgiev (1993) p. 9. However, some scholars claim that if lack of precision and generality of the terms of the agreements are too indefinite to create enforceable obligations, these agreements should be presumed to be non-binding (See, Schachter, 1977, p. 297).

[92] Morgenthau, Hans J., *Politics Among Nations*, Alfred A. Knopf: New York, 1985, p. 299

specific legal commitment make in many cases soft law more attractive than hard commitment. Use of soft law instruments enables states to agree to more detailed and precise provisions because their legal commitments and the consequences of any non-compliance are more limited. The main techniques to bridge over these differences are to retain discretion over the content of the obligations, or to preserve an emergency exit when needed and to secure flexibility in implementation. According to Bothe, states are generally prepared to accept a legal commitment only if they in a reasonable way can foresee that they will be in a position to comply with it.[93] Thus, if a situation is unsettled, states usually prefer not to be bound legally. Yet, states may wish to reach an agreement if it is considered useful, i.e. there is a "certainty of mutual expectations".[94] According to Shelton, the choice of soft law may also reflect respect for hard law. States may use the soft law form when they have concerns about the possibility of non-compliance, either because of domestic political opposition, lack of ability or capacity to comply with a norm.[95]

Abbot and Snidal explain the recent interest in soft law within the wider context of an increasing "legalisation" of international relations in the post Cold-War era. According to the writers, contemporary international relations have a tendency to "move to law" even though this legalisation displays great variety both in degree and form. As maintained by the writers, international actors choose to regulate their relations through international law and design treaties and other 'softer' legal arrangements to solve specific substantive and political problems. They further argue that international actors choose softer forms of legalised governance when those forms offer superior institutional solutions mainly due to the advantages soft law may have including lower transaction cost.[96]

As already pointed out, the argument for using soft law is often sustained on the ground of flexibility. It is for instance said that being flexible soft law instruments can be adapted to the needs of specific situations. They can also more easily adapt to

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[93] Bothe, Michael, *Legal and Non-Legal Norms –A Meaningful Distinction in International Relations?*, 11 Netherlands Yearbook of International Law (1980) p. 91

[94] *Ibid.* Klabbers considers this motive 'pessimist' and names these types of agreement as "the semblance of agreement" (Klabbers, 1998, p. 184).

[95] Shelton (2003) p.12

[96] Abbott and Snidal (2000) p. 421

suggestion of improvements are either arising out of institutional experience or new scientific evidence.[97] However, it is important to note that soft law is not the only means of creating flexibility; there are other devices that enable states to respond to the demand for flexibility. One way of creating flexibility, especially in regard to the rapid progress in scientific knowledge is the adoption of technical norms and specifications in the form of annexes of the main treaty and of special procedures for modifying such annexes without being obliged to the slow procedure for the modification of treaties. Another and relatively new technique in this regard is the so-called "relative standards", which entails differentiated obligations on the contracting states, either because of the recognition of the difference between their level of development or the difference in responsibility between developed and developing countries for the historically larger contribution to a problem area of developed countries, especially to global environmental degradation, as in the case of climate change.[98]

Needless to say, the drawback of these 'advantages' of soft law over hard obligation is the conceivable weaker engagement to live up to these soft commitments. Therefore, the use of soft law is sometimes labelled *delegalisation* of international law.[99] Yet, even in such cases, where a soft law arrangement is used as "window-dressing", the subject-matter that soft law instrument in question embodies may at a later stage become 'legalised' or 'internationalised'. This development may, in turn, serve as a valuable tool for international actors, not least for NGOs, to promote a normative discourse in the issue-area and stimulate accountability politics especially when soft law instruments

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[97] Yet some writers consider *soft* law rules and *flexible* rules as two different phenomena. Carlson, for instance, contends that flexibility and softness are not synonymous or analogous concepts. The writer argues that flexible rules that permit temporary and limited deviations from important norms may contribute to respect for those norms, by permitting gradual compliance with the norms. By doing so, the perceived harmful impact of the norms may be limited. Moreover, within clearly defined boundaries, flexible rules that cause non-uniform obligation can contribute to the application of the terms more fairly. In contrast, according to Carlson, soft law creates national freedom without possessing most of the virtues flexible norms have. The ambiguity and weakness that soft law often displays foster derogation from and disrespect for the goals that soft law norms seek to achieve (Carlson, Jonathan, *Hunger, Agricultural Trade Liberalization, and Soft International Law: Addressing the Legal Dimension of a Political Problem*, 70 Iowa Law Review [1984-1985] p. 1270).

[98] Article 3.1 of the UNFCCC sets out the principle of "common but differentiated responsibility", which refers to the fact that certain problems affect and are affected by all nations in common, if not to the same degree, and that the resulting responsibilities ought to be differentiated because not all nations should contribute equally to alleviate the problem (Yamin and Depledge, 2004, p. 69).

[99] For the use of the term "delegalisation" in the context of sustainable development, see Barral, Virginie, *Johannesburg 2002: Quoi de neuf pour le dévéloppement durable*, 107 Revue Générale De Droit International Public (2003) 2, p. 415.

contain normative commitments. This is a point that can sometimes be important especially in the areas such as human rights and environment.

As discussed in the beginning of this chapter, the development of soft law could, at least partly, be explained by the increasing gap between the "traditional sources" of international law and international reality. It is held that the fundamental role of soft law is to create a compromise between *sovereignty* and *order*. Accordingly, in the areas of international economy, technology, environment and more recently "international terror", states are willing (or even often obliged) to address issue areas collectively but at the same time they do not want to be subject to any constrain, which may arise from such 'collective actions'. States mainly use two techniques in order to bridge over these apparently conflicting goals. The first technique is that when signing a treaty, states retain discretion over the definition of the obligations they undertake. Secondly, they simply avoid undertaking precise legal obligations. Sometimes states use a combination of both methods. According to Gruchalla-Wesierski, those provisions, which use one of the above-described techniques, or both, can be defined as soft law.[100]

The conciliatory role of soft law between sovereignty and order becomes more apparent when states make international treaties, which contain legal obligations and are binding upon state parties. Such a legal obligation always entails what is called "sovereignty costs". Abbot and Snidal argue that states attempt to overcome or at least to limit sovereignty cost arisen from treaty obligations by using either legally binding nonetheless enforceable or legally non-binding legal arrangements. The writers identify three different types of sovereignty cost.[101] The first type concerns the limitation of sovereignty over particular policy issues, such as allowing the free movement of capital, goods and labours within the borders of the states parties to an agreement. In these cases the sovereignty cost is relatively low. States usually accept this type of cost when they seek to attain more important collective results. The second type of sovereignty cost

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[100] Gruchalla-Wesierski, Tadeusz, *A Framework for Understanding "Soft Law"*, 30 McGill Law Journal (1984) p. 39

[101] Abbot and Snidal (2000) p. 436-441. On the other hand, however, this function of soft law would evidently not be applicable to the regulations issued by non-state actors, such as MNEs and NGOs even if these regulations were accepted as soft 'law'. For, while soft law issued by states and international organisations could be considered as a 'compromise' between sovereignty and order, regulations issued by non-state actors, if considered soft 'law', would indicate a new structure in the international legal order.

occurs when states are obliged to accept international authority over important domestic decision areas, as it is the case within the WTO framework. Within this type of framework, states' ability to govern important domestic policy issues, such as industrial policy, is considerably reduced. Thus, the sovereignty costs are relatively high. The sovereignty cost is the highest in the third category. This type of cost refers to when an international agreement interferes in the relations between the state and its citizens or territory as in the example of the rules of the International Criminal Court.

According to this reasoning, the very existence of the concept of soft law is a side-production of the incompatibility of the legal sovereignty of the nation-states (in the meaning that they are not subject to any higher authority) with the minimum needs for an international legal order, a phenomenon that weakens the structure of international law. It is hence not unexpected that Klabbers links the soft law approach to the criticisms against international law. Accordingly (and sarcastically), the soft law thesis is prepared for both prongs of attack (i.e. positivism and political realism). First it pays tribute to positivism that "we actually talk about law, that it actually, just like real law, creates commitments and gives rise to expectations but that it is also capable of accurately reflecting politics; soft law can bow gracefully to overriding political demands".[102]

To summarise, one of the most striking features of the international legislation in the post-war period is the increasing use of soft law. However this development has also caused tension between two conflicting strands of argument. On one hand, soft law instruments and the hortatory and good-will language of soft law clauses in international treaties are welcomed on the ground of flexibility, widespread participation, speed, adaptability, and effective implementation, not least by using purposive interpretation of soft law instruments and treaty principles. On the other hand, soft law instruments and soft law clauses in international treaties can be understood as proof of the unwillingness of treaty-makers to create effective law or of the inability of the state parties to reach a clear conclusion on a specific and formally binding and, thereby, effective obligation. Moreover, it can be said that arguments such as, "states' wish" and "the advantages of reaching *some form* of agreement" in relation to the 'facilitatory' function of soft law should be approached with prudence. The "states'

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[102] Klabbers, Jan, *The Redundancy of Soft Law*, 65 Nordic Journal of International Law (1996) 2, p. 170

wish" approach embodies a certain degree of subjectivism, which presumes that "states can conclude whatever they wish to conclude, and if they wish to conclude a soft law instrument, then a soft law instrument it will be."[103] It is important to bear in mind that the notion that states "choose" soft law (states' wish) formulations may be deceptive. As Finnemore argues, soft law, like customary law, is not always deliberately created by states as a result of their strategic purpose. Soft law "is not simply out there to be chosen".[104] The root of the premise that states are able to "choose "may be found in the understanding that equal, independent and *sovereign* states are empowered to act in ways that have been decided among them. From this assumption it follows that international law is the "universalising will"[105] of sovereign states. However, taking states as sole "international reality maker" does not take into consideration several other aspects of the dynamic and complex social process in which international law is formed. As to the latter approach, which suggests that soft law enables states to reach an agreement in those situations where the treaty form might be too hard and therefore out of political reach, might at first sight appear realistic. However, the "some agreement better than no agreement" approach is, as Klabbers contends, rather a simplistic assessment of international relations. The understanding that 'norms are better than chaos' also reveals the apologetic tendency of the use of soft law, which gives "the politicians the possibility to be released from their responsibility to take necessary measures to achieve a given effect.[106]

2.7 Soft law: a challenge to the normative structure of international law?

The widening and intensification of the scope and function of international law both horizontally and vertically and the inclusion of new actors in the international arena have raised doubts about whether the so-called "traditional sources" of international law

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[103] Klabbers (1996) p. 169

[104] Finnemore, Martha and Toope, Stephen, J., *Alternatives to "Legalization": Richer Views of Law and Politics*, 55 International Organization (2001) 3, p.748.

[105] Allott (2001) p. 300

[106] Klabbers (1998), p. 383

might still be sufficient to meet the demands international life asks. However, despite the apparent insufficiency of the "traditional sources" of international law, the notion of soft law was not readily recognised in the beginning. Soft law was rejected either categorically or partially on the basis of lack of legality and has for a long time not been attributed neither the status of a source of law nor considered having a "self-contained regime"[107] though some writers have claimed that it has or should have such a status.[108] Instead, the "traditional sources" are regarded to be capable to meet the new phenomena, which have occurred at the international arena.

In point of fact, customary international law and treaties, the "traditional sources" of international law, have to some extent been adapted to these changes. The common occurrence of adaptation is to assimilate the norms and instruments, which do not fall in either category of the traditional sources within the framework of the established law making process, in particular, international customary law. The most controversy in this respect emerged out of the question of the legal character of the UN General Assembly (UNGA) resolutions. It is fairly evident from the text of the UN Charter that the UN General Assembly does, with some exceptions,[109] not have the legal power of taking binding decisions upon its member states. As discussed in Chapter 5, related to the efforts by the so-called Third World countries to establish new legal frameworks for the

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[107] A "self-contained" regime is generally understood as a subsystem of international law that contains all necessary secondary norms and that significantly limits the application of secondary norms of general international law. A "self-contained" regime provides for remedies in case of breaches of the obligations under the regime. In other words, a self-contained regime does not include only the rules for conduct of states, but also rules on the consequences of non-compliance with such rules. The prime examples of "self-contained" regimes are the WTO legal system and European Community Law (Marschik, Axel, *Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System*, 9 European Journal of International Law [1998] 1, p. 220). See also, Simma, Bruno and Pulkowski, Dirk, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 European Journal of International Law (2006) 3

[108] Discussing on "non-treaty agreement", Hillgenberg, for instance, argues that it is not possible to ascertain from the Vienna Convention of 1969 on the Law of Treaties whether non-treaty agreements are excluded from the application of international law. While the writer acknowledged that if the parties expressly or implicitly do not want a treaty, the provisions of the Vienna Convention will not apply. However, the writer adds, "this does not necessarily mean that all non-treaty agreements only follow political or moral rules. There is no provision of international law which prohibits such agreement as sources of law, unless –obviously- they violate *jus cogens*" (Hillgenberg, Hartmut, *A Fresh Look at Soft Law*, 10 European Journal of International Law [1999] p. 503).

[109] According to Article 18(2) of the UN Charter, the following decisions of the General Assembly are binding: the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1© of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary question.

New International Economic Order (NIEO) in the 1960s and 1970s, some adherents of the NIEO argued for the bindingness of UNGA resolutions on the ground that customary international law has changed the hortatory character of the UN Charter and consequently UNGA resolutions have become mandatory.[110] However, there is no evidence supporting the development of such a new customary rule. The fact is that state consent is essential for new rule development in international law and no one can expect the US and other major economic powers to consent to such a rule development that would reduce their economical and political power considerably.

As a matter of fact, UNGA resolutions can be linked to customary international law at least in three distinctive ways: (i) depending on the "circumstances of adoption" (i.e. adoption by majority vote, unanimous vote, consensus, reservations expressed by particular states), some resolutions may serve as *evidence* of existing customary international law, as in the example of The "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States".[111] They may also record the content of existing customary international law on particular matters or they may articulate the substance of existing legal norms. Some resolutions may also constitute *opinio juris* in the forming of a customary law when they are not authoritative themselves.[112] It is important to remember, however, that to be the 'evidence' of a customary law is not the same as constituting customary law itself. (ii) The UNGA resolutions can even create a new rule as in the example of the "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space", which led to the adoption of four major multilateral treaties.[113] (iii) Some resolutions may promote new rules in certain areas. The "Universal Declaration of

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[110] Another far-reaching argument regarding customary law character of UNGA resolutions is made on the basis of the so-called "instant customary law", which refers to the assertion, according to which customary law requires only *opinio juris* and not necessarily together with 'practice'. On the subject, see Mendelson, Maurice, "The Legal Character of General Assembly Resolutions: Some Considerations of Principle" in Hossain Kamal (ed.), *Legal Aspects of the New International Economic Order*, Nichlos Publishing Company: New York, 1980, p. 99; and Seidl-Hohenveldern, Ignaz, *International Economic Law*, Kluwer Law International: Dordrecht, 1999, p. 35

[111] Resolution 2625 (XXV) of 24 October 1970. According to Brownlie, among others, it provides evidence of consensus among Member States of the UN on the meaning and elaboration of the principles of the Charter (Brownlie, Ian, *Basic Documents in International Law*, Clarendon Press: Oxford, 1995, p. 36).

[112] Castaneda, Jorge, *Legal Effects of UN Resolutions*, Colombia University Press: New York, 1969, p. 2-21

[113] Resolution 1962 (XVIII) of 13 December 1963

Human Rights" (UDHR),[114] for instance, intended to be an authoritative guide of the UN Charter has consequently become, at least partly, a new customary international law. This is so, at least due to the fact that the UDHR has to a large extent been embodied in the subsequent UN Human Rights Covenants as positive international law.[115]

It can further be said on the association between resolutions and customary international law that even when resolutions do not gain full normative quality, they may still constitute "*embryonic norms* of nascent legal force or *quasi-legal rules*".[116] It should also be recalled that non-binding soft law instruments might possess variable regulatory forces and in certain cases this may be judicially relevant[117], not least in the application of law through serving as an interpretative guide for the courts, as Fastenraht suggests.[118] On the other hand, the threshold of legal normativity should not be undermined despite the complexity of the matter to determine what may be called the normativity threshold.[119] It is also important to be aware of the fact that at some stage of development of rules towards customary law, the normativity threshold may be further blurred. Indeed, Dupuy, for instance, defines soft law as the "transitional phase in the development of norms where their content is vague and scope imprecise.[120]

Some scholars have tried to explain the legal character of UNGA resolutions within the framework of the "traditional sources" of international law in association with international treaties. It has been argued for instance that the expression of consent or

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[114] Resolution 217 (III) of 10 December 1948

[115] The "International Covenant on Civil and Political Rights" and the "International Covenant on Economic, Social, and Cultural Rights", both are adopted in 1966 and entered into force in 1976. See also page 70 in this study.

[116] Weil (1983) p. 416, footnote 10

[117] For instance, in *Grimaldi* case, the European Court of Justice held that Article 189 of the EC Treaty recommendations must be taken into account when interpreting national legislation despite the fact that these recommendations are legally non-binding (Case C-322/88, Salvatore Grimaldi *v.* Fonds des Maladies Professionelles, [1989] ECR 4407, cited in Klabbers, 1998, p. 388).

[118] Fastenraht, Ulrich, *Relative normativity in international law*, 4 European Journal of International Law (1993) p. 305-340.

[119] Weil (1983, p. 415). In Weil's understanding, the legal threshold is important to limit gradualness and see whether a legal norm was actually born (become hard 'enough!').

[120] Dupuy, René, Jean, "Declaratory Law and Programmatory Law: From Revolutionary Custom to "Soft Law" in Akkerman, Robert, J. (ed.), *Declarations on Principles. A Quest for Universal Peace*, Sijthoff: Leyden, 1977, p.252

acceptance through recommendations constitutes a modern extension of the law of treaties. As Van Hoof points out, this line of reasoning has proved particularly attractive with respect to resolutions, which have been adopted unanimously.[121] According to this approach, unanimously adopted resolutions can be deemed as an extension of treaty law depending on the extent and quality of the consensus. Or, when they do not create enforceable rights and duties they can still be used to interpret or legitimate a treaty.[122] However, it would be very difficult to reach a general consensus on this ground. For, the consent that a state express for a recommendation may be qualitatively different from the consent a state expresses in the case of a treaty. It should be remembered that states vote or express views more 'freely' in the UN General Assembly. States know that these views or votes are *not* legally binding upon them. For, according to Chapter IV of the UN Charter on the "Functions and Powers of the General Assembly, this organ may in principle make only "recommendation", whose legal character is non-binding.[123]

The "general principles of the law recognised by civilised nations" is also suggested by scholars to explain the legal nature of UNGA resolutions within the realm of the "traditional sources" of international law.[124] Since this subsidiary source exists to fill in gaps between treaty law and customary law some scholars have argued that general

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[121] Van Hoof (1983) p. 181

[122] See among others, Asamoah, Obed, Y., *The Legal Significance of the Declarations of the General Assembly of the United Nations*, Nijhoff: The Hague, 1966. It can also be said that resolutions of international organisations are viewed as a source of international law in Soviet international law tradition. However, this recognition was strictly conditioned to the existence of a concordance of the wills of states relating to recognition of a particular rule as a norm of international law (See Tunkin, 1974).

[123] Article 10 of the UN Charter reads as follows: "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters".

[124] General principles are a secondary source of international law, embodied in Article 38(1) © of the Statute of the International Court of Justice. The idea is that some rules of law may not have had sufficient application in practice to be accepted as a rule of customary law. Nonetheless, it may be invoked as a rule of international law, at least in claims based on injury to persons, because it is a general principle common to the major legal systems of the world and is not inappropriate for international claims. For example, rules relating to the administration of justice, such as the rule that no one may be judge in his own cause and rule. General principles may also provide 'rules of reason' of a general character, such as the principle that rights must not be abused, and the right to compensation to repair a wrong. International practice may sometimes convert such a principle into a rule of customary law. On the subject, among others, see Cheng, Bin, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press: Cambridge, 1987.

principles must/can be the basis of the development of new rules in international law.[125] Even though this subsidiary source can be useful to make sure that international law covers most aspects of international life, it is highly questionable whether this function of the subsidiary sources can be stretched out to cover every aspect of international legal theory. Above all, there would not be a wide consensus on what these general principles might be as the legal traditions vary considerably in the world. In the case of UNGA resolutions, there is little ground to claim that states voting for a resolution each time rely on a 'general principle'. In addition, soft law has today become a much larger issue than only resolutions of international organisations. It would therefore not be satisfactory to maintain that all these soft norms and instruments issued by manifold international authorities covering countless areas, can adequately be explained by general principles.

The non or limited recognition of soft law within the realm of the "traditional sources" of international law has not been found satisfactory by many scholars considering that an increasing body of international soft norms and instruments regulate the conduct of states, international organisations and even private entities. It is claimed that attempts to explain the increased use of soft norms and instruments within the scope of the traditional sources of international law are almost bound to result in stretching the concept of these sources beyond what would seem to be warranted in view of the clarity and certainty the sources have to provide.[126] It is indeed important to elaborate theoretical boundaries, which permit us to understand the nature and functions of legal norms. Van Hoof explains the limitation in the adaptation of custom and treaties partly by the need for clarity and certainty that law and in particular its sources have to provide. "If the concept of each of these sources is stretched beyond a certain point, in an effort to have them encompass phenomena resulting from new developments, the results become counter-productive".[127] This argument forwards the idea that the established sources of international law would face the risk of failing to function as a regulator of distinguishing legal norms from other types of norms and rules.

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[125] See for instance, Laing, Edward, A., *International Economic Law and Public Order in the Age of Equality*, 12 Law and Policy in International Business (1980) 3, p. 746 and Asamoah (1966, p. 61-62).

[126] *Ibid.* p. 184

[127] Van Hoof (1983) p. 179

Some scholars have suggested that UNGA resolutions should be recognised as an 'independent' source of international law, with its own. According to this "new source" approach, such recognition would enhance the ability of the UN to respond more dynamically to new developments of international life. Criticising "a sovereignty-centred conception of obligation", which assumes that all obligations in international law can be traced directly or indirectly to the consent of the sovereign state, Falk, for instance, suggested that the resolutions of the General Assembly can be placed in the quasi-legislative process of customary law formation. For, according to this writer, 'consent' as the basis of obligation, does not account for the growth of interdependence and participation as salient aspects of community at the world level. Instead, "there is a discernible trend from consent to consensus as the basis of international legal obligations".[128] In a similar vein, Abi-Saab considers UN resolutions as 'new custom'; a complex legislative mechanism without formal legislative effects but nonetheless authoritative because of their relevance, ascertainable content and democratic legitimacy.[129] Gathii has also suggested that 'general principles of law' listed in Article 38 (1) (c) of the Statute of the ICJ can be accepted as the legal basis for admitting UNGA resolutions as sources of international law.[130] Indeed, there is no doubt that a new source of international law can be created through existing sources. A custom could grow up, say for instance, out of a unanimous UNGA resolution. Or such an approach might also be justified on the assumption of the emergence of completely new ways of law-making, as in the example of new *lex mercatoria*, as suggested by some scholars. As a matter of fact, the search for "new sources" is by no means limited by UNGA resolutions: the contractual activities of MNEs, practices of legal or non-legal professionals, such as bankers and tax specialists, shortly "transnational business practices" are increasingly deemed as "new sources of law". Among many, Cutler holds that these new sources of law do not emanate from the authority of the public state but from the authority of non-state actors.[131]

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[128] Falk, Richard, *On the Quasi-Legislative Competence of the General Assembly*, 60 American Journal of International Law (1966) p. 785

[129] Cited in Koskenniemi (1998) p. 405

[130] Gathii (2000) p. 2031. On the legal statues of UNGA resolutions *inter alia*, see Higgins, Rosalyn, *The United Nations and Law Making*, 64 American Journal of International Law (1970).

[131] Cutler (2003) p. 22

Some scholars, who agree on the shortcomings of the "traditional sources", nevertheless do not adhere to the idea of the "new source approach", have suggested that the concept of soft law can bridge the widening gap between traditional sources and the new changes that have occurred in international rule-making. Van Hoof holds that this "soft law approach" has to a large extent succeeded in explaining the traditional sources of international law without attributing to soft law a status of a new source of international law. According to the writer, the "soft law" approach most of all, identifies and recognises the existence of a "grey area". For, as discussed in this section, some international rules and instruments cannot be understood and classified by using the criteria of the traditional sources. They do not fulfil the formal requirements for rules of international law. Nevertheless, they meet at least certain criteria and cannot therefore be considered entirely legally insignificant.[132] Besides, as will be discussed below, some soft law instruments are legally binding and some others have legal effects. Yet, it should be remembered that soft law is often unenforceable "because the parties retain discretion over the content of the obligation or its exigibility",[133] a characteristic, which is frequently its *raison d'être*.

To sum up, it can be said that international law produces many examples of soft law. Nevertheless, the "soft law" approach demands great prudence in order to avoid an oversimplified understanding of international law- making. For instance, as Klabbers rightly points out, the understanding that "the General Assembly is not empowered to make hard law, so consequently, whatever it makes must be soft law" would be default reasoning.[134] The result of such an over-inclusive use of soft law would blur the normative characteristics of international legal norms and undermine the authority of established legal norms.

2.8 Soft law as "law"

As viewed in the present chapter, there are various sources, from which "softness" of a norm or instrument may be originated. For instance, norms or instruments can be "soft",

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[132] *Ibid.* p. 187-191

[133] Gruchalla-Wesierski (1984) p. 40

[134] Klabbers (1996) p. 169.

because they may be not among the three "traditional sources" of international law due to manifold reasons, such as they may emanate from bodies that lack international law-making authority or are based upon voluntary adherence. Norms and instruments can also be "soft" because of the "soft", i.e., non-binding or non-compulsory, nature of the obligation that they articulate. In the latter case, we are to some extent talking about a limited normative force of certain norms due to the fact that those norms would not be *enforceable* by an international court or other international organ. However, any attempt to conceptualise the boundaries of the norms of international law on the basis of "bindingness" or "enforceability" is inherently controversial in that the international law-making process itself is usually informal and essentially decentralised. Thus, to reject the concept of soft law on the ground of a rigid understanding of law that a norm is either obligatory, i.e., "binding" or legally irrelevant is normatively untenable, considering that there is often no clear answer as to what make the binding character of international 'legal' norms. Nor is it possible to draw a rigorous line between legal norms and non-legal norms on the ground of enforceability given that international law in itself lacks both a sovereign (command) and a centrally organised sanction system.[135] As often pointed out, the United Nations is not a world government, its General Assembly is not a world parliament, the Security Council is not a world government nor world police and the International Court of Justice (ICJ), which lacks the authority of

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[135] Of course this does not imply that international law completely lacks any sanction. Quite contrary, sanction has always existed in international law in the form of diplomatic, economical or military action. In the Westphalian era of international law, obligations were largely bilateral and reciprocal, enforced by self-help (not least by war) and counter-measure while in the 'modern era' new enforcement mechanisms have been developed. For instance, within the UN system, under Chapter VII of the Charter, the UN Security Council may take enforcement measures where it is determined the existence of a threat to the peace, breach of the peace, or act of aggression. In addition, the decisions of *ad hoc* tribunals as well as those of International Court of Justice are also binding.

There are also non-legal enforcement mechanisms that may function as sanction. For example, *economic coercion*, which refers to "efforts to project influence across frontiers by denying or conditioning access to a country's resources, raw materials, semi-or finished products, capital, technology, services or consumers" (Farer, Tom, *Political and Economic Coercion in Contemporary International Law*, 79 American Journal of International Law [1985] p. 408 in "Editorial Comments"). For further reading, see Orford, Anne, *Locating the International: Military and Monetary Intervention after the Cold War*, 38 Harvard International Law Journal (1997) 2; Bowett, Derek. W., *International Law and Economic Coercion*, 16 Virginia Journal of International Law (1976); Chimni, Bhupinder, *Towards A Third World Approach to Non-intervention*, 20 Indian Journal of international law (1980); and Wallensteen, Peter, *A Century of Economic Sanctions*, Uppsala University: Sweden, 2000. For a general account of sanction, see also Wallensteen, Peter an Staibano, Carina (Eds.), *International Sanctions: between words and wars in the global system*, Frank Cass: New York, 2005.

compulsory jurisdiction, is not a world court.[136] When there is an alleged breach of international obligation in the absence of a centralised authoritative decision-maker there may consequently be disagreement between states even about what constitutes a breach and what rule to be applied in a given case. In addition, even if the state parties to a dispute agree on the authority of the ICJ for the case in question, there is no authority, which can adequately force the state to comply with the ICJ's decision.[137] In the words of Cassese, it is still for individual states to decide how to settle disputes or to impel compliance with law.[138] Hence, if law is essentially considered a matter of commanded rules backed by sanction,[139] then the whole international law can be seen as "soft" and "little more than a euphemism for international morality".[140]

In order to appreciate the relative normative force of international "soft" norms may have, that is also to ask, whether there is a "soft law", it is important to examine the concept of obligation, which corresponds to the following two questions: (i) Why is international law binding? (ii) What normative authority may international law claim? Since *softness* appears as a graduation of normativity and refers to the content of obligation especially in the case of "treaty soft law", Sub-section 2.7.1 investigates the "normal normativity", which it is presumed that "hard obligation" incorporates while Sub-section 2.7.2 reviews the notion of "soft obligation", which implies relative normativity.

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[136] The ICJ is one of the six principal organs of the UN. Jurisdiction in contentious proceedings is dependent on the consent of states. According to Article 36(1) of its Statute, all the (state) parties to a dispute must agree that the case should be referred to the Court. In other words, there is no compulsory jurisdiction. Paragraphs 2 and 3 of Article 36 provide an optional clause, which make it possible to accept the jurisdiction of the Court beforehand.

[137]Judgements of the Court are binding. Article 94 of the UN Charter authorises the Security Council to 'make recommendations or decide upon measures to be taken to give effect to the judgement. However, these powers have not yet been used to enforce a judgement. A request by Nicaragua to the Security Council to enforce the Court's decision in the *Nicaragua* case was vetoed by the United States. For more details on the subject, see Tanzi, A., *Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations*, 6 European Journal of International Law (1995), p. 539-572

[138] Cassese, Antonio, *International Law*, Oxford University Press: Oxford, (2001) p. 6

[139] Austin famously argued that "Laws properly so called are a species of commands (...) And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author" Austin, John, *The province of jurisprudence determined*, Weidenfeld and Nicolson: London, 1954, p. 133

[140] D'Amato, Anthony, *International Law And World Order*, West Publishers: St.Paul, 1990, p. 11

2.8.1 Hard law obligation

Why to obey law? The answer of this question may vary depending on how law is defined. The positivist school has defined law as the command of a sovereign. Therefore the answer of the adherents of this school is basically: the law has to be observed, because a sovereign, a supreme legislator commands it, and sanctions will be applied for non-observance. Then, according to the positivist understanding in its pure form, international legal system does not have the necessary conditions for genuine obligation, because it lacks a body of rules enforceable by external (sovereign) power. Yet, despite the non-existence of a sovereign and lack of organised sanction, "almost all nations observe almost all principles of international law, all of their obligations almost all of the time".[141]

Sanction, as the basis of international legal obligation, has not been very convincing for the majority of international lawyers. It is for instance said that whether there is enforcement or not, legal subjects have an obligation to obey the rule in question, thus sanction is little more than a factor for compliance but is not the source of obligation. In other words, "law is enforced because it is binding"[142] and not *vice versa*. Furthermore, as a matter of fact, many existing international rules do not have any sanction attached to them nonetheless they exist and states (and other subjects of international law) are under an obligation to obey them.

One problem with the argument that international law is no more than "positive morality" is that it fails to appreciate the crucial difference between 'obligation' and 'sanction'. As Reus-Smit remarks, the nature and roots of legal obligation is not the same thing as compliance. "Obligation is a reason for rule observance, compliance is the fact of such observance".[143] Thus, obligation is one reason, among others. The motives for complying with the rules ('feeling' bound) even when they are not equipped with sanctions can be varied. It is said that notions such as 'rightness', 'justice', 'appropriateness', 'self-interest', 'social disapproval', or 'common interest' play an

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[141] Henkin, Louis, *How Nations Behave*, Colombia University Press: New York, 1979, p. 47. Of course, this hypothesis should not be understood as an empirically verified fact but an assumption.

[142] Reus-Smit, Christian, *Politics and International Legal Obligation*, 9 European Journal of International Relations (2003) 4, p. 597

[143] *Ibid.* p. 595

important role in observing the norms even in domestic law where there is an organised sanction. No sovereign of any domestic legal system is able to compel people to obey all rules *only* because of (existing or potential) sanctions or other forms of (physical or social) coercion even though the potentiality of enforcement may in some cases be responsible for the compliance with certain rules.[144] Friedmann also observes that the sense of obligation has become the prevailing criterion for the 'reality' of international law. According to the writer, the general legal philosophy underlying this approach is that obedience to law does not necessarily rest upon the command of the threat of sanction but on the acceptance of a norm as binding.[145]

Scholars have offered various explanations for the basis of international legal obligation. Historically, the period between 1648 and 1900 has witnessed an oscillation between two competing approaches, namely idealism and realism regarding the comparative relation between law and sovereignty. According to the idealist approach, states should obey international law because it resonates some higher conceptions such as natural law, universal moral or justice, which exist independent from sovereign will or interest. Conversely, the realist (and legal positivist) approach[146] explained the

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[144] It is also important to pay attention to the distinction between treaty compliance and regime effectiveness as Young suggests (Young, Oran, "The Effectiveness of International Institutions" in Rosenau, James, N. and Czempiel, Ernst-Otto (eds.), *Governance Without Government: order and change in world politics*, Cambridge University Press, Cambride, 1992). Chayes and Chayes introduce another concept to the discussion on compliance: "acceptable level". According to the writers, treaty compliance should be measured by using "acceptable level" compliance instead of 'strict compliance' "in the light of the interests and concerns the treaty is designed to safeguard" (Chayes, Abram and Chayes, Antonia, Handler, *On compliance*, 47 International Organization (1993) 2, p. 176. In this article, they also develop the criteria to determine and adjust the 'acceptable level'.).

[145] Friedmann (1964) p. 85. Purvis argued that in the occurrence of voluntary compliance, in the absence of coherence, the authority of international law operates on two levels. First, when states seek to resolve issues among them they firstly and essentially engage in the international legal discourse and they consequently behave as if international law makes a difference. Second, states seem in general to have accepted the rule of law as the *appropriate mechanism* for structuring international life, which enhance the normative authority of international law (Purvis, Nigel, *Critical Legal Studies in Public International Law*, 32 Harvard International Law Journal [1991] 1 p. 110). Attributing to Franck's legitimacy theory, Purvis calls this mechanism "the internal coercion of sovereign psychology" (i.e. rules themselves pressure states towards compliance). Then again, this view can also be challenged on the "realist" ground that states "give lip service to international law because they find it in their interest to engage in legal discourse about international life" due to its usefulness as a tool of propaganda (*Ibid.*).

[146] It can sometimes be observed some confusion between "legal realism" and "legal positivism". They are not the same theories even though they share some common features that make it possible to classify them here under the same category. For instance, both focus on power and sovereignty, in both theories states are main actors, and both have "consent" (or state *will*) based system regarding the basis of obligation. Nonetheless they have important dissimilarities. For instance, unlike positivism, legal realism holds the indeterminacy of law; belief in the importance of interdisciplinary approaches to law and view about instrumentality of law in either balancing competing interests or achieving social purposes. For a

bindingness of international law by the will or practices of states. In this account, the status of international law as law was dependent on its ability to reflect the actual reality of international order.[147]

Morgenthau, the 'founder' of the traditional realist school, even claimed the existence of not one but two different types of international law. Accordingly, states generally observe the rules of "non-political international law" that codify states' mutual and permanent self-interests whereas the rules of the "political international law", which are based on the temporary and fluctuating interests of states, such as political agreements, especially treaties of general alliance and their modern substitutes are not as frequently observed as previous ones.[148]

To escape the idealist/realist opposition, legal theorists have tried to find a middle ground.[149] In such an attempt, normativist school suggested the universalised *will* of sovereign states and their *consent* as the basis of the binding nature of international law. According to Kelsen, the state authority, whether parliament or any other organ of a state with power to make laws, can create legal rules because of already existing constitutional norm (*Grundnorm*), which empowers the state authority in question.[150] In the *Lotus* case (1927), the permanent Court of International Justice sees 'consent' as a central feature of international law. The Court argued, "international law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally

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more detailed description of legal realism and different types of legal realism, such as "American Legal Realism" and "Scandinavian Legal Realism", see Green, Steven Michael, *Legal Realism as Theory of Law* 46 William&Mary Law Review (2005).

[147] Kennedy classifies the sources of Article 38 as two mutually exclusive categories to illustrate how "sources doctrine" works regarding the authority or binding nature of various legal instruments. Accordingly, treaties are characteristically *hard*, the ultimate expression of sovereign consent whereas custom and general principles are *soft* sources (Kennedy, David, *The Sources of International Law*, 2 American University Journal of International Law and Policy, 1987, p. 24). In other words, hard sources are grounded in consent whereas soft sources not, though they are authoritative in the meaning that they are considered as binding on the state, which does even not consent.

[148] Morgenthau, Hans, J., *Positivism, Functionalism, and International Law*, 34, American Journal of International Law (1940) p. 279

[149] For an overview of the modern "conceptual pragmatism" emerged to mediate between naturalism and positivism, see Koskenniemi, Martti, *From Apology to Utopia*, Cambridge University Press: New York, 2005, especially pages between 182-223. In these pages, Koskenniemi examines four most important "reconciliatory doctrines": "Rule-approach", "Policy-approach", "Scepticism" and "Idealism".

[150] Kelsen, H. *The Essence of International Law* (1968), cited in Casanovas, Oriol, *Unity and Pluralism in Public International Law*, Martinus Nijhoff Publishers: The Hague, 2001, p. 7

accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims."[151] According to this conclusion, international law-making is not in conflict with the concept of sovereignty. To the contrary, the constraint that may arise from the making of international law is an important characteristic of sovereignty (auto-limitation). In a similar attempt to explain the basis of obligation, Bedjaoui maintains: "If one postulates at the outset that there is no higher authority than the state, how can the norm of international law be produced for and applied by such a sovereign state? As might be expected, there is only one possible answer to this question, namely that, historically, it has not been possible for international law to be anything other than a law resting largely on the consent" (of states).[152]

Likewise, socialist scholars argued that the 'mandatory legal rules' of international law come into existence as a result of being made by the concordance of the wills of states.[153] It is nonetheless interesting to note that the "consent approach" has gained a normative quality as the signifier of legal obligation within the historical tradition of the liberal political philosophy. The emergent ideal of the legitimate statehood in the period between 1776 and 1848 was that of democratic, rule of law polity that law was only legitimate if it was authored by those who were subject to it.[154] The liberal theory of social contract considered men as free, equal and independent and to hold natural, inalienable rights. Nonetheless, it is argued, men need a government based on the *will* of the collective (political society) in order to overcome the practical problems through instituting and upholding civil laws. The price of this 'way out', it is furthermore argued, is that individuals have to accept to change their natural rights for civil rights in

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[151] [1927] P.C.I.J., ser. A, No. 10, at 18.

[152] Bedjaoui, Mohammed (ed.), *International Law: Achievements and Prospects*, UNESCO: Paris, 1991, p. 2. In defence of the consent approach against criticism that states are bound to observe rules that they have never explicitly consented to, such as the rules of customary law, Higgins maintains that in the absence of an explicit consent norms may still emerge through "tacit consent" in case there is no a consistent opposition to the emerging rule in question (Higgins, Rosalyn, *Problems and Process: International Law and How We Use It*, Clarendon Press: Oxford, 2001, p. 14).

[153] Tunkin (1974) p. 251

[154] Reus-Smit (2003) p. 595

favour of collective legislative and executive power of the political society.[155] As Reus-Smit points out, rationalists, and in particular liberal institutionalists, bring these *contractarian* ideas into international relations. By analogy, they consider states as free, consisting of equal and autonomous individuals that rationally pursue their own interests. According to this understanding, world order is basically a social contract among sovereign states, which can be characterised as rational egoists that are mainly concerned with their self-interests and "seek to maximise their preferences within prevailing environmental constraints and incentives".[156]

Hart, among many others, scholars, considers the 'consent' or 'auto-limitation' approaches, according to which international law is binding because states have decided to be bound by it, as an attempt to reconcile the (absolute) sovereignty of states (which is inconsistent with obligation of any kind) with the existence of binding rules of international law.[157] On the other hand, the theory of 'will' as the basis of obligation is criticised for being "apologetic" in the meaning that in this understanding international law would be too political as it is vulnerable to states' political powers. From this perspective, if "legal rules whose content or application depends on the will of the legal subject for whom they are valid are not proper legal rules at all but apologies for the legal subject's political interest".[158] As argued by Friedmann, "the 'self-limitation' theory is weak because what states can consent to they can also revoke".[159]

To summarise, the dichotomy between the concept of sovereignty and world order makes it impossible to find a conclusive explanation as to why the rules of international

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[155] For the basic themes of this approach, see *Social Contract: essays by Locke, Hume and Rousseau*, Ernest Barker (ed.), Greenwood Press: London, 1980; Locke, John, *Two Treaties of Government*, McMaster University: Hamilton, Ont., 2000, prepared by Hay, Rod.

[156] Reus-Smit (2003) p. 599

[157] Hart (1994) p. 224-225. Hart nonetheless criticises these theories for failing to explain for instance 'how it is known that states '*can*' only be bound by self-imposed obligations, or to explain those rules which are binding independently of the choice of the party bound by them. Friedmann argues that "the self-limitation of states can drive normative character only from an already existing rule that a state is bound to keep its promises. In other words, this theory postulates that the *pacta sunt servanda* principle, in order to constitute an effective basis of international law, must stand above the revocable consent of states" (Friedmann, 1964, p. 85). However, not all scholars, who consider 'consent' as the basis of binding character of international law, agree with this understanding. Tunkin for instance, rejects the idea according to which a basic norm such as *pacta sunt servanda* reflects the fusion of the wills of individual states and therefore constitutes a final criterion (Tunkin, 1974, p. 209).

[158] Lauterpatcht, Hersch, *The Function of Law in the International Community*, Union, N.J.: Lawbook Exchange 2000 (Originally published: Clarendon Press: Oxford, 1933, p. 189)

[159] Friedmann (1964), "Preface"

law are binding upon states. Therefore legal theories explaining the basis of obligation in international law become vulnerable to the criticism that each of them in the final analysis rests on the presumptions of either idealist or realist arguments.

2.8.2 Soft law obligation

As viewed above, the legal effect is traditionally considered decisive to separate hard obligation (law) from other norms, such as moral and political. In international law, the legal effect means that the non-compliance has a certain effect that manifests itself in the law of "state responsibility". In this sense, the very wording of the term soft law can be considered as paradoxical: the word "law" in soft law suggests an obligation that is *legal* in form while the word "soft" indicates the existence of a norm, which is 'below' the normativity threshold.[160] Indeed, to name an instrument or norm as soft law demands to resolve two definitional questions. First, what normative qualities do these norms and instruments have that may justify the label of 'law'? Second, if these norms and instruments hold the necessary minimum normative qualities that make the label 'law' appropriate, why are they 'soft'?[161] Moreover, this definitional problem is not only limited to the so-called 'non-binding' soft law, but also includes the so-called 'treaty' soft law. For, as discussed earlier, 'treaty' soft law does not necessarily indicate the existence of a *legal* obligation. In other words, it cannot automatically be presumed that if there is a treaty there must be a legal obligation too. The reason is that the binding quality of a legal norm or instrument and the existence of a legal obligation are not one and the same thing. To put it differently, state parties to a treaty, which embodies soft provisions, are not by definition under a legal obligation even though treaties are by definition legally binding. In such cases, it is indispensable to scrutinise, among other things, the wording of treaties to find out whether there was an intention of state parties to assume a legal obligation within the treaty provision(s). On the other hand, to say "soft law does not imply obligation and therefore possible breach and responsibility for breach"[162] can be seen as a far-fetched generalisation. However, as

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[160] Gruchalla-Wesierski (1984) p. 30

[161] Carlson (1984-1985) p.1202

[162] Lichtenstein, Cynthia, Crawford, *Hard Law v. Soft Law: Unnecessary Dichotomy?*, 35 The International Lawyer (2001) 4, p. 1433.

seen in the previous section, even when the obligation of soft law is merely political in its nature they may still create both direct and indirect legal effects or grow into legal obligations.

Yet, one could rightly ask oneself what might distinguish a non-binding soft law from other types of norms, particularly social, moral or professional ones when considering the fact that even these norms can have impacts on states or other international actors?[163] This is obviously a complex issue and there is no all-embracing satisfactory answer. One important reason for this complexity is that many of these rules have comparatively similar features. This difficulty hence exists not only for international law but for domestic law as well. It is for instance not easy to explain the differences between the characteristics of a domestic legal rule and say a moral one, especially if one puts aside the centralised coercive power of the state. And so, the degree of complication to distinguish between different categories of norms further increases in the case of international law due to the lack of a centralised system of sanction at the international level.[164]

On the other hand, the understanding that in the absence of a customary or treaty law there can only be a 'non-legal obligation' draws its inspiration from the strict legal/non-legal division of domestic law. Moreover, it can also be maintained that to look for a legal basis for non-legal soft law obligation would in many cases be in contradiction with the very *raison d'être* of these instruments. For, when governments or international organisations intend to be legally bound by an international instrument they would

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[163] Finnemore even goes one step further saying that before starting any debate about the nature of the obligations of soft law it should be established whether legal norms (hard law) have any distinctive effects from other types of norms. (Finnemore, Martha, *Are Legal Norms Distinctive?*, 32 New York University Journal of International Law and Politics [2000] p. 2)

[164] In an attempt to explain the differences between legal and moral/social norms, Hart identifies four essential features: i. importance (any moral rule has to be regarded as something of a great importance to maintain whereas a legal rule has not to be), ii. that a moral rule is immune from deliberate change, iii. that moral offences have a voluntary character and finally iv. the form of moral pressure (Hart, 1994, p. 173-181). In a similar vein, Tamanaha holds that there is an ontological distinction between "state law norms" and non-state norms" (other forms of normative social ordering), which make it possible to reserve the term 'law' for state law norms. Accordingly, non-state normative orderings primarily consist of "concrete patterns of social order" even though they also sometimes have enforcement mechanisms. In other words, social norms exist as a part of social group(s) rather than part of institutional recognition (Tamanaha, Brian, Z., *The folly of the "social scientific concept" of legal pluralism*, 20 Journal of Law & Society, 1993).

likely choose first and foremost a formally concluded treaty thereby their rights and duties would be governed under international law.

In his seminal study on whether international law is capable of preventing ethnic conflicts, Ratner investigates whether international norms matter in international relations. In this study, the writer borrows the label of "normative optic" from Keohane[165] to classify theories, which basically hold that norms by definition have the capacity to influence state behaviour because of their internal normative nature.[166] What is interesting in Ratner's study is that in the case of the High Commissioner on National Minorities (HCNM), which has been set up by a 'soft law organisation', namely the Organization for Security and Cooperation in Europe (OSCE) there is no difference between hard and soft law (in either form –'legal' or 'non-legal') as to how key decision-makers respond to the norms. On the High Commissioner's invocation of norms of varying legal characters ranked from hard and legal soft law (for instance, the European Convention on Human Rights and ICCPR) to non-legal soft law (for instance, OSCE documents or recommendations of the Parliamentary Assembly of the Council of Europe), the key decision-makers do not react differently according to the degree of hardness of the invoked international standards. When they accept international norms, they see no reason to delve into the details of their legal status. According to the case studies on which Ratner's arguments base, the distinction between norms of different normative quality is significant only among small groups of bureaucrats, who overwhelmingly have legal training. He finally concludes that the relevance of the hardness or softness of a norm for the behaviour of different group of actors largely depends on the forum in which the norm is invoked.[167] Hence, in terms of compliance, do the results of the study of Ratner suggest that discussions on various normative qualities of international norms interest only a group of legal professionals and therefore the issue of normative quality of international rules is just a "legal creed"?

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[165] Keohane, Robert, O., *International Relations and International Law: Two Optics*, 38 Harvard International Law Journal (1997) p. 487

[166] Ratner, Steven, R., *Does International Law Matter in Preventing Ethnic Conflict?*, 32 New York University Journal of International Law and Politics (2000), p. 649. The writer also perceives constructivists within the normative optic *Ibid.* p. 650). In that sense, it would be possible to examine Hart's definition about the "internal aspect" of a legal norm under the "normative optic" classification.

[167] *Ibid.* p .659-65

It should however be remembered that despite the lack of a legal basis for obligation, non-legal soft law might still acquire compliance due to various reasons. Finnemore's suggestion about the distinctive effectiveness of law could also be applied to non-legal soft law. According to this writer, "the contemporary world is permeated by a culture that invests authority in impersonal rules, procedures, and legalities". In other words, the rules of international law have distinctive power over other norms "because the world culture supports and values them".[168] Legitimacy has been offered as another explanation for the observance of non-legal soft law. Nevertheless, as Finnemore maintains, the quality of "oughtness" in the meaning that a non-legal soft law is viewed as binding due to its legitimacy and therefore observed is not a feature that non-legal soft law exclusively has vis-à-vis other non-legal norms such as moral and social ones.[169] Since the present study is not about compliance, this question will not be addressed here further even though to analyse the issue of compliance with soft law is certainly relevant to the questions whether and how and to what extent soft law, in particular non-legal soft law, enhance and promote the compliance with international norms.

According to Franck, there are four factors, which produce the legitimacy of a norm: the norm's historical pedigree, its determinacy; its coherence with related norms; and its adherence with constitutive norms of international law.[170] Within this approach, legal legitimacy appears to be a fundamental source of obligation. Accordingly, 'legitimate' law generates obligation both in a formal and informal way. If a norm possesses characteristics, such as general applicability, clarity and determinacy, coherency (with other rules), transparency, non-retroactivity, constancy and finally participation (in

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[168] Finnemore (2000) p. 3. Another reason Finnemore gives for the law's distinctive power is that the staffs of foreign ministries are increasingly chosen among lawyers, who would likely find legal norms more persuasive than other kind of norms. 'Professional training and norms' tend to shape organisational behaviour. Thus, "as lawyers increasingly staff state bureaucracies dealing with foreign affairs" it would not be surprising that legal norms are to have a distinctive role in shaping political behaviour (*Ibid.* p. 2).

[169] Finnemore (2000) p. 2

[170] Franck, Thomas, M., *The Power of Legitimacy Among Nations*, Oxford University Press: New York, 1990, p. 184. Nonetheless, it can be claimed that Franck's legitimacy theory becomes unsafe when facing the criticism of being a dress for morality. As Koskenniemi reminds, if law is about formal validity, then "legitimacy is its opposite, the setting aside of validity to make room for something grander" (Koskenniemi, Martti, *Legal Cosmopolitanism: Tom Franck's messianic World*, 35 International Law and Politics, 2003, p. 480). Koskenniemi adds that in order to avoid being seen as a 'preacher of natural law', Franck used the concept of legitimacy to cover up the morality that his theory contains in the form of "common sense of values"(*Ibid.*).

constructing the norm), then, it is said, this norm has legitimacy, which is more likely to generate obligation.[171] In the case of soft law, two sources of legitimacy can be identified. First, 'consent', which gives soft law an authoritative base, and secondly, 'expectation' that soft law create about the adherence to the behavioural values or policies that soft law embodies.[172] No matter how vague the obligation that soft law enters upon can be, or, no matter how weak the command that soft law imposes can be, if the intention (consent) of the parties to a soft norm/instrument generates an expectation about its seriousness, then it can be assumed that soft law possesses legitimacy.

In the beginning of this section, a conceptual paradox was mentioned and two questions were posed concerning what might justify certain norms and instruments to be classified as both "soft" and "law". To end with an answer, it can be said that the element of 'consent' that soft law may convey and 'expectation' that it may create gives a reason for the wording "law" in soft law formulation. While the vagueness of the obligation and/or the weakness of the command that soft law typically displays is the most convincing justification of the characterisation of "soft" in soft law conceptualisation.

2.9 Soft law in a hardening process

Categories of hard and soft law do often not indicate two diametrically opposite and frozen polarities. There is in many cases a continuum from 'soft' to 'hard' law. In other words, soft law may undergo a hardening process, in which soft law norms may transform into binding (and enforceable) norms.

Obviously, to talk about a hardening process of a particular soft law instrument is essentially different from claiming that soft law has now become a new source of international law. An assertion that a soft law norm is hardening is often to argue that

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[171] Finnemore and Toope (2001) p. 749. According to Franck, legitimacy in turn also creates an independent "compliance-pull" effect that may result in compliance with the rule in question (Franck, 1990, p. 184).

[172] Carlson (1985) p. 1202. In addition to the elements of consent and expectation, Gold gives four further 'complementary' elements. Accordingly, (i) a clear common intent to respect soft law, (ii) its legitimacy "as promulgated" is not challenged, (iii) the parties to a soft law should not fail to observe it simply because such a failure would not amount to a breach of 'legal' obligation, (iv) conduct that respects soft law cannot be deemed invalid (Gold, 1983, p. 443).

the subsequent state practice has elevated the status of a (previously) legally non-binding rule to customary law. That is to say, two fundamental elements of customary international law (subjective criterion, the so-called *opinio juris* –"accepted as law" and objective criterion -"general practice of states") have been fulfilled. To claim that soft law has become a new source of international law is a more controversial nonetheless more interesting one. For, a 'hardening process' does not necessarily imply any change in the setting of 'traditional' international law making. On the other hand, to affirm that soft law has become a source of international law is inherently to proclaim a change in the sources of international law.

The hardening of soft law can to a certain extent be considered as an early stage of a process within which a customary rule emerges. In this sense, every rule of customary international law has to pass through this 'soft law' stage before it is considered as a legally binding rule. According to Meijers, it is possible to identify three stages in the process when a rule becomes a rule of customary law. In the first 'formative' stage, the *content* of the rule is being defined. In this early stage, there is no certainty whether this 'practice' will acquire a binding character, though the content is more or less distinct. During the second stage, the 'will' of the relevant states has to be formed and the rule becomes law. This stage is concerned with the development of the will to make a rule into law. To put it differently, this is an accomplishing stage, in which "the subjective element" in the formation of customary law is full-fledged. The third stage concerns the number of states that consider themselves as being bound by a rule and the sufficiency of use of this rule in practise. These two factors require the element of evidence of a "general practice accepted as law". This is the stage in which the rules formed by custom in the first stage are to be divided into legal and non-legal rules depending on whether the above mentioned *objective* and *subjective* elements of customary law have been fulfilled.[173]

Eide also formulates a similar phase description to illustrate the development of non-binding rules into binding ones though exclusively in human rights domain. The writer distinguishes between three different stages in the hardening process that certain international human rights have experienced: "idealisation", "positivisation" and

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[173] Meijers, H. *How is international law made?*, Vol. 9 Encyclopaedia of Public International Law, Netherlands (1978) p. 5-18.

"realisation". The "idealisation" stage includes the emergence and dissemination of ideas on human freedom articulated by philosophers, other publicists, and political actors. This stage could also be called the 'discourse process,' for the reason that its prevailing feature is "the appeal to build a broad consensus based on values essential to the full and equal dignity of all human beings".[174] The Universal Declaration of Human Rights (UDHR) can be said as the declaration of such a discursive consensus and can therefore be seen as the first idealisation stage. The 'positivisation' stage, which refers to the transformation of ideals into normative standards, is a stage, which includes a transition from morality to law. Two international Convenants adopted in 1966,[175] followed by numerous more specific conventions constituted further steps towards positivisation. This has also meant an obligation for state parties to implement the norms embodied in the Convenants at the national level. The third stage called 'Realisation' indicates the effective enjoyment of standards and rights in practice. This stage also requires appropriate economic and social policies and the establishment of relevant institutions, such as health service, welfare agencies and others.[176]

Some scholars hold that those soft law norms, which lack the psychological element (i.e. *opino juris*) can still fulfil a function as the material element (i.e. state practice) in the creation of customary law. However, it is highly doubtful whether soft law may be evidence of state practice. For, it could be argued that since the form of soft law is not legally binding, the parties' *intention* is not to be bound by a conforming practice.[177] On the other hand, by raising the *expectations* tacitly or explicitly, it can be argued, soft law may provide the psychological element of custom. However, that is not to say that the adoption of a soft law norm does always reveal the presence of *opinio juris*. It is important not to confuse two different functions that soft law fulfils. When soft law

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[174] Eide, Asbjörn, *Article 28* in "The Universal Declaration of Human Rights, a Commentary", Eide, A. and Alfredsson, G. (eds.), Kluwer Law International: The Hague, 1999, p. 603.

[175] "International Convenant on Economic, Social and Cultural Rights" and " International Convenant on Civil and Political Rights"

[176] *Ibid.* See also, Eide, Asbjørn, "Economic, Social and Cultural Rights as Human Rights" in Eide, A., Krause, C. And Rosas, A. (eds.), *Economic, Social and Cultural Rights*, Martinus Nijhoff Publishers: the Netherlands, 1995, p. 30

[177] Gruchalla-Wesierski (1984) p. 53-54. Discussing about the so-called 'qualifying effect' of soft law, the writer argues, soft law may give acts subsequent to its adoption a quality, which results in the acts having effects on international law. For example, acts may be given a quality, which shows them to be part of the process of law formation, state practice that is creating custom. However, the writer underlines once more that this is not to say that the soft law itself is the state practice (*Ibid.* p. 60).

functions as *opinio juris*, it would qualify the practice as being *binding* as law. When soft law does not reflect *opinio juris*, it may create subsequent acts, which in turn may form international law. In the latter case, soft law norm does not provide the psychological element of custom.

Georges Abi-Saab identifies three significant interdependent criteria for determining whether a soft law instrument has crystallised into customary international law: the circumstances of the adoption of the instrument, including voting patterns and expressed reservations; the concreteness of the document; and the existence of follow up procedures.[178] There is no reason why at least some of the existing non-legal soft law instruments may not have been transformed into customary international law. The OECD Guidelines for Multinational Enterprises, for instance, may at least partly be taken as a suitable example for this development, given that the OECD members represent a significant group of state whose practice carry a considerable weight in terms of state practice. Moreover, Abi-Saab suggested that these Guidelines are considered containing three important elements. First, they possess internationally agreed standards and norms; secondly, they are supported by an international institutional mechanism, which have adopted procedures for the interpretation and application of the standards; thirdly, there is a close interaction between national and international norms and actions.[179]

Yet, even though the OECD Guidelines accommodate most features that have been described as features characterising a hardening process, no one has claimed that such a process has occurred in the case of the OECD Guidelines, mainly due to the preference of the OECD Members. Taking into account the fact that the OECD countries have fervently supported liberalism and deregulation, Muchlinski regards it unlikely that the OECD Guidelines could harden into rules of positive international law if they are accepted and frequently applied by governments.[180] A similar remark is also made by Fatouros. According to this writer, the alleged inability of international law to issue binding rules for private actors is hardly an explanation for the voluntary character of

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[178] Ali-Saab, G., *Cours géneral de droit international public*, 207 Recueil des Cours (1987)

[179] *Ibid.*p. 10

[180] Muchlinski (1999) p. 580.

the OECD Guidelines. Rather, the collective unwillingness of the states concerned to adopt binding standards is the real reason for such a result.[181]

As a last remark on the subject, it is important to note that the desirability of a hardening process should not be taken for granted in every case. Even though the existence of soft law may in some cases promote a trend towards the 'hardening', there is no an automatic continuum from 'soft' to 'hard' law. It should also be recalled that the non-binding character may sometimes be the very *reason d'être* of a soft law instrument. Otherwise, in many cases, there would not exist an international instrument or agreement at all.

2.10 Concluding remarks

It has, in this chapter, been argued that a considerable amount of principles rules or instruments of international law cannot be easily explained within the concept of 'traditional sources'. These rules and instruments, which are more and more frequently named soft law, can be found both in treaties, which are legally binding, and in legally non-binding instruments such as resolutions of UN General Assembly. It has also been discussed in this chapter that it would be misleading to classify all treaties and treaty provisions as hard whereas resolutions, declarations, codes of conduct, etc as soft. For, some treaties may entirely or partly be soft and unenforceable due to being vague, too general, non-self-executing, hortatory or political in nature whereas some non-binding instruments, such as certain UN General Assembly resolutions, can be legally binding.[182] Likewise, certain provisions of essentially non-binding international instruments may be considered obligatory.[183] There are indeed cases where the content of a formally binding instrument has been so precisely defined and formulated that some of its provisions could be integrated into a treaty.

This chapter has also argued that the expectation (of compliance) that soft law creates regardless of whether it is legal or non-legal, may be a valuable characteristic. However,

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[181] Fatouros (1999) p. 7

[182] Such as the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations

[183] Such as the provisions of Helsinki Final Act of 1975 which regulate military manoeuvres

this point requires a considerable prudence. For, under certain circumstances soft law may also create false expectations toward resolving an international problem. In such cases, soft law may rather become the source of increased conflicts.[184] It has been viewed that expectation that soft law creates may differ in degree of certainty depending on its form.[185] Nonetheless, the form of soft law (i.e. 'treaty' and 'non-binding') is not the only determinant if a state will observe an international soft rule. The precision of the norms and the context in which the norm is invoked are equally important. According to Bothe, the expectation of compliance is only marginally dependent on the existence of a legal obligation to comply.[186] As it has been discussed, the decision-makers within states often respond, to a considerable extent, the same to claims about the requirements of legal rules and claims about the requirements of non-legal norms.[187] By the same token, the legal value of a norm depends on the nature of the norm rather than on its form. Especially when it comes to UN resolutions, a number of other factors determine what sort of obligation a resolution will engender. These factors could for instance be the circumstances, which have led to its adoption, the degree of agreement on which it is based, and implementation procedures.[188]

It is certain that 'treaty' and 'non-binding' soft law entail different consequences. Since only violation of formally binding rules entail responsibility under international law, a 'treaty' soft law may serve as the basis of a legal decision delivered by an international court. Although non-legal obligation can also be relevant in a legal dispute for instance as a proof of customary law, it cannot constitute the basis of a legal judgement. However, the practical effects are not as far reaching as they might seem at first sight, considering the fact that comparatively few disputes have been brought before

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[184] For a detailed analysis of such a 'false expectation' in the case of GATT, see Carlson (1984-1985).

[185] Bothe (1980) p. 85. The writer also adds that the existence implementation procedures show that compliance with the norm in question is expected (*Ibid.* p. 78).

[186] *Ibid.* p. 86

[187] Ratner (2000) p. 666

[188] Gruchalla-Wesierski (1984) p. 47 According to the writer, implementation procedures are not only a proof that compliance is expected, they are also a means of exerting pressure to secure compliance, even where a state objects (*Ibid.*).

international courts: Between 1946 and 31 July 2004, the International Court of Justice dealt with 106 contentious cases between states in which it delivered 80 Judgements.[189]

According to a common but nevertheless misleading understanding, soft law is argued to create only moral and/or political obligation but no legal obligations. This understanding of soft law fails to consider the obvious fact that soft law may also generate direct as well as indirect *legal* effects alongside with political and moral ones. As it has been pointed out in the chapter, one of the most important features of soft law is that it can start a rule of customary international law or serve as an evidence of it. Moreover, in certain cases soft law may 'de-legitimise' the legal status or binding nature of an existing norm through adopting a soft law norm, which is opposite to an existing, say, customary norm. Thus, in these cases, it may be possible to claim that there is no longer *opinio juris* for the rule of custom.[190] Another important effect soft law may create is the internationalisation of a subject area. Once a matter has become the subject of a soft law, it would hardly be possible for a state party to claim that the matter in question still falls into domestic jurisdiction of the state. This point is especially relevant for the areas of human rights and environment.

Arguably, soft law may also make state behaviour more predictable and thereby inter-state relations more stable. In addition, soft law may promote a more democratic international law, as it more immediately reflects 'general tendencies of change of beliefs and opinions' in the "international community".[191] However, it should be remembered that, the concept of soft law is a double-edged tool. As pointed out above, soft law may also serve as a strategy to a few powerful states to strengthen their position and undermine the will of the remainder i.e. whenever a few powerful states do not agree with the will of the rest; they may seek 'non binding soft law' as a refuge. Or soft law may give an excuse to states, which are unwilling to comply with their international

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[189] http://www.icj-cij.org/icjwww/igeneralinformation/ibleubook.pdf

[190] Gruchalla-Wesierski (1984) p. 56

[191] "*Soft law* is the bearer of the hopes of the damned of the earth in a society that they wish to turn into a better world. This is also one of the functions of Law" (Pellet, Allen, *Contre la tyrannie de la ligne droite*, Thesaurus Acroasium, Vol. XIX, 1992, p. 354, cited in Casanovas (2001) p. 83

commitments as in the case of International Covenant on Economic, Social and Cultural Rights.[192]

Soft law may also promote more participatory international law permitting the participation of non-state actors in the law-making process. States are seemingly more inclined to accept the participation of non-state actors in norm creating activities when instruments are expressly legally non-binding and when the outcome is either declaratory or programmatic. Non-binding international instruments, such as declarations, agenda, and programs, increased in number during the 1990s and can be exemplified by the results from the global summit conferences.[193] This interesting though limited development has occurred notably in the domains, which are, as argued by Chinkin, "inherently soft, or perhaps too intrusive into domestic jurisdiction to be subject of binding obligation" such as human rights, environment, population, poverty, economic and social development, human habitation, women, children.[194] These global summit conferences have been brought into being with the active participation of individuals, NGOs, and business organisations though having only observer status and not as a part of the formal conference negotiations. It is not surprising that the high level activities of non-state entities in the creation of legally non-binding rules in such global summits is welcomed by many scholars as the democratisation of international law. It is true that these summits at least lead to new international legal discourses and create expectations, which may function as an authoritative guidance encouraging states to comply with the rules in question. However, it is hardly possible to regard this development as the beginning of a new institutional international law making. It is also

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[192] The Convenant has a reporting system and no provision for inter-state complains or individual petitions. However, the Committee established 1987, prepares 'General Comments' on particular rights in order to hinder States from evading their responsibilities under the pretext of that rights that the Covenant contains are rather programmatory and their realisation depend much on resources (and the 'goodwill') of States parties.

[193] To give a few examples: 1992, Rio de Janeiro "The World Conference on the Environment and Development"; 1993, Vienna "The World Conference on Human Rights"; 1995, Beijing "The Fourth World Conference on Women"; and 1996, Istanbul "Habitat II".

[194] Chinkin (2003) p. 28. Indeed, the criticism of feminist scholars' regarding soft law is essentially centred around subject-matters that states use soft instruments for matters that are not regarded as essential to their interests (soft issues of international law) or where they are reluctant to incur binding obligations. It is argued that "many of the issues that concern women thus suffer a double marginalisation in terms of traditional international law making: they are seen as the 'soft issues of human rights and are developed through 'soft' modalities of law-making that allows states to appear to accept such principles while minimising their legal commitments" (Charlesworth and Chinkin, 2003, p. 66).

highly questionable whether the participation of non-state entities in the creation of non-binding rules should be accepted as the democratisation of international law. The 'democratisation' claim based on an increased participation of non-state actors demands great prudence. Because, it may be deceptive to consider international NGOs as the true representatives of "international society" even if it is accepted such a concept exists. First of all, to affirm that all NGOs are democratic (and monolithic) is an ungrounded assertion. Second, this understanding underestimates the risk of over-representation in the meaning that NGOs with greater resources and support would have more chance to be heard in such international institutional activities. Hence, it is hardly surprising that there is an increasing interest in this issue focusing on democratic deficiency or a legitimacy crisis of global governance.

Lastly, soft law may represent opportunities for promotion of international norms and further legalisation of international relations. It is therefore important to understand the relations between hard and soft law as well as formal and informal norms to appreciate their joint contribution to efforts to improve world order instead of insisting upon a rigid dichotomy between what is legal and what is not. As Chinkin suggests, hard and soft law should be seen as part of a continuum of international legal mechanisms. Both may contribute to the development of international law, to the creation of stability and expectation in international relations and both facilitate international co-operation.[195] Yet, the need for a more complete and larger spectrum of understanding of international norms and the need to answer to the ever-increasing complexity of international affairs should not increase further the structural weakness of international law neglecting the necessary minimum requirement of the normative threshold between what is legal and what is not. Although "the forces that converge to impinge upon and constrain states to behave one way or another are broader than the narrow consideration of legality",[196] the aptness of a norm to affect state practice is not conclusive reason for its legal validity. Otherwise, there would hardly be left any meaningful criterion to differ legal norms from moral, political or social norms.

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[195] Chinkin (2003) p. 42

[196] Tiewal, S., *The United Nations Charter of Economic Rights and Duties of States*, 10 Journal of International Law and Economics (1975) p. 687

3 A PARADIGM SHIFT IN INTERNATIONAL ECONOMIC SOFT LAW AND REGULATION

3.1 Introduction

The possible effects of the increased use of soft law in international economic law have become an important issue as economic relations affect international relations. International economic soft law has emerged frequently from the normative activities of international organisations, centred on the United Nations system, as a result of the differences in economic structures and interests of the member states. In the post-1989 period, the concept of soft law has increasingly been used to define norm-like activities of non-state actors as well as the acts of informal international institutions. It is today widely held that the relevancy of non-state actors in explaining and analysing recent developments in the field of international economic law has dramatically increased. It is however not always acknowledged that the growing role of non-state actors nor informal soft law development describes the whole picture. On the shadowy side of this rhetoric, there has been a simultaneous re-regulation and hard law development in the form of the institutionalisation of neo-liberal ideas associated with globalisation through the rules and practices of multilateral rule-based frameworks.

This chapter sets up two alternative paradigms in international economic soft law and sketches out the paradigm shift from state-centric to a dual globalist paradigm. Its focus is on the key features of each paradigm. The chapter begins with a conceptual discussion of the terms of international economic 'law' and 'regulation' in order to show how the use and content of these terms resonates with the paradigm shift this study examines. It then outlines the basic components of the two paradigms. Thereafter it portrays the paradigm shift taking place in the post-1989 period, by describing the changing nature, role and actors of international economic soft law. Although a short description of the economic and ideological circumstances, which precipitate such a shift, is provided in this chapter, these circumstances will be analysed at length in the following chapter. The issue of how this shift may affect the development of international economic soft law is addressed in chapter 9.

The paradigm shift examined in this study involves in the first place the erosion of the principle of sovereign equality and the demise of state sovereignty as well as the corresponding rise of non-state actors. The chapter therefore investigates lastly these key concepts and the issue of international legal personality of MNEs and NGOs, the two most significant non-state actors of international economic law.

3.2 The definition of economic 'law', 'regulation' and 'self-regulation'

As noted earlier, in the post Second World period, the scope and participants of international law have been extended and diversified. International law in this period has reached into many fields formerly outside its preoccupation, such as economy, human rights and environment. As stated in the introductory chapter, due to the growing economic interdependence, the law governing international economic relations has since the Second World War become one of the most important areas where international law and institutions operate in practice.

Since international economic law cuts across most of the subjects embraced by international law, it is not surprising that there is no agreement on what the term "international economic law" exactly includes. However, the broadness of the inventory of subjects of international economic law, which contains, among others, the law of economic relations, the law of economic institutions, the law of foreign investment, the regulation of international trade and the law of regional economic integration, is not the only difficulty that one may face. Another important difficulty in defining international economic law arises from whether international economic law, as a branch of international law, should deal with the transactional and regulatory economic activities carried out between actors other than states and international organisations. Thus, the definition and scope of international economic law principally depends on how one defines international law. For instance, extending the categories of subjects of international law to individuals as traders and MNEs, Seidl-Hohenveldern maintains that international economic law refers to "those rules of public international law, which directly concern economic exchanges between the subjects of international law".[197]

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[197] Seidl-Hohenveldern (1999) p. 1

To define the concept of 'regulation', which has been used widely in recent years, is certainly not less problematic. If one reason of this difficulty lies in the ambiguous relation between 'law' and 'regulation', the other lies in the fact that within the context of globalisation, the concept of regulation is being increasingly seen as 'decentred' from the state.[198] Correspondingly, as a result of the diminishing role of the state in the globalisation process, the state has lost the capacity to command and control, especially in the domain of economic activities. Consequently, the relation between governments and other actors are not any longer a unilateral or linear. Regulation, just as law, does not solely emanate from the state. According to Black, when law is defined as the 'monist', 'statist, and 'positivist' tradition of law, regulation is less than law. From this point of view, regulation is part of law that is "instrumentalist in orientation, and contained in the mass of technical statutes, and other secondary rules that set out standards of conduct to be followed".[199] In functional terms, thus, regulation performs only one of the many functions of law, such as stabilising and adapting expectations, allocating authority, and dispute resolution.[200] On the other hand, if law is defined from an instrumentalist point of view that "the main value of a particular legal precept is in its usefulness for the specific goal or goals it is thought to serve",[201] then there would be no significant difference between law and regulation. In a similar way, Picciotto explains the increasing popularity of the concept of regulation with its ambiguous nature which arises from its widening scope, embracing almost any kind of regular behaviour. Besides, this concept now includes "all kinds of rules, not only formal state law".[202]

For Haufler, on the other hand, regulation is action or behaviour that is required by governments –it is nót voluntary, and the regulators are public authority. In other words, the term regulation embraces only *formal* rules and standards. Attributing to the definition in the General Agreement on Tariffs and Trade (GATT), Haufler contends

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[198] Black, Julia, *Critical Reflections on Regulation*, 27 Australian Journal of Legal Philosophy (2002), p. 1

[199] *Ibid.* p. 23

[200] *Ibid.*

[201] Cotterrell, Roger, *Law's Community: legal theory in sociological perspective*, Clarendon: Oxford (1995) p. 282

[202] Picciotto, Sol, *Reconceptualizing Regulation in the Era of Globalization*, 29 Journal of Law and Society (2002) 1, p. 1

that when it is not formal and voluntary, then it is labelled "standards" or better said, "voluntary standards".[203]

"Self-regulation", as the other type of the so-called "next generation" of regulatory techniques, like co-regulation, voluntary agreements, regulatory flexibility, negotiated agreements, environmental partnerships, informational regulation, and economic instruments, has often been claimed to be more advantageous for business over state-based legislation, particularly in terms of its flexibility and cost effectiveness. The term self-regulation refers to a form of decentred regulation that is not exclusively dependent on the state, where a group organises itself in order to control the conduct of its members and it is considered to constitute a new form of soft law: "informal soft law".[204] The liberal rationality behind this development characteristically argues that because of the complexity of post-industrial and globalised economies external control-oriented regulation cannot work alone. New generation of regulation, it is claimed, has to go beyond the state and must not only affect but, in many cases, be administered by business itself and civil society.[205]

Such self-regulatory informal soft law instruments are characterised by their extreme diversity. They typically include voluntary codes of conduct, internal rules of business, instruments that are supervised or monitored by government agencies, and instruments that are provided for by the statues or that are laid down by state law. A self-regulation process can entail one or more of the following four stages: standard setting, monitoring, enforcement, and adjudication.[206] Some have argued that self-regulation essentially occurs outside a legislative framework, where there is deemed to be no need, at least yet, for legislation or where a legal basis for legislation is lacking. Therefore, according to this understanding, when a legislative act involves in one or some of the above-given stage(s), the instrument at issue should rather be considered as a form of

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[203] Haufler, Virginia, *A Public Role for the Private Sector*, Carnegie Endowment for International peace: Washington, D.C. (2001) p. 8

[204] Barton, Barry, "The Theoretical Context of Regulation" in Barton, Barry; Barrera-Hernandez, Lila; Lucas, Alastair; and Ronne, Anita (eds.), *Regulating Energy and Natural Resources*, Oxford University Press: Oxford, 2006, p. 29

[205] For an overview of the "new generation" of regulatory activities in the field of environment, see Milani, Brian, *Designing the Green Economy*, Rowman & Littlefield: Canada (2000).

[206] Scott, Colin, *Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance*, 29 Journal of Law and Society (2002) 1, p. 56

"co-regulation", which refers to the regulatory activities where the state and the private regulators co-operate in joint institutions.[207]

In sum, closely related to the restructuring of the relation between the public and private spheres in the globalisation process, the widened scope of regulation has created an ambiguity over its boundaries and its relationship with law. Furthermore, even in the 'conventional' forms of regulation, this concept is increasingly used to promote a pluralistic, decentralised, and deformalised understanding of international law, not only in terms of who makes law, but also in terms of what role law plays.

3.3 A paradigm shift in international economic soft law

This section depicts a shift between two paradigms of international economic soft law. The first paradigm, labelled the "state-centric" paradigm in this study, occurred in the post-World War II period, it reached its highest point in the 1970s and were related to the concern for the welfare of developing countries but withered away in the 1980s. In the recent expansion of economic liberalisation, it is argued in this thesis that, the state-centric paradigm has been replaced by a dual "globalist" paradigm. To describe this paradigm shift, the section begins by outlining the central features of the two stylised paradigms. It then explains how and to what extent these paradigms can apply the examples that this study has chosen to illustrate the occurrence of such a paradigm shift.

Some preliminary remarks are called for before starting to explain the paradigms. In the first place, the objective of conceptualising and 'stylising' them as ideal-types is to show how each of them captures the central aspects of a particular understanding of societal development such as the role of the state. Otherwise, none of these paradigms is meant to be conceived in unitary terms; although they display distinctive and often contrasting characteristics, in many instances there is no absolute dichotomy between state-centric and globalist approaches. Moreover these paradigms are not necessarily successive stages of an ahistorical and straight-forward societal development.

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[207] Senden, Linda, *Soft Law, self-regulation and co-regulation in European Law*, 9 Electronic Journal of Comparative Law (2005) 1, p. 11, available at http://www.ejcl.org/91/art91-3.html

3.4 The "state-centric" paradigm

It is commonplace to say that modern international law has been a state-centric system. It can be said that state-centrism, is a key concept in understanding not only the basic characteristics of international legal and political order, but also to understand the recent changes within that order. State-centrism may mean many different and sometimes contrasting things. Susan Marks remarks that state-centrism has generally a descriptive and a normative dimension. Counterpoising the "state" to "non-state", the descriptive dimension refers to "a preoccupation with states to the exclusion of non-state actors" while its normative dimension claims that "international law is too preoccupied with states, and should pay more attention to non-state actors".[208] Sure enough however, whatever meaning might be, state-centrism is increasingly used as a derogatory concept either to express disapproval and/or too often to naturalise the emerging new neo-liberal world order and delegitimise its legal/political alternatives.

State-centrism in international law basically refers to the understanding that international law is a set of rules created by states, and that principally governs inter-state relations for the benefits of states themselves. It is premised on the concept of sovereignty and the principles of the sovereign equality of states, a duty of non-intervention on the part of states in the internal affairs of other states. The concept of state centrism is often associated with positivism, which has promoted the dominant view that international law is based on sovereign consent, manifesting itself in the forms of treaty and customary law. States within this approach are regarded as the sole legitimate subjects.

There can be found two specific sources for the establishment of the state-centrism as a leading paradigm in international economic law in general and international economic *soft* law in particular. These are (i) the creation of an 'international' economy among the members of the Western alliance under the US leadership in the aftermath of World War II based on the free market and free trade philosophy. (ii) The international bargaining process between developing and industrialised countries involving the re-

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[208] Marks, Susan, *State-centrism, International Law, and the Anxieties of Influence*, 19 Leiden Journal of International Law (2006) p. 341

distribution of international economic power and resources during a period starting with the decolonisation process to the 1980s.

No doubt, the centrality of the state and international organisations was the main common feature of both sources. Yet, in the former occurrence, the state and international organisations assumed a role of rebuilding devastated national economies of mainly industrialised capitalist European countries and creating a compatible 'embedded' liberal economic order[209] in the context of the Cold War. Whereas in the latter, the role of the state was to lead to the development of Third World countries through restructuring of international economic and legal order as well as acquiring financial and technological transfer by intermediary of international organisations, likewise, in the surrounding of the Cold War.

Until the end of the Second World War, economic issues were essentially seen as a matter of domestic regulation. The bilateral trade agreements between states were virtually the only basis for the regulation of international economy. In the immediate post-war period, however, the involvement in the restructuring of the ruined national economies of "free", i.e., non-communist European countries as well as that of Japan was a vitally important for the US both politically and economically. The aim was twofold: (i) to increase the American power by allowing its capital to be invested abroad, expanding its economy on a world wide scale, which necessitated the dismantlement of the barriers that had been erected during the long history of protectionism.[210] (ii) To create a post-war consensus on international economic liberalism by linking it with the restructuring of 'West' European countries through Keynesian macroeconomic policies and the welfare state. The multilateral Bretton Woods system, set up in 1944, has been the institutional outcome of this process, established on three pillars: the IMF, the World Bank and later the General Agreement on Tariffs and Trade (GATT).[211]

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[209] Ruggie coined the concept of "embedded liberalism" to refer to the post-war Keynesian consensus of welfare state. See, Ruggie, John Gerard, "*International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order*," 36 International Organization (1982).

[210] Cassese (2001) p. 398

[211] Unlike the IMF and the WB, which were established in the end of the Bretton Woods Conference in 1944, the GATT was not founded as an organisation, nonetheless over the years an organisational structure evolved. On the subject, see for instance, Jackson, John, H., *The World Trading System: Law*

The major economic powers, especially the US and the UK agreed that trade and other economic activities should be regulated by *binding* rules and that states were not to interfere in the determination of international economic outcomes.[212] However, as Bothe observes, the 'par value' system of Bretton Woods was only in part based on legal obligations. For instance, in international monetary relations the non-legal approach to regulation has been widely used.[213] Likewise, it soon proved that it was not easy to agree on acceptable common international economic legal rules even among those states with a shared economic ideology and relatively comparable level of development. As Gruchalla-Wesierski argues, the failure to obtain unanimous support for the GATT illustrates the fact that even the widest of legal principles has difficulty receiving general acceptance.[214] Although the GATT put forward a set of obligation on the contracting states, such as the "most favoured-nation treatment", which provides for non-discrimination among partners, the rules of the GATT displayed essentially a soft character in so far as the GATT provisions contained a set of exceptions and escape clauses.[215] In the same vein, the GATT panel procedure within the framework of the dispute settlement provisions was merely a quasi-legal form of adjudication.[216]

Of course, all these arguments do not necessarily imply the ineffectiveness of the 'soft law' approach. On the contrary, the GATT for instance played an important role in reducing barriers to international trade, partly due to "its flexible semi-legal/semi-political nature of application".[217] Then, this is another matter of discussion, essentially

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and Policy of International Economic Relations, MIT Press: Cambridge, 1997, 2nd ed., in particular chapter 2.

[212] Gilpin, Robert, *The Challenge of Global Capitalism*, Princeton University Press: New Jersey, 2000, p. 57

[213] Bothe (1982) p. 82

[214] Gruchalla-Wesierski (1984) p. 41. The purpose of the GATT was to establish general principles and rules for the liberalisation of international trade by reducing customs and other barriers to trade and by eliminating discriminatory treatment between states in international commerce (Malanczuk, 1997, p. 228).

[215] For instance, Article XIX of the GATT covered safeguards, which permit post hoc protection of endangered industries. It permitted the contracting parties to offer emergency protection to industries by imports. For an overview of Article XIX, see Kleen, Peter, *The safeguard issue in the Uruguay Round*, 25 Journal of World Trade (1989).

[216] Picciotto, Sol, *The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance*, 18 Governance: An International Journal of Policy, Administration and Institutions (2005) 3, p. 484

[217] Malanczuk (1997) p. 230

involving the effectiveness of soft law.[218] However, what is important for the purpose of this section is that the institutions of the Bretton Woods were part of "a planned global regulatory system for trade and finance"[219] and soft (and of course hard) law was formed in this multilateral system by states and international organisations.

The second main source of the state-centric paradigm in international economic soft law is shaped both by the context of the historical moment, i.e. decolonisation process and the Cold War, and by the discrepancy between economic power and voting power in the UN General Assembly. The emergence of new nations, mostly former colonies -a heterogeneous and impoverished group of nations, rendered the composition of international relations more complex. Although Western states retained their dominant position in the Security Council due to the veto power, the majority in the UN General Assembly shifted from the Westerns states to an alliance between the bloc of socialist and the newly independent countries (NICs).[220]

This "Third Worldism" emerged in the post-1945 conjuncture of decolonisation, national liberalisation and the Cold War and reached its peak during first half of the 1970s centring on the call for the NIEO.[221] As a newly independent and/or developing country ideology, Third Worldism can be defined as a mixture of socialism, explicitly state-led developmentalism through import substitute industrialisation strategies and

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[218] As an early example on the issue of "effectiveness" in the context of international organisations and informal rules, see Schwebel, Stephen, M. (ed.), *The Effectiveness of International Decisions*, Oceana Publications: New York, 1971. For a recent study in the context of the World Bank, see, Sureda, Anders, R., *Informality and Effectiveness in the Operation of the International Bank for Reconstruction and Development*, 6 Journal of International Economic Law (2003) 3

[219] Braithwaite and Drahos (2001) p. 98

[220] Admittedly, the terms of newly independent countries", "developing countries" and the "Third World countries" do not always include the same countries. Nor is there a consensus on the definition of these terms. Still, all these three terms are in this study used interchangeably, for the reason that likewise the South-North division, all three terms sufficiently indicate the uneven power relations between countries and the concentration of economic, political and military power in the so-called industrialised "Western" states.

[221] The term "Third World" has been used in the context of international law to conceptualise at least four different phenomena: first, as an ideological category (non-alignment during the Cold War); second, to describe a political/geographical content (relatively distinctive demographic, economic and political characteristics); third, ex-colonial countries; and forth, a set of associations which describes 'backwardness'. According to Rajogopal, the first three conceptions of the term Third World are premised on the idea of national sovereignty whereas the fourth one is essentially unconnected to the idea of 'nation-state' and 'independence'. This concept in the fourth meaning allows us to critique the hierarchical ordering of globalisation on both state and non-state levels even under the conditions of late capitalism and rapid globalisation (For more details, see Rajogopal, Balakrishnan, *International Law From Below*, Cambridge University Press: Cambridge/New York, 2003).

anti-Western nationalism in the wider context of decolonisation and the Cold War.[222] One of the major features of this approach was the exclusion of non-state entities from the ongoing international bargaining process. MNEs, for instance, were viewed exclusively as agents of their home state, and even worse, they were seen as the prime vehicle of maintaining developing countries in a subordinate stage of underdevelopment.[223] The emphasis was clearly on state and state sovereignty. On the domestic arena, a strong and centralised nation-state was considered as a necessary vehicle for the achievement of industrialisation. Likewise, in international economic relations and law states were seen as the prime and only legitimate actors. Nonetheless, Third Worldism also attached great importance to form alliance, which would make it possible to act collectively under the umbrella of various regional and international forms of political and economic co-operation, such as the non-alignment movement and the United Nations.[224] The central idea was that the process of a true independence would only be achieved when the Third World countries attain economic independence, which could be more effectively carried out on a regional and transnational level.[225] In other words, in the Third Worldist approach, the emphasis was both on sovereign territorial nation-states that guided the national development and on international/transnational cooperation in order to transform the centre-periphery relations to reach an equitable sharing of global resources.[226]

As might be readily seen, the 'traditional' international law making techniques, namely customary and treaty law were not suitable in attaining the objectives of a fundamental restructuring of the institutional and legal economic order governing economic

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[222] Rist, Gilbert, *The History of Development: From Western Origins to Global Faith*, Zed Press: London, 2002, p. 140

[223] Waelde, Thomas, W., *A Requiem for the 'New International Economic Order'*, 1 The Internet Journal of the Centre for Energy, Petroleum and Mineral Law and Policy (1995), p. 11, available at http://www.dundee.ac.uk/cepmlp/journal/html/Vol1/vol1-2.html

[224] Berger, Mark, T., *After the Third World? History, Destiny and the Fate of Third Worldism*, 25 Third World Quarterly (2004) 1, p. 11

[225] Nkrumah, the Ghanaian President,, who was overthrown by the army in 1966, developed these ideas in the African context. See, Nkrumah, Kwame, *Neo-Colonialism: The Last Stage of Imperialism*, Nelson: London, 1965

[226] For the concept of "international resource planning and management" and "common heritage of mankind", both of which assumed central a role in the 'transnationalism' that the Third Worldism embraced, see Mann-Borgese, Elisabeth, "The International Seabed Authority as Prototype for Future International Resource Management Institutions" in *The New International Economic Order*, The Hague Workshop 1980, Martinus Nijhoff Publishers: The Hague, 1981

interaction. For, treaty law requires that states reach an agreement. Obviously, to persuade developed capitalist countries to undertake treaty obligations, which to a certain extent would damage their own interests and advantageous position, was not a realistic option. Nor could developing countries count on the formation of customary law endorsing their expectations. First of all, the formation of customary law is normally a slow process; a customary rule must be based on a constant and uniform usage, which entails the consistent practices of a large amount of countries.[227] Besides, since international law is essentially based on consent, a state cannot be bound against its wish if the state in question is a 'persistent objector'.[228] Consequently, the newly independent countries could not rely on the formation of new customary law to redress economical, cultural and social injustice they encountered in the past and to attain their goal of economic development and independence.

Thus, in consideration of strong opposition from the industrialised capitalist countries to a substantial change in international economic order, which would put their vital interests at stake, developing countries had to invent new legal strategies other than the 'traditional' law making methods in order to impose obligations on the developed countries. Since the United Nations principle of the sovereign equality of all its members entails the acceptance of the one state-one vote principle, the so-called Third World countries tried to use the majority's voting power in the UN General Assembly to create a new law-making mechanism. According to this approach, the concept of *consensus* rather than the traditional concept of consent would be the basis of international obligation, which would empower the UN General Assembly with a quasi-legislative competence. The adoption of the "Declaration on the Establishment of a New International Economic Order",[229] "Programme of Action on the Establishment of a New International Economic Order",[230] the subsequent "Charter of Economic Rights

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[227] In the *Asylum* Case (Colombia versus Peru), the International Court of Justice suggested that a customary rule should be based on a "constant and uniform usage, accepted as law" (*Asylum* Case, I.C.J Rep. 1950, p. 277)

[228] In the *Anglo-Norwegian Fisheries* Case, The Court held that Norway was not bound by the rule, since it had continuously opposed any attempt to apply the rule to the Norwegian coastline (*Anglo-Norwegian Fisheries* Case, I.C.J. 1951, p. 116).

[229] UNGA Res. 3201 (S-VI) of 1 May 1974

[230] UNGA Res. 3202 (S-VI) of 1 May 1974

and Duties",[231] and the "Declaration on the Right of Development"[232] are the most important examples of such attempts that aimed to change the asymmetrical international economic power relations between 'North' and 'South'.

To sum up, the key elements of the state-centrism in international economic soft law, which are particular to a historical momentum, can be listed as follows: (i) The actors are states and international organisations. This has been the case not only in the 'Third World' approach but even in the Bretton Woods system. In both examples, international economic soft law is formed by either international organisations or the agreements between states. (ii) The concepts of state sovereignty and sovereign equality are the basis of international economic relations. In the Third World model, the right of states' permanent sovereignty over natural resources and economic activities constitutes the inalienable part of sovereignty. (iii) State centrism grew as a part of Keynesian global planning and welfare state example of the industrialised countries whereas state-centrism established itself in the Third World model as a part of the state-led developmental ideology and economic nationalism. This model also favoured a national and jointly formed and equally represented regional and transnational economic planning and highly regulated international economic system. (iv) Non-state entities, especially MNEs were merely seen as the subjects of the regulatory rules that sovereign states lay down and supervise the compliance with these rules. (v) Lastly, the 'softness' of the set of principles and rules in state-centric international economic law resulted partly from the difficulty in agreeing on detailed binding obligations where vague or general principles were seen as the best way to reach an agreement. This was the case, especially in the example of the development of the Bretton Woods system. On the other hand, an important body of soft law did not result from such preference of states concerned. Because within the developing country context, the norms applicable to international economic relations set forth were intended to be binding in order not to leave the matter of putting the rules into effect to the discretion of the industrialised states. Nor occurred the softness as a result of an 'inescapable compromise' reached in the end of a global bargaining process between developing and developed countries. As will be exemplified by NIEO in the following chapter, the 'non-bindingness' in such

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[231] UNGA Res. 3281 (XXIX) of 12 December 1974

[232] UNGA Res. 41/128 of December 1986

cases resulted essentially from the "discrepancy between economic power and voting power in most world-wide organisations".[233]

3.5 The dual "Globalist" paradigm

The present study holds that this emerging "post-state centric legal order", which is perceived as reflecting social and economic changes more accurately, displays in fact a dual character. On the one hand, the 'emerging' non-state legal order seeks to overcome the limits of national sovereignty over the international rule-making. Currently, we are witnessing an institutional divorce of the nation-state from economic sphere due to the neo-liberal separation of politics and economics, which has led to a decrease in the economic and political autonomy of nation states through policies of liberalisation, deregulation and privatisation. Simultaneously, on the other hand, we are witnessing an opposite nonetheless complementary tendency of the re-regulation and institutionalisation of international economy through multilateral and bilateral investment agreements as well as the rules and practices of multilateral institutions to render a constitutional status to the power of capital on a world scale.

The dual "globalist" paradigm is based upon two assertions. On the one hand, the recognition of the rise of non-state actors in international law, policy and decision-making and implementation processes. On the other hand, the increasing institutionalisation of neo-liberal ideas associated with globalisation through a multilateral rule-based framework that has substantial authority over national governments of developing countries.[234] The basic premises of the former assertion, which this study refers to as "non-state actor" paradigm, are: (i) the decline of sovereignty; (ii) the growing authority of private entities as a result of deregulation, economic liberalisation and privatisation; (iii) the increasing normative impact of non-state actors on formal international law-making; and (iv) the emergence of informal

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[233] Seidl-Hohenveldern (1999) p. 40

[234] "Neo-liberalism" as is understood in this study, basically refers to a particular ideology which asserts that the *market* is the core institution of modern societies and that both domestic and international politics and policy-making are (and *should be*) primarily concerned with making markets work well (Soedeberg, Susanne; Menz, Georg; and Cerny, Philip, G. (eds.), *Internalizing Globalization: The Rise of Neoliberalizm and The Decline of National Varieties of Capitalism*, Palgrave MacMillan: Basingstoke, 2006, p. 12).

normative structures. The non-state normative developments, like the so-called private or mixed "soft law regimes", entail both the concepts of the multiplicity of law-making (legal pluralism) and self-regulation. As illustrated in this study, self-regulation as opposed to centralised law, which is imposed from states and or international organisations, can take place mainly in two distinctive ways. First, in the so-called "bottom-up" model, self-regulation develops as a spontaneous and gradual process. As in the example of *lex mercatoria*, the repetition of the business procedure and commercial practices of traders may develop into trade usage or custom. Second, in the so-called "top-down" model, self-regulation results from a deliberate enterprise or regulatory impulse. As the development of the international principles of corporate social responsibility exemplifies, self-regulation may be the outcome of public pressure, societal expectation or self-interest.

On the other hand, the "hegemonic state" paradigm entails seemingly an opposite, nonetheless complementary direction: a greater legalisation and institutionalisation in international economy to regulate the behaviour of actors more deeply through institutional rules, often in the 'hard' form, as the evolution of GATT/WTO dispute settlement procedures exemplifies. The hegemonic state paradigm refers to (i) the restructuring of Third World states to ensure that they operate under the discipline of international capital to deliver the tasks such as an improved long-term investment climate and better protection of private property rights[235] and (ii) the diminishing of the political influence on the outcome of the proceedings by disciplining the international liberal trade market in the interests of not only the most powerful states, but the global capitalist market as a whole.

The "non-state actor" and "hegemonic state" paradigms compose the "dual-globalist" paradigm, which has been the leading model of the recent process of the neo-liberal restructuring of international economy and politics, commonly referred as globalisation. Its central claim is the necessity of the recognition of this paradigm shift in the name of the continuing relevancy of international law, which should reflect the dynamic nature of international relations. Therefore, this study interprets the paradigm shift from state-

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[235] Gill, Stephan, *The Constitution of global capitalism*, paper presented at the Panel: "The Capitalist World, Past and Present" at the International Studies Association Annual Convention, Los Angels, 2000, p. 9 (Available at http://www.theglobalste.ac.ukp).

centric to globalist as a power shift in the sense of the enhanced bargaining power on part of the industrialised countries.

While more will be said in the following chapter, the factors that have led to a shift from the state-centric to the dual global paradigm can briefly be listed here as follows: (i) the collapse of the socialist bloc, which diminished the bargaining power of developing countries; they could no longer rely on diplomatic manoeuvres by playing off East against West, (ii) technological progress, (iii) the withdrawal of some state apparatus from previously deemed public activities, (iv) the opening of national markets to international investors (deregulation, privatisation and liberalisation of national economies), and finally (v) the inadequacy of formal law-making bodies to regulate all new spheres as well as trans-sovereign problems, such as refugee flows, terrorism, disease, and environmental degradation, which demand both flexibility and speed.

3.5.1 The "non-state actor" paradigm

Recently, scholars on international economic soft law have sought to examine not only the normative value and role of soft law in a state centred international normative order, but also focused on the normative instruments of non-state actors in association with their increasing role in the process of globalisation. It is a widely shared perception that contemporary international society is not comprised exclusively of nation states. Indeed, it has long been recognised that a broad range of significant entities is involved in international affairs, such as international and regional organisations as well as non-state actors.[236] Today, the voices announcing the significantly reduced policy-making capacity of national governments in many areas not least in international economy and the rise of non-state actors are being heard even more forcefully. However, unlike the relatively limited implications of the call for the recognition of the 'new actors' on international scene in the Cold War period, the dominant discourse of the post-Cold War period is an indication of a more substantial shift a paradigm shift in international law making, from state-centric to non-state actors.

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[236] Already in the beginning of the 1960s, Wolfgang Friedmann, the widely influential writer of his time, for instance, held that "while states remain the basic unit of international relations it can no longer be regarded as the exclusive subject of international law". According to this writer, along with international organisations and "public international corporations", private corporations, especially MNEs had become

It is increasingly claimed that our world has now become globalised. According to this perception, a revolutionary shift is taking place from a state-dominated to a market-dominated international economy, which inevitably will lead to a re-definition of international public sphere. The latter is also often conceived as signalling a paradigm shift in international law making from a sovereignty-based international legal system to an 'informal', 'transnational' and 'non-state' legal order. According to this line of understanding, the decline of the state has led to an open and truly global economy characterised by unrestricted trade, financial flows, and international activities of multinational enterprises. It is further argued that the integration of the world economy has unavoidably shifted the balance of power away from states towards markets, and non-state actors have taken on authoritative roles and functions in this emerging new order. In a similar vein, it is said that the globalisation of liberalism and privatisation of government activities have increased the reliance on market mechanisms, which has resulted in the relocation of regulatory functions from public to private authority. As a consequence, it is argued, the distinction between international public and private sphere, national and international, and local and global has blurred.[237]

It can indeed be observed an increasing tendency among scholars to extend the use of soft law instruments and institutions as something that can and should reside outside the 'traditional' international public sphere. Cutler, for instance, holds that state-based, positivist international law and 'public' notions of authority are being combined with or, in some cases, superseded by non-state law, informal normative structures, and 'private' economic power and authority as a new transnational legal order takes shape.[238] It is also asserted that MNEs and global business associations have alone assumed the roles that traditionally belonged to the international public authority. These developments have been conceptualised with the term of "global private governance", which basically refers to commercial arbitration, rating agencies, and other types of private regimes.[239]

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the new subjects of international law even though the latter, in Friedmann's view, should not be granted international legal status "equal to that of public international organization" (Friedmann, 1964, p. 223).

[237] See for instance, Cutler, Claire, A., "Private international regimes and interfirm cooperation" in Hall, Rodney, Bruce and Biersteker, Thomas, J. (eds.), *The emergence of Private Authority in Global Governance*, Cambridge University Press: Cambridge, 2002, p. 23. See also Strange, Susan, *The Retreat of the State: the diffusion of power in the world economy*, Cambridge University Press: Cambridge, 1966

[238] Cutler, Claire, A., *Private Power and Global Authority*, Cambridge University Press: UK, 2003, p. 1

[239] Ruggie (2004) p. 502

The recurring reason offered for this modification is the changing international reality, which has created a disjunction between "formalistic and legalistic" structures of international law combined with the new world that has developed in the globalisation process in which state and law has become detached and the public/private distinction has eroded.[240] Questioning the basic premises of 'traditional' international law, which is a system based on sovereign states, many writers conclude that there is a need to recognise that the basic rules and rule makers of "the game" have changed. In the words of Flood, in this 'new age', which demands fast, flexible and often unaccustomed solutions, soft law has become the law of globalisation.[241] As may be expected, in this emerging legal order the concept of soft law is also to be redefined. Accordingly, soft law now does not refer to the rules with vague obligation that governs inter-state relations, but to "regimes that rely primarily on the participation and resources of nongovernmental actors in the construction, operation, and implementation of a governance arrangement".[242]

Even though there is no uniformity in the definition of 'informal' soft law and soft law regimes, the exclusion of state authority from the norm creating and implementation processes appears to be the common characteristic. These emerging sources of law "do not emanate from public, state authority, but rather from privatized, non-state authority".[243] It is said that the private international regimes, which are created by enterprises and business associations in the interactions among themselves as well as between their customers, is the most important example of these emerging non-state authorities. In this study such developments are scrutinised and assessed in the examples of the so-called 'new' *lex mercatoria* and the international standards of "corporate social responsibility" (CSR). The 'new' *lex mercatoria* refers to "customary practices of merchants that transcended local custom or law and which came to be

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[240] In the words of Lipschutz and Fogel, "Today, the state monopoly over regulation is well past its twentieth-century apogee. The "fluidization" of regulatory space is a feature arising from globalization, the declining authority of the state, and the growing tendency of individuals and organizations to act outside traditional rules and frameworks" (Lipschutz, Ronnie, D. and Fogel, Cathleen, *"Regulation for the rest of us?" Global civil society and the privatization of transnational regulation* in Hall and Biersteker, 2002, p. 122). See also Cutler, Clair, A., *Public Meets Private* 13 Global Society (1999) 1

[241] Flood, J., "Capital markets, globalisation and global elites" in Likosky, Michael (ed.), *Transnational Legal Process*, Butterworths: UK, 2002, p.116.

[242] Kirton and Trebilcock (2004) p. 4

[243] Cutler (2003) p. 22

recognized by national courts".[244] *Lex mercatoria* is generally considered as representing the so-called "bottom-up" informal soft law, for the reason that commercial actors formulate rules, set standards and create monitoring and compliance procedures in the voluntary and non-binding form to govern their own activities.[245] While the international standards of CSR refers to the voluntary ethical behaviour of a company towards society, human and workers' rights, environmental protection, community involvement, and supplier relations. Unlike, *lex mercatoria*, the CSR is mainly driven by a regulatory impulse, heightened by increasing public pressure, consumer awareness and other dynamics, which force companies to self-regulate in the absence of external international norms to deal with the 'backlash of globalisation' in the above mentioned areas and therefore can be classified as 'top-down' informal soft law.

To sum up, the "non-state actor" paradigm, as it is understood here, mainly refers to a perception of 'global' situation, which assumes: (i) the decline of the nation-state, (ii) the rise of non-state actors as a new source of authority, (iii) the multiplicity of international norm making, (iv) formal/informal soft law and (self-) regulation, and finally, (iv) the belief in the supremacy of free-market and the transforming power of market forces (and technology).

3.5.2 The "hegemonic state" paradigm

As outlined in the previous section, in the post-Cold War period, we have been witnessing a turn from government, formal international legislation, legal rules, public authority and institutions to governance, "open-ended" legalisation with a "differentiated obligation", informal norm-like acts of private entities, private authority, and private or hybrid regimes. However, this period has also witnessed a parallel and complementary tendency of *re-forming*, which consists of policies such as regulation and *re*-regulation as well as of a hardening process of already existing soft law and soft law institutions in different areas of law. Today, there are more multilateral agreements

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[244] Braithwaite and Drahos (200)1 p. 46

[245] Cutler, Claire, A., Haufler, Virginia, and Porter, Tony (eds.), *Private Authority and International Affairs*, State University of New York Press: New York, 1999, p. 14

and multilateral institutions addressing more areas of policy than ever before".[246] Indeed some writers even remark the "rejuvenation of international law"[247] and observe "a move to law in international relations".[248] This continued "legalisation", characterised primarily a proliferation of bilateral trade and investment treaties as well as the so-called international regimes dealing with particular issue areas - especially the WTO system -, can be understood as incorporating strategies, which seek to "expand the power of capital in the long term through bilateral and multilateral and quasi-legal agreements, and the constitutionalisation of neo-liberal policies, rules and standards by international economic institutions", in brief, the strategies that seek to establish a framework for a "new constitutionalism" and create a "disciplinary neoliberalism".[249]

Bilateral trade and investment agreements have indeed been a widely used method in this process to ensure that developing countries do not fail on the liberalisation, privatisation and deregulation measures dictated by World Bank/IMF structural adjustment programs or domestic free market policies imposed by the North.[250] Especially in the last two decades, the US, one of the key actors of the paradigm shift, has showed a strong commitment to bilateralism in the areas of investment, trade and competition.

Likewise, multilateral institutions, especially the WTO, the IMF and the WB have promoted a framework for global capitalism and sustained the process of creating a market discipline. On the one hand they endorse globalisation process by making rules, which national governments have to comply with. The WTO agreements, for instance, place extensive legal obligations on states to ensure that their national economic

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[246] Raustiala, Kal, *Sovereignty and Multilateralism*, 1 Chicago Journal of International law (2000) 2, p. 401

[247] Simpson, Gerry, *The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power*, 11 European Journal of International Law (2000) 2, p. 439

[248] Goldstein, Judith; Kahler, Miles, Keohane, Robert, O., and Slaughter, Anne-Marie, *Introduction: Legalization and World Politics*, 54 International Organization (2000) 3

[249] Gill, Stephen, *The constitution of global capitalism*, paper presented to a Panel: "The Capitalist World, Past and Present" at the International Studies Association Annual Convention, Los Angeles, 2000, available at http://www.theglobalsite.ac.uk

[250] A bilateral treaty in the area of the promotion and protection of foreign investment is defined by Muchlinski as follows: "legally binding international instrument between two states, whereby each states promises, on a reciprocal basis, to observe the standards of treatment laid down by the treaty in its dealings with investors from the other contracting state" (Muchlinski, 1999, p. 617).

regulations conform to WTO standards, covering matters ranging from intellectual property rights, treatment of foreign investors to corporate taxation.[251] On the other hand, international financial organisations oblige developing country governments to adopt the policies of neo-liberal macroeconomic management in return for financial aid. The latter is also known as 'conditionality', which is often criticised for undermining the government authorities' ownership of policies.

It is a common knowledge that the decision-making authority in the most prominent and powerful institutions of "global economic governance", in particular in the IMF, the World Bank, the WIPO (World Intellectual Property Organization) and the WTO, continues to be disproportionately accorded to the United States, the EU and Japan. Whereas developing countries have had comparatively little influence on the outcomes in the standard-setting process of these institutions mainly due to the continued use of webs of economic coercion and incentives by the US, EU and Japan. However, this should not be understood as if these institutions are merely tools that powerful states to impose rules on 'peripheral' states and co-ordinate inter-'central' state bargains. As Cammack holds, these organisations are seeking to define and exercise a relatively autonomous role in order to be able to deal with the contradictions that a global capitalist system generates and which cannot be addressed at national level alone, not even by the most powerful states.[252]

It is important to note that the concepts of "hegemonic international law" (HIL) and "hegemonic state paradigm", as is understood and used here, are not one and the same thing. HIL refers to a more comprehensive and fundamental restructuring of international law and relations, which also incorporates *most* aspects of the "hegemonic state paradigm". The contemporary HIL refers to the US disengagement from international law in many issue areas either in the form of unilateralism and withdrawal from multilateralism, as in the cases of International Criminal Court, the Kyoto Protocol, and the "war against terrorism" in Afghanistan and Iraq. HIL therefore entails policies, which undermine the role of international law as a regulatory (thus, restrictive) apparatus for the hegemonic power(s). Nonetheless, HIL does not involve a total

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[251] Picciotto (2005) p. 477

[252] Cammack, Paul, *The Governance of Global Capitalism: A New Materialist Perspective* in Wilkinson, Rorden (ed.), "the Global Governance Reader", Routledge: London & New York, 2005, p. 157.

disengagement from law. Because international law and its institutions do not only constrain power, but also magnify it. The HIL model therefore also aims at "designing a new generation of international institutions and redesigning old ones,"[253] as in the cases of the acceptance and enforcement of WTO-based Agreements on TRIMs and TRIPS, near-defining power on the terms of the IMF conditionality. This is where the concept of "hegemonic state paradigm" comes into view. However, as pointed out above, it is important to note that although both HIL and "hegemonic state paradigm" assault the principle of sovereign equality and envisage the recognition of an asymmetrical power relation, the latter should not be reduced simply to one state's policy preference but should be seen as the restructuring of international economy in the interest of the global capitalist system as a whole.

All things considered, the "hegemonic state" paradigm in this study basically refers to the institutionalisation of neo-liberal economic ideas through both (i) bilateral and multilateral treaties backed by a few powerful states, notably the US, and (ii) the rules and practices of multilateral institutions controlled essentially by the same powerful states. It is important however to note that the concept of 'hegemony' here does not simply indicate the dominant position of one or a few powerful states due to their economic and military supremacy. Broader than state dominance; it refers to a consensual order rather than merely a form of dominance. As Cox remarks, a hegemonic system is "based on a coherent conjunction or fit between a configuration of material power, the prevalent collective image of world order (including certain norms) and a set of institutions which administer the order with a certain semblance of universality".[254]

Lastly, this "hegemonic state paradigm" shows a "quasi-unembedded" neo-liberal character. It is *neo-liberal*, because it lays a greater emphasis on the primacy of global market forces. It is quasi-*unembedded*, because, unlike the regime of "embedded liberalism", it states the necessity of divorcing market from the post-war domestic institutions. Finally it is "*quasi*-unembedded", because it partly recognises the social, economic and human cost of laissez-faire, as the diverse policies launched by the World

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[253] Slaughter (2000) p. 224

[254] Cox, Robert, W., *Social Forces, States and World Orders: Beyond International Relations Theory*, 10 Millennium: Journal of International Studies (1981) 2, p. 139

Bank and the IMF involving "Poverty Reduction Strategies" and " Comprehensive Development Framework/Growth Facility" in 1998 respectively 1999, timidly demonstrate.

For example, there are many instances where states are actively involved in a 'non-state' norm creation process, as in the case of "The Forest Stewardship Council" and "International Organization for Standadization". Moreover, some of the characteristics provided here are relevant rather to some particular issue-areas and do not represent a general attitude. For instance, it would be wrong to assume that weaker states do always and in every issue-area seek for hard law whereas powerful states always prefer soft law. As Cutler observes, hard law instruments are favoured by weaker states on the periphery because it provides a greater transparency, predictability, stability, and enables to lock-in the commitments that become more difficult for powerful states to renege upon, especially in areas such as international aid and transfer of technology.[255] On the other hand, developing countries have generally been less willing to undertake legal obligations in areas, where their sovereign rights are considered constrained. By the same token, powerful states are less willing to undertake hard law whose rules lay down obligations on the basis of the equality of sovereign states whereas these countries are much more for hard law in areas such as trade, intellectual property rights and the protection of foreign investment. Moreover, the difference between paradigms does not always indicate an absolute dichotomy. Soft law and hard law complement each other rather than compete against each other, in many issue-areas. These two 'methods' of regulation may operate in the same issue-areas separately or in a combined manner, as in the type of the so-called "elaborative" soft law.[256]

Below, the main characteristics of the "state-centric" and the "globalist" paradigms are illustrated by Table 1. These stylistic comparisons do however not include every aspect that one could find in each model.

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[255] Cutler (2003) p. 23

[256] For "elaborative" soft law, see section 2.3 in this study.

Table 1. Characteristics of the state-centric and globalist paradigms
Source: Original formulation based on the analysis in chapter 3

	State-centric paradigm	**Dual globalist paradigm**	
		Non-state actor	**Hegemonic states**
Actors	-States -International organisations ("One state-one vote" rule -UNGA)	-MNEs -NGOs -International organisations -Policy network groups	-Powerful states -International Economic Institutions (WTO, WB and IMF)
Hard law/ Soft law	-Hard law -Multilateralism	-Soft law/standards -Self-regulation -Voluntary adherence	-Hard legalisation (WTO, TRIPS, TRIMS, and BITs) -Abstention from direct regulation -Deregulation/privatisation and liberalisation
Law creation process	-State consent -The will of the "International Community" of states	-Legal pluralism -Non-state actors participation -Mixed and informal regulation process	-Increasing bilateralism -Formal and informal intergovernmental networks and "soft law summits (G7/G8) -Mixed/informal standard-setting forums (Davos meetings)
Sovereignty	-Sovereign equality (Promoted by Third-World and socialist states) -Government	- The demise of sovereignty - Private authority - Governance	-Asymmetrical/uneven sovereignty (US, EU and Japan) -Government/governance
National/ International/ Global	-National -International and horizontal -"Common heritage of mankind" as a basis of planning and management of the international resource)	-Globalist	-National -International and vertical/hierarchical -Global (protection of private property)
Economic ideology	-State-led developmentalism	-Laissez-faire neo-liberalism -Market-led and market-based	-Unembedded neo-liberalism

On the other hand, some of the characteristics are diametrically opposite, such as sovereignty and sovereign equality. Because, one of the constitutive premises of the 'globalist' paradigm is based on the understanding that the concept of sovereignty is now obsolete while the principle of sovereign equality is rather a formal, i.e. an empty,

concept. In the words of Vagts, a hegemonic international law most specially requires discarding the idea of the equality of states on the ground that norms cannot stray too far from reality and must therefore recognise inequalities of power.[257]

3.6 The concept of "sovereignty" and the principle of "sovereign equality"

International public law is traditionally the law concerned exclusively with 'sovereign' states. Accordingly, states are the only legitimate or original, i.e. as opposed to 'derivative', subjects of international law, therefore only states can create and employ international law. It is premised on the principle of the "sovereign equality of states" and their formal equality in law that is based on the non-intervention in the internal affairs of other states and state consent as the source of international obligations.[258]

Sovereignty as a legal concept established itself as a supreme power over a certain territory (the substantive realm of sovereign) following the 1648 Peace of Westphalia, which ended the Thirty-Year's War.[259] Territorial Rights of a sovereign, based on the new phenomenon of the territorial state, embodied rights such as to make, interpret and enforce laws, declare wars, impose taxes, and form alliances.[260] Later on, the 1713 Peace of Utrecht, which ended an 11-year war between France and Grand Alliance, resulted in defining sovereignty geographically; that is to say, sovereign rights were to be bound territorially and not according to dynastic entitlements.[261] In other words, since the latter part of the sixteenth century, the concept of sovereignty has included both *internal* and *external* dimensions of power. The former has referred to the position

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[257] Vagts, Detlev, F., *Hegemonic International Law*, 95 the American Journal of International Law (2001) 4, p. 845

[258] Cassese (2001) p. 88

[259] Nonetheless, although the doctrine of sovereignty is overwhelmingly seen as an outcome of the Peace of Westphalia Kresner argues that the Westpahalian sovereignty in the meaning of non-intervention norm in internal affairs had vitually nothing to do with the treaties signed in 1648. This principle was first explicitly articulated in the 1760s by Wolff and Vattel (Krasner, Stephen, D., *Sovereignty: Organized Hypocrisy*, Princton University Press: New Jersey, 1999, p. 21).

[260] Reus-Smit (2003) p. 619)

[261] Article 6 of Treaty of Utrecht declared the establishment an equilibrium, and political boundaries between the Kingdoms (*Ibid.* p. 620)

of a sovereign to his inferior within a state; that is to say, there is no other power superior to it internally while the latter has referred to the position of a sovereign (state) vis-à-vis other sovereigns (states) in the meaning that a power is sovereign because it is not subject to another foreign power in its external relations.

The idea that sovereign states cannot be bound by, or have an obligation under, international law only reflects the understanding of sovereignty in its absolute terms, according to which the sovereign, possessing supreme power, is not himself bound by these laws, which he himself made.[262] However, it would be wrong to assume that state sovereignty and international law that imposes restraints on this sovereign are two incompatible concepts that exclude each other by definition. No modern state has ever been sovereign if this term is to be understood as 'unlimited power'. There have always been internal challenges, which have led to "institutionalizing legal limitations on internal sovereignty in the form, among others, of constitutional law".[263] Moreover, the acceptance of notions such as Natural Law, a theory, which reached almost a universal acceptance in the 16th and 17th centuries[264] and the principle of *pacta sunt servanda*,[265] demonstrates that the concept of sovereignty was conceived as limited as a legal concept from its early stage of development. More important proof for the compatibility of the concept of sovereignty with international law is the nascent of sovereignty as a *legal* concept. In Morgenthau's words, without mutual respect for the territorial jurisdiction of the individual nations, and without the legal enforcement of that respect,

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[262] This approach recognises the precedence and priority of sovereignty as a 'real life fact' over the law. In what Koskenniemi calls it as "pure fact view", "sovereignty and together with a set of territorial rights and duties are something external to the law, something the law must recognize but which it cannot control" (Koskenniemi, 1990, p. 15).

[263] Wallerstein, Immanuel, *States? Sovereignty?* in Smith, Solinger and Topik (1999) p. 20

[264] The theory of natural law is formulated by Cicero as "right reason in agreement with Nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrong-doing by its prohibitions (...) It is a sin to try to alter this law, nor it is allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely" (Cited in *Legal Philosophies*, Harris, J.W., Butterworths: London, 1997, p. 7). Although the theory of natural law has its origin in Roman law, it is adopted by the Roman Catholic Church as the official philosophy of law. Later on, however, natural law was increasingly secularised. "Even if God did not exist" said Hugo Grotius (1583-1645), "natural law would have the same content, and just as God cannot cause that two times two shall not be four, so he cannot cause the intrinsically evil to be not evil" (cited in Harris, 1997, p.12). In other words, "the existence of natural law was the automatic consequence of the fact that men lived together in society and were capable of understanding that certain rules were necessary for the preservation of society" (Malanczuk, 1997, p. 16).

[265] As a *priori* basis of obligation, as the "highest, irreducible, final criterium", as a "fundamental norm".

international law and a state system based on it could not exist.[266] Likewise, Hart argued that sovereignty means no more than 'independent' labelling the 'absolutist view' as "unreasoned dogma", i.e. states ought to be free of all or at most be limited only by certain types of restraints.[267]

Many studies on the post Cold War international order trace the weakening of state sovereignty, from the classic Westphalian model, through the establishment of the United Nations to the current trend of globalisation. Today, it has become commonplace to refer to the growing interdependence in the post-1945 period and to conclude that the concept of sovereignty is inadequate to capture the complexity of contemporary international relations.[268] However, a mere reference to the growing interdependence is not enough to capture reality in all its complexity either. It is likewise important to examine the nature and consequences of this interdependence, which displays an asymmetrical character between industrialised and developing countries. As Chimni points out, the phrase neo-colonialism was coined precisely to sum up the essential character of the present phase of interdependence.[269] Bull also observes that many developing countries have long insisted on the preservation of state sovereignty due to the fact that they have regarded the institution of sovereignty as one which provides safeguard against the attempts of more powerful states to wrest from them control of the economic resources.[270]

The principle of sovereign equality has become an integral part of the doctrine of state sovereignty in the post-1945 period. Article 2(1) of the UN Charter recognised all its

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[266] Morgenthau (1985) p. 330

[267] Hart (1994) p.223

[268] Among many, see Slaughter, Anne-Marie, *A New World Order*, Princeton University Press: Princeton and Oxford, 2004 and Malanczuk (1997). Besides, according to many writers, in the globalisation process not only has the concept of sovereignty lost its explanatory force and function, but also the nation-state itself has ceased to exist. Yet, some scholars differ the diminishing role of sovereignty as a legal concept from the issue of "the fate of the nation-state". Malanczuk, for instance, argues that even if sovereignty as a legal doctrine may be viewed as outdated in the light of modern realities, this still does not necessarily lead to the conclusion that also state has become obsolete (Malanczuk, Peter, "Globalization and the future role of sovereign states" in Weiss, F.; Denters, E. and de Waart, P. (eds.), *International Economic Law with a Human Face*, Kluwer Law International: The Hague, 1998, p. 48).

[269] Chimni, B. S., *International Law and World Order*, Sage Publications: New Delhi/Newbury Park/London, (1993) p. 109

[270] Bull, Hedley, *The Anarchical Society: A Study of Order in World Politics*, Palgrave: New York/Basingstoke (2002), p. 291

members as equal while both Article 1(2) and Article 55 emphasised 'respect for the principle of equal rights and self-determination of peoples'.[271] It is generally acknowledged that the principle of sovereign equality also includes the principles of non-intervention in the internal and external affairs of other states, prohibition of the threat or use of force, and permanent sovereignty over the natural wealth and resources.

Differences in power are of course undeniable, as can easily be exemplified by the structure of the Security Council of the UN, in which five members permanently seated with the power of veto.[272] Sovereign states were clearly unequal in terms of power, wealth and resources. Considering this relative asymmetrical power relations among states, a number of writers tend to understand the principle of sovereign equality as either "legal fiction" or merely as "formal equality" under the "one state, one vote rule" in the General Assembly of the UN and nothing more.[273] However, as Cassese contends, the principle of sovereign equality constitutes "the linchpin of the whole body of international legal standards, the fundamental premise on which all international relations rest",[274] not least the necessity of each state's 'consent' with respect to the formation of customary international law and international treaties. Thus, the principle of sovereign equality does not imply the *actual* equality of law creating power of states but rather a special aspect of the concept of sovereignty. But more than that, as will be seen in chapter 5, developing countries have considered the concept of international law

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[271] Article 2, paragraph 1 of the UN Charter declares that "the Organization is based on the principle of sovereign equality of all its members". Sovereign equality was confirmed in many subsequent UN resolutions, notably the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of their Independence and Sovereignty of 21 December 1965 (Resolution 2131 [XX]) and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations of 24 October 1970 (Resolution 2625 [XXV]).

[272] Yet, even this 'institutional design' could be seen as a compromise between sovereign equality, great power primacy and institutional efficacy.

[273] International organisations use one or a combination of three types of decision making rules for most non-judicial decisions: (i) *majority voting*, where each member has one vote and decision are taken by majority; (ii) *weighted voting*, where member states have differentiated vote power based on different criteria, such as financial contribution (as is the case with the IMF and the World Bank) or population (as is the case in certain institutions of the EU) and decision taken by a majority of this differentiated votes; (iii) *sovereign equality voting*, where equal representation is offered and decisions are taken by consensus or unanimity of the members (as is the case in the NATO, the GATT/WTO, the OECD, the UN Development Program -UNDP, and some other specialised agencies of the UN). For a detailed analysis of the effects of the different types of voting systems on the outcomes, especially in the case of the GATT/WTO, see Steinberg, Richard, H., *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 International Organization (2002) 2

[274] Cassese (2001) p. 88

based on sovereign equality as a new form of global justice and the denial of which as a major setback for both the form and content of international law.

However it is important to note that the existence of the principle of sovereign equality within the institutional framework of an international organisation does not automatically guarantee that this principle always delivers what it promises. It is generally recognised that the principle of sovereign equality is more likely than weighted voting, as in the case of the IMF and the World Bank, to confer legitimacy on the outcomes of the activities of international organisations. However, as shown in chapter 8, the legitimising generation effect of this principle may be manipulated through the so-called "invisible weight" as in the case of the WTO, which formally takes its decision on the basis of sovereign equality though the asymmetrical nature of the outcomes of this organisation in favour of the powerful advanced capitalist countries is widely acknowledged.

3.7 The subjects theory and "non-state actors" of international economic law

It has become a truism to say that despite the changing international reality, the classical "state-centric" view, which recognises states as the only subjects and Article 38 of the Statute of the International Court of Justice as the exhaustive list of sources of international law, still endures and continues to predominate.[275] Associated to this unconformity with the circumstance of the day, international law, it is said, runs the risk

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[275] It must be recalled that the nature of the sources listed in Article 38(1) indicates a contested terrain. Objections against especially 'international custom" are manifold. One of the most established criticisms is based on the fact that many rules of customary international law have been developed without participation of non-European states and therefore it is doubtful whether these rules could be considered reflecting a *common* practice of 'international community' (For a detailed discussion, see Snyder, Frederic E. and Sathirathai, Surakiat (eds.), *Third World Attitudes Towards International Law*, Martinus Nijhoff: Dordrecht, 1986). See also Anghie, Antony, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press: UK, 2005; *Third World and International Order: law, politics and globalization*, Anghie, Antony (ed.), Brill Publisher, 2003; and Gong, Gerrit, W., *The Standard of "Civilization" in International Society*, Clarendon: Oxford, 1984. Likewise, socialist scholars have also claimed that rules of international law especially up to 1917 were the main result of a consensus between the Christian, colonialist, capitalist European nations. Therefore, socialist countries favoured a treaty-based international law. For more details, see, among others, Tunkin, G., *Is General International Law Customary Law Only?*, 4 European Journal of International Law (1993) 4; Tunkin, *International Law: The Contemporary and Classic* in "Essays on International Law", Nawaz, M. K. (ed.), Sijthoff-Leyden, 1976; Higgins, Rosalyn, *Conflict of Interests*, The Bodley Head: London, 1965).

of losing its relevancy. Hence, according to the "necessity argument", as called by Klabbers,[276] it is essential to recognise non-state entities as legitimate participants in international law and policy making, and therewith the expansion of the accepted modes of international norm creation by embracing the new "hybrid" and "private" regulations, formal and non-formal methods and "hard" and "soft" legal standard-setting techniques that generate the rules of the contemporary international law.

Not surprisingly therefore, the prescription to surmount the "state-centric nature of international law" uniformly combines two interrelated solutions: (i) to reassess the state-centric modalities for the creation of international legal rules, that is to say, to re-evaluate the doctrine of sources, codified in Article 38 and, (ii) to incorporate non-state actors into the framework of international law through elevating them to the status of subject of international law.

A *subject* of international law[277] can be defined as; "an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims".[278] Despite the fact that there are various actors participating in contemporary international relations, according to the established legal practices on the subjects and sources of international law, only states and, to a limited degree, international organisations are the subjects of international law. In other words, 'traditional' international law differentiates between "international legal personality" and "participants in international relations". However, states' long-established monopoly in this field has nowadays increasingly been challenged. Even though it is

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[276] Klabbers, Jan, "(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors" in Petman, Jarna & Klabbers, Jan (eds.), *Nordic Cosmopolitanism*, Martinus Nijhoff Publishers: Leiden/Boston, 2003, p. 364

[277] The concepts of 'subject of international law' and' international legal personality' are often used interchangeably. Malanczuk, for instance, states that "when lawyers say that an entity is a legal person, or that is a subject of the law –these two terms are interchangeable- they mean that it has a capacity to enter into legal relations and to have legal rights and duties (Malanczuk, 1997, p. 91). However, as Malanczuk points out, in certain examples, some differences between these two concepts are recognised. For instances, *The Restatement (Third)* Vol. 1, part II rejects the term 'subjects' on the ground that the term may have more limited implications meaning (*Ibid.* p .91 footnote 1). Likewise, according to Oppenheim the concept 'international personality' has larger implication than the concept 'subject'. Therefore for instance, "non- full" sovereign states can be 'only' subjects of law, hence, 'imperfect international person' (Oppenheim, *International Law. A Treatise*, 7th ed., edited by Lauterpacht, Hersch, Longmans, Green: London, New York, 1948, p. 134).

[278] Brownlie, Ian, *Principles of Public International Law*, Oxford University Press: New York, 2003, p. 57.

overwhelmingly recognised among scholars that states remain the principal actors on the international scene, to argue for the importance of the recognition of non-state actors' participation in international law-making have gained a widespread acceptance. This section first gives an overview on the 'traditional' subjects and sources theory of international law, and then, by presenting arguments for and against, discusses whether non-state actors have obtained the status of the subject of international law.

Regardless of whether it is national or international any legal system requires 'legal personality' for the capacity to bear rights and duties. An entity that does not have legal personality can not enter into legal relations, or present claims against other legal personalities.[279] Nevertheless there is a crucial difference between national and international law on this matter: unlike national law, the subjects of the international law (participants in legal relations) are *also* the authors of the law. In other words, unlike national law, legal rules of international law consist of the practices of its subjects (i.e. those entities, which have international legal personality). One important consequence of this peculiar feature regarding the issue of international legal personality of non-state actors is that when non-state actors are considered as the subjects of international law, then this may imply that the practices of non-state actors should also be considered as 'sources' of international law. That is to say, non-state actors might create international law. Such recognition would, in turn, suggest a radical change in normative structure of international law in terms of both its sources and authors.

Of course, the definition of subjects of international law is closely related to how one defines international law. *If* international law is defined as the law regulating only (or primarily) interstate relations, then international law is to be applied to states, which at

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[279] There is an important difference between *benefit* and *right*. This is especially important when discussing the position of individuals, enterprises and NGOs before international tribunals. Malanczuk for instance argues that the existence of various rules of international law for the benefits of individuals and companies does not necessarily mean that the rules create *rights* for the individuals and companies, "any more than municipal rules prohibiting cruelty to animals confer right on animals" Malanczuk (1997, p.100). The writer furthermore holds that even when a treaty expressly says that individuals and companies shall enjoy certain rights, one has to read the treaty very carefully to ascertain whether the rights exist under international law, or whether the states party to the treaty are merely under an obligation to grant municipal law rights to the individuals or companies concerned (*Ibid.* p. 100). According to O'Connell, "the *beneficiary theory* is a midway position between the object and the subject theorists, proposing that the law treats human beings neither as things nor as actors, but as *beneficiaries* of its rules" (O'Connell, D. P., "International Law", 1970 cited in Meijknecht, 2001, footnote 108).

the same time appear as the sole law-makers. Listing the main legal characteristics of the international community, Cassese maintains that "the first salient feature of international law is that it aims at regulating the behaviour of states, not that of individuals" and therefore states are "the principal dramatis personea (the characters of the play) on the international scene".[280] Malanczuk also argues that "the problem of including new actors in the international system is reflected in the very concept of legal personality, the central issues of which have been primarily related to the capacity to bring claims arising from the violation of international law, to conclude valid international agreements, and enjoy privileges and immunities from national jurisdictions".[281] Likewise, according to Brownlie, states and international organisations, on condition that states have provided them with international personality, represent the normal types of legal personality on the international level.[282]

This understanding, whose origin can be found in the positivist school, is also compatible with the theory of state sovereignty, which suggests that sovereign states cannot be bound by the practices of individuals and organisations over which they have exclusive jurisdiction. Otherwise, a theoretical inconsistency would appear: if, say, individuals, municipal organisations and enterprises are accepted as the subjects of international law, a legal system whose rules are essentially made up by the practices of its subjects, then *sovereign* states were to be bound by the practices of these subjects over which states have virtually absolute jurisdiction! In other words, there would be no logic if states were to be bound by the practices of individuals, enterprises,

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[280] Cassese, A. *International Law in a Divided World*, Clarendon: Oxford 1989, p.9. Later on Cassese seems to preserve the same position on the matter: In his book *International Law* dated 2001, he upholds the idea that States are the primary or fundamental subjects of international law while insurgents, international organisations, individuals and national liberation movements are named as relatively new subjects with a "limited legal capacity" (Cassese, 2001, p.46).

[281] Malanczuk (1997) p.91. The question whether international organisations possess international personality was indeed settled by the International Court of Justice in *Reparations for Injuries Suffered in the Service of the United Nations* case. The Court stated that the UN possessed international rights and duties and it had the legal capacity to bring its claims before international tribunals. The decision of the Court suggested that international organisations have a limited degree of international personality that is functionally necessary to enable them to fulfil the tasks they assumed (*Reparations for Injuries Case* (1949) ICJ Rep., note 178-179). As opposed to the "original" subject (i.e. states), this type of international personality is sometimes named "derivative subject" in view that the entities other than states derive their legal status from states (Jägers, Nicola, *Multinational Corporation Under International Law* in Addo, M. "Human Rights Standards and The Responsibility of transnational Corporations", Kluwer Law International: The Hague/London/Boston, 1999, p.263).

[282] Brownlie (2003) p. 57..

organisations, etc on the international level whereas they have jurisdiction over them on the national level.[283]

On the other hand, states are obviously not the only *participants* of international scene. In addition to international organisations, non-state entities have increasingly involved in international affairs. As opposed to the "recognition" requirement of state-centric approach", according to which international legal personality requires acceptance by international community of state, the increasing number of scholars subscribe to, what might be called the "necessity" (or "sociological") approach. Dupuy indeed ingeniously notes that the concept "non-state actors" was first introduced by "sociology-oriented American authors",[284] such as Michael Reisman and Anne-Marie Slaughter, both of whom are among the most enthusiastic proponents of a legal thought with multiple legal forms and sources -public and private, formal and informal. This tendency bolsters a cognitive rather than normative vocabulary, based on a perceived empirical factual knowledge, i.e., states are not any longer the only *participants* in the normative process, which is created outside traditional public international law.

The proponents of an expansion of international legal personality to non-state entities through granting them rights and obligations under international law often endorse this idea on the ground of the significance of international law's being closer to the reality as such realism would secure international law's continuing relevancy. According to this "necessity" approach, when considering the factual power and functions of non-state entities in international policy and law making as well as implementation/enforcement processes, a necessity of accommodating non-state entities under international law, hence, a need of a paradigm shift in the 'subjects theory' becomes obvious.

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[283] When 'natural law' philosophy was the dominant theory, in other words while there was not a clear distinction between national and international law, the individual (It should nonetheless be recalled that to be individual did always not include all human beings!) was recognised as the bearer of certain inalienable 'natural' rights. For further discussions on the position of individual in the history of international law, see *inter alia* Malanczuk (1997) p. 100 and Higgins (2001) p.49

[284] Dupuy, Pierre-Marie, "Proliferation of Actors" in *Developments of International Law in Treaty Making*, Wofrum, Rüdiger and Volker, Röben (eds.), Springer: Berlin (2005) p. 539

On account of such need, notions such as "relative legal personality"[285], "limited legal personality"[286] or "implicit legal personality"[287] have been suggested as intermediaries between the changing international reality and state-centric theories. Yet, even such middle-ground approaches can be seen as the indications of the states' persistent power in international scene as the most important actor. Meijknecht, for instance, explains the expression "subjects to a lesser extent" with the apparent "unwillingness" and "hesitancy" of states to admit new actors such as individuals and indigenous people to the international sphere. According to the writer, the reason for this reluctance is that the acceptance of new international personalities would weaken state sovereignty.[288]

Instead of trying to interpret the legal status of non-state actors within the established limit of the concept 'subject of international law', Higgins suggests the complete abandonment of the concept and proposes the use of a new concept, namely 'participants'. Defining the subject-object dichotomy as an "intellectual prison", Higgins maintains that if international law is to be understood as a particular law making process (i.e. not just 'rules' in the meaning of "accumulated past decisions") within which there are "variety of participants, making claims across state lines, with the object of maximizing various values" no "objects" and "subjects" are needed but *participants*.[289] Lindblom has also suggested the employment of the concept 'participants' but with some differences. Lindblom holds that there is no association between having "international legal personality" (or to be "subject") and to be

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[285] Citing from Friedmann, who states that "there is no reason why there should not be different degrees of subjectivity in international law" (Friedmann, Wolfgang, *The Changing Structure of International Law*, Stevens: London, 1964, p. 218), Ijalaye maintains that "states and these non-states entities are all subjects of international law but that the extent of their subjectivity in the international legal order varies mutatis mutandis with the quantum of attributes they enjoy". Ijalaye, David Adedayo, *The Extension of Corporate Personality in International Law*, Oceana Publications, New York, 1978, p. 3.

[286] According to Meijknecht, the notion "limited subjectivity" means in practice two different things: i. an indirect attribution of rights to entities and leaving to States a considerable measure of discretion concerning the implementation ii. a direct attribution of rights or duties to the new entities, while denying effective means of remedy (Meijknecht, Anna, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*, Intersentia: Antwerpen-Groningen-Oxford, 2001, Chapter II)

[287] See, for instance, Maragia, Bosire, *Almost There: Another way of conceptualizing and explaining NGOs' quest for legitimacy in global politics*, 2 "Non-State Actors and International Law (2002) p. 332

[288] Meijknecht, (2001) Chapter II

[289] Higgins (2001) p. 50

"participant" of international law-making.[290] The writer further maintains that the concepts 'international legal personality' or 'subjects of international law' are imprecise and therefore impractical as tools. Instead, the concept 'international legal status' is suggested. Accordingly, the specific content of this international legal status "may vary according to the circumstances. It is a neutral concept, meaning only that an entity has some sort of status in some respect, which needs to be specified for each particular entity".[291]

All things considered, it is important to remember that the legal status of non-state entities in international law must be based on defined legal capacity deriving from customary law and international treaty, two principle sources of international law. Moreover, all legal rights and obligations under international law must directly be addressed to a particular actor with some form of enforcement mechanism. NGOs and MNEs are doubtless the most important non-state entities related to the issue of "new participants" in international law. Section 3.7.1 investigates the legal status of NGOs as law-makers within the framework of the state-centric sources of international law and then overviews their rights and duties under international law by surveying the existing international regulations regarding NGOs' participation in international affairs. Section 3.7.2 also follows a similar path to examine the legal status of MNEs scrutinising the arguments of both state-centric 'recognition approach' and sociological 'necessity approach'.

3.7.1 Non-governmental organisations (NGOs)

Although NGOs involvement in international law and policy is not a new phenomenon and has occurred for over 200 years, a growing role for NGOs especially since the end

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[290] Lindblom suggests four alternate views on the relationship between personality and law-making. The denial of any relationship between personality and law-making in the meaning that no matter if non-state entities are or become subjects of international law, States will continue to be the only law-makers is the first approach. Second possible attitude is that some non-state entities may have personality and some of them may participate in law-making without any connection of one to the other. Third view is the 'classical understanding'. Accordingly, having full legal personality means an entitlement to participate in the process of law creation. Lastly, the participation in the creation of international customary law is an *indica* of personality (Lindblom, Anna-Karin, *The Legal Status of Non-Governmental Organisations in International Law*, Uppsala Universitet: Sweden, 2001, p. 81). On the same issue, see Nijman, J. E., *The concept of international personality*, T.M.C. Asser Press: The Hague, 2004

[291] Lindblom (2001) chapter 3.2.5

of the Cold War, in particular in the areas of human rights and the environment can be observed.[292] NGOs have for example taken part in international conferences, monitor the implementation of treaties, provide expert advice to the UN commissions and committees, bring knowledge and information into the decision making process, raise new issues and concerns and contribute to a broad consensus-process. It can also be added that NGOs have obtained "consultative" and "observer" status not only within the UN system but also within the institutional framework of other international organisations, such as the EU, the OECD and the Atomic Energy Agency.

Despite their expending participation in international affairs, however, the legal status of NGOs in international law is far from being established.[293] This section first examines the capacity of NGOs as "law makers" in the process of creating 'international treaty' and 'custom', two principal sources of international law. It then discusses whether their increasing involvement in the policy, decision and law making and implementation processes has improved the international legal status of NGOs significantly.

An international treaty (or *conventions*, as worded in Article 38 of the Statute of the ICJ[294]) is defined "for the purposes of the Convention" by Article 2(1) of the 1969 Vienna Convention, as "an international agreement concluded between States in written form and governed by international law (...)". This definition, without doubt, excludes

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[292] Charnovitz, Steve, *Two centuries of Participation: NGOs and International Governance*, 18 Michigan Journal of International Law (1997) p. 185

[293] In fact, not only their legal status, but the definition and functions of NGOs are also contradictory. For some writers, the term NGO describes most organisations, which are not governmental including lobby organisations, trade unions and MNEs. For some others, the term only includes private non-profit organisations with societal concerns. According to Malanczuk, for instance, the International Chamber of Commerce is a NGO. He even goes further claiming that MNEs can under certain aspects be seen as NGOs (Malanczuk, 1997, p. 97). Unlike Malanczuk, Santos recognises a contrariety between NGOs and MNEs. According to Santos, "there is some evidence that transnational NGOs represent for the agendas of subaltern cosmopolitanism and common heritage of humankind what the TNCs represent for the agendas of localized globalism and globalized localism" (Santos, 2002, p. 186). Santos furthermore observes that "the new prominence of transnational advocacy NGOs is connected with recent trends in the world system and in particular with the collapse of Communist regimes, the exhaustion of command-economy development models, the antistatist ideology associated with neo-liberal economic policy and crisis of the public sector in many states, the globalization of the economy, the political culture of neo-communitarianism and the new communication and information system" (*Ibid.* p. 185). For further discussions on NGOs, see, among others, Cohen, Robin and Rai Shirin (eds.), *Global Social Movements*, The Athlone Press: London, 2000; Dunne, Tim and Nicholas Wheeler (eds.), *Human Rights in Global Politics*, Cambridge University Press: Cambridge, 1999.

[294] Article 38(a) provides: "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states"

all entities but states.[295] Hence, NGOs do not have the capacity to enter international treaties with states, nor can agreements made by NGOs be governed by international law. The only exception of this is "the International Committee of the Red Cross (ICRC)", which is a sui generis entity rather than a NGO. ICRC has been entitled to the legal status to be a party to the Geneva Conventions of 1949 and its Additional Protocols, due to the important role it has played in the development of humanitarian law.

On the other hand, agreements between inter-governmental and non-governmental organisations, which may sometimes be named "memoranda of understanding" or "partnership of agreements", or "letters of understanding" seem to be more favourable regarding the question of the recognition of NGOs as possessing some degree of international legal personality. In parallel with the increasing role of international organisations and their co-operations with NGOs especially within the framework of the UN, a need to regulate this relationship has emerged.[296] Nevertheless, at this stage it would go too far to claim that these agreements, which sometimes may refer to 'international law' or 'general principles of law' as the applicable law in case of disagreement, elevate the NGOs in question to the status of international legal person.[297]

The position of NGOs in contributing to the creation of customary international law is more complicated, mainly due to the inherently indefinite nature of custom. Article 38(b) provides "(The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply) international custom, as evidence of a general practice accepted as law". Thus, the constitutive elements of international customary law are (i) general practice (a material element), (ii) "accepted

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[295] Yet, despite the restricted wording of the Article 2(1) of the Convention, there is no doubt that international organisations have the capacity to enter into international treaties. The "Convention on the Law of Treaties Between States and International Organizations or Between International Organizations" makes this point clear even though the convention has not yet entered into force as of 2003 (The Convention on the Law of Treaties Between States and International Organizations or Between International Organizations -The text is reproduced in *International Legal Material*, 25, 1986, p. 543-592). Besides, the advisory opinion given by the ICJ in the *Reparation for Injures* case also endorses the legal capacity of international organisations to enter into international treaties (*Reparation for Injures Suffered in the Service of the United Nations* (1949) ICJ, Rep. 174).

[296] For more details on different kinds of agreements concluded between international organisations and NGOs, see Lindblom (2001) chapter 9.3

[297] For a somewhat different view, see Van Hecke, G. "Contracts between International Organizations and Private Law Persons" in *Encyclopaedia of Public International Law*, Vol. 1, 1992, p. 812

as law" (a psychological element - *opinio juris*). Although the article does not explicitly say *state* practice, there is no room to doubt that the article refers exclusively to the practices of 'states and not any other entities'. For, when Article 38 was formulated (the Court began work in 1946, when it replaced the "Permanent Court of International Justice", which was founded in 1922) only states, were recognised as subjects of international law (and to a far limited extent the UN). Thus, customary international law develops from the practice of states and not to the practice of non-state entities.[298] Indeed, in the *Continental Shelf (Libya v. Malta)* case, the ICJ clearly stated that "the substance of customary international law must be looked for primarily in the actual practice and *opinio juris* of States".[299]

On the other hand, it can be said that the practice of non-state entities may be used as *evidence* of an existing customary law. However, this point should not be exaggerated in favour of the possible involvement of NGOs in *forming* customary international law. Because what is searched is the evidence of actual *state* practice and it can be found in a variety of primary and secondary source materials: records of a state's foreign relations and diplomatic practices; legislation concerning a country's international obligations; resolutions, declarations, and legislative acts of intergovernmental organisations; yearbooks of states and of intergovernmental organisations; or even opinion published in a newspaper.[300]

Of course, pointing out the increasing level of institutional involvement of NGOs in the formulation and implementation of international legal norms and policy, it might be claimed that international law is not static but a dynamic process and the "sources approach" does not reflect the reality of today. Within the institutional framework of the UN, based on Article 71 of the UN Charter and ECOSOC resolution 1996/31, NGOs

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[298] To international lawyers, 'the practice of states' means official governmental conduct reflected in a variety of acts, including official statements at international conferences and in diplomatic exchanges, formal instructions to diplomatic agents, national court decisions, legislative measures or other actions taken by governments to deal with matters of international concern." (Murphy, Tom Buergenthal, *Public International Law in a Nutshell*, Sweet & Maxwell: UK, 2002, p. 22)

[299] *ICJ Rep.* 1985, 29

[300] Higgins (2001) p. 22. See also Malanczuk (1997) p. 39-41 and Van Hoof (1983). By the same token, the votes and views of states in international organisations may have a legal significance as evidence of customary law. The International Law Commission stated, "Record of the cumulative practice of international organisations may be regarded as evidence of customary international law with reference to states' relations to the organisations". International organisations may even be the cause of the creation of a new customary law (*Yearbook* of the ILC, 1950, Vol.II, p. 368).

are allowed to participate in international affairs mainly in the following four ways: a NGO (i) may request accreditation for a special UN conference,[301] (ii) establish working relations with special bodies of the UN,[302] (iii) associate itself with the UN Department of Information, (iv) lastly and arguably most importantly, a NGO can ask for consultative status with the Economic and Social Council of the UN (ECOSOC).[303] Yet, as Aston holds, even the 'general consultative status', which is the most privileged among three different types of status, allows a limited NGO participation.[304] Besides, within the UN framework, as Charnovitz observes, NGO involvement is uneven. NGOs have no established role in some of the most influential special international financial

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[301] The UN Conference on Environment and Development held in 1992 is a well-known example for such participation. The "non-binding action plan on environment and development", also known as *Agenda 21*, proclaimed the "partnership role" of NGOs, which have subsequently been given a place in the UN Commission on Sustainable Development.

[302] For instance, NGOs have access as petitioners or counsel to petitioners to six human rights committees, which have been established to monitor the implementation of the principal human right treaties within the UN context. These six committees and the status of NGOs are as follows:

The Human Rights Committee: there is no provision on the NGO participation but only an established practice. *The Committee on Economic, Social and Cultural Rights*, which is a subsidiary body of ECOSOC: the Committee adopted a procedure regarding the NGO participation in 1993, which was supplemented in 2000 (E/1994/23, *Report of the Committee on Economic, Social and Cultural Rights, 1993*, para.354, E/C.12/1993/WP.14, *NGO Participation in activities of the Committee on ESCR*, 12 May 1993, and E/C.12/2000/6, *Substantive issues*, 7 July 2000). Accordingly, NGOs are allowed to be a part of general discussion on a State report and draft general comment on it. *The Committee against Torture*: According to Rule 62(1) of the Committee's Rules of Procedure, the Committee may invite a relevant NGO in consultative status with the Economic and Social Council to submit to it information, documentation and written statements (CAT/C/3/Rev. 3, *Rules of Procedure*, 13 July 1998). *The Committee on the Elimination of Discrimination against Women*: The Rules of Procedure of the Committee provides a general provision on the NGO participation. Accordingly, representatives of NGOs may be invited by the Committee to make oral or written statements and to provide information or documentation. *The Committee on the Elimination of Racial Discrimination*: Although there is no specific provision on the NGO participation, in 1991 the Committee decided to receive information from all available sources including NGOs (Decision 1 (XL) of 13 August 1991, A/46/18, Report of the Committee on the Elimination of Racial Discrimination, 1992, p.104). *The Committee on the Rights of the Child*: Despite the lack of a complain mechanism in or connected to the Convention, the Committee has the right to use NGOs as technical or expert adviser on the basis of Article 45 of the International Convention on the Rights of the Child. For a complete account for the NGO participation in the UN treaty bodies, see Lindblom (2001) p. 366-376.

[303] Since 1946, where the consultative status for NGOs was first introduced, the number of accredited NGOs has increased from 41 to 2719. The consultative relationship with ECOSOC is governed today by ECOSOC resolution 1996/31. The resolution outlines the eligibility requirements for consultative status, rights and obligations of NGOs in consultative status, procedures for the withdrawal or suspension of consultative status, the role and functions of the ECOSOC Committee on NGOs, and the responsibilities of the UN Secretariat in supporting the consultative relationship. Consultative status is granted by ECOSOC upon recommendation of the ECOSOC Committee on NGOs, which is comprised of 19 Member States (http://www.un.org/esa/coordination/ngo)

[304] Aston, Daniel, Jurij, *The United Nations Committee on Non-governmental Organizations*, 12 European Journal of International Law (2001) 5

and trade organisations, such as the IMF and the WTO.[305] It can be said that this is mainly due to fact that the involvement of NGOs strictly depends upon the needs and policy preferences of states in any given area.[306]

To be sure, outside the institutional framework of the UN, there are 'regional' progresses, though comparatively more limited, in the codification of the legal personality of NGOs. The noteworthy developments are: guidelines, adopted by the Permanent Council of the Charter of the Organisation of American States (OAS) in 1999 to set up a framework for the participation of civil society organizations within OAS activities.[307] Similarly, Chapter XIII of the Rules of Procedure of the *African Commission*, dated 1995, contains rules to regulate relations between the African Commission and NGOs. Accordingly, NGOs can be granted observer status under the Rule 75.

The most far-reaching development in this regard is the "European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations", which is the only international agreement on NGOs to date.[308] It is signed by eight countries and has been in force since 1991. The Convention is open only to those 'international' NGOs, which have been established under the national law of one of the state parties to the convention. They must have their statutory office and central headquarters in the territory of one of the state party and operate in at least two states. But this is hardly a convention that enables NGOs to have an international personality in that the convention places NGOs on the same basis as national associations in their host country.[309] In other words, NGOs are essentially governed by the law of the state in which they are incorporated even though the convention provides some reciprocal recognition of the legal personality of such NGOs between state parties.

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[305] Charnovitz (1997) p. 279

[306] The WTO Agreement can be given as an example of such subjection: Article (V)2 of the Agreement Establishing the WTO (15 April 1994) states that the WTO General Council "may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO".

[307] CP/RES. 759 (December, 1999)

[308] Convention 124. http://www.coe.int/T/E/NGO/public/Convention_124

[309] Merle, Marcel, *International Non-governmental Organizations and Their Legal Status*, report presented to the "Colloquy on the role of international non-governmental organizations (NGOs) in contemporary society" (Strasbourg, February 1983), available at http://www.uia.org/legal/app35.php.

NGOs have gained some legal recognition at the international level. However, the existing international regulations regarding NGOs participation mostly involve NGOs relationship with international organisations rather than setting standards for, rights and duties of NGOs under international law. To put it differently, despite the fact that NGOs increasingly co-operate and participate in the policy, decision and law making process in international arena, NGO participation is essentially informal and derivative. Especially their direct participation is mostly within the framework of soft law development and their involvement depends on governmental preference and disposition. In conclusion, there is no *general recognition* by the international community of states that de facto participation of NGOs in international affairs conveys NGOs the status of international legal personality.

3.7.2 Multinational Enterprises (MNEs)

The international legal status of MNEs[310] has doubtless been a subject of much more ardent debates than that of NGOs, due to their important role in the globalisation process.[311] Moreover, it is said, in addition to their growing influence on international

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[310] A MNE can be defined as "an enterprise that engages in foreign direct investment (FDI) and that owns or controls value-added activities in more than one country" (Spero, J. E. And Hart, J. A.; *The Politics of International Economic Relations*, Routledge: New York, 2000, p.96). Multinational enterprises (MNEs) are also named as 'multinational corporations' (MNCs), 'transnational corporations' (TNCs), and 'transnational enterprises' (TNEs). The UN favours the term TNC making a distinction between "enterprises owned and controlled by entities or persons from one country but operating across national borders –the *transnational* and those owned and controlled by entities or persons from more than one country –the *multinational*- (Muchlinski, 1999, p.13). In the present study, however, the term *enterprise* is preferred to *corporation* given that "it avoids restricting the object of study to incorporated business entities and to corporate groups based on parent-subsidiary relations alone" (Muchlinski, 1999, p. 12).

Unlike many other scholars, Hirst and Thompson do not use the terms MNC and TNC interchangeably nor attribute they a difference to these two terms in line with the UN. Objecting to globalisation as a 'new' phenomenon, they argue that genuine TNCs appear to be relatively rare. "Most companies are nationally based and trade multinationally on the strength of a major national location of production and sales". According to the writers, TNCs are genuine footloose capital, "without specific national identification and with internationalized management, and at least potentially willing to locate and relocate anywhere in the globe to obtain either the most secure or the highest returns. Thus the TNCs, unlike the MNCs, could no longer be controlled or even constrained by the policies of particular national states." (Hirst, P. And Thompson, G., *Globalization in Question*, Polity Press: Cambridge, 1999, p. 11)

Interesting to note, while the UN still used the term MNC, before changing it to 'TNC', Aron Broches, "the founding father of International Center for Investment Disputes (ICSID)" disapproved the term MNCs on the ground that the term 'multinational corporations' was used "almost interchangeably with large U.S. corporations" (Broches, Aron, *Selected Essays*, Martinus Nijhoff Publishers: Dordrecht, 1995, p. 517).

[311] 1999 World Investment Report of UNCTD depicts this role as following: "TNCs are one of the principle drivers of globalization. They are also seen to be most important beneficiaries of the

economy, MNEs have become active participants in international law making and implementation processes. Accordingly, in view of the need of a close conformity of international law to the changing realities in the international system, MNEs should be integrated into the international normative order.

Although recent discussions on the international legal personality of MNEs are mostly related to their "driving" role in the globalisation process, the issue of the international legal status of MNEs is hardly new. Historically, aiming to find a legal basis to guarantee the flow of natural resources to the former colonial powers during the early post-colonial period, it is claimed that public international law should govern the so-called *internationalised contracts.*[312] Despite the decision of the Permanent Court of International Justice (PCIJ), which states that "Any contract, which is not a contract between states (...) is based on the municipal law of some country",[313] and several UN General Assembly resolutions,[314] some scholars and arbitrators argued that MNEs had rights under international law arising out of such contracts. The purpose of making international law (instead of 'national' law) the basis of "internationalised contracts" ("international state contracts") was to elevate the legal status of these contracts to international treaties made between states. Indeed, Professor Dupuy, the arbitrator in the *Texaco* case, claimed that "it does not seem that one can establish a distinction between

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liberalization of investment and trade regimes, with rising influence on the development of the world economy and its constituent parts" (p. 345).

[312] An "internationalised contract' is defined as "an agreement made between a state and a foreign corporation which has been placed under international law, general principles of law or only under the provision of the contract itself aiming to protect foreign investment, mainly against nationalisation" (Leboulanger, Philippe, *Les Contrats Entre États Et Entreprises Étrangères*, Economia: Paris, 1985, p. 206). This type of contracts is sometimes named *transnational investment agreement*. It refers to "legal relationships, whereby a state, *generally a Third World Country* (Italic added), or a state enterprise enter into an agreement with a foreign investor, usually a transnational company for the purpose of an investment project" (Wolfgang, Peter, *Arbitration and Renegotiation of International Investment Agreements*, Martinus Nijhoff Publishers: Dordrecht, 1995, p.5). For a detailed review on "internationalised contracts" see also Muchlinski (1999) especially pages between 494-501 and two outstanding works of Sornarajah: (Sornarajah, M., *The International Law on Foreign Investment*, Cambridge University Press: Cambridge, 2004; and *International Commercial Arbitration*, Longman: Singapore, 1990).

[313] Ruled by the *Permanent Court of International Justice*, the precursor of the current International Court of Justice, in the *Serbian and Brazilian Loans* Case (1929) PCIJ Rep. Series A, No.20/21, cited in Muchlinski, 1999, p. 493).

[314] To mention a few: resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources of 14 December 1962; Charter of Economic Rights and Duties of 12 December 1974

a treaty and an international contract".[315] By equating an international contract with an international treaty it is intended to provide increased security for foreign investment, making the state party to an internationalised contract responsible under *public* international law.

According to Friedmann, MNEs should acquire "a limited ad hoc subjectivity to the extent that their transactions are controlled by the norms of public rather than private international law".[316] In other words, at least a 'limited subjectivity' is necessary for MNEs so that state contracts can be treated under international law. It is nonetheless highly questionable whether the so-called "internationalised contracts" give MNEs rights and/or duties under international law, which is a pre-condition to determine whether an entity has international personality. Even in cases, where the state party to an "international state contract" intends to recognise the rights of MNEs under international law, there is little support endorsing the idea that such an intention might be sufficient to create such a result. As Abi-Saab observes; "The intention to submit a contract to international law is not sufficient by itself to produce this result if one of the parties is not subject to this legal system and consequently cannot reach or act on the international legal level".[317] In any case, arbitral awards should be considered as carrying little weight as a proof for the argument that MNEs are granted international personality. Considering that even the decisions of the International Court of Justice constitute only "subsidiary means" of public international law, it would hardly be possible to attribute to arbitral awards an authority to create new norms or personalities.[318]

There are more recent developments in the field of international investment that challenge "states only approach" of the state-centric paradigm. Unlike the previous international legal rules concerning the protection of foreign investment, according to which only host and home states had legal standing and not the investor (i.e., MNEs),

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[315] *Texaco* Case (1977) 53 ILR, para. 66

[316] Friedmann, 1964, p.223

[317] Abi-Saab, *The International Law of Multinational Corporations: A Critique of American Legal Doctrines*, Annals of International Studies, 1971, p.97

[318] Article 59 of the Statute of the International Court of Justice states that "the decision of the Court has no binding force except between the parties and in respect of particular case". On the other hand, judicial decisions and arbitral decisions can be evidence of customary law. On the subject, see Malanczuk (1997) p.51; Shaw (1997) p.86; Cassese (2001) p.152

related to the efforts to promote free markets and protect the rights of capital in the globalisation process, investors have gained new legal grounds through multilateral and bilateral investment agreements. In addition to the contributions of diverse international organisations in the field of investment protection, such as the World Bank's "Multilateral Investment Guarantee Agency" (MIGA),[319] the WTO's "Trade-related Aspects of Investment Measures" (TRIMs), and the IMF's "conditionality",[320] MNEs have also obtained the status of international *locus standi* before international tribunals "(through) the extension of direct treaty-based dispute settlement rights to investors, allowing them to use international dispute settlement procedures against the host State".[321] Indeed, over 900 of the currently existing 1100 bilateral treaties on investment provide for disputes to be settled by the International Centre for Settlement of Investment Disputes (ICSID), established by an international convention.[322] As Braithwaite and Drahos point out, the ICSID has an increasing influence on the development of a globalised international investment law "through a degree of institutional centralization of the case law".[323]

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[319] MIGA is "a multilateral risk mitigator, promoting foreign direct investment into developing countries" through protecting foreign investors by issuing guarantees, including co-insurance and re-insurance against non-commercial risks (http://www.miga.org).

[320] As Alvarez notes, Although the IMF is not often recognised as part of the more formal treaty regimes governing foreign investment, IMF conditionality may function as another mechanism intended to ensure that foreign investors are compensated if expropriated, face no discrimination relative to national investors, enjoy rights to fair and equitable treatment, etc. (*International Organizations as Law-makers*, Alvarez, José, E., Oxford University Press: New York, 2005, p. 243).

[321] "First Report" of International Law Association (ILA) on International Law on Foreign Investment, Toronto Conference (2006), available at http://www.ila-hq.org/pdf/Foreign%20Investment/Draft%20Report%202006.pdf

[322] http://www.worldbank.org/icsid/treaties/intro.htm. ICSID was established in 1966 as an autonomous international organisation under the auspicious of the World Bank group on the basis of The Convention on the Settlement of Investment Disputes between States and Nationals of Other States and signed up by 155 states and, as of January 25, 2006, ratified by 143 states (http://www.worldbank.org/icsid/constate/c-states-en.htm). The main purpose of the ICSID is to resolve investment disputes arising from contracts between States and MNEs bearing the nationality of another country than the state party to an international contract. On the ICSID, among others, see Broches, Aron, *Selected Essays*, Martinus Nijhoff Publishers: Dordrecht, 1995; Baker , James, *Foreign Direct Investment in Less Developed Countries: The Role of ICSID and MIGA*, Quorum Books: London, 1999, and Muchlinski (1999)

[323] Braithwaite, John and Drahos, Peter, *Global Business Regulation*, Cambridge University Press: the UK, 2001, p. 183.

The Treaty of the European Economic Community could be another example for the *locus standi* status of MNEs. According to Articles 173(2) and 175(3) of this Treaty, enterprises, likewise individuals can bring claims before the Court of Justice of the European Union. However, some scholars question the appropriateness of this example. Malanczuk, for instance, holds that the EU is "almost a hybrid between

There can be found several objections to the argument that MNEs may acquire some degree of international personality as holders of rights under investment treaties. First of all, in such treaty-based investment agreements, the nature of the host state's obligation is ambiguous.[324] For, the contracting party to an international treaty is not MNEs but the home state(s) of the MNEs. Thus, it can be maintained that the host country is under a treaty obligation to the home state and not to MNEs.[325] Besides, even such treaties are at the discretion of the host state, they do not confer international personality on the foreign enterprises. Since the status of international personality requires the general acceptance of the community of states, a bilateral elevation of the status of a MNE only by the host and home states would interfere with the rights of other states, not least because bilateral treaties are the outcome of bargaining capacity of individual state.

A further area to be discussed relates to the issue of international legal personality of MNEs is whether MNEs may acquire a degree of international personality as holders of obligations under international standards. As it is a well-known fact, there are no many international instruments, which impose obligations directly on MNEs. The international instruments that set standards for MNEs' conduct, such as the OECD Guidelines for Multinational Enterprises and the 1998 ILO Declaration on Fundamental Principles and Rights at Work, are legally non binding.[326] There are also those instruments embodying the so-called corporate social responsibility standards adopted by various public, public-private hybrid or private organisations, including MNEs themselves. However they may be deemed significant and efficient, there is no general consensus on whether these corporate codes of conduct should be classified even as soft law. Hence, it would hardly be convincing to claim that international personality may emanate from the voluntary/non-binding obligations of MNEs, embodied in soft law instruments or 'soft' standards whose legal nature is itself far from being established.

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international law and federal law" and therefore is not an appropriate example for the progress made in this area (Malanczuk, 1997, p.101).

[324] ILA report (2006), p. 5

[325] For a contrasting view on the subject, see Douglas, Zachary, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 The British Yearbook of International Law (2004).

[326] The now abandoned "Draft UN Code of Conduct on Transnational Corporation" was the one of the earliest examples of 'non-binding' public international instruments on the issue of MNEs responsibility.

The increasing participation of MNEs in international policy making is another commonly invoked evidence to demonstrate why MNEs should be regarded as new subjects of international law. If *policy* is defined as "the substance of political programmes which different groups put forward to shape the social environment"[327] and then no one can doubt that MNEs actively involve in shaping the "substance of political programmes" in many policy issue areas. The form of their influence and participation may vary. They can be direct participants of a policy- making process, such as being part of national delegations, or they may exercise indirect influence on policy makers, as in the examples of lobbying activities at national and international level[328] and awarding research grants within universities and other public institutions.[329]

The negotiation process of the Multilateral Investment Agreement (MAI) is perhaps one of the best present-day indications of the increasing direct influence of MNEs on the international policy-making process. Fuelled by "shifts towards liberalization, privatization and the recognition of the utility of inward direct investment by TNCs as a source of capital and technology",[330] the MAI agenda was initially shaped by American

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[327] Coker, Christopher, *Outsourcing War* in "Non-State Actors in World Politics", Josselin, Daphné and Wallace, William (eds.), Palgrave: UK, 2001, p.192.

On the other hand, compared to business' privileged position, which is a lasting consequence of liberal ideology about business-state partnership at the national level, NGOs have limited possibility to access to the agenda setting process. Furthermore, it can be said that many NGOs are depended at least in part on the state for funding their activities. Nonetheless, NGOs may have been successfully influential on negotiations, as the MAI process has proved, at international level and (mainly thanks to electoral pressure) on ratification process at national level of international agreements.

[328] According to Rowlands, in the field of environment, MNEs often lobby policy makers in their 'home country' in order to increase the chance that their preferences will be reflected in international environmental agreements. "Having the 'home government' as a focus of lobbying attention often makes good sense: access to policy makers (e.g., regular private meetings, conversations at clubs, personal contacts afforded by former employees, etc) may already exist from other issues; and policy makers may well want to 'please' the TNCs" (Rowlands, Ian, H. *Transnational Corporations and Global Environmental Politics* in Josselin and Wallace (2001) p. 138. Muchlinski also examines the role of MNEs as lobbyist as a part of his empirical enquiry in the generation of national and multilateral regulatory regimes (Muchlinski, Peter, *'Global Bukowina' Examined: Viewing the Multinational Enterprises as a Transnational Law-Making Community* in Teubner, Gunther (ed.), "Global Law Without a State", Dartmouth: Aldershot: 1997).

[329] By way of research grants, MNEs may create a policy agenda or shape a ongoing policy discourse through "directing research within universities and other public institutions into areas that serve best its own ends" (Rowlands, 2001, p. 137). See also, Miller, M. A. I., *The Third World in Global Environmental Politics*, Open University Press: Buckingham, 1995

[330] Muchlinski, Peter, "A Brief History of Business Regulation" in *Regulating International Business: Beyond Liberalizm*, Picciotto, Sol and Mayne, Ruth (eds.), Macmillan Press Ltd.: New York, 1999, p.55

business to obtain a "charter for global business."[331] Through the Advisory Committee on Trade Policy Negotiations, the policy making institution in this area, in which US business was directly represented and the US Council for International Business, the MAI was put on the agenda of the OECD in order to make it multilateral.[332]

The degree of business influence on and participation in international policy making depends on several factors. According to Levy and Egan, enterprises are in general more influential at the domestic level than at the international level. This is the case in almost every country but it is even stronger in the United States.[333] It is also argued that the degree of technical detail associated with the international negotiations is often correlated with the level of the MNEs influence. Indeed, the development of the International Organization for Standardization (ISO) 14000 family of environmental standards seems to support this explanation. During the lead-up to the 1992 Earth Summit, only 25 per cent of working group chairs of the so-called Technical Committee 207, which was set up by the ISO, one of the participatory organisations of the summit, occupied by national standard-setting bodies. As Krut, R. and Gleckman observe, "Over half of the chairs are employees of transnational corporations (...) Since these positions do not rotate, working groups chair may have the power to influence the outcome of the

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[331] Walter, Andrew, *Unravelling the Faustian Bargain: Non-State Actors and the Multilateral Agreement on Investment* in Josselin and Wallace, 2001, p.150. The US Council for International Business (USCIB) and the American affiliate of the International Chamber and Commerce, two leading business lobbies, urged for a new forum to start a 'high standard' international investment regime (*Ibid.* p. 159)

[332] Walter (2001) p.159. For further reading on the subject of MAI, see, among others, *The Rise and Fall of the multilateral agreement on investment: Where Now?*, Muchlinski, Peter, 2000 "The International Lawyer 34, p.1033-1052; *MAI: multilateral agreement on investment : national sovereignty for sale?*, Kaur Plahe, Jagjit (ed.), Forsyth, Jessie Wanyeki (co.ed.), EcoNews Africa: Nairobi, 1999; "The Multilateral Agreement on Investment and the Review of the OECD Guidelines for Multinational Enterprises", Huner, Jan, in Kamminga and Zia-Zarifi (2000); *OECD's Multilateral Agreement on Investment: a Chinese perspective*, Huiping, Chen, Kluwer Law International: The Hague, 2001; *Dismantling Democracy: the MAI and its impact*, Jackson, A. and Sanger, M. (eds.), Ottawa: Co-published by the Canadian Centre for Policy Alternatives and James Lorimer, 1998; *The Multilateral Agreement on Investment: the MAI negotiation text*, OECD: Paris, 1998; *Fighting the Wrong Enemy: antiglobal activists and multinational enterprises*, Graham, M. Edward, Institute for International Economics: Washington, 2000

[333] Levy, D. L., and Egan, D., *Capital Contests: national and transnational channels of corporate influence on the climate change negotiations*, 26/3 "Politics & Society" 1998, p. 337-361. According to the writers, the reason for this different degree of influence in the USA lies in the tools: funding by political action committee, claiming the interests of 'American competitiveness', etc. As Walter observes, the USA, having less complex institutional structure of policy making in the meaning that the key political institutions for agenda-setting, negotiation and ratification are based in Washington may further foster this difference (Walter, 2001, p. 156)

ISO standards in a way that could have competitive advantage for their firm or their country".[334]

The degree of formality and the intention of 'binding' output of international negotiations are also consequential on the possibility of enterprises to influence international policy making: "Corporations have their greatest political influence on global environmental issues when there are no negotiations on a formal, binding international regime governing the issue. Under those circumstances, they are able to use their economic and political clout with individual governments and international organizations to protect their freedom to carry out economic activities damaging to the environment."[335]

Yet, despite the above-given examples and possible many others, it can be claimed that MNEs are not even the most important determinant factor in international agenda setting. This is the case even in the fields such as economy and environment where they are 'natural' partners of liberal state policies. It is a matter of fact that non-state participation in international policy making is still largely dependent on traditional interstate bargaining of multilateral, regional or bilateral treaties. As Josselin and Wallace conclude, states are still central in international policy making: "Global campaigning is unlikely to bring positive results unless at least some state actors (and preferably those in the West) endorse the agenda of private organizations. The same state actors continue to formulate the policies (and often set the agenda) of international institutions".[336]

And perhaps more importantly, law-making process is not the same as public policy-making process even though they are closely related. *Law- making* is about setting out standards, procedures and principles, which must be followed. (Public) *policy-making*, on the other hand, refers to a venue in which the substance of a political programme and the goal that is intended to be achieved is outlined either through, institutionalised or non- institutionalised interaction between decision-makers and interest groups. It also includes the methods and principles that the policy-makers will use to achieve it.

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[334] Krut, R. and Gleckman, H., *ISO 14001: a Missed Opportunity for Sustainable Industrial Development*, Earthscan: London, 1998, p. 55

[335] Porter, G. And Brown, J. W., *Global Environmental Politics*, Westview Press: Boulder, 1996, p.63

[336] Josseline and Wallace (2001) p. 257

Another important difference is accountability. Law-making bodies, which rest on the constitutional power, are accountable to the public not only for the laws that are passed and but also how these laws are implemented while policy-making does not imply such accountability on *all* participants.[337]

The discussion whether MNEs should be granted international personality and, if so, to what extent, displays highly ideological characteristics and therefore causes deep controversy. As noted earlier, the adherents of the "necessity" (or "sociological) approach argue for the recognition of non-state actors on the basis of the factual reality. According to this line of understanding, since MNEs have become most powerful actors on the international arena alongside states, and even more powerful than many states it would be unrealistic not to recognise this power in the legal domain as well.[338] Otherwise, it is argued, the continued viability of the international legal system, which depends upon the close conformity of public international law to international reality, would be put at stake.[339]

In fact, Friedmann used the 'reality' argument already in the 1960s. He maintained that international law address itself to the realities of international life and, when appropriate, treat entities other than states as having rights and obligations under international law.[340] Likewise Ijalaye claims that "the international life now demand that private corporations should be accorded at least a partial subjectivity to

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[337] For a more detailed description of policy-making process, see Kelly, Rita Mae, and Dennis J. Palumbo, "Theories of Policy Making", in *Encyclopedia of Government and Politics*, Hawkeworth, Mary and Maurice Kogan (eds)., Routledge: London, 1992

[338] This claim has been put forward by many scholars. Among others see, Korten, David, C., *When Corporations Rule the World*, Earthscan: London, 1997; Malanczuk (1997) p. 102; Spero and Hart (2000) p.98. However, there are some others that regard this claim as "myth". Chandler, for instance, maintains that "the globalisation of the economy has shifted the relationship between governments and companies. But the myth that companies are more powerful than governments is still a myth and it is something that we should ensure remains a myth if we believe in democracy" (Chandler, Geoffrey, "Keynote Adress: Crafting a Human Rights Agenda for Business" in Addo, 1999, p.40).

[339] Charney, Jonathan, I., *Transnational Corporations and Developing Public International Law*, Duke Law Journal, 1983: 748.

[340] Friedmann (1964) p. 213-245. He also wrote elsewhere that "the evolution of international law has been overwhelmingly dependent upon the progressive adoption and modification of rules in response to changes international conditions (...) corporations play an increasingly important and frequent part in international transactions to which states are parties, it is for the science of international law to interpret this phenomenon against the broader background of modern international economic activities" (Friedmann, *The Changing Dimensions of International Law*, 62 Columbia. Law Review (1962) cited in Charney 1983, p.759). Nonetheless, Friedmann stressed that MNEs should not be endowed with international personality to the extent that international organisations have (Friedmann, 1964, p.223).

international law in their effort to contribute to the most needed expansion or extension of the international economic law".[341] More recently Cutler also argued that MNEs are "significant *de facto* subjects of law, notwithstanding their analytical status as 'objects' and not 'subjects' of law and their theoretical insignificance or 'invisibility' under international law".[342] The writer further claims that *de jure* insignificance of MNEs and their *de facto* significance cause the growing disjunction between theory and practice, between international law and society to the extent that international law has ceased to mirror the changing reality and social forces.[343]

Another explanation as to why MNEs should be given some degree of international personality is offered on the basis that MNEs actually benefit from their international non-status. According to this argument, the non-status "immunizes them from direct accountability to international legal norms and permits them to use sympathetic national governments to parry outside efforts to mould their behaviour".[344] Moreover, it is also said that the international legal personality of MNEs is important in terms of an effective human rights protection. "Just as individuals can be seen as legal subjects, and therefore can be held accountable for violation of certain human rights, MNEs should be able to".[345]

Of course, there are also arguments against the greater participation of MNEs in international law making. Accordingly, in the absence of a binding international

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[341] Ijalaye, David Adedayo, *The Extension of Corporate Personality in International Law*, Oceana Publications: New York, 1978, p. 245

[342] Cutler, Claire, A., *Private Power and Global Authority*, Cambridge University Press: New York, 2003, p. 21

[343] *Ibid.* p.249. As a first objection to Cutler's approach, it can be said that this issue should be understood within a wider context and not only on the ground of MNEs' being 'most significant economic players' and 'the dominant private institutions of the world economy' but also on the ground of what one understands of the, meaning, utility and distinction of public-private spheres. It is true that law is not a self-sustaining and autonomous system and independent force from economic, political and social life. However, law creation process and forces are not only about a plain reflection of 'reality' either. If it was so, what are the differences between law and other types of social, moral and political rules? And then again, what is the reality and why is it so?

[344] Charney (1983) p.767

[345] Jägers (1999) p.269. However, it should be recalled that individuals were seen capable of being guilty of crimes against international law, as the Nuremberg and Tokyo Tribunals showed after the Second World War, but this did not inherently mean that individuals obtained a certain degree of international personality whereby they had any rights under international law. On the subject, see *Human rights and multinationals: is there a problem?*, Muchlinski, Peter, "International Affairs" 77,1 (2001) p.31-47 and Malanczuk (1997) p.100

business regulation and other necessary international mechanisms to cope with problems MNEs may cause, a greater participation of MNEs would only give them a further expended political influence, which would basically be disproportional to the power they have already obtained.

In the end, regardless of what view might be held concerning the international personality of MNEs, the discussion is also about an ideological standing and not purely technical or theoretical. Muchlinski observes, "No account of concern over MNEs would be complete without an awareness of ideological positions in the field of political economy".[346] As Cox states, "all theories are *for* someone and *for* some purpose".[347]

In conclusion, it is true that MNEs have become major actors in many issue areas, from international economy to human rights and environment. It is also true that the role of MNEs cannot be considered as limited to only policy making and the capacity of making legal claims before international arbitration tribunals. Evidently they exercise considerable influence on even law creation process. However, international legal personality is more than barely participation in law making process;[348] it is also the acceptance of international legal order, which today still means the law creating practices of sovereign states. There is not sufficient evidence supporting the view that non-state entities have obtained an autonomous participation in international law making. MNEs and all other non-state entities as the bearers of international rights and obligations and their role within the process of international rule making is not autonomous but through state consent, which is still explicable within the framework of the 'traditional paradigm' of international law making.

3.8 Concluding remarks

This chapter has argued that the state-centrism was the leading paradigm in international economic law in the post-war period until the end of the 1980s. It has also been

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[346] Muchlinski (1999) p.8

[347] Cox, Robert, *Social Forces, States and World Orders: Beyond International Relations Theory* in "Approaches to World Order", Cox, Robert and Sinclair, Timothy, J. (eds.), Cambridge University Press: New York, 1996, p.87

[348] Van Hoof, G. J. H., *Rethinking the Sources of International Law*, Kluwer Law and Taxation Publishers: Deventer, 1983, p .63

demonstrated that international economic soft law in this period had two main sources: the process of the restructuring of the post-war national economy through the institutions of the Bretton Woods and the discrepancy between economic power and the majority's voting power within the framework of international organisations centred on the UN system.

It is further argued in this chapter that the state-centric paradigm has been replaced in the globalisation process by a dual 'globalist' paradigm as a result of a global power shift that has taken place particularly since the end of the Cold War. This currently dominant globalist paradigm is mainly associated with a retreat of the state from the economy -deregulation, privatisation and liberalisation of both domestic and international economy as well as the rise of non-state actors and transnational market forces with the globalisation of liberalism. However, as been demonstrated in this chapter, the constitutional foundations of this informal non-state legal order have been dictated and governed by international economic institutions mainly controlled by powerful states. Therefore, the chapter concludes that the globalist paradigm displays a dual character. On the one hand, the globalist paradigm embraces the *deformalisation* of international law, which refers to the increasing management of the world's affairs by formal/informal, legal/non-legal soft law and standards, private dispute-settlement as well as flexible and informal non-territorial networks. On the other hand, it entails a *re-forming* (or 'legalisation') process, which mainly takes the form of institutionalisation of neo-liberal principles associated with globalisation through bilateral and multilateral agreements and institutions.

Lastly, it has been argued in the chapter that although non-state actors have increasingly been influential on international law making multiple platforms and obtaining different status, it can hardly be maintained that these activities have elevated non-state actors to the status of new subjects of international law. It has also been shown that in those examples, where non-state actors have obtained a limited degree of the status of subject of international law, they have been derivative subjects.

4 GLOBALISATION AND PARADIGM SHIFT: A NEW CONTEXT FOR INTERNATIONAL ECONOMIC SOFT LAW

4.1 Introduction

In recent years debates surrounding soft law have intensified and gained new dimensions. It is increasingly held that although international law is traditionally defined as the law governing states, in the process of globalisation, the nation state has lost its exclusive position on international scene. On the other hand this process has endorsed the rise of non-state actors and increased their impact on the definition, nature and function of international law. Therefore, according to this understanding, one of the most significant consequences of the proliferation of the non-state actors has been the reassessment of the traditional sources of international law including the challenge to accepted modes of international norm creation.[349] It is said, in certain areas of international law, most notably, international economy, environment and human rights, this traditional state-centred international law and public notions of authority are being combined with or, in some cases, superseded by non-state law, informal normative structures, and private economic power and authority.[350] As this storyline goes, globalisation has created gaps in the formally valid legal order through detaching state and law and eroding the public/private distinction. In response to the needs of the new social, economic and legal formations emerged as a result of globalisation, there is, it is claimed, an apparent need for international law to accommodate itself to the increasingly heterogeneous nature and pluralist character of subjects and sources of law. Correspondingly, it is maintained that international law should reflect the changing nature of state-private (market) relations through recognising non-state actors as the

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[349] Redgwell, Catherine, "International Soft law and Globalization" in *Regulating Energy and Natural Resources*, Barton, Barry; Barrera-Hernandez, Lila; Lucas, Alastair; and Ronne, Anita (eds.), Oxford University Press: Oxford (2006) p. 89

[350] Cutler (2003) p. 1

new participants (subjects) in law making and to interpret their acts as displaying highly 'public' character as the new sources of international law.

The purpose of this chapter is dual: (i) to identify social, technological and ideological circumstances that precipitate the examined paradigm shift that has changed our way of understanding and perception of 'reality' and (ii) to examine our responses to that perception. The chapter describes the nature and roles of these circumstances within the context of the historical moment of the end of Cold War.

Globalisation has generally been pointed out as the principal cause for the proliferation of formal, informal and hybrid soft law and institutionalisation, voluntary and self-regulatory codes of conduct and non-state dispute settlement, which are regarded to correspond with privatisation and deregulation and liberalisation of business activities. According to this account, it is argued that to meet the challenges of globalisation, international law needs more flexible, speedy, and pluralistic, i.e., public, non-state and hybrid, rule setting, dispute settlement and enforcement mechanisms, including sub-states, supra-state, and transnational. Accordingly, only such a development could ensure the continuing relevancy of international law to the rapidly changing structure of international reality. Section 4.2 analyses the concept of 'globalisation' as both a descriptive and prescriptive discourse that aims to map out the direction of societal developments towards the integration of international economy and establishment of free markets, which would allegedly lead the world to prosperity, liberal democracy and (perpetual) peace. Section 4.3 looks at the 'inevitability' discourses in the context of technological and economic determinism that contributed to the advance of the legitimating rhetoric of the globalist paradigm. Section 4.4 examines the nature of the changes in state-market relations that have characterised globalisation and economic liberalism. Section 4.5 critically assesses the concept of global governance describing it as an integral part of the dominant neo-liberal discourse that "provides a guide for action" to both deregulate and re-regulate international politics through decentralising and de-legitimising 'government' and promoting a new "global public policy network" consists of MNEs, NGOs and international organisations.

4.2 Globalisation

Nowadays, it has virtually become a truism to say that globalisation is a heavily loaded and vague concept.[351] When the word is used descriptively, it often refers to "the rapid integration of economies worldwide through trade, financial flows, technology spillovers, information networks, and cross-cultural currents".[352] It is mostly associated with recent changes in international as well as domestic life, such as the demise of nation-state, liberalisation of trade and capital movements, technological developments, the introduction of the "information age", and the emergence of "network society". For some, on the other hand, the word globalisation means a euphemism for Western *imperialism*. Similarly, many consider globalisation as a qualitatively new and *inevitable* process while some others see nothing substantially new in globalisation but a further stage of capitalism in which nation-states still are the vital agents of world economy/politics.

It is fairly common to examine these competing interpretations of globalisation in three broad categories: (i) strong globalisation, (ii) weak globalisation, and (iii) globalisation scepticism.[353] The interpretations that can be considered in the first category generally

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[351] Many consider the concept of globalisation as ideological, catchword or buzzword and therefore do not see it as very useful for analytic purposes. On the other hand, writers such as Therborn and Giddens assert that the concept meets the necessary criteria to be considered as a functional concept of social theory. Therborn lists his three criteria as follows: It should have a precise meaning, preferably not a semantically arbitrary one; it should be useable in empirical investigations, and it should have a wide range of possible applications in the meaning that the concept should be abstract. On this basis, Therborn defines globalisation as "referring to tendencies towards a worldwide reach, impact, or coherence, of social phenomena, including a world-encompassing awareness among social actors" (Therborn, Göran, *Introduction: The Atlantic Diagonal in the Labyrinths of Modernities and Globalizations* in Globalization and Modernities, Therborn, Göran (ed.), Forskningsrådsnämnden: Stockholm, 1999, p.31). In Giddens' definition, globalisation is virtually equated to the modernisation on a global scale. See *The Consequences of Modernity* (Giddens, Anthony, Stanford University Press: Stanford, 1990, p. 64). For further discussions on the value of globalisation as a theoretical concept, see Clark, Ian, *Globalization and Fragmentation*, Oxford University Press: New York, 1998, p. 16).

[352] See, http://www.imf.org/external/pubs/weomay/01overv.htm.

[353] For similar categorisations, see, among others, Marks, Susan, *The Riddle of all Constitutions*, Oxford University Press: New York, 2003; Sutcliffe, Bob, "The Place of Development in Theories of Imperialism and Globalization" in Munck, Ronaldo & O'Hearn, Denis (eds.), *Critical Development Theory*, Zed Books: London and New York, 1999; Gray, John, *False Dawn: The Delusion of Global Capitalism*, Granta Books: London, 2002. For another yet similar version of tripartite division ("hyperglobalists", "sceptics" and "transformationalists"), see Held, David; Goldblatt, Peter and Perraton, Jonathan (eds.) *Global Transformations: Politics, Economics and Culture*, Polity Press: London, 1999. Muchlinski makes another possible version of tripartite grouping: the globalists, the anti-globalists and the prophets of post-globalisation. The last group is further divided into two sub-groups. Accordingly, these two 'protagonist' sub-groups, both, conceive globalisation as a reversible process, their explanations as to

hold that "the power of individual states has been reduced to be replaced by an overweening growth in the power of multinational companies and some international organizations, which form a proto-state at the international level".[354] Keep in mind however that there are also different degrees to which adherents of this category see globalisation as an all-encompassing system. In its strongest version, globalisation represents a world system where capital is completely de-nationalised and differentiations such as 'centre' and 'periphery' have become history. As a consequence any division based on the concept of nations is outmoded. Hence, as Marks remarks, in the liberal interpretation of strong globalisation, the ideas about "the end of the nation-state" and "the end of history" become one and the same thing.[355]

In the so-called 'weak globalisation', it is maintained that in the last three decades international economic transactions in the forms of investment and trade have accelerated to the extent that countries have become deeply interdependent. As a result, national governments have largely lost their power to control financial flows and it has increasingly become difficult, even impossible, to form economic policy on the national level. In this understanding of globalisation, the nation-state has indeed been weakened, fragmented, and sometimes even restructured but not disappeared or replaced by any other transnational political order.[356]

The arguments adhering to the global sceptic category have different forms and sources. Some scholars understand the recent changes commonly referred to as globalisation barely a new phase in the capitalist development, which embraces some new elements

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what may be the cause of the possible reversibility differs. Authors in the first group, like Samuel Huntington, stresses "clash of civilisations" while authors in the second group, like Lester Thurow, put forward regional economic and political blocs as the likely cause for such reversal (Muchlinski, Peter, *Globalisation and Legal Research*, 37 The International Lawyer [2003] 1, p. 224).

Keep in mind however that this very brief account of the threefold categorisation does not cover all nuances each category in fact displays. Nor is this categorisation the only possible analytical method of perceptions of globalisation. Scholte, for instance, distinguishes at least five different ways of conceiving of globalisation. They are 'internationalisation', 'liberalisation', 'universalisation', 'Westernisation', and finally 'deterritorilasation' (Scholte, Jan Aart, *Globalization: A Critical Introduction*, Palgrave: New York, 2000, p. 15).

[354] Sutcliffe (1999) p.146.

[355] Marks, Susan, *The Riddle of all Constitutions*, Oxford University Press: New York (2003) p. 79

[356] Among numerous scholars and writers supporting the idea of weak globalisation from both liberal and left wings, see Snyder, Francis, *Governing Economic Globalisation: Global Legal Pluralism and European Law*, 5 European Law Journal (1999) 4; and Gilpin, Robert, *Global Political Economy: Understanding International Economic Order*, Princeton University Press: New Jersey (2001).

such as novelties in communication and transportation technologies, homogenisation ("macdonalisation") of the world culture and the creation of a universal capitalist space.[357] According to this line of reasoning, globalisation basically means an increase in the power of Western (the North) capitalist countries through MNEs and international financial organisations.[358] Some other globalisation sceptics consider globalisation and especially globalisation of the world economy as mythical. Accordingly, *transnational* corporations, which are considered as the most salient and driven features of globalisation, are rare and the so-called *global* enterprises are still seen as deeply embedded in their respective countries.[359] It is also said that while there has been a fast expansion of international economic transactions especially after the mid-1970s this has not yet reached unprecedented proportions relative to the overall size of the world economy.[360]

The periodisation and degree of globalisation is also much disputed. Many scholars, in particular those who show some degree of scepticism, tend to consider 'present day globalisation' as a new phase of a long-term historical process starting as early as 4th century C.E. with the diffusion of world religions and the establishment of transcontinental civilisation[361] or late 15th century with European colonial conquests.[362]

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[357] Boron, Atilio, A., "Globalization: A Latin American Perspective" in Therborn, Göran (ed.), *Globalizations and Modernities*, Forskningsrådsnämnden: Stockholm, 1999. For a more hard-line approach, see Petras and Veltmeyer (2001).

[358] It is interesting to note that from left ideological spectrum the proponents of the 'strong globalisation' have often refused to regard the globalisation process as imperialism. As Sutcliffe points out one of the earliest formulations of strong globalisation labelled the process as "post-imperialism" (The term was used by Sklar, Richard, *Postimperialism, a class analysis of multinational corporate expansions*, Comparative Politics, 1976, October cited in Sutcliffe, 1999, p. 148).

[359] Zysman, John, *The Myth of a "Global" Economy: Enduring National Foundations and Emerging Regional Realities*, 1 New Political Economy (1996) 2; Doremus, Paul, N., Keller, W., Pauly, Louis and Reich, Simon, *The Myth of the Global Corporation*, Princeton University Press: New Jersey, 1998; Hirst, Paul and Thompson, Grahame, *Globalization in Question*, Polity Press: UK, 1996. Hirst and Thompson are often considered as globalisation sceptics in view that they hold that enterprises are not of transnational character and nation-states play important roles in international economy. However, they explain their position in the introduction of their frequently cited book as challenging the strong version of the thesis of economic globalisation; but they do not see themselves as globalisation sceptic in every aspect of this concept.

[360] Sutcliffe (1999 p. 148). In the same vein, for a recent account of the relative comparison of world economy since the 1870s, see Hirst, Paul and Thompson, Grahame, *The Limits to Economic Globalization*, http://www.polity.co.uk/global/pdf/GTReader2eHirstThompson.pdf . For a general account of discussions on globalisation, see Scholte (2000).

[361] Therborn (1999) p. 33

[362] Waters, Malcom, *Globalization*, Routledge: London and New York (2001)

While according to some others, the last decades of the 19th century with the growth of corporate monopolies, the territorial division of the world into colonies, the export of capital,[363] or after the World War II with economical, technological and political developments, associated with the Cold War.[364] On the other hand, most liberal writers (but not all) suggest that globalisation is essentially and qualitatively new phenomenon. According to this understanding, in the last decades a new world economy has emerged. The production of goods and services and especially financial markets have become transnationalised mainly due to technological developments, which have been either a determinant or facilitating factor (The role of technology in globalisation is discussed in detail in the following section). While the views over the 'periodisation' of globalisation are diverse, there seems to be a consensus on the fact that globalisation as a term has emerged only recently. According to Waters, the word was first used by *The Economist* in 1959 and entered into academic circulation in the end of the 1980s.[365] Scholars such as Holmén and Gilpin explicitly underline the fact that the term came into popular usage after the fall of the Berlin Wall and related to the significant increase in foreign direct investment by MNEs.[366] Friedman, on the other hand, contends that globalisation is the international system that has replaced the Cold-War system.[367] As Berndtson says, this approach makes globalisation a general metaphor that describes a new international system replacing the 'old' world order existed till the end of the Cold War.[368]

Yet, no matter what view can be upheld on the genesis or novelty of globalisation, there is little room to doubt about the prescriptive and programmatic character of the "modern form" of globalisation. Its key features echo distinctly the neo-liberal view of societal development that prescribes maintaining fiscal discipline, liberalising finance and trade,

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[363] Petras and Veltmeyer (2001)

[364] Bretherton, Charlotte and Ponton, Geoffery (eds.), *Global Politics: An Introduction*, Oxford: USA (1996)

[365] Waters (2001) p. 2

[366] Holmén, Hans, *Limits to Globalization*, 5 European Review (1997) 1, p. 76; and Gilpin (2001) p. 6. Gilpin explained globalisation as a result of combination of the end of the Cold War (politics), novel technologies especially in transportation, computer and telecommunications and the shift from a state-dominated to a market-dominated international economy (*Ibid.* p. 8).

[367] Friedman, Thomas, L., *The Lexus and the Olive Tree*, Anchor Books: New York (2000) p. 42

[368] Berndtson, Erkki, "Globalization as Americanization" in Goverde, H., Cerny, P. Haugaard, M. and Lentner, H (eds.),*Power in Contemporary Politics*, Saga: London (2000) p. 158

abolishing barriers to foreign direct investment, privatising state-owned enterprises, reducing regulatory restrains on business and establishing a clear regime of property rights through international norm setting. Certainly all these may gain an 'objective' dimension when taken together with the 'historical fact' that Marx formulated some 150 years ago as follows: "The bourgeoisie cannot exist without constantly revolutionising the instrument of production, and thereby the relations of production, and with them the whole relations of society (...) The need of a constantly expanding market for its products chases the bourgeoisie over the entire surface of the globe. It must nestle everywhere, settle everywhere, and establish connection everywhere. The bourgeoisie has, through its exploitation of the world market, given a cosmopolitan character to production and consumption in every country".[369] Thus, according to Marx, capitalism inherently tends to expand and internationalise. However, doest it imply that this expansive tendency of capital towards endless accumulation would validate the claim about the inevitability of liberal globalisation that we are witnessing today? This is the question the following section deals with.

4.3 Technology and economy as the determinants of change

> *"The hand-mill gives you society with the feudal lord, the steam-mill, society with the industrial capitalist"*[370]

The notion of determinism refers to an understanding, according to which all aspects of society are dependent on a single set of factors that are responsible for all qualitative changes. The scholars that regard globalisation as an inevitable, irreversible and autonomous process that is beyond the control of public policy and which is the result of technological revolution or economic development can be labelled as determinist. In this understanding, globalisation is considered to be "represented as a finality, as the logical and inevitable culmination of the powerful tendencies of the market at work".[371]

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[369] Marx Karl and Engels, Frederic, *Communist Manifesto* in "Marx & Engels Selected Works", Preface, Lawrence and Wishart: London, 1973

[370] Marx, Karl, *The Poverty of Philosophy*, Lawrence & Wishart: London, 1973

[371] Cox, Robert, W., "A Perspective on Globalization" in Mittelman, James, E. (ed.), *Globalization: Critical Reflections*, Lynne Rienner Publishers: US (1997) p. 21

Today, unlike in the 1980s and 1990s, technological progress is less enthusiastically argued to be the determinant of globalisation though its key importance continues to be stressed without exception. However, earlier, when the word globalisation was still new, many theorists held the idea that unprecedented progress of technology especially in domains of the communication and transportation was the major driving force behind globalisation.[372] This approach that can be labelled *technological determinist* basically considers technology as an autonomous force.[373] Over time, however, this approach has somewhat softened. Nowadays, recognising the multi-faceted character of the process of globalisation, an increasing number of scholars that adhere to some form of deterministic approach on globalisation seem to combine technological determinism with economic determinism, which refers to "the tendencies, forces, and outcomes of economic process exert an independent, determining influence on other aspects of social development, such as political organisations and cultural beliefs".[374] It is for instance argued that globalization patently could not have occurred in the absence of extensive innovations in respect of transport, communications and data processing.[375] According to this view, technological revolution has boosted international economic activity. In the words of Clark, "technology (was) necessary but not sufficient for globalisation to take place".[376]

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[372] Among many, see Wriston, W. B., *The Twilight of Sovereignty: How the Information Revolution Is Transforming Our World*, Charles Scribner's Sons: New York, 1992. It can also be noted that technological determinists often use the discourse of post-industrial, (post-Fordist) post-modern society seeing a sharp contrast between the 'old society' characterised by heavy industry, mass production and consumption, bureaucratic organisations whereas the 'new post-modern/industrial society by "flexible production", where technology, knowledge, and information are the axial or organising principles" (Kellner, Douglas, *Theorizing Globalization*, http://www.gseis.ucla.edu/faculty/kellner/papers/theroyglob.htm. See also Best, Steven and Kellner, Douglas, *Postmodern Theory: Critical Interrogations*, Guilford Press: New York, 1991; Bell, Daniel, *The Coming of Post-Industrial Society*, Basic Books: New York, 1976; Baudrillard, Jean, *Symbolic Exchange and Death*, Sage: London, 1993; and Harvey, David, *The Condition of Postmodernity*, Blackwell: Cambridge, 1989).

[373] Although Castells maintained that 'technology does not determine society, but embraces it, he has nonetheless developed an instrumental view on the autonomous character of technology. For instance, Castells argued that the IT revolution is partly responsible for the collapse of the Soviet Union together with statism and a more effective capitalism (See his trilogy: *The Information Age: Economy, Society and Culture*; Vol. 1: "The Rise of the Network Society" [1996]; Vol.2: "The Power of Identity" [1997]; Vol. 3: "End of Millennium [1998]).

[374] Bimber, Bruce, "Three Faces of Technological Determinism" in Smith, Merritt Roe and Marx, Leo (eds.), *Does Technology Drive History?*, The MIT Press: Massachusetts, 1995, p. 91

[375] Scholte (2000) p. 99

[376] Clark (1998) p. 20

However, to regard technology and/or economic development as the determinant(s) of historical discontinuities or paradigm shifts is hardly new: the belief in technology as a key governing force in society dates back to the Industrial Revolution, during which the society was transformed (modernised) enormously.[377] Indeed, the intellectual forerunners of the eighteenth-century Enlightenment considered technology (and science in general) as a liberating force with an almost unreserved optimism. By the same token, it is interesting to note that in certain instances Marx's historical materialism was not completely free from one or another form of determinism. Indeed, according to Fischer, Marx, has on some occasions provided future Marxists with an excuse for viewing history as an automatically functioning mechanism who's most important components are not living men but dead objects –instruments of labour, machines and relations between objects.[378]

Regardless of whether it was steam, navigation, train, telegraph and telephone as in the 18th and 19th centuries, or it is computer, telecommunication, aircraft, banking, stock markets, biogenetic engineering, etc. as in the present days, the transforming power of technological developments in our daily life is always mind-boggling. It is therefore reasonable, at least to so extent, that witnessing such innovations that transform our daily life may create a popular narrative about technology's being the driving agent of social changes. It is also understandable, again to certain extent, that technological (or economic) developments are put forward as the determinant of globalisation. Nevertheless, the 'direct' translation of the transformed texture of our daily life into a

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[377] Smith, Roe, Merritt, *Technological Determinism in American Culture* in Smith, Roe, Merritt and Marx, Leo (eds.), "Does Technology Drive History?", The MIT Press: USA, 1995, p. 2

[378] Fischer, Ernst, *Marx in His Own Words*, Penguin Books: Middlesex, 1981, p. 82. To give a few examples of arguments that provides an excuse for viewing history in a deterministic manner: "In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces" (Marx, Karl, *A Contribution to the Critique of Political Economy* in Preface in "Marx & Engels Selected Works" Preface, Lawrence and Wishart: London, 1973, p. 181). The perhaps most well known aphorism of Marx, which is greatly used as proof of Marx's technological determinism, is as follows: "Social relations are closely bound up with productive forces. In acquiring new productive forces men change their mode of production; and in changing their mode of production, in changing the way of earning their living, they change all their social relations. The hand-mill gives you society with the feudal lord; the steam-mill, society with the industrial capitalist". (Marx, Karl, *Poverty of Philosophy*, Lawrence & Wishart: UK, 1973, p. 122). Fischer explains Marx's occasional "over-emphasis" regarding the primacy of technology and/or productive forces over other factors in the course of social development with the influence of Darwin's evolution theory as well as Hegel (*Ibid.* p. 85). For counter-arguments about Marx's being technological and/or economic determinist, see among others, Bimber (1995), Miller, Richard, *Analyzing Marx*, Princeton University Press: New Jersey, 1984.

social theory can function as an ideological shortcut as it is the case when explaining globalisation with uncontrolled and autonomous market forces or a technological revolution. As Boron maintains, the claim about the objectivity of globalisation generates a false realism, which in turn facilitates to the ideological success of neo-liberalism converting it into the "common sense" of our time.[379] In the words of Grass, the consequences of privatisation, destruction of thousands of job, mass unemployment, poverty, etc. disguised as globalisation. "All this now is accepted as if divinely ordained accompanied at most by the customary national grumbles".[380]

4.4 Changes in state-market relations

As viewed earlier, globalisation has often been associated with the diminishing role of the nation-state and the growing influence of market forces. It is claimed that states' capacity to control international/transnational economic transactions and information flows has considerably eroded (or even vanished) due to the following developments: (i) market friendly policy changes since the 1980s, such as liberalisation, deregulation and privatisation that have diminished the possibility for states to make and manage national macroeconomic programmes (which also meant the end of Keynesianism); (ii) the internationalisation of capital, production and financial transactions organised by MNEs[381]; (iii) the technological advances in communication and transportation have decreased the possibility for states to control "the flow of ideas" making internal policies in many domains infeasible; (iv) the increasing and intensifying interconnectedness between states, which has led to the escalating importance of international and transnational organisations causing a growing power and function

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[379] *Ibid.* p. 135.

[380] Grass, Günter, *The High Price of Freedom*, published in "The Guardian", Saturday, May 7, 2005.

[381] In Schachter's words: "The role of the state has also been reduced by the explosive growth of foreign direct investment by transnational corporations and portfolio investment by pension and mutual funds. Much of such foreign investment takes place without regard to the source state or its control. The old-style 'imperialism' of capital-exporting countries has no role in these cases and their state power is diminished" (Schachter, Oscar, "The erosion of state authority and its implications for equitable development" in Weiss, Friedl; Denters, Erik; and de Waart, Paul (eds.), *International Economic Law with a Human Face*, Kluwer Law International: The Hague/Dordrecht/London, 1998, p. 33).

transfer; and also (v) the end of the Cold war, which has lessened the need for nation-states.[382]

To a considerable degree, there is a historical kinship and continuity between the conviction that states have lost power to markets in the globalisation process and the classical liberal thinking of free market as the natural form of economic life. Both ideas are closely linked to the vision of retirement of the state in society. However, unlike the utopia of *laissez- faire*, which predicts a self-adjusting, deregulated market beyond the possibility of political and social control and a minimum state power, the development of the free market that took place in Great Britain in the mid-nineteenth century ("the Great Transformation") did not come into being merely by allowing things to take their course. As Karl Polanyi argued, it was "naively imagined" that creation of a self-regulating market economy was to be the natural outcome of the spreading of markets.[383] In the 1930s, objecting to the liberal perception that *laissez-faire* was the spontaneous, automatic expression of economic facts and not a deliberate policy, Antonio Gramsci also contended that the *laissez-faire* liberalism was a form of state regulation, introduced and maintained by legislative and coercive means. In other words, "the road to the free market was opened and kept open by an enormous increase in continuous, centrally organized and controlled interventionism"[384] concluding that *laissez-faire* was a political programme to change the economic programme involving the distribution of the national income.[385] Gray argues that the "Great Transformation" of England during the mid-Victorian times was an "artefact of power and statecraft; it was created by state coercion, and depended at every point in its workings on the power

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[382] Among vast literature dealing with some of these arguments, see, Held, David, *Democracy, the Nation-State and the Global System* in Held, David (ed.), "Political Theory Today", Polity Press, Cambridge, 1991; Waters (2001); Hirst and Thompson (1996) in particular Chapter 8; Burnham, Peter, "The Recomposition of National States in the Global Economy" in Edwards, Paul and Elger, Tony (eds.), *The Global Economy, National States and The Regulation of Labour*, Mansell: London and New York, 1999; and Keohane, Robert, O., "Hobbes's Dilemma and Institutional Change in World Politics: Sovereignty in International Society" in Keohane, Robert, O., *Power and Governance in a Partially Globalized World*, Routledge: London and New York, 2002.

[383] Polanyi, Karl, *The Great Transformation: The Political and Economic Origins of Our Time*, Beacon Press: Boston, 1957, p. 57.

[384] *Selections from the Prison Notebooks of Antonio Gramsci*, Hoare, Quintin and Nowell-Smith, Geoffrey (eds.) Lawrence and Wishart: London, 1973, p. 140

[385] Gramsci (1973) p. 60

of government.[386] According to Gramsci, the practical origin of this "theoretical error" of liberal approach, which presupposes the separation of political society from civil society, lies in the assertion that economic activity belongs to civil society and therefore the state must not intervene to regulate it.[387]

Like its antecedent, the present version of the (global) free market is also claimed to be a natural consequence of an uncontrollable, technologically/economically predetermined process (i.e. globalisation).[388] However, even though they have gained enormous popularity, the claims about the nation-state's declining capacity in the face of globalisation's "anonymous forces" and the emerging "stateless capitalism" have not gone unchallenged. It is argued that globalisation is not faceless and is authored by powerful states and primarily consists of re-organising, rather than bypassing states. Keohane for instance, holds that the decision of the United States in 1945 to maintain a capitalist economy with increasing openness has been an important basis for the further developments of globalisation.[389] In a similar way, Gilpin maintains that globalisation rests on a political foundation that could disintegrate if the major powers fail to strengthen their economic and political ties.[390] Petras and Veltmeyer also maintained that the new era should be named as the "New Statism" rather than the era of the free market considering that the scale and scope of the states' activities in military as well as economic areas, especially those of the USA, has grown exceptionally. The authors further argued that globalisation is primarily a product of the New Statism, which is

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[386] Gray (2002) p. 5-7

[387] Gramsci (1973) p. 60. Both Gramsci and Gay name "the Enclosures", whereby common right was extinguished and commoners lost common right at enclosure, as the first crucial step towards a free British market economy. By using its power the state transformed common land into private property. Moreoer, both note that the Enclosures had a paramount importance in forming of the nineteenth-century agrarian capitalist economy of large landed estates. Second and arguably most important measure aiming at creating the free market was the "repeal of "the Corn Laws" of 1846, thereby an agricultural free trade was established. Another critical step was taken by adopting "Poor Law Amendment" in 1834 thereby the responsibility for protection against insecurity and misfortune has been transformed from communities to individuals (For different steps of engineering free market in 18th and19th centuries of England, see also Taylor, Arthur, J., *Laissez-faire and State Intervention in Nineteenth Century Britain*, Palgrave Macmilllan: London, 1972).

[388] In the words of Bauman "All this surrounds the ongoing process of the 'withering away' of nation-states with an aura of a natural catastrophe. Its causes are not fully understood; it cannot be exactly predicted even if the causes are known; and it certainly cannot be prevented from happening even if predicted" (2000, p. 56).

[389] Keohane (1995) p. 166.

[390] Gilpin (2000) p. 294

sustained by direct state intervention.[391] In a similar vein, Hirst and Thompson hold that states continue to play a central role in international economy. Although the writers acknowledge the changing role of nation-states in the 'post' Keynesian era and states' diminishing power as administrative and policy-making agencies, they nevertheless maintain that the function of the nation-state in the integration of different levels of governing powers (i.e. international, national, regional), is irreplaceable by any other agencies. Nor can markets alone provide the interconnection and co-ordination that today's high level of division of labour and economic interdependence requires.[392] The writers conclude that markets and companies cannot exist without a public power to protect them on both national and international level.[393]

It can be argued that the liberal assertion that the nation-state is "withering away" in favour of the market is suffering from a threefold deficiency. First, it deceptively counterpoises state and market as two opposing institutions and sees their multifaceted relationship as isolated and external. As Burnham puts it, this understanding fails to see states and markets as being differentiated aspects of the same set of social relations and the development of nation-state as an integral "part of the antagonistic and crisis-ridden development of capitalist society.[394]

Second, arguments about the nation-state's having yielded substantial amount of domestic regulatory authority to the transnational regimes and organisations, in particular international financial institutions (IFI), such as the IMF and the World Bank as well as to treaty regimes, such as the WTO/GATT as a response to the imperatives of globalisation, understand the concept of 'sovereignty' in its very abstract form and generalise it in isolation from asymmetric power relationship and hierarchical structure of international order.[395] It is hard to ignore the fact that most powerful international economic institutions (IEIs), which have actively promoted economic and financial policies, such as liberalisation, de-regulation and privatisation, are effectively controlled

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[391] Petras and Veltmeyer (2001) p. 55

[392] Hirst and Thompson (1996) p. 184.

[393] *Ibid.* p. 188

[394] Burnham (1995) p. 44

[395] See for instance Strange, Susan, *The Retreat of the State: The Diffusion of Power in the World Economy*, Cambridge University Press: New York, 1996.

by the advanced capitalist countries.[396] However, this influence should not be understood in such a way that all activities of IEIs can be reduced to a direct policy choice of individual powerful states. As Cammack argues, the IEIs continually seek to define and exercise a relatively autonomous role to promote and sustain a framework for global capitalism. For, such an autonomous role is indispensable to deal with the shortcomings and setbacks that cannot be addressed at national level alone, not even by the most powerful states.[397]

Third, the perception of sovereignty (or national autonomy) in the "nation state's withering away" approach is based on an absolutist form of the concept of sovereignty and therefore exaggerates the nation-state's ability to control economy prior to globalisation.[398] There is no evidence in history that nation-states have ever enjoyed unlimited economic sovereignty and determined their economic policy in complete freedom.

Until World War I, under the classical gold standards of fixed exchanges rates, national governments had very little effective control over their economies. The economic agenda of governments was at that time only a little more than maintaining the par value of their currencies through central banks.[399] It was the combined and cumulative effects of events and developments such as the Great Depression, the influence of the socialist ideals and system, the Cold War and the rise of the labour movements that led developed capitalist countries to adopt welfare policies and to involve more actively in

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[396] For an overview on the subject, see Anghie, Antony, *Time present and time past: globalization, international financial institutions, and the third world*, 32 New York University Journal of International Law and Politics (2000).

[397] Cammack, Paul, "The Governance of Global Capitalism: A New Materialist Perspective" in Wilkinson, Rorden (ed.), *The Global Governance Reader*, Routledge: London & New York, 2005, p. 157.

[398] It can also be observed that most writers claiming the demise of nation-state use the concept of sovereignty loosely without any precision that such complex concept arguably requires. Often, a relatively limited possibility to exercise one type of sovereignty may mean the exercise another type of sovereignty. It is true that the "new" developments such as transboundary air pollution or the transborder movements of capital may indicate a loss of interdependence sovereignty (For different types of sovereignty, see the second chapter of this study section 2.5 "state sovereignty in international law"). Still, this does not automatically suggest that state sovereignty has been undermined as a whole and states are not any longer able to provide solutions to changed face of international life. As Krasner holds, as a response, in most cases states adopt international agreements or create international organisations, which in turn may lead states to reconcile their Westphalian sovereignty with the changing international reality (Krasner, *Sovereignty: Organized Hypocrisy*, 1999, p. 13).

[399] Gilpin (2000) p. 317

economic life. Yet, as Gilpin reminds us, "the role of Western governments in economy remained fairly limited" even in the post World War II period.[400]

Stressing the continuing importance of the state, however, is not the same as saying that the nation-state remains unchanged. Probably the state will not even endure forever as a political/social structure *and form*. With the end of the Cold War and the triumph of the market economy, the functioning of the nation-state has been restructured through financial markets (increased capital mobility), economic integration and inter-governmental organisations. This can be regarded as the structural changes of nation states as the transition of state management from a politicised (the welfare state model) to a depoliticised. In this current form state activities are marketised (privatisation of state functions) and responsibilities for management (the regulatory and economic policy making capacity of states) have been shifted onto international regimes (usually an international monetary mechanism, which sets rules) and independent organisations (the independence of central banks). According to Burnham, this policy, which can be called the "rule-based" strategy, aims to depoliticise the government's economic policy thereby protecting the government from the political consequences of pursuing deflationary policies.[401]

There is little doubt that in the last three decades or so, national economies have become internationally more integrated, and as a result, national governments have lost significant power of economic policy-making to MNEs and international organisations. It is important to bear in mind, however, that this process has not developed uniformly. Firstly, the biggest MNEs, "the most important actors" of economic globalisation are based in advanced capitalist countries[402] and backed up by these "home states".[403]

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[400] *Ibid.* p. 318

[401] Burnham (1995, p.45-46). Hirst and Thompson also define the new political rhetoric as "anti-political liberalism" (1996, p. 176). The elimination of the welfare state alongside with diminishing regulation on overseas flows and demolishing political and economic constraints in overseas markets are given as the 'centrepiece' of globalisation by Petras and Veltmeyer (2001, p. 54).

[402] According to the UNCTAD's "World Investment Report", only 3 of the world biggest 100 MNEs are not based on the most advanced capitalist countries. These 'exceptions' are Hong Kong (China), Singapore and Republic of Korea (http://www.unctad.org/sections/dite_dir/docs/wir2005top100_en.pdf).

[403] In the words of Spero and Hart, "Some governments – particularly powerful governments like that of the United States- actively encouraged multinational expansion. The progressive elimination of restraints on capital flows made expansion of direct investment possible. The reduction of tariffs made direct investment more attractive. Governments directly subsidized FDI outflows by providing various forms of insurance for international investments (2000, p.109). Nonetheless, the writers also point out that however

Moreover, as discussed above, the same developed countries have the greatest influence over IEIs, which is generally regarded as governing economic globalisation and functioning virtually as political institutions. Chimni contends that the claim that not only developing countries but also *all* states have lost certain degree of sovereignty to IEIs, fails to make a distinction between what is *formal* and what is *substantial*. It is the exercise of their sovereign power that continuously shapes the objectives of IEIs and the rules these countries enforce.[404] Thus a decline in state power seems more tangible for the so-called Southern states for which globalisation has meant an imposed liberalisation by IEIs, through fiscal austerity, tariff reductions, privatisations, de-regulation and an often desperate quest for FDI. In the words of Therborn, "globalization to the Third World is irreducible to economic objectification, be it from imposed liberalism, indebtedness, or dependence on aid or capital inflow".[405] In the globalisation process, "the Third World state is diminished, and more subordinate than at any time since the colonial era. Its elites are more externalized, and its hold on national sovereignty more tenuous than ever".[406]

To sum up, it is held in this section that the liberal and state-centric approaches to recent changes in state/market relations, share a similar weakness. Both approaches understand these relations, as "isolated, fragmented aspects of social reality existing in a purely external and contingent manner".[407] The liberal approach reduces states to a simple instrument determined by the hegemonic classes while the state-centric approach reasserts the continuing importance of states and sees globalisation essentially as a matter of a policy choice of powerful states. The latter approach understands international life essentially in terms of the behaviour of the autonomous states by

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important they could be government policies cannot be the only explanation of the MNEs increasing activities (*Ibid.*). Braithwaite and Drahos also explain the varied and uneven influence of MNEs over the regulatory activities by the power of their host states. According to the writers, US corporations exert more power in the world system than corporations of other states because they can enrol the support of the most powerful state in the world. (Braithwaite, John and Drahos, Peter, *Global Business Regulation*, Cambridge University Press: UK, 2001, p. 490).

[404]Chimni, B. S., *International Institutions Today: An Imperial Global State in the Making*, 15 European Journal of International law (2004) p. 25

[405] Therborn (1999) p. 38.

[406] Graf, William, *The State in the Third World*, in "Socialist Register 1995" Merlin Press: London, 1995, p. 159. It is then of course important not to consider the "Third World" as a homogenous entity.

[407] Burnham (1995) p. 43

reducing recent changes to simply Western imperialism or Western states' activities. The state-centric approach also fails to take into consideration the impacts of new developments, such as new communication technologies, cheaper and more reliable transportation networks, and organisational sophistication.[408]

To be sure, advanced capitalist countries have been an integral part of the liberal globalisation. They have accommodated to and in certain areas accelerated the process. On the other hand, there can be found counter-evidence for the diminishing possibility to manage their economies by means of fiscal and monetary policies, labour and welfare legislation, and a manifold regulatory regimes targeting business even for powerful states.[409] Therefore, avoiding a deceptive state/market binary, it can be concluded that the globalisation process accommodates both the hegemonic/hierarchical re-ordering of inter-state relations while it restructures the functions of the nation-state around a capitalist project in which production, markets and finance are highly integrated. In this

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[408] Cox captures the 'non-political' character of globalisation with the term of "global perestroika" making an allusion to Gorbachev's perestroika, which was initiated as an economic reorganisation, nonetheless soon got out of control. Calling the term globalisation as a euphemism for "global perestroika", he argues that this "global perestroika" has essentially not been the consequence of a conscious decision of political leadership but a result of structural changes in capitalism (Cox, Robert, W. "Global Perestroika" in Wilkinson, Rorden, (ed.), *The Global Governance Reader*, 2005, p. 140). However, it should be remembered that Cox forcefully underlines the role of state power in globalisation. Calling the claim about the free market as being self-regulating a myth, he elsewhere argues that globalisation of our time, like its predecessors, also depends upon the military-territorial power of an enforcer (*Ibid.* p. 149).

[409] It is possible and necessary to examine and analyse the development of the European Union (EU) from a diverse aspects considering its peculiar and hybrid nature. Not surprisingly, the question of 'the fate of nation-state' has been important to the discussions surrounding the European integration. The EU has not developed according to a master plan in the sense that the ongoing process lacks a completed, coherent blue-print. Still, the EU owes its birth and current state of existence to a strong political will and resolution. Therefore, the history of the EU feeds both state-centric and 'post state-centric' accounts abundantly. The diversity of the theories of European integration reflects this complexity. Theories such as 'functionalism', 'neo-functionalism' and 'federalism' have developed different degrees of supranational paradigm whereas theories such as 'confederalism', and 'cooperative federalism' more state-centric paradigms. Yes, the members have in many areas pooled their sovereignty into the EU in the sense that the member states have *agreed* to transfer their decision-making power to a supranational *political* entity. Power is transferred to the Council, or to the Commission of the European Communities. Yet the EU can also be seen as an example for how states use international institutions created by themselves to achieve their own interests. There are many elements in the European integration that have been the products of *interstate* interactions. In the words of O'Neill, "Project 1992 (The Maastricht Treaty on European Union –I.A.O.) was not about a Federal Europe –at least not for majority of the participants. It was primarily about the survival of Europe's nation states by ensuring their continuing capacity to compete in a highly competitive world economy. Survival demanded, of course, mutual adjustments, common strategies and even a degree of pooled sovereignty" (O'Neill, Michael. *The Politics of European Integration: A Reader*, Routledge: London, 1996, p. 46). Among countless books on the European integration, see Rosamond, Ben, *Theories of European Integration*, Palgrave Macmillan: Basingstoke, 2000; and Gillingham, John, *European Integration, 1950-2003: Superstate or New Market Economy?*, Cambridge University Press: New York, 2003.

sense, as Saul points out, 'Empire' (the world of capitalist globalisation) and 'empire' (the world of western imperialism) co-exist though their extents and effects are neither identical nor invariable.[410]

4.5 Global Governance: re-drawing boundaries or the Emperor's new clothes?

As viewed in the previous chapter, it is clamed that in the process of globalisation of the economy state boundaries have gradually become less important as the rapidly growing flows of trade, investment, technology, finance capital, labour and ideas create an integrated world economy. According to this account, however, the ill-fitting traditional sovereign state-based political institutions have lagged behind this transformation and therefore the ability to govern the market and other world affairs has stayed comparatively weak. In other words, the economy has been globalised, but the polity has not. Moreover, this old political structure has, it is maintained, not only been challenged by the forces of economic globalisation, but also, following the collapse of socialist system in 1989, by the emergence of "a third image of international law of transnational society". In this third image sources of governance has become heterogeneous and multiple and boundaries between public and private authority has been re-drawn.[411]

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[410] Saul (2004) p. 261

[411] Hurrell, Andrew, *International Law and the Changing Constitution of International Society* in Byers (2002) p. 337. It is commonplace to examine the evolution of the 'modern' international legal order by dividing it into two distinctive phases until the end of the Cold War. The first phase called the law of *co-existence* and lasted until the World War II, was one of the inevitable consequences of a world of plurality of sovereign states. Yet, it is true that even during this period there were some significant steps towards creating some degree of international regimes as a result of the concern for survival (for instance, the creation of League of Nations in 1919) as well as with human welfare (for instance, the constitutions of the International Labour Organisations –ILO in 1919).

The second phase, which is commonly named as the law of *co-operation*, emerged as a result of the extensive devastation of World War II and proceeded on different levels depending on the nature of subject-matters. The ideological rivalry of capitalist and socialist blocks and the bipolar structure of the Cold War doubtlessly gave its colour to this period and effectively shaped the character and scope of international law. This period has resulted in the construction of a multifaceted range of institutionalisation of which the UN system is in the centre to address, above all, the security but also economic and political challenges and changes that this new era created.

The term global governance has become an attractive discourse in social science and gained worldwide currency in describing societal transformation within a 'new era' marked by the end of the Cold War, globalisation, the growth of private authority, and the alleged erosion of territorial sovereignty as the primary organisational principle of world politics.

Yet, there is no consensus over what the term of global governance exactly means. The term is often used to describe different and sometimes opposing trends. For some, global governance is an instrument to enhance the power of the US and global capital through international financial and economic organisations. To some others, it indicates one of the most serious threats to the sovereignty of the US.[412] Likewise to some others, the term global governance is argued to symbolise the increasing inequality and unfairness in international relations and to some it is seen as the embryonic phase of the emerging cosmopolitan democracy. Yet again, for some, global governance indicates the crises of democratic accountability whereas some others welcome it as the de-centralisation of power and the possibility for a more participatory democracy.[413] Thus, Finkelstein is probably not too sarcastic asserting that "global governance appears to be virtually everything".[414]

From a Foucauldian perspective, the ambiguity surrounding the nature of global governance can be interpreted as one of those concepts that is important to look at not just as to how it is defined but also how it is not defined. Like the concept of globalisation, the concept of global governance is also both a description and a prescription. When the concept is understood as a response to the increased complexity of human condition that globalisation lays down, it describes the shift from government to governance, from political organisations to policy networks, from political realm to economic and social realms, and from command to state-market coordination.[415] As a prescription, global governance involves the consensus-formation around the needs of

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[412] Bolton for instance understands global governance as one of the most serious threats to the sovereignty of the US (Bolton, John, *Should We Take Global Governance Seriously?*, 1 Chicago Journal of International Law 2000, p. 207).

[413] "The creation of adequate governance mechanisms will be complicated because these must be more inclusive and participatory –that is, more democratic (...)" (The Commission on Global Governance, *Ibid.*).

[414] Finkelstein, Lawrence, S., *What is Global Governance?*, 1 Global Governance, 1995, p. 368.

[415] Rosenau, James, N., *Governance in the Twenty-First Century* in Wilkinson (2000) p. 50

the world market[416] and the legitimising discourses on and ideological persuasion around the liberal democracy and market economy as being the only acceptable political/economical form.[417] Thus, as a prescriptive concept, global governance is a *demos* developing, "a shared sense of community" creation project,[418] that aims to provide a basis of legitimacy for the market economy and liberal democracy. The main facilitator of this project is the hierarchical structure of international relations: "Once the ideas of the centre have been recognized as valid by the periphery, the impression of domination disappears entirely" as in the example of "the internationalisation of ideas of 'good governance' by elites of developing countries".[419]

Global governance is sometimes put forward to proclaim the end of anarchical nature of international relations ('Grotian paradigm', according to which states act in their interests).[420] It is argued that even though there seem to be a paradox between the fragmentation of pluralistic models of global governance and the idea of 'order', the

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[416] Cox (2005) p. 144. Cox further states that there is no explicit political or authority structure for the global economy still there is something that can be described by the French word *nébuleuse* or by the notion of "governance without government". Accordingly, the consensus-formation process takes place through both inter-state (official) such as the G7 and the OECD and informal forums, such as the Bilderberg Conference. These forums also tighten the transnational networks that link policy making from country to country (*Ibid.*).

[417] Callinicos (2005) p. 263.

[418] Bodansky, Daniel, *The Legitimacy of International Governance*, 93 American Journal of International Law (1999) p. 615

[419] Krisch (2005) p. 404. Anghie also holds that "governance is now designed to provide the political institutions that will enable the furtherance of globalization. Specifically, this has to be achieved through the international human rights norms that are seen as prescribing universally accepted international standards and which are used as a basis to further governance" (Anghie, Antony, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press: Cambridge, 2005, p. 253-54). Anghie further explores convincingly the resemblances between the term of 'good governance' in the Third World related to the promotion of liberal democracy and free markets, and the 'civilization mission' of Western colonialism (*Ibid.* In particular in Chapter 5).

[420] According to the most common categorization, those, who define international politics as the struggle of sovereign states for power, are 'realists'. The competing 'idealist' model, which also can be named as 'Kantian paradigm', envisages the possibility of a world order, in which peaceful and democratic states co-operate promoted by shared human/community values (Of course, there are many other paradigms that differ one way or another from idealist and realist schools. However, none of them keep entirely out the constitutive elements of these two paradigms from their approach.). It can be added that some sort of world government has often been included in the latter paradigm. According to Lauterpacht, for instance, the function of law is to open the way for "the gradual integration of international society in the direction of a supra-national Federation of the World" (Lauterpacht, Hersch, *International Law and Human Rights*, Praeger: New York, 1950, p. 46). Nonetheless, even the realists do not categorically rule out the possibility of the creation of a world state. Yet, according to Morgenthau, the way of succeeding in this is not to weaken sovereignty but create an international community (Morgenthau, 1985, p. 559). Then the question is whether it is possible to 'create' an international society without reducing national states to some form of polity?

numerically and qualitatively growing importance of international institutions, interdependence as well as the emerging of complementary (or sometimes even alternative) private regimes have brought a degree of order in the international arena.[421] In this sense, global governance has been intended to function as the political re-regulation of world affairs through a multi-centred global public policy network that consists of states, non-state actors and regional/international organisations.[422] However, the suggestion as to the ability of global governance to overcome the current fragmentation problems, which arise from nation-states' diminished ability to regulate central areas of international life, provide a unity and to satisfy the need for some sense of order/centralism through a system of co-ordination between multiple legal regimes is not very convincing. The boundaries of different regimes are open-ended, imprecise and their principles often contradict each other. To give only a few examples: trade regime with human rights or environmental regimes, economic development regime with the environmental regime, intellectual property rights regime with human rights regime, international security regime with human rights or humanitarian law regimes, and so forth.

Moreover, the ideological consensus over the concept of global governance, which is imperative to establish some sort of 'sense of order', seem to have weakened in parallel to the worldwide decline of the post-Cold War optimism. It is still a fresh memory that in the early post-Cold War period there was an unprecedented hope about the possibility of achieving the "perpetual peace" and democracy throughout the world. It was hoped that in this period, the principle of rule of law would finally reign in our globe. As remembered, the Security Council of the UN started indeed to work effectively and extended its power to other domains than only peace and security, such as democracy, economic development and human rights. Furthermore, the UN organised a series of world conferences, such as the Environment (Rio 1992), Human Rights (Vienna 1993), Women (Beijing 1995) and, Human Settlement (Istanbul 1997) with an increasing non-state participation. As Koskenniemi observes, "This was a true governmentality: world

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[421] Arguably, the concept of *nébuleuse* ("governance without government"), which Cox introduced, also envisages the existence of a centralised supranational management structure. Cox describes it as "global centralization of influence" (Cox, 2005, p. 144).

[422] Brand, Ulrich, *Order and Regulation: Global Governance as a hegemonic discourse of international politics?*, 12 "Review of International Political Economy" (2005) 1, p. 155

government by world conferences adopting universal standards". This has reached its highest point by the establishment of the WTO in 1995 with, above all, a unified dispute settlement mechanism –a constitution for international trade law.[423] As might be expected, these developments created much positive enthusiasm about an emerging and certainly better form of world order. Such hopeful anticipations ranged from prophecies of "the end of history", "Kantian liberal internationalism", or the neo-realist version of "transgovernmentalism" to "cosmopolitan federalism" and "human governance". Proposed 'new' rights, such as "the right to globalisation"[424] and "the right to democratic governance"[425] reflect perfectly the spirit of the period. The air was full of hope and promises and they have mostly been articulated around diverse versions of the idea of cosmopolitanism referring to an idea of world government and corresponding citizenship.[426]

Alas, unlike all enthusiastic anticipations, however, the Security Council did not enact the rule of law and remained, as always, selective; the world conferences did not create law and their 'wish-lists' have remained largely unfulfilled.[427] And the goals of the UN's Millennium Declaration of 2000, which included the 'eradication of extreme poverty and hunger', 'achieving universal primary education' and 'reducing child mortality', are already seen as daydream rather than programmatic.[428] This picture is no

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[423] Koskenniemi, Martti, *Global Governance And Public International Law*, 2004, available at http://www.valt.helsink.fi/blogs/eci/Frankfurt.pdf.

[424] Pendleton, Michael, D., *A New Human Rights –The Right to Globalization*, 22 Fordham International Law Journal (1998-1999)

[425] Franck, Thomas, M., *The Emerging Right to Democratic Governance*, 86 American Journal of International Law, 1992

[426] On the various variations of cosmopolitanism, among many, see McGrew, Anthony, *Liberal Internationalism: Between Realism and Cosmopolitanism* in Held and McGrew, 2003; Paul, T. V. and Hall, John, A. (eds.), *International Order and the Future of World Politics*, Cambridge University Press: Cambridge, 2000; and Doyle, Michael, *Kant, Liberal Legacies and Foreign Affairs*, Philosophy and Public Affairs, Summer/Fall, 1983; Archibugi, Danielle, Held, David, and Kohler, Martin (eds.), *Re-imaging Political Community: Studies in Cosmopolitan Democracy*, Polity Press: Cambridge, 1998; Falk, Richard, *On Human Governance: Toward a New Global Politics*, Polity Press: Cambridge, 1995; Marks, Susan, *The Riddle of all Constitutions*, Oxford University Press: New York, 2003; Held, David, *Democracy and Global Order: From the Modern State to Cosmopolitan Governance*, Polity Press: Cambridge, 2004.

[427] Koskenniemi, 2004, Frankfurt speech: *Global Governance And Public International Law*

[428] United Nations Millennium Declaration, G.A. Res. 55/2, U.N. GAOR, 55th Sess., Supp. No. 49, at 4, U.N. Doc.A/55/49 (2000) available at http://www.un.org/millennium. According to the Human Development Report of 2000 of the United Nations Development Programme (UNDP), more than 30.000 children die *every day* from mainly preventable causes, such as malnutrition (UNDP Human

doubt frustrating. It is hence not surprising that many feel global governance as distorted and understand it as promoting the interests of the most powerful states and 'global' capital while holding back an enhanced social justice and greater human security. It can be claimed that the disappointment resulting from the direction of the development of world affairs can be observed in different forms and in different parts of the world. To give but a few examples: the electoral success of left-wing political parties, especially in South American countries such as Brazil, Venezuela, Bolivia and Chile, the extra-parliamentary movements (often described as "anti-globalists"), the increasing interest in political interpretation of religions as well as the so-called "global terrorism" can be read as the signs of this frustration regarding the new world order that the post-Cold War period and globalisation process have brought about.[429]

It should also be added that the decreasing popularity of the concept of global governance has partly arisen from the lack of accountability, transparency, and democratic deficiency of the institutions that have assumed a constitutive role in the advancement of the concept of global governance.[430] There is not much evidence supporting the view that formal or informal inter-state agencies of global governance are there to pursue the mutual benefits of all countries. The weighted voting system as in the case of the IMF and the WB, the veto power in the UN Security Council and the

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Development Report (2000), available at http://hdr.undp.org/reports/global/2000/en/pdf/hdr_2000_ch4.pdf). In a similar vein, Human Development Report of 2005 of the UNDP informed the world that the "Millennium Development Goals" targeting for child mortality would be missed. Accordingly, in the coming 10 years, 41 million children will die from poverty related diseases. And another 50 million will be even then out of school in 2015. It is also remarked that despite some progress, still 2.5 billion people, nearly half of the world population, live on $2 or less a day (UNDP Human Development Report (2005), available at http://hdr.undp.org/reports/global/2005/pdf/HDR05_chapter_1.pdf)

[429] To such an 'opposition list', it might easily be added countries, such as Peru, where left leaning parties/movements have not seized the power but made considerable progress in elections. Furthermore, many other countries whose peoples are mostly Muslim, such as Turkey, Indonesia, and the Philippines, increasingly tend to show interest in Islamist political parties that embody a strong anti-American/Western view. For an interesting account of political development in Latin America, see Mattei, Ugo, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 Indiana Journal of Global Legal Studies (2003).

[430] Yet, 'state transparency' is another subject matter to be scrutinised. It is often claimed that states have become more transparent, at any rate, in the economical and financial areas. Nonetheless, it would be wise not to jump to the conclusion that this development is related to the democratisation of the state. As Gill remarks, increasing state transparency and credibility requirement imposed by the "global supervisor", such as the IMF and World Bank, has a result that private investors more easily can access to information, which in turn increases the structural power of capital (Gill, Stephan, "New Constitutionalism, Democratisation and Global Political Economy" in Wilkinson, Rorden (ed.), *The Global Governance Reader*, Routledge: London and New York, 2005, p. 176).

informal consensual processes as in the case of the WTO (the so-called 'Green Room' process, which is dominated by the US, the EU, Japan, and Canada[431]) raise criticism about democratic deficiency of the inter-state governance.[432] Likewise, NGOs have also been criticised of serving as a legitimatisation tool for neo-liberal agenda to "privatise" the risk and to supply the necessary consent for social order.[433]

The legitimacy of global governance indicates a contested terrain. There are no easy answers; each answer produces new questions. For example, it can be said that people should be given the opportunity to participate in the decision-making mechanisms (participatory legitimacy), because public participation is an important source of legitimacy by given stakeholders a sense of ownership in the process.[434] Then another question arises; to what extent the participation of NGOs may satisfy this requirement? Who decide what NGOs are to be chosen as representing the public?[435] And then again, to what extent these NGOs should be accorded access? Would it mean the transfer, at least partly, of actual decision-making power? And so forth.[436]

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[431] Woods, Ngaire, "Global Governance and the Role of Institutions" in Held and McGrew (2003) p. 31. Although sympathetic to the decision-making process in IEIs on the ground of 'efficiency', Keohane and Nye nonetheless recognise the 'legitimacy' problem in it and therefore point out the necessity of developing "new strategies to resolve the dilemma of efficacy versus legitimacy" (Keohane, Robert, O. and Nye Jr., Joseph, S., "Governance in A Globalizing World in Keohane, Robert, O., *Power and Governance in a Partially Globalized World*, Routledge: London & New York, 2002, p. 214).

[432] There is an increasing recognition among scholars that "mostly by improper and unfair use of the weighted majority voting system which often forced Members to implement decisions to which they are strongly opposed" is one of the important causes of the growing legitimacy problem and the decreasing popularity of the IMF and the World Bank (Van den Bossche, Peter and Alexovicová, Iveta, *Effective Global Economic Governance By The World Trade Organization*, 8 Journal of International Economic Law [2005] 3, p. 676).

[433] Gill explains the insistence of the World Bank on NGO participation in certain decision-making processes as "a tactic to legitimate the attenuation of democracy in economic policy by increasing participation in safely channelled areas" (Gill, 2005, p. 183).

[434] Bodansky (1999) p. 617

[435] Charnovitz explains the strategies for how the WTO chooses which NGO would involve. Accordingly, "the WTO can 'marginalise' the NGOs by not allowing them to do anything more than attend symposia, or can 'mainstream' them" (Charnovitz, Steve, *WTO Cosmopolitics*, 34 New York University Journal of International Law and Politics, 2001-2002, p. 343).

[436] A growing interest in the concept of legitimacy can be observed. This is partly due to the preference to promote a new vocabulary to replace the language of the state-centric era. For instance, in the 'post-state era' discourse, the concepts legitimacy, informal regulation and regimes have replaced 'law' and the concept governance has replaced government. However, in addition, related to this deformalisation tendency, the growing importance of international organisations has also boosted the interest in legitimacy discourse. Among numerous articles and books dealing with the legitimacy issue, see Keohane, Robert, O., *Power and Governance in a partially Globalized World*, Routledge: London and New York, 2002 (in particular Part III); Scholte, Jan, Aart, *Civil Society and Democracy In Global*

To sum up, these structural weaknesses are articulated in a number of critical deficits in the institutional capacity of global governance, especially in generating welfare, providing security and achieving poverty reduction. These governance deficits have resulted in a legitimacy crisis, which has in turn considerably reduced its capacity to deliver effective, responsive and accountable governance.

4.6 Concluding remarks

It has been argued in this chapter that contemporary globalisation is the restructured global form of capitalism that has gained worldwide dominance. In the past two decades, globalisation has been facilitated by neo-liberal ideas and powerful states' controlled international economic institutions promoting a reduced role for the state and an increased role for the market, which has resulted in the expanding reach, influence and power of multinational enterprises. In other words, globalisation and the development of its institutions are shaped by a neo-liberal global constitution that structurally privileges the interests and agenda of global capital and hegemonic countries. It is nonetheless contended in the chapter that this is not to argue that globalisation and its institutional frameworks can simply be explained adequately as a new stage of imperialism.

It has been shown that the emphasis on the pluralism in the norm-creating processes and the varieties of sources and institutions in the globalisation process has created space for the expansion of non-state 'law'. However, the articulated values and norms of non-state actors are frequently assimilated in inter-state institutions; and increased range of informal, yet norm-governed, governance mechanisms often built around complex networks of both public power and private authority. The evolution of this institutionalised form of complex multilateralism, labelled global governance, has practically meant a further step towards the deformalisation of the law, which involves transferring decision-making power from the governments to the non-territorial networks in which decisions are shaped in the interests of dominant actors under no democratic account.

Governance, 8 "Global Governance" (2002); Colás, Alejandro, *International Civil* Society, Polity Press: Cambridge, 2002; Bodansky, Daniel, "The Legitimacy of International Governance", 93 American

In some aspects, the entire chapter could be read as the diverse segments of the deformalisation chart of public international law in the neo-liberal globalisation process, in which a whole range of new vocabulary has been developed, such as 'regimes', 'regulation', 'governance' and 'actors' to replace the 'traditional' concepts of international law, such as 'institutions', 'rule', 'government' and international legal subjects".[437] Weiss observes that the term globalisation is akin to 'post-cold war' and analysts are "understandably uncomfortable with" the traditional frameworks and vocabulary used to describe old world system.[438] Thus in order to appreciate the role of this new vocabulary more fully, it is important to deconstruct the structure of the storylines that this new vocabulary communicates and its implication on "informal/non-legal" soft law development as a tool for developing a pluralistic model, which entails informal rule-setting, rule administration and conflict-settlement. In this sense this chapter has argued that in the 'post-state' era, soft law, as the "language of governance", has grown to be the language of the dominant neo-liberal ideology and used to facilitate and legitimate a decentred and deformalised normative development.

The basic characteristics of (informal) soft law within the process of globalisation can be framed as follows: First, even though it is widely recognised that soft law has long existed in different forms in international life, non-state or 'informal' soft law and institutions are essentially developments that have occurred in the globalisation process. Second, the increasing use of soft law and the tendency to soft institutionalisations is closely related to the circumstances in which state power and state law are de-centred. In other words, the proliferation of (informal) soft law and institutionalisation in this process is primarily related to the declining state power and the rise of non-state actors. Therefore, soft law has become a key concept for the development of an informal or hybrid legal pluralism. Third, the development of informal soft law and institutions has essentially taken place in market economies (or "market civilisation" as named by

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Journal of International Law (1999).

[437] Koskenniemi maps out six different steps towards this end (Koskenniemi, Frankfurt speech, 2005, http://www.valt.helsinki.fi/blogs/eci/Frankfurt-Formalism-05h[1].pdf).

[438] Weiss, Thomas, G., "Governance, Good Governance and Global Governance: Conceptual and Actual Challenges" in Wilkinson, Rorden (ed.), *The Global Governance Reader*, Routledge: London and New York, 2005, p. 78-79

Gill[439]). The last feature also entails the re-articulation and reinforcement of private authority as well as the re-location of power relations in the globalisation process. Fourth, as a part of the "order-creating" function of global governance, soft law seems to have been assumed a role in establishing public-private partnerships to facilitate the establishment of an unwritten neo-liberal global constitution. In the words of Mörth: "In systems of government the law (*was*) hard; in systems of governance the law is soft".[440]

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[439] Gill, Stephan, *Power and Resistance in the New World Order*, Palgrave Macmillan: Basingstoke, 2003. Kirton and Trebilcock even associated soft law with 'open democratic society' (Kirton and Trebilcock (2004) p. 11).

[440] Mörth, Ulrika (ed.) *Soft Law in Governance and Regulation*, Edward Elgar: Cheltenham, UK (2004) p. 1

5 THE STATE-CENTRIC PARADIGM: THE NEW INTERNATIONAL ECONOMIC ORDER

5.1 Introduction

This chapter aims to provide a tangible example of the principal characteristics of the state-centric paradigm by accounting for the historical experience of the so-called New International Economic Order (NIEO), which is generally seen as the most important, comprehensive and controversial example of the state-centric paradigm. The chapter first depicts with bolder strokes the economic and ideological conditions that prepared the birth of the NIEO in the "UN Charter era". This first section also considers the main sources of the NIEO focusing on the principles that are particularly relevant to the understanding of the state-centric paradigm rather than on a detailed survey of the whole scope that the NIEO covers. The next section concentrates on the normative quality of the principles that the NIEO lays down.

Thereafter, the chapter examines briefly the evolution and subsequent regulatory activities, which either originated from the NIEO, as in the example of the "international code on technology transfer" or were produced as a counter to it, as in the case of the "OECD Declaration on International Investment and Multinational Enterprises". Thereafter the factors that caused the NIEO to fade away in the early 1980s are reviewed to provide an overview of the conditions out of which an alternative paradigm emerged. Lastly, before the conclusion, the section 4.6 assesses the lasting effects as well as the adequacy and effectiveness of the premises on which the NIEO developed as a historical model of the state-centric paradigm.

5.2 Economic and ideological conditions and perceptions underlying the NIEO

The UN was founded by 51 states. The number of the UN member states increased almost threefold reaching 160, two thirds of which were developing countries when the

UN General Assembly adopted the NIEO and the subsequent Charter in 1974. Hence, the profile of the organised international community of states had fundamentally changed. The majority in the General Assembly and the assemblies of other international organisations shifted to an alliance between the socialist bloc and the so-called Third World, which was composed of the formerly colonies of Asia and Africa, formerly mandate states of the Middle East and states from Latin America.[441]

The initiative to establish a new international economic order was launched in 1973 during the Algiers conference of the Non-Aligned countries, which decided to ask the UN to hold a special session relating to raw materials and development problems.[442] Shortly after, the UN General Assembly, without a vote, adopted the resolutions on the NIEO "Declaration on the Establishment of a New International Economic Order" and "Programme of Action on the Establishment of a New International Economic Order" in May 1974. These two resolutions, together with the subsequent "Charter of Economic Rights and Duties of States" (hereinafter "the Charter") in December 1974,[443] were built on earlier efforts to address the structural inequalities of the international economic order.

At the organisational/institutional level, these previous efforts included the establishment of the "Group 77" at the 1962 Economic Conference of Developing Countries in Cairo and the establishment of the United Nations Conference on Trade and Development (UNCTAD) in 1964.[444] At the legal level, the earlier efforts include General Assembly Resolution 626 (VII) entitled "Right to Exploit Freely Natural Wealth and Resources" in 1952 and the principle of "permanent sovereignty over natural resources" advanced by Chile, also in 1952 in the UN Commission on Human Rights.[445] The latter also adopted as a UN General Assembly resolution in 1962 entitled

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[441] Malanczuk (1997) p. 28

[442] Gilpin, Robert, *The Political Economy of International Relations*, Princeton University Press: New Jersey, 1987, p. 275

[443] UNGA Res. 3281 (XXIX). The "Charter of Economic Rights and Duties" was adopted on 12 December 1974 by a roll-call vote of 120 in favour, six against and ten abstentions. Six countries that voted against the resolution were the USA, the UK, Germany, Belgium, Denmark and Luxembourg. The countries that were abstaining: France, Japan, the Netherlands, Austria, Canada, Norway, Spain, Italy, Ireland and Israel.

[444] Berger (2004) p. 24

[445] UN Doc. E/CN.4/L.24 (1952)

"Permanent Sovereignty over Natural Resources",[446] which basically emphasised the priority of state sovereignty over the right of foreign ownership of the means of production.

The ideological inspiration of Third Worldism displays a rather eclectic nature. It is a combination of national liberalisation, anti-Western nationalism, the 'spirit' of the *Calvo Doctrine*,[447] and a centrally planned and state-led economic development model, as well as, though to some extent, a "neo-mercantilism".[448] As examined in the following section, the NIEO provided a profound and relevant criticism of the existing unequal structure of international economic relations and demand for justice and welfare. Still, despite the fact that the implementation of the reforms that the NIEO's call urged would have necessitated a radical transformation of the legal and economic international order, the economic programme in itself was hardly revolutionary. Even though the NIEO can to some extent be interpreted as an attempt to replace liberal market-oriented international regimes with a socialist-inspired centrally planned economic alternative, it did nonetheless not reject the integration of the Third World into the capitalist system. Similar to social Keynesianism, the NIEO called essentially for "the extension to the international economic system of the redistribute framework that had been consolidated in the social democracies of Western Europe after World War II"[449] so that the weaker members of the community of states would obtain a larger

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[446] UNGA Res. 1803 (XVII) of 14 December 1962

[447] The doctrine is named after the Argentinean diplomat and jurist Carlos Calvo. The Calvo Doctrine can be seen as a rejection of the "minimum international standard" principle", which allowed powerful Western countries to interfere in the internal affairs of developing countries in the name of "the right of diplomatic protection". According to Calvo, it was acceptable that aliens who established themselves in a foreign country have the same rights to protection as nationals, but nothing more: "An exorbitant and fatal privilege, essentially favourable to the powerful states and injurious to the weaker nations, establishing an unjustifiable inequality between nationals and foreigners" (Calvo, Carlos, *Le Droit International théorique et pratique* –5th ed. 1896 in 1 Encyclopaedia of Public International Law, 1995, p.521). See also, Sornarajah, M. *International Commercial Arbitration*, Longman: Singapore, 1990; *Calvo Doctrine, Calvo Clause*, 1 Encyclopaedia of Public International Law (1992) p. 521-523; Muchlinski (1999) p. 626.

[448] Lake, for instance, argues that the NIEO can be interpreted as a mercantilist strategy, which is essentially concerned with how the economic power positions of subordinate countries could be improved relative to dominant powers by manipulating international markets. According to this writer, mercantilist patterns are represented in the NIEO, but in disguise. Accordingly, the developing countries aimed with the NIEO to mandate unrequited capital transfer through increased foreign and development aid, the expropriation of foreign investment, and reduction of Third World debt (Lake, David, A., *Review Essay: Power and the Third World: Toward a Realist Political Economy of North-South Relations*, 31 International Studies Quarterly [1987] 2, p. 231).

[449] Berger (2004) p. 24

share. Indeed, it was generally recognised by developed and developing countries alike that the NIEO reflected the need for an urgent 'co-operation' within the 'international community' for the development purpose.[450] As Lake puts it, the uniqueness of the NIEO lies not in its goals, but primarily in its multilateral nature. Going beyond mere complaints, the NIEO attempted to "mobilise the collective power of the weak" that constitute a large majority of UN membership.[451] In the words of Krasner, due to the acceptance of the claim that all sovereign states are equal, the institutional structure of the UN has become the most important determinant of the magnified international power of otherwise weak Third World.[452]

5.3 The scope and legal nature of the NIEO

The basic underlying perception pervaded in the NIEO was that industrialised countries, mostly former colonial powers, were responsible for the poverty and developmental problems of Third World countries. Therefore, the establishment of a new international economic order was proclaimed, based on equity, sovereign equality, interdependence, common interest and co-operation among all states. The idea was that this new order would correct inequalities and redress existing injustices, eliminate the widening gap between the developed and developing countries.

In addition to reaffirming the principle of sovereign equality of states, permanent sovereignty of states over its natural resources and all economic activities, self-determination and the principle of non-interference in the internal affairs of other states, the programme of the NIEO and the subsequent Charter include the following proposals:

(i) favourable conditions for the transfer of financial resources to developing countries;

(ii) debt renegotiation (i.e., reduction);

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[450] Malanczuk (1997) p. 233

[451] Lake (1987) p. 232

[452] Krasner, Stephen, D., *Structural Conflict: The Third World Against Global Liberalism*, University of California Press: Berkeley, 1985, p. 59

(iii) the transfer of technology on favourable terms;

(iv) strengthening the role of the UN system in the field of international economic cooperation, mainly on a preferential basis to provide greater assistance to developing countries;

(v) the amelioration of terms of trade of developing countries;

(vi) full and effective participation of developing countries in all phases of decision-making in international economic institutions;

(vii) regulation and control over the activities of transnational corporations by taking measures in the interest of the national economies.

Even a brief survey of the NIEO reveals the state-centric nature of its programme. Several proposals required greater governmental intervention in international markets, as in the example of the proposal of the creation of a generalised system of preferences for Third World products and the reduction of Northern trade barriers on a non-reciprocal basis. The programme also required a highly regulated international system of economic order, as in the example of setting up prices for export of developing countries commodities. Just as importantly, some of the provisions of the NIEO required the expansion of capital transfer from developed to developing countries both public and private in accordance with the needs and requirements as determined by the recipient developing countries. Moreover, the demands formulated in the NIEO were inherently multilateral in nature and required political concessions by the developed countries, which could only be obtained through collective Third World pressure on the North.[453]

There is no doubt that the establishment of the NIEO required fundamental changes in the notion of international law and law making process, necessitating a new approach to the theory of obligation in international law. In the words of Bulajic, the NIEO demanded not only new international economic law but a new method of its codification too. Instead of the 'traditional' concept of *consent* as the basis of legal obligation, the NIEO entailed the concept of *consensus*, which was claimed to translate an overriding consensus among the states into rules of order and norms of obligation despite the

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[453] Lake (1987) p. 221

possible opposition of the minority of sovereign states.[454] Taking into account its institutional structure, it is hence not astonishing that resolutions of the UN General Assembly were seen as the most accessible mechanism for the establishment of a new understanding of international legal obligations on which the 'centre-periphery' relations could be transformed in favour of developing countries.

There can be pointed out a number of reasons that foreclosed the possibility for the NIEO of growing to be 'hard' law. For instance, some legal/technical characteristics that the NIEO displays distinctly undermine its claim to be considered as hard law. As Chinkin indicates, for instance, the NIEO as well as the subsequent Charter of Economic Rights and Duties of States set the agenda and established an overall *political* framework for the proposed new international economic order in *general language*.[455] In other words, the provisions contained in these resolutions provided general goals and programmed action rather than precisely worded obligations and exactly specified rights. A further factor impairing the claim of the NIEO to binding authority is inconsistency: On the one hand it is stated that "every state has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural system in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever". On the other hand, the NIEO envisaged the establishment of a world-wide planned welfare economy and for this purpose the co-operation of developed countries.[456]

Finally and importantly, as viewed earlier in section 2.6, the legal status and effects of the UN General Assembly are highly complex and controversial. From a 'formalistic' point of view, the UN General Assembly does not possess a legislative power. Article 10 of the UN Charter clearly states that a resolution adopted by the General Assembly is merely *recommendation* (of course, unless its content is declaratory of rules of customary international law). In other words, the majority of the UN General Assembly cannot impose its will on a dissenting minority.

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[454] Bulajic, Milan, "General Principles and the Charter of Economic Rights and Duties of States" in *Legal Aspects of the NIEO*, Hossain, Kamal (ed.), *Legal Aspects of the New International Economic Order*, Nichlos Publishing Company: New York, 1980, p. 60

[455] Chinkin (1989) p. 852

[456] For a detailed overview of such contradictory provisions, see Seidl-Hohenveldern, Ignaz, *International Economic "Soft Law"* in 163 Recueil Des Cours (1979), especially chapter VI.

Yet, as Falk recalled long ago, the absence of a *formal competence* of the UN General Assembly to legislate is not a primary reason for the limit of its law-creating role. Perhaps before everything else, the political constraints arising from the necessity to converge the competing interests of state members to support legislative claims on a particular issue-area set the real limits upon the claim of the quasi-legislative competence of the General Assembly.[457] For, if a rule is to be effective, its growth must be conjoined with the distribution of effective power, especially to the extent that a legislative claim is posited. Thus, if a voting majority in the General Assembly does not represent the actual power distribution, then, there is a risk of engendering scepticism about the authority of the General Assembly as law maker. Therefore, it can be said that declarations of rights and obligations on economic matters are not likely to have practical effects unless they are accepted by states that have the resources. Indeed, as will be discussed in detail in the following section, to seek to transfer economic wealth and technology to developing countries by using the mechanism of majority vote in UN General Assembly was soon proved to be operationally ineffective. As Schachter maintains, the concurrence of governments with economic power and resources will have decisive importance in the formation and adoption of soft law in international economic matters.[458]

Beyond what have been said, it is also highly questionable whether the mere adoption of UNGA resolutions should be considered enough to classify these instruments as soft law irrespective of whether they are formulated in 'soft' or 'hard' law terminology. For, as it has been argued by Seidl-Hohenveldern, any possible legal effect of such rules arises only between states having accepted the rule concerned.[459] From Gathii's point of view, on the other hand, the classification of UNGA resolutions as merely soft law, on the ground that they fail to command a sufficient level of legality is a "liberal strategy" developed by Western countries.[460] According to this writer, the "soft law" classification serves to perpetuate an unjust status quo by adopting the political posture that opposing claims (i.e. the bifurcation of legal claims: representing the status quo on

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[457] Falk (1966) p. 788

[458] Schachter, Oscar, *Recent Trends in International Law Making*, 12 Australian Year Book of International Law (1988-1989) p. 13

[459] Seidl-Hohenveldern (1979) p. 196

[460] Gathii (2000) p. 2032

the one hand and soft law in the meaning of deviations from the status quo on the other) "may in time become legal principles when they attain or command a sufficient level of legality".[461]

Recalling what has been stated above; it is possible to conclude that the NIEO was designed as a multilateral strategy and a global bargaining forum in an attempt to increase the economic and politic power of the Third World countries at a particular moment in history. The combination of the post-conjuncture of decolonisation, the institutional structure of the UN, the Cold War, and the 1973 oil crisis marked this moment. Its overall aim was to restructure international economic legal order to redress economic imbalances. However, despite the determination of developing countries, the NIEO did not become legally binding on UN member countries, mainly due to the disparity between economic and voting power in the UN General Assembly.

5.4 The evolution of the NIEO and subsequent regulatory activities

This section examines resolutions and codes of conduct that have been adopted or negotiated as a follow-up of the NIEO to give substantive content to its framework over the ensuing years. The section also investigates two further regulatory activities, namely the "ILO Declaration" and the "OECD Guidelines" both of which have been adopted either under the influence of the NIEO or as a reaction to it in the mid-1970s.

The "Programme of Action on the Establishment of a New International Economic Order" contained a programme of action for the adaptation and implementation of the principles laid down in the "Declaration on the Establishment of a New International Economic Order". Indeed, efforts towards a more specialised and detailed codification of these issues had been successively taken up in the framework of the UN. These efforts included (i) the adoption and implementation of an international code of conduct for transnational corporations, and (ii) the formulation of an international code of conduct for the transfer of technology corresponding to needs and conditions prevalent in developing countries.

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[461] *Ibid.* Footnote 117

Developing countries were long concerned about the dominance of MNEs, the "new imperialist agents" of the West, on their national economies including interference in the domestic politics. Traditional international law was considered by developing countries as essentially being preoccupied with the protection of foreign investment against nationalisation. Within the framework of the NIEO, developing countries therefore sought to build a new international legal regime regarding the practices of MNEs based on planning and restriction of business activities and to strength state authority. For this purpose, backed by the socialist countries, "Group 77" succeeded to set up a "Commission on Transnational Corporations" in 1974.[462] The expectation was that a *binding* "Code of Conduct on Transnational Corporations" would provide developing countries with the power of exercising their 'sovereign right' to regulate and supervise MNEs and oblige them to conform to the country's economic and social policies. The latter purpose also involved the measures of ensuring that MNEs would bring more capital into the country than they take out.

Developed capitalist countries, on the other hand, were concerned to use the Code "primarily as a means of protecting TNCs against discriminatory treatment contrary to the international minimum standards accepted by these states".[463] These two fundamentally opposite approaches to the role of the Codes of Conduct constituted a major obstacle in reaching an agreement on a UN Code of Conduct for Transnational Corporation. Eventually, under the US pressure, negotiations over the Code were abandoned in July 1992.[464]

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[462] The Commission was established by the Economic and Social Council under resolution 1913 (LVII) of 5 December 1974. The preparation of the text of the Draft Code was entrusted first to an Ad Hoc Inter-Governmental Working Group.

[463] Muchlinski (1999) p. 593

[464] Braithwaite and Drahos (2001) p. 192. For a detailed review of the Draft UN Code of Conduct on Transnational Corporations, see Muchlinski (1999) p. 592-597; Muchlinski, Peter, "Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD" in Kamminga and Zia-Zarifi (2000); Braithwaite, John and Drahos, Peter, *Global Business Regulation*, Cambridge University Press: the UK, 2001; Asante, S. K. B., *United Nations: International Regulation of Transnational Corporations*, 13 Journal of World Trade Law, 1979 (From 1988, the title changed to "Journal of World Trade") and Vagts, Detlev, F., "The Question of a Reference to International Obligations" in *the United Nations Code of Conduct on Transnational Corporations: A Different View*, United Nations: New York, 1986; Faturos, A. A., "The UN Code of Conduct on Transnational Corporations" in Horn, Norbert (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises*, Kluwer Law and Taxation: Deventer, 1980.

The transfer of technology was an integral part of the NIEO programme. In 1977 the General Assembly decided to convene a Conference on the Code to negotiate "all measures necessary for its adoption."[465] Under the auspices of the UNCTAD, six conferences were held between 1978 and 1985 with the aim to adopt a legally binding code on technology transfer. For this purpose, an International Code of Conduct on the Transfer of Technology (usually called the "TOT-Code") was drafted. As should be expected, however, the United Nations failed to reach agreement on a number of key provisions of the TOT-Code. In particular, issues such as the regulation of restrictive business practises in technology transfer agreements embodied in chapter IV of the TOT-Code and the 'choice of law' governing technology transfer agreements and the settlement of disputes arising from them were major challenges and proved to be irreconcilable. These conferences therefore did not give any result and no conference has therefore been held since 1985.[466]

Relatedly, the International Labour Organisations (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of 1977, also known as "the ILO Declaration" has also been the product of the conditions that prepared the NIEO.[467] The ILO has since 1919 assumed the responsibility to induce countries to accept and secure minimum labour standards. As Muchlinski notes, in the 1960s and early 1970s, labour representatives and developing countries urged the ILO to adopt a binding international code for MNEs.[468] The demand for the adoption of an international code of a *binding* nature was opposed by employer organisations, which were also represented in the tripartite institutional structure of the ILO together with representatives of governments and labour. The outcome of these tripartite meetings that took place between 1972 and 1976 was the *non-binding* ILO Declaration.[469]

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[465] UNGA Res. 32/188 (1977)

[466] For more details on the TOT Code, see Chapter 12 in Muchlinski (1999); Blakeney, Michael, *Legal Aspects of the Transfer of Technology to Developing Countries*, ESC Publishing: Oxford, 1989; Wilner, Gabriel, M., "Transfer of Technology: The UNCTAD Code of Conduct" in Horn, Norbert (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises*, Kluwer Law and Taxation: Deventer, 1980.

[467] "Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy" adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977).

[468] Muchlinski (1999) p.458

[469] See further, Hepple, Bob, "Labour Regulation in Internationalized Markets" in Picciotto, Sol and Mayne, Ruth (eds.), *Regulating International Business: Beyond Liberalizm*, Macmillan Press Ltd.: New York, 1999; Bratton, W., McCahery, Picciotto, S. and Scott, C. (eds.), *International Regulatory*

The "OECD Declaration on International Investment and Multinational Enterprises", adopted by the Organisation for Economic Cooperation and Development (OECD) in 1976,[470] can be interpreted as a counter reaction of the developed capitalist countries to limit the possible outcome of the developing countries' efforts to regulate the activities of MNEs. In the words of Muchlinski, "To counter these developments, the OECD ministers, urged on by the US government, decided to adopt their own policy on MNEs, which it was hoped would influence the UN's attempts at 'codification' to move away from a highly regulatory position of MNEs control".[471] Not surprisingly, the OECD Guidelines proved to be influential on the debates within the framework of the UN, considering the fact that most MNEs were based in the OECD member countries.

Unlike the ILO Declaration, which covers only labour issues, the OECD Guidelines are today the only existing international tool that has set up a code of conduct for MNEs. However, the OECD Guidelines do not have a general applicability; they apply only to MNEs operating in or from the territories of the member and the other adhering states. The Guidelines are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws. Observance of the Guidelines by enterprises is voluntary and not legally enforceable".[472] Thus, for at least three reasons the OECD Guidelines can be classified as soft-law: First, the Guidelines are not adopted in a legally binding form. Second, Guidelines are not addressed to the adhering governments but to the MNEs. Third, these guidelines are only recommendation for MNEs, thus not obligatory. It is

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Competition and Co-ordination, Clarendon Press: Oxford, 1996; Gunter, Hans, "The Tripartite Declaration of Principles (ILO)" in Horn, Norbert (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises*, Kluwer Law and Taxation: Deventer, 1980; Blanpain, Roger (ed.), *Multinational Enterprises and the Social Challenges of the XXIst Century*, Kluwer Law International: The Hague/London/Boston, 2000

[470] The OECD Guidelines were adopted as an Annex to the 'OECD Declaration on International Investment and Multinational Enterprises', which also includes 'the principle of national treatment', 'international investment incentives and disincentives' and 'inter-governmental consultation procedures on the guidelines for multinational enterprises'. The Guidelines were revised and adopted by the governments of the 30 member countries of the OECD and Argentina, Brazil and Chile on 27 June 2000 (http://www.oecd.org/dataoecd/56/36/1922428.pdf).

[471] Muchlinski (1999) p. 578. The writer gives the waves of nationalisation in the 1960s and 1970s, and the oil crisis in 1973 as other alarming reasons for OECD members to initiate their own policy on MNEs (*Ibid*).

[472] *The OECD Guidelines for Multinational Enterprises*, http://www.oecd.org/dataoecd/56/36/1922428.pdf).

however important to note that the voluntary, i.e. non-binding, nature of the OECD Guidelines does not necessarily indicate that such rules cannot be applied effectively. For, as viewed in the chapter 2 in this study, the observance of soft law is primarily related to the content of the rules, that is to say, whether the rules at issue are acceptable to all parties, rather than the legal form of the instrument.

It is also interesting to note that the Global Agreement on Tariffs and Trade (GATT) endorsed the NIEO principles of "non-reciprocal"[473] and "preferential treatment" (i.e., reduction of barriers) to developing countries. Although developing countries succeeded in pushing developed countries to adopt these principles, these endorsements were formulated in the form of soft law. For instance, the legal impact of the principle of "non-reciprocal" embodied in Article XXXVI(8) was reduced by the final paragraph of this Article, which provided that "the adoption of measures to give effect to these principles and objectives shall be a matter of conscious and purposeful effort", thus not a matter of obligation.[474] Similarly, the principle of "preferential treatment" in the GATT, negotiated during the "Tokyo Round", was authorised with 'soft' wording: "Contracting parties may accord differential and more favourable treatment to developing countries".[475]

In sum, the NIEO caused considerable legal activism in the 1970s. Several resolutions, declarations, guidelines and codes of conduct adopted during this decade have their origin in the ideas proposed by the NIEO. Developing countries hoped that UN resolutions would lead to new and binding rules as a follow-up on the NIEO through majority voting in the UN committees and in the General Assembly. However, the search for an effective restructuring of North-South economic relations through a new and effective law of economic development ultimately became a 'soft' and fragmented version of the initially desired law.

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[473] This principle implies that developing countries may receive trade concessions without being required themselves to grant concessions.

[474] Protocol Amending the GATT to Introduce a Part IV on Trade and Development, February 8, 1965, cited in Carlson (1984-1985) p. 1273, footnote 387

[475] Agreement Concerning A Framework for the Conduct of World Trade, reprinted in the House of Representatives Document, No: 96-153, 96th Cong., 1st Sess. 619 (1979), cited in Carlson (1984-1985) p. 1273, footnote 387.

5.5 The decay of the NIEO

This section reviews the factors that have been influential on the rapid disappearance of the NIEO from the international agenda by the beginning of the 1980s. Since the conditions that gave rise to the NIEO continued to be the same, if not worse, the factors that have caused the disappearance of the NIEO bear closer examination. Such a retrospect is important not least because the same factors lie behind the dynamics that smoothed the path of a paradigm change in the international economic and legal order.

As viewed earlier, the political independence of the colonial world put the issue of development in the centre of North-South relations. The emphasis in the 1960s and 1970s was predominantly on economic development in national contexts, which required the restructuring the world economy and legal order to address the inequalities between developed and developing countries. In the beginning of the 1980s, this perspective was increasingly challenged by the emergent of the US-led globalisation project, which also represented a shift away from the territorially constituted state-guided development approach that the NIEO projected.[476] Under the Reagan administration (1981-1988) and Thatcher governments in Britain (1979-1990), the 1980s witnessed a new rhetoric of globalisation predicting a greater reliance on the market in the management of economic affairs and the integration of national economies into a 'global' economy of expanding trade and financial flows. During this period, deregulation became a key policy measure, which also entailed privatisation for major state-owned industries that obviously runs counter to the fundamental idea of the NIEO –a state-led industrialisation.

In addition to the spread of the neo-liberal economic policies and practices under the auspices of the IMF and the World Bank supported by the US and its alliance, the structure of private financial flow to developing countries also experienced major changes in the 1980s. The rise in the price of oil, combined with restrictive monetary policies in the major industrial countries, led to record-high real interest rates and world recession. The increase in interest rates generated dramatic effects in the budgetary allocation of developing countries. Since foreign commercial bank flows and domestic

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[476] McMichael, Philip, *Development and Social Change: A Global Perspective*, Thousands Oak: California, 2004, p. 147

sources of capital were channelled to service debt, under pressure of the international financial institutions, the economic growth in highly indebted countries collapsed.[477]

The debt crisis was managed through an economic stabilisation agreement between the indebted countries and the IMF. Restructuring of bank debt was linked with macroeconomic stabilisation and broad structural reform in debtor countries. The IMF and the World Bank, strongly supported by the United States and other bilateral lenders, conditioned their lending on adoption of sound macroeconomic policies such as deficit reduction and on economic restructuring programs including domestic deregulation, privatisation, trade liberalisation, and more open investment policies.[478] As Spero and Hart emphasise, the critical importance of the IMF did not result from the fact that its loans were immense, but that the IMF provided a vehicle for imposing and surveying national economic policies deemed necessary for the debt repayment. "The IMF could hold up its lending and all rescheduling if a debtor did not agree to certain policies. It could also hold up disbursements of monies if a country did not meet agreed-upon economic commitments".[479] Under these circumstances, foreign direct investment (FDI) emerged as the only available source of much needed foreign capital and foreign exchange for the debt service and development targets. It is also claimed that the increasing awareness of the need for technology made by the North made developing countries more pragmatic vis-à-vis MNEs and FDI.[480]

Also, the structural adjustment loan programme of the World Bank and the conditionality of the IMF accelerated the re-orientation of Third World country government policy towards liberalisation and privatisation as well as an investor-friendly international economic law. This development reinforced the process further, during which the initiative with respect to international economic law moved from the UN to international economic institutions, over which developed countries exercised comfortable control. As pointed out earlier, the UN General Assembly, with its one

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[477] Spero and Hart (2000) p.186

[478] *Ibid.* p. 202.

[479] *Ibid.* p. 189. For the widespread adverse effects of the domestic austerity programme of the IMF on human rights, see Chossudovsky, Michel, *The Globalization of Poverty: Impacts of IMF and World Bank Reforms*, Quorum Books: London, 1997

[480] Comeaux, P. E. and Kinsella, S. N., *Protecting Foreign Investment Under International Law*, Oceana Publication Inc.: New York, 1997 in 'Introduction'.

country-one vote rule has been the most convenient platform for developing countries to put the NIEO on the international agenda. On the other hand, the institutions like the World Bank and the IMF do not grant similar access having weighted voting systems, which favour developed countries.

However, the shift from a state-led to a market-led world economy and the subsequent collapse of the NIEO cannot be understood and explained solely in terms of economic change. As Gilpin notes, "the evolution of the post-World War II international economy and the Cold war were intimately joined in every particular".[481] The NIEO rose on the historical context of the Cold War as a multilateral bargaining project and its specific power relations shaped to a considerable extent the perception, power and demands of the developing countries. Therefore, the decline of the NIEO should be placed in a larger context of a power shift that took place during the renewal of the Cold War in the early 1980s, resulting in the demise of the socialist system in 1989. This meant for developing countries to be deprived of the strategically valuable support especially within the institutional framework of the UN. In addition, on a psychological level, the triumph of the Western liberal idea as the basis for a political and economic system imposed the perception that there could be found no other way than accept the dominance of liberalism.

Lastly, it should be added that the eagerness of developing countries to use their numerical superiority in the UN General Assembly as a tool to adopt legally binding rules to some extent focused on seeking redresses for what they believed to have had been deprived of by ex-colonial powers. Otherwise, Third World countries displayed a great diversity in respect to their ideological, political, social, religious, economical foundation and preferences. For instance, as the oil crisis in 1973 showed clearly, there were fundamental differences of interest between the oil exporters and non-oil producer Third World countries. The fragility of the Third World coalition became further obvious when some developing countries, especially the so-called "Asian Tigers" adapted themselves rather well to the conditions that the market economy required.

In sum, as a result of the geopolitical changes and the cumulative result of the above-described economical and political circumstances, above all the end of the Cold War,

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[481] Gilpin (2000) p. 53

the world-wide spread of the market economy and the increasing diversity between the developing countries, the NIEO has lost its significance.

5.6 The legacy of the NIEO

The rise and decline of the NIEO within the space of twenty years allows us to reach some tentative conclusions about the weakness and attractiveness of the NIEO as the prominent example of the state-centric paradigm, which appeared in the 1960s. In the light of the above considerations, it seems possible to draw the following conclusions regarding the legacy of the NIEO. First, the role of international law is much more limited in restructuring international economic order than the NIEO presumed. The emphasis placed on the potential of international law fundamentally to transform international economic relations failed to realise that the relationship of socio-economic forces and their underlying legal and institutional systems involve more complex mechanisms than merely changing or choosing the law. Although law can play an important role either as a facilitator or hindrance, it cannot shape and restructure the nature of economic relations and systems. Second, to restructure international economic relations requires more than the majority vote in international organisations (again the role of law). Third, law as a solely inter state action is not able to restructure the international economic legal order as the international economy consists of different countries with different economic regimes, businesses and legal cultures. In most countries, private companies are among the most important actors in shaping economic decisions. The total exclusion of MNEs and other non-state entities from the international economic decision making mechanisms combined with the understanding of the international economy solely as a matter of inter-state bargaining is not realistic. MNEs are not only and exclusively the agents of their home state but they exist to a large extent with their own agenda aiming to maximise their profit. To consider MNEs only as the subject to regulatory activities of states was consequently an illusionary understanding of the role of law in international economy. Ironically enough, the OECD Guidelines produced by developed countries to counter UN Codes of conduct are the only remaining legal effect of the NIEO to the present. Fourth, an important negative aspect of the state-centric model à la NIEO was the rapid formation of the "nomenklatura" in many domestically weak countries and gave rise to the related

problems of corruption. Despite the nationalist discourse of the NIEO, the borrowed money or development aid went partly to the state-led administration and/or military consumption. Besides, the high level of regulation and the related bureaucratic approach to economic administration, as well as the regulatory procedures within the state apparatus, generated significant transaction costs to cover the preparation, adoption and dealing with regulations and governmental intervention.[482] Fifth and more importantly, the NIEO programme was contradictory in itself. On the one hand, the NIEO emphasised territorially grounded national economic development, which was inward orientated; its main strategy was based on the import-substituted industrialisation and investment of borrowed capital through state enterprises. On the other hand, the international economy of the Cold War era had already displayed the characteristics of an increasingly globalised economic order. The degree of economic interdependence that the international economy had reached in the post-war period would not tolerate policies with such an exclusively territorially grounded notion of economic development. Lastly, and a more positive legacy of the NIEO is that although attempts to create an alternative international economic order were largely unsuccessful at UN level, its programme significantly raised the consciousness of the unequal structure of international economic and legal order. Since the demands embodied in the NIEO, which in due course made their way onto the development agenda in subsequent years, are not less relevant today than two decades ago due to the structural conditions inherent in international relations, the NIEO can serve as a tool of a better understanding of international relations.

5.7 Concluding remarks

It has been seen in this chapter that the basic characteristics of the NIEO can be examined in a number of ways. At an initial level, the NIEO was an attempt to fundamentally restructure international economic and legal order through international law in the context of the Cold War. At another level, the NIEO was an amalgamation of anti-colonial economic nationalism, state-led industrialisation and a highly regulated international economy. Its programme did not amount to a revolutionary break with the

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[482] Waelde (1995) p. 21

existing capitalist economic relations but was an attempt to replace market-orientated order with a centrally planned developmentalism by using their collective power in a global bargaining process. Paradoxically, however, although the issues, which underlay the NIEO have kept their relevance, the NIEO itself was largely overtaken in the 1980s, as a result of the changing international economic and power relations as well as because of the contradictions inherent in its programme. It was eventually displaced by the globalist paradigm without leaving much legal trace behind it.

6 THE NON STATE ACTOR SUB-PARADIGM: THE "NEW *LEX MERCATORIA*"

6.1 Introduction

As discussed in the previous chapter, state-centrism, the dominant paradigm of international economic relations in the post-war period, was in the beginning of the 1980s replaced by the so-called globalist paradigm. Since the 1980s, we have witnessed a near-complete reversal in many fields of international economy: from a state-led developmentalism to an increased reliance on market forces, from nationalisation to large-scale privatization of state-owned enterprises, from restrictions of foreign investment to deregulation of national economies.

One of the most frequently occurring themes of the post-1980s has been that the non-state actors have acquired a legitimate authority without relying on the explicit support of states. Moreover these non-state actors have also assumed the roles that traditionally belonged to the international public authority. According to some scholars, this development corresponds mainly with the globalisation of international economy and the increasing foreign direct investments made by MNEs, bolstered by the developments in information and communication technologies, as well as the improvements in transport that have facilitated border-crossing exchange of goods and service.

It is also said that the 'old' international legal system, with its numerous nation-states, each having its own legal order was not suitable to respond to the increased extent, intensity, and speed of international transactions. Collisions of norms and gaps between different systems originate from the incompatibility of the transnational nature of modern international business and the monopoly of power claimed by states. The dynamic character of transnational commercial transactions is seen, in this understanding, as creating a need for flexible legal instruments and institutions in order to reduce the transaction costs and satisfy the simplicity and certainty required by the business community. As a consequence, commercial actors have, spontaneously and

gradually, adopted their own solutions directing to facilitate the drafting of contracts and the creation of a reliable institutional and regulatory framework for international transactions, the so-called 'new' *lex mercatoria.*[483]

This chapter examines *lex mercatoria* as an example of bottom-up self-regulation and an emerging form of non-state ordering. The purpose of the chapter is to analyse in what respects and to what extent the 'new' *lex mercatoria* bears the characteristics of the "non-state actor" paradigm. This will be done by outlining the key elements of *lex mercatoria*, which makes it "the most successful example of global law without a state" at least in the eyes of some scholars.[484] Section 6.2 briefly defines the 'new' *lex mercatoria* as an example of "bottom-up" regulation emanating from the commercial actors themselves. Moreover, this section discusses the argument forwarded by some scholars that this new law merchant has medieval roots. The purpose of this discussion is to shed light on the reasons for the recently growing interest in a claimed revitalisation of the old law merchant. Section 6.3 describes the institutional components of the 'new' *lex mercatoria* to provide a closer look at its basic elements. Section 6.4 critically assesses the 'new' *lex mercatoria* as an independent (autonomous) non-state legal system linking it with the discussions surrounding the concept of legal pluralism. This section also includes an overview of other occurrences of private international regimes, which occurs in the international legal debate, with the purpose of establishing the main characteristics of the new *lex mercatoria* in the larger context of the so-called "private global governance". Section 6.5 reassesses the significance of *lex mercatoria* in relation to the state-centric paradigm to illustrate the possible effects of this pluralistic and non-state law development on the traditional international law.

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[483] Volckart, Oliver and Mangels, Antje, *Are the Roots of the Modern Lex Mercatoria Really Medieval?*, 65 Southern Economic Journal (1999) 3, p. 429

[484] The quoted assessment belongs to Teubner in Teubner, Gunther, "Global Bukowina: Legal Pluralism in the World Society in Teubner, Gunther (ed.) *Global Law Without a State*, Dartmouth: UK&USA, 1997, p. 7

6.2 The definition of *lex mercatoria* and its historical roots: the "rebirth of Venus"

Lex mercatoria or 'Law Merchant' is commonly defined as transnational legal principles, rules and standards derived gradually from the trade usage, customs and practice of international commerce, formed by the commercial actors independently of any political authority and applied by arbitrators in case of trade disputes.[485] Thus, according to its proponents, *lex mercatoria* is (i) transnational, (ii) spontaneous, (iii) created by the trade community without reference to a particular national system of law (self-regulation), and (iv) a self-applying legal system beyond national laws (autonomous).

It would not be an exaggeration to say that the last few decades have seen an explosion of interest in the origin of the so-called 'new' *lex mercatoria*. Some writers confidently assume that the historical origins of the 'new' *lex mercatoria* can be traced back to the need of merchants in the medieval feudal societies to have a common law regulating the trade as they belonged to different cities, ethnic groups with different trading cultures, rules and commercial practices. It is claimed that a body of law directed to create a common trade and conflict resolution rules in order to secure and improve inter-societal trade environment emerged sometime during the Middle Age.[486] We are solemnly assured by these scholars that by the end of the 11th century, the Law Merchant, much of which derived from the Roman law of sale, came to govern most commercial transaction in Europe, providing a uniform set of standards across large number of locations.[487]

According to the most common argument, the time between the tenth and thirteenth century transnational economic relations in Western Europe flourished thanks to the

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[485] Berman, Harold, J. and Dasser, Felix, J., "The 'New' Law merchant and the 'Old' Sources, Content, and Legitimacy" in Carbonneau, Thomas, E. (ed.), *Lex Mercatoria and Arbitration*, Transnational Juris Publications: New York, 1990, p. 21. Similar definition of the 'new' *Lex Mercatoria* can be found, for example, in Flood, J., "Capital Markets, Globalisation and Global Elites" in *Transnational Legal Process*, Likosky, Michael (ed.), Butterworths: UK, 2002 and Teubner (1997).

[486] See for instance, Epstein, Richard, A., *Reflection on the historical Origins and Economic Structure of the Law Merchant*, 5 Chicago Journal of International Law (2004-2005) 2

[487] Milgrom, Paul, R.; North, Douglass, C; and Weingats, Barry, R., *The Role of Institutions in the Revival of Trade*, 2 Economics and Politics (1990) 1, p. 5

development of a law merchant similar to the system which today is called the 'new' *lex mercatoria*.[488] As claimed by these "genesis theorists", this mediaeval law merchant was an integrated legal system, a body of law, formed and applied by traders themselves to regulate their border-crossing transactions independently of any political authority.[489] Within this story line it is also argued that, with the rise of the nation-state and the establishment of the Westphalian system, nation-states gained control over their borders and did not want to recognise any source of legitimation for rules applicable within its own territories other than its own. As a consequence, the mediaeval law merchant was first suppressed and then gradually incorporated into the national laws.

However, there is no agreement on the existence and the nature of such a law. As Fassberg remarks, the question of whether *lex mercatoria* exists as an autonomous body of law has from the beginning been rather a question of belief.[490] With such doubts about the legal status of this mediaeval 'law', it has for instance been argued that the law merchant is nothing but a heterogeneous lot of loose undigested customs, which it is impossible to dignify with the name of law".[491] Mann considered the use of commercial usage as the legal base (substantive law) of any decision as 'undesirable' and even 'dangerous', for the reason that such "rules of conduct of variable" would deny any measure of predictability and certainty.[492] Nor could it be said that the medieval law merchant was 'transnational' due to fact that even as a body of customs it was local and varied.[493] However, even if such an autonomous body of law ever existed it should have lost much its applicability with the development of capitalism. It can be asserted that with the expansion of trade due to technological developments, navigation, discovery of new places, the East-Indian and Chinese markets, the colonisation of America, trade

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[488] Foster, Nicholas, H. D., *Foundation Myth as legal formant*, Forum Historiae Iuris (18th March, 2005), p. 3 available at http://www.rewi.hu-berlin.de/online/fhi/articles/0503foster.htm

[489] Donahue, Charles Jr., *Medieval and Early Modern Lex Mercatoria*, 5 Chicago Journal of International Law (2004-2005) 2, p. 22

[490] Fassberg, Celia Wasserstein, *Lex Mercatoria -Hoist with Its Own Petard?*, 5 Chicago Journal of International Law (2004-2005) 1, p. 67

[491] Ewart, J., *An Exposition of the Principles of Estoppel by Representation*, Chicago, 1900, quoted in Foster, (2005) p. 3

[492] Mann, F. A., *England Rejects Delocalised Contracts and Arbitration*, 33 International and Comparative Law Quarterly (1984) p. 197

[493] Foster (2005) p. 4

with the colonies, etc. made 'trade customs' less uniform and less obvious as a result of the diversified customs.

But, the purpose of this section is not to analyse at length whether and to what extent the mediaeval law merchant existed or whether the 'new' *lex mercatoria* has its origin in the Middle Ages. What is interesting here are the reasons why the medieval *lex mercatoria* has become such a source of inspiration for those, who predict the emergence of a new global law developed outside the realm of the public sphere. To put it differently, why do the proponents of the 'new' *lex mercatoria* often invoke it as a revival of the 'old' law merchant? Is it possible that the claims involving medieval roots of the 'new' *lex mercatoria* are put forward only because it provides the legitimacy and respectability of ancient heritage and carries with it the implication of efficiency and therefore strengthens the authority of the 'new' *lex mercatoria*?[494]

Surely, a mythical foundation for the autonomous and transnational past of *lex mercatoria*, how inconsistent and unhistorical it may be, is of course very useful as to provide the psychological basis of a rhetoric discourse the "re-emergence" of a "global private legal order in its own right".[495] Nevertheless, there can be found at least one additional and possibly more important explanation for this 'romance' involving the history of trade.[496] By having 'old' law merchant as its historical reference the 'new' *lex mercatoria* "conjures up an idyllic image of an international community of merchants interacting on the basis of shared values and customs, independent of local borders and law – a kind of self-governing transnational community".[497] As Fassberg points out, it is this model of medieval self-governance that several proponents of the 'new' *lex mercatoria* seek to reinvent. It is the possibility of the existence of a self-governing supranational body of legal principles developed and enforced independently from the national and international power and law structure that is sought after by the proponents

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[494] Foster (2005) p. 8-9

[495] Teubner (1997) p. 4

[496] Donahue (2004-2005) p. 37

[497] Fassberg (2004-2005) p. 67

of this modern non-state body of law. In other words, the medieval *lex mercatoria* is regarded to be the archetype of the "transnational private order".[498]

As viewed, most supporters define *lex mercatoria* as a spontaneous emanation of customs and principles arising purely out of professional mercantile circles and through mercantile activity and dispute resolution.[499] It is therefore hardly surprising that the reference to the alleged medieval law merchant gives rise to a number of interpretations of this law. It is for example seen as "a coherent body of law" and "transcend territoriality" (Santos, for instance, defines *lex mercatoria* as the "oldest form of globalization of the legal field").[500] The most important one, for the purpose of this study, is the association of the supposedly 'autonomous' 'old' law merchant with the asserted autonomy of the so-called modern 'private regimes' and other types of "private government" from the state as well as public international law. These "private governments", including the 'new' *lex mercatoria*, are claimed to be created through negotiation and interaction among firms within a particular industry sector or issue area and incorporating a number of national and international business associations, producing mainly informal rules to govern their activities.[501]

As is well known, the Goddess Venus is usually known for her beauty, love and grace. Yet ironically, she was born of violence and chaos. In the Greek mythology, Venus was conceived when Kronos (Saturn in the Roman mythology) castrated his father, whose semen fell into the ocean. They mixed with the foam of the ocean and from this Venus (Aphrodite –hence her name came from the word 'aphros', meaning 'foam') instantly rose full-grown from the sea. The Mayans and Aztecs of Central America saw the planet Venus as connected to violence. They believed that when Venus returns back, she morphs from a woman into a man, gets seduced by the goddess of love into

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[498] Some writers find similarities between the Middle Ages, where the co-existence of the competing and overlapping authorities was possible, and today's multiple and multilayered sources of authority and therefore call this development as the new Middle Age. For a criticism of this approach, see Hirst and Thompson (1996) p. 184.

[499] It is however important to note that some scholars consider *lex mercatoria* as a creation of mixture of public and private authority and recognise the participation of governmental institutions and officials (see for instance Cutler, 2003, p.5).

[500] Santos (2002) p. 209

[501] Cutler, Haufler and Porter (1999) p. 14

tarnishing "his" purity, and fathers a sea monster child. Then in a ritual game of ball, "he" loses and must be sacrificed by the Sun, after which "he" is reborn as a "she".[502]

According to the rhetoric described above, the medieval law merchant was formed and developed in the circumstances of medieval political and legal fragmentation; it emerged from the chaos of the "Dark Age". But it gradually lost its independence when the nation-state had grown to its full strength at this point it became incorporated into the municipal law of each state. So, the most fundamental difference between the modern world and medieval Europe was the lack of states.[503] Yet, as it is stated by its proponents, today, in connection with the nation-state's retreat due to the unstoppable forces of globalisation, the 'old' merchant law has been reincarnated; in a modern form, as the 'new' *lex mercatoria*.

The similarities between the rebirth of Venus out of the chaos and that of *lex mercatoria* out of the 'darkness' of the interventionist nation-state allow drawing an analogy. If it is possible to label the explanation of the 'birth' of this autonomous legal system as the creation myth that explains the cosmology of the 'new' *lex mercatoria*, we could then perhaps label the second coming of *lex mercatoria* "the rebirth of Venus", just in disguise.

6.3 A brief description of the institutional components of the 'new' *lex mercatoria*

The notion of *lex mercatoria* is not new. As viewed in the previous section, it is claimed by its proponents that the historical roots of this law can be found in the Middle Ages. However, 'time' is not the only factor that separates the 'new' law merchant (*lex mercatoria*) from its alleged forerunner. The 'old' law merchant was supposedly a body of trader customs, practice and behaviour. On the other hand, the new law merchant, along with the practices of traders, is mostly made by professional lawyers, accountants, business associations, and technical experts, international arbitrators and legal academics.

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[502] http://www.britannica.com/eb/article-9075054/Venus. Depending on the source, Venus can be the daughter of Zeus and Diana as well.

The new *lex mercatoria* can more precisely be defined as an institutional set consisting of (i) "trade usage" (or custom), (ii) "model contracts", (iii) "standard clauses", (iv) "general legal principles" and (v) "international commercial arbitration". It can be argued that these components are primarily about defining the legal character, sources and its applicability of the 'new' *lex mercatoria*, thus its existence as an independent non-state legal order. The content of these components can be outlined as follows:

First component is trade usage (or custom) that is the central element of the new *lex mercatoria*; it is about whether *lex mercatoria* is a distinctive body of substantive law or at least a complete and coherent set of principles and rules. "Trade usage" refers to the commonly accepted spontaneous and autonomous trading practices of the international business community.[504] Since the custom regulating the business community is claimed to have evolved spontaneously, out of a long experience with trading practice of the commercial actors themselves, *lex mercatoria* can therefore be regarded as an example of a "bottom-up" regulation.

Second is "model contracts" (or standard form contracts), which refers to a text formulated in advance that intends to regulate specific parts of the contract. Its purpose is to replace the dispositive rules of national law by proposing its own solutions usually including arbitration clauses. In practical terms, they facilitate the drafting of contracts by helping traders to formulate their obligations and rights under the contract more precisely and to calculate their cost more clearly.[505] There are different type of standard contract forms drafted by individual enterprises, standard conditions issued by trade associations (for example, General Trade and Conditions for the Sale of Goods and for Machines FIDIC), and general conditions and standard form contracts drowned by international organisations (ICC, UNCITRAL). The use of standard contracts dominates the practice of the commodity trade and plays in important role in trade sectors such as

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[503] Volckart and Mangels (2001) p. 435

[504] It is commonplace to make a distinction between custom and trade usage. Custom is regarded as a source of law, with general validity. On the other hand, trade usage has is considered as mere contractual practices generally observed, which are used as proof of the will of the parties and they do not have an obligatory character because the parties may contract them out (Baronova, Veronika, *Lex Mercatoria and World Trade Organisation Law In Relation To International Commercial Contracts*, Interleges, 2006, available at http://www.interleges.com/html/contents/articles/veronika01.pdf).

[505] Volckart and Mangels (1999) p. 431

sea and air transport, banking, construction of industrial works and international finance.[506]

The third component consists of "standard clauses", which refers to general terms and conditions for trade, as in the example of the "International Commercial Terms" (Incoterms).[507]

The internationally accepted norm-like "legal principles" governing contractual relations, such as *pacta sunt servanda* (contracts should be enforced according to their terms) and *rebus sic stantibus* (substantially changed circumstances can entail a revision of contract terms) are the fourth component of the new *lex mercatoria* and refer to the principles common to several legal systems. They are referred to when no applicable international trade usages exist in cases of arbitral awards, hence they function as a possible source of *lex mercatoria*.[508] Despite the fact that at a first glance, these principles seem not to have developed independently of the legislature of nation-states, Volckart and Mangels argue that the origin of these principles goes back to ancient times when nation-states did not exist. Therefore, according to these writers, such principles should be considered as the "results of private autonomous action with legal implication".[509]

The last component is "international commercial arbitration", which refers to the process of resolving business disputes between or among business parties through the use of one or more arbitrators rather than through courts. It requires the agreement of the parties, which is usually given via an arbitration clause that is inserted into the contract or business agreement. The decision is usually binding. Arbitration institutions generally restrict access to information on arbitration proceedings because of the private nature of the arbitration; therefore published sources of data on international arbitration

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[506] Baronova (2006) p. 4

[507] The Incoterm (International Commercial Terms) is a universally recognised set of definitions of international trade terms, such as FOB, CFR and CIF, developed by the International Chamber of Commerce (ICC). It defines the trade contract responsibilities and liabilities between buyer and seller. For further information, see http://www.iccwbo.org/policy/law/id315/index.html.

[508] Lord Justice Mustill enumerated the general principles of international contract law, as applied by arbitrators. His list contains twenty general principles (Lord Justice Mustill, "The New Lex Mercatoria: The First Twenty-five Years" in Bos, Maarten and Brownlie, Ian, *Liber Amicorum for the Rt. Hon. Lord Wilberforce*, Clarendon Press: Oxford, 1987, p. 174-177).

[509] Volckart and Mangels (1999) p. 431

are limited.[510] Still, it is generally recognised that arbitration has become the most prevalent means of dispute resolution in international commerce mainly due to the following two reasons: (i) to avoid the other parties' home court system and (ii) to take advantage of the international legal framework governing the enforceability of arbitration awards.[511] According to Teubner, arbitration, as a self-created external institution, is very important for the "externalisation of the self-referential contract."[512]

Lex mercatoria, as the substantive rules applicable to 'transnational' state contracts (or the so-called "internationalised contracts") and the role of international arbitration in the development of such contracts, indicates rather a peculiar aspect of the use of *lex mercatoria*. The idea that 'transnational' state contracts involving foreign private party may be governed by *anational* law was developed in a series of arbitral awards to remove investment agreements from the law of the host state mainly through 'choice of law' and 'arbitration' clauses. The origin of the discussions concerning *lex mercatoria* (or general principles of international law) as the substantive law in regard to internationalised contracts can be traced back to the petroleum concession disputes. During the early post-colonial period, aiming to find a legitimate international basis for guaranteeing the flow of natural resources to the former colonial powers, some scholars and arbitrators argued that contracts between states and foreign private parties can be governed by general principles of law (or public international law). Accordingly, Middle Eastern petroleum concession agreements did not usually contain any provision regarding the applicable law in order to leave this point to be decided by arbitrators.[513]

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[510] Drahozal, Christopher R., *Arbitration by the Number*, 22 Arbitration International (2006) 2, p. 299. The writer nonetheless adds that Published reports highlight some basic facts about the use of international arbitration and its growth over time. From 1993 to 2001, annual case filings with 11 leading international arbitration institutions almost doubled, from 1,392 cases per year to 2,628 cases per year (*Ibid.*).

[511] Bühring-Uhle, Christian, *Arbitration and Mediation in International Business*, Kluwer Law International, The Hague, 1996, p. 135

[512] Teubner, Gunther, *Breaking Frames: Economic Globalization and the emergence of lex mercatoria*, 5 European Journal of Social Theory (2002) 2, p. 212

[513] The *Sapphire Petroleum Arbitration* is an outstanding example to demonstrate how much freedom of interpretation arbitrators had to determine applicable law especially in the 1950s and 1960s. In the *Sapphire* case, the arbitrator refused to apply Iranian law on the ground that "It was unlikely, in view of the enormous capital risk involved in the project, that Sapphire could have accepted Iranian law as the law applicable to the contract as such law could be changed at will by Iran". Consequently, the arbitrator held that the law applicable to the agreement was the "general principles of law recognised by civilised nations" (Sapphire International Petroleum *v.* National Iranian Oil Company, 35 I.L.R. 136 [1963]).

The rationale for such 'anationalisation' has been to ensure the satisfaction of foreign investment for its maximum possible protection in developing countries. From the point of view of the capital-exporting countries, the law of the (developing) state party does not secure enough protection as the state party may amend its law governing the investment agreement at will. Consequently, internationalisation appeared as the best solution, relocating the agreement beyond the reach of the sovereign power of the state party.[514]

6.4 The 'new' *lex mercatoria* as an 'autonomous' non-state legal order

This section examines the asserted autonomous nature of *lex mercatoria* and its theoretical implication on the traditional doctrine of sources and subject theory of international law as well as on the theory of legal pluralism. Furthermore, since *lex mercatoria* is not the only occurrence of the so-called private international regimes, the section also gives a brief account of some other examples of these "new forms of governance" in order to establish the significance of *lex mercatoria* within the larger context of the "non-state actor" paradigm.

When the 'new' *lex mercatoria* (or the modern law merchant) is defined as a private transnational legal order which has emerged out of the practices of international business community, it goes without saying that such a definition implies a fundamental transformation in international law-making. For, such characteristics contrast sharply with both the traditional doctrines of the legal 'sources' and subjects of international law implying the emergence of the new sources of law which do not emanate from state, but from non-state authority. Obviously, it can be easily inferred from such a definition that law is not any longer confined to the political process, but also seen as a production of multiple unofficial social and economic processes, in which non-state actors stand on equal footing with states. As claimed by Teubner, "*lex mercatoria* breaks a double taboo about the necessary connections between law and state" by suggesting that it is

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[514] On the subject of "internationalised contracts", see section 3.7.2 in this study. See also Delaume, Georges, R., "The Myth of the Lex Mercatoria and State Contracts" in Carbonneau, Thomas, E. (ed.), *Lex Mercatoria and Arbitration*, transnational Juris Publications: New York, 1990; and Sornarajah, M. *International Commercial Arbitration*, Longman: Singapore, 1990.

law without state and it has emerged spontaneously and that is valid on a transnational scale without the sanctioning power of the state.[515]

However, the interpretation of *lex mercatoria* is highly controversial. The above-stated views hardly reflect the common understanding on the subject. Even a quick inquiry suffices to reveal the existence of a broad spectrum of opposing views ranging from the total denial of the existence of such a law, to arguments against its lack of generality and predictability as well as arguments against its vagueness and incompleteness. Yet, the assumed autonomous nature of *lex mercatoria* is perhaps the area, where the theory of the 'new' *lex mercatoria* encounters criticism most frequently as it constitutes the central pillar of the new sources theory of global law, which is asserted to lay beyond the nation-state.

As discussed previously, according to the new non-state international legal sources doctrine, international law's original exclusive focus on states as the only legal subjects and law makers is no longer compatible with the emergence of non-state actors on the international stage as a result of globalisation. As it is maintained by the proponents of the emergence of a spontaneous new transnational *lex mercatoria*, the state has lost its previously dominant position in international policy and rule making process along with the decreased significance of sovereignty, around which the traditional theory of legal sources was centred. According to this line of understanding, the contractual rule making has been transformed into a source of law as a means of business self-organisation as a result of pressures from the dynamics of globalisation.[516] Hence, the freedom of the parties in international contract law is not only breaking down the paradigmatic concept of state-centred law and legal order, but also decreases the importance of political law-making. International contract becomes instead the central means as a source of 'law' in international business requiring a reconsideration of the traditional theory of legal sources.

The concept of autonomous contract refers to two distinct yet interrelated concept of autonomy. (i) Substantive autonomy, which describes *lex mercatoria* as a supranational legal order, distinct from both national and international public law which emerges

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[515] Teubner (1997) p. 10

[516] Berger (2001) p. 11

spontaneously in the framework of international trade. The parties enter in the field of application of this legal order when they conclude an international contract, especially in the cases when they submit the disputes to arbitration. Thus, the autonomy of the contract refers to the 'will' of contracting parties, which includes both the "choice of law" and the means of dispute resolution as the law governing trade relations. (ii) Institutional autonomy describes *lex mercatoria* as independent from any national system of law and institution that is capable of functioning as a self-governing legal order. The greater uniformity brings about the greater autonomy. The greater autonomy, in turn, leads to the diminishing role of the state and decreasing relevancy of borders. Methods employed to attain greater uniformity for contracts include (i) the use of standard contracts; (ii) the choice of *lex mercatoria*;[517] (iii) the reference to uniform principles and rules; (iv) the use of self-regulating contracts that attempt to internalise all aspects of the parties' relationship for example selecting the law of an acceptable state; (v) and the recourse to international commercial arbitration.[518]

As already noted, the search for new forms of private governance are not limited to *lex mercatoria*. As stated by Teubner, similar combination of globalisation and informality displaying "a highly 'public' character" can be found in many other areas.[519] The so-called "international private regimes", which refer to those organisations that are created by negotiation and interaction among firms, inter-organisational negotiating systems, and world-wide standardisation processes, are among the most advanced examples of such market-based private regulatory developments. [520] They create mostly soft law in the form of voluntary and formally non-binding agreements to govern their activities.[521]

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[517] The difficulty in determining the content of *lex mercatoria* has been a subject of endless debates about the practical usefulness of it. To provide evidence of the existence of *lex mercatoria* and to make it more accessible by formulating or codifying has been an important goal of many scholars and institutions. One significant example of such attempts is the so-called UNIDROIT principles (*The Principles of International Commercial Contracts* of the "International Institute for the Unification of Private Law") published in 1994-1995. Another is the *Principles of European Contract Law* of the so-called "Lando Commission" (the Commission on European Contract Law). For a comprehensive survey on the subject, see Berger, Klaus, Peter, *The Creeping Codification of the Lex Mercatoria*, Kluwer Law International, The Hague, London, Boston, 1999.

[518] Amissah, Ralph, *the Autonomous Contract*, the International Trade Law Monitor, available at http://www.cisg.law.pace.edu/cisg/biblio/amissah2.html#endnotes

[519] Teubner (2002) p. 207

[520] Cutler, Haufler, and Porter (1999) p. 14; Teubner, Gunther, *Global Private Regimes: Neo-spontaneous law and dual constitution of autonomous sectors in world society?*, Paper prepared for the Workshop on

To give but a few examples, the maritime transport regime, the "autonomous law of Internet",[522] the internal legal regimes of MNEs (corporate governance), professional self-regulation, and technical standardisation. In the environmental area, private non-profit and for-profit certifications, such as Eco-Labeling, Green Seal and Eco-Rating, which are used to ensure that those products meet specified environmental standards. For instance, an eco-label is a form of certification placed on a product to boost the market value of the product by communicating its environmentally friendly characteristics, such as "non-toxic" or "ozone-friendly".[523] These certifications are issued by predominantly private regulators, such as "The Forest Stewardship Council" and "International Organization for Standardization" (ISO). It is important to note however that in terms of institutional structures, some of these organisations display a 'hybrid', rather than entirely private character. For instance the French member body of ISO (*Association Francais de Normalisation* –AFNOR) is a governmental agency.[524]

'Globalisation and Public Governance' 17/18 March 2000 European University Institute, Florence, available at http://www.jura.uni-frankfurt.de/ifawz1/teubner/dokumente/global_private_regimes.pdf

[521] 'Regime theories' initially emerged to analyse international organisations from a less state-centric and more liberal optic. Keohane, one of the earliest 'regime theorists' for instance, explains "international regimes" as institutions, such as international monetary regime and trade regime, with sets of formal and informal rules, created to facilitate cooperation among states (Keohane, Robert, O., "Hobbes's dilemma and institutional change in world politics" in Keohane, Robert, O., *Power and Governance in a Partially Globalized World*, Routledge: London and New York, 2002, p. 71). However, according to Cutler, regime studies did not fulfil their initial promise of including non-state actors and regime analysis was consequently gradually 'captured' by a neo-realist synthesis of realism focussing excessively on states, state power and formal rule structuring (Cutler, 2002, p. 26). Koskenniemi also reaches a similar conclusion though on a contrasting ground. According to the writer, regime theories do not replace realism but embrace it. The basic unit in these theories remains power, interests and rational actors seeking to maximise both (Koskenniemi, Martti, *Formalism, Fragmentation, Freedom*, paper presented in Frankfurt, 25.11.2005 at a conference titled "Kantian Themes in Today's International Law" available at http://www.valt.Helsinki.fi/blogs/eci/Frankfurt-Formalism-05h[1].pdf). Susan Strange's early and prominent critique of regime analysis should also be deemed useful in this respect (Strange, Susan, *Cave! Hic Dragones: A Critique of Regime Analysis* 36 International Organization [1982] 2). On the other hand, the injection of the concepts such as "private" and "hybrid" regimes into "state-centric" regime theories can be interpreted as the revision of the (neo realist) character of the regime theories to open up new avenues for neo-liberal school in international relations.

[522] The issue of whether the Internet has, or even constitutes, its own legal order increasingly attracts the attention of academics, especially in parallel to the growing importance of Internet commerce. Internet law has frequently been linked to lex mercatoria. For some recent examples, see Trakman, Leon E., *From the Medieval Law Merchant to E-Merchant Law*, 53 University of Toronto Law Journal (2003) and Polanski, P., Paul, *Towards a supranational Internet law*, 1 Journal of International Commercial Law and technology (2006) 1.

[523] See generally, Staffin, Elliot, B., *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labelling and its Role in the "Greening" of World Trade*, 21 Columbia Journal of Environmental Law (1996)

[524] ISO has 156 national standard bodies: http://www.iso.org.

Besides, it is important to remember that the interstate or international organisation involvement often plays an important role in the establishment or enhancement of the normative authority of such regimes. For instance, in the case of the ISO, the adoption of "the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)" and "the Agreement on Technical Barriers to Trade (TBT Agreement)", both endowed by the WTO, have improved considerably the normative authority of the ISO through several provisions in the SPS and the TBT Agreements.

As discussed in the following chapter, some of these "private regimes" are closely related to the concept of corporate social responsibility (CSR). For example, to the extent that social or eco-labeling certifications communicate the social and environmental process and conditions relating to the manufacture of the product to consumers, they can be considered within the realm of the concept of CSR. Likewise, despite the fact that the concept of corporate governance concerns primarily the behaviour of corporate professionals, outlining business goals and drawing ethical principles, the scope and content of it also intersects with those of CSR in many subject-areas, in particular with accountability, transparency, and information disclosure.

Obviously, the recognition of *lex mercatoria* and other forms of the so-called international private regimes as constituting 'positive law' would not be possible without rehabilitating the doctrine of legal sources as well as the subject theory of international law. The underlying assumption of such rehabilitation is the blurring boundaries between the public and private domains, the transformation of state-society relations as well as the disappearance of the distinction between legal norms and other kinds of social norms. Once the distinction between 'political law-making' and 'social norm-making' has blurred, then there is no obstacle left to assert that social groups such as the community of merchants are also capable of producing legal rules.

Initially, the concept of legal pluralism (multiple sources of law) referred to the law of colonial societies as well as the simultaneous existence of different rules of law applying to identical situation *within a single* legal order. In the latter case, legal pluralism has meant the recognition of the reality and existence of especially indigenous, religious or ethnic *law* in a given society.[525] Legal pluralism, recognising

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[525] According to an early definition of the concept, legal pluralism refers to the situation in which two or more laws interact (Hooker, M. Barry, *Legal Pluralism: An Introduction to Colonial and Neo-colonial*

the possibility of the simultaneous existence of multiple legal orders, contradicts the "ideology of legal centralism", according to which law is a "single, unified and exclusive hierarchical normative ordering and within which the conception of the state is the fundamental unit or political organisation".[526]

On the other hand, the idea of international legal pluralism might have been expected to threaten the traditional sources and subject theory less seriously, in particular when the term solely refers to *inter-state* law pluralism, which is often used to describe the 'fragmentation' of international tribunals applying international law.[527] As should be expected however, the antagonism grows visibly bigger when international legal pluralism also includes the non-state and/or hybrid (public-private mixed) legal orders, as in the case of *lex mercatoria*. Snyder uses the term "global legal pluralism" to describe the interconnectedness of multi-layered governmental institutions and networks as well as non-state ones. In other words, Snyder's conceptualization envisages the togetherness of both non-state and inter-state forms of governance.[528] Likewise, Teubner uses the concept of global legal pluralism to describe both state law and the "unofficial laws of world market" in which MNEs and business associations emerge as new legal order creators.[529] As should be expected, however, the call for the

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Laws, Clarendon Press: Oxford, 1975, p. 6). Santos defines the concept as following: "legal pluralism concerns the idea that more than one legal system operate in a single political unit" (Santos, 2002, p. 89).

[526] Griffiths, John, *What is Legal Pluralism?*, 24 Journal of Legal Pluralism and Unofficial Law (1986)., p. 3. Santos also states that legal pluralism "originated as a scientific concept at the end of nineteenth century in the European anti-positivistic legal philosophy as a reaction against the reduction of law to state law" (Santos, 2002, p. 89). However, it is interesting to note that the recognition of the legal nature of 'customary law' within a single legal order as a form of non-state law can be the starting point of the concept of legal pluralism. Nonetheless, some writers hold that there is also a form of "state law pluralism", for instance, "when different rules, standards of proof or judges operate with respect to commercial issues from those with respect to other issues" (Woodman, Gordon, R., *Ideological Combat and Social Observation: Recent Debate About Leal Pluralism*, 42 Journal of Legal Pluralism and Unofficial Law, 1998, p. 23. In this article, Woodman compares different approaches to legal pluralism chronologically).

[527] Among many, see Koskenniemi, Martti, *Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought*, Harvard speech, 5 March 2005, available at http://www.valt.helsinki.fi/blogs/eci/PluralismHarvard.pdf. Challenging the idea of the "fragmentation of international law", Burke-White also defines international legal pluralism in terms of the diversification of international tribunals applying *international law*, the expanding possibility for non-state actors to access to international tribunals, and the development of hybrid courts incorporating national and international law. (Burke-White, William, W., *International Legal Pluralism*, 25 Michigan Journal of International Law, 2003-2004).

[528] Snyder (1999) p. 334

[529] Teubner (1997) p. 4

recognition of "global legal pluralism" (or multiple international legal regimes) as an empirical example of how globalisation is governed does not go without being challenged. As will be discussed in chapter 8, some others consider global legal pluralism as an example of social engineering leading to the deformalisation of international law, which aims to smooth the path of neo-liberal globalisation.

It is also important to note that although there is a general consensus among the supporters of *lex mercatoria* on the point that this legal body has developed spontaneously from the practices of commercial actors, there are different understandings of the degree of its autonomy. On the one hand, *lex mercatoria* is by some scholars portrayed as ultimately 'autonomous'. For instance, in Teubner's approach states and international organisations are principally not given any role but through the enforcement of arbitral awards, which, according to the writer, by no means impairs the authentically global character of *lex mercatoria* nor invalidates its quality as a legal order.[530] On the other hand, the claim of a complete autonomy is by many considered as rather ambivalent, on various grounds. It is contended for example that *lex mercatoria*, though transnational in its origin, can only exist because of state laws, which give it effect.[531] In a similar vein, it is argued that *lex mercatoria* has emerged from a long experience with both commercial practice and material/procedural law formed within the nation-state".[532] Indeed, in many instances, it is still through the 'recognition' by 'official' law as a part of *state* law that the standards of *lex mercatoria* achieve their applicability. For instance, Lloyds Ship and Goods Form (SG Form) was used as the basis of the Insurance Act of 1906 and thereby it was recognised as the legal

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[530] Teubner also contends that sanction is losing its place as being a constitutive part of law (Teubner, 1997, p. 12-13). For an identical approach, see Robé, Jean-Philippe, "Multinational Enterprises: The Constitutions of a Pluralistic Legal Order" in Teubner, Gunther, *Global Law Without a State*, Dartmouth: UK&USA, 1997. It can be added that Robé's arguments for the desirability, necessity and reality of this "new legal pluralism" in the "post-absolute sovereignty era" are based on an extreme interpretation of liberal history and market economy. According to the writer, the definition and protection of property rights and the acknowledgement of freedom of contract necessarily involve the decentralisation of norm making in any liberal legal system (*Ibid.* p. 57).

[531] See, for instance, Schmitthoff, C. M., *Clive M. Schmitthoff's Select Essays on International Trade Law*, edited by Chia-Jui Cheng, Martinus Nijhoff: Dordrecht, 1988, p. 223.

[532] Zumbansen, Peer, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 European Law Journal (2002) 3, p. 406.

standard of the common law in the marine insurance field.[533] Just as importantly, it is said that the autonomy of *lex mercatoria* consists in the contracting parties' autonomous selection of the law, i.e., the so-called "choice of law" clause.[534] Indeed the provision most commonly added to the International Chamber of Commerce arbitration clauses was choice-of-law clause, which specifies a particular law to govern the contract. However, in only very few examples, contracting parties have chosen that dispute resolutions are to be governed by the rules of *lex mercatoria*. Instead, the choice of law clauses in the majority of these contracts have provided that a possible dispute arising from the contract is to be resolved under one or another national law of a preferred country.[535]

Perhaps more importantly, the claim of the ultimately autonomous character of *lex mercatoria* fails to recognise the exclusive role of national courts, states as well as regional organisations, such as the EU and the NAFTA, as well as international organisations, such as the WTO, in its development. Dismissing the approach that *lex mercatoria* is purely contractual, Santos points at the hierarchical structure and unequal character of business practices and stresses that *lex mercatoria* is not able to sustain itself as a normative order without being supported by non-contractual elements and political facilitation. He also adds that dominant business actors in transnational contracts "enjoy state like political prerogatives, immunity privileges, special access to political resources –tax incentives, special rights on infrastructure". He concludes, "the dominant practices at the basis of this global law are the practices of the dominant actors".[536]

Showing a total belief in the force of private order, Teubner argues that *lex mercatoria* is "more a law of values and principles than a law of structure and rules". Its softness, indeterminacy and the lack of enforceability are its strength, virtue rather than a

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[533] Muchlinski (1997) p. 86-87. Muchlinski traces back the historical development of English marine insurance law and the influence of Lloyds on it as the market leader as well as some other "collective standardization" examples (*Ibid.*).

[534] Zumbansen (2002) p. 406

[535] Bond, Stephen R., *How to Draft an Arbitration Clause*, 1 ICC International Court of Arbitration Bulletin (1990) 2, p. 14

[536] Santos (2002) p. 211

deficiency.[537] However, such an over-emphasis on informal soft law not only fails to appreciate the role of 'hard' law in the establishment of the principles of *lex mercatoria* performed by national and international public authorities/institutions, but also the interaction and continuum between hard and soft law.[538] To give but one example is the IMF loans, which are generally conditional on the adoption of appropriate economic policy reforms like trade liberalisation and privatisation or removal of legal restrictions on private entrepreneurship and elimination of price control.

6.5 Lex *mercatoria*: the shift from public ordering to self-regulation

This section discusses *lex mercatoria* within the context of blurring boundaries between the public and private spheres. This section also discusses the shift from the traditional patterns of public ordering to societal self-governance, from national/inter-'national' to transnational. By doing so, it is intended to provide a ground on which a clearer distinction can be drawn between the sovereign national state centred model of international economic law and the "non-state actor" model of law. The section further deals with the relative advantages and disadvantages of *lex mercatoria* as a model of commercial self- regulation compared to use national/international law as a basis for commercial regulation. In the conclusion part, the key elements of *lex mercatoria* as an example of the "non-state actor" paradigm and its distinctions from the NIEO model are reviewed in order to establish the nature of the paradigm shift that this study examines.

As viewed above, it is said that the transnational expansion of the market economy in the globalisation process has led to the denationalisation of trade and investment rules and activities of MNEs and the eradication of economic nationalism. There has been an increasing pluralism and heterogeneity in both legal sources and subjects as regards to law creation and enforcement. In this process, as it is maintained, law becomes more and more detached from the nation-state. The new and expanding sources of law emanate from privatised, non-state authority. The 'new' *lex mercatoria*, which is the privatisation of law creation and dispute resolution, therefore should be interpreted in the larger context of the transformation of state-society relations. Its proponents identify

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[537] Teubner (1997) p. 21

[538] Snyder (1999) p. 342

the private ordering mechanisms in transnational commerce as a noble reflection of societal self-government by embracing a matter of fact affirmation of *lex mercatoria* as the expression of private, autonomous, market-related power.[539] The underlying conception of a pure, private law, free from political intervention and influence is based on the conceptual separation of state and society, which is derived from the nineteenth century *laissez faire* liberal economic model, according to which economic sphere is apolitical and belongs to the society.[540]

Consistent with the above-described developments, it is suggested that the definition of the international public sphere has changed. Unlike the *domestic* public sphere, which refers to "the sphere of private people come together as a public" engaging in public debate ("rational-critical discourse") on political ("state-related") matters,[541] the traditional *international* public sphere *was* composed exclusively of states, for the reason that states were the only recognised and legitimate *public* in the Westphalian system.[542] It is claimed, however, that in connection with globalisation and the rise of non-state actors a new and non-state based global public sphere is emerging.

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[539] Zumbansen (2002) p. 419

[540] The historical background of this non-interventionist state is discussed at length below in chapter VIII.

[541] Habermas, Jürgen, *The Structural Transformation of the Public Sphere*, Polity Press: Cambridge, 2003, p. 176. The 'contemporary' use of the concept of public sphere is virtually associated with the German philosopher Jürgen Habermas, who examines the concept of public sphere as the historically specific phenomenon that arose in conjunction with a society separated from the state in the seventeenth and eighteenth centuries (*Ibid.* p. 127). In the first part of his above-mentioned book, Habermas examines the development of public sphere in the period of liberal capitalism while he in the second part investigates the transformation (degeneration) of the public sphere in the 'organised capitalism' where the distinction between private and public realms becomes blurred and where a rational-critical debate is replaced by apolitical/passive culture of consumption and where the public sphere becomes dominated by states and corporate actors. It is however important to note that Habermas' idealisation of the early bourgeois public sphere is criticised, among others, for exaggerating the emancipatory potential of the bourgeois public sphere as it was composed of only educated and propertied men. In other words, the early (ideal) bourgeois public sphere did not include the largest part of the population it did not include workers nor women. For a detailed criticism of Habermas' work, see, Calhoun, Craig (ed.), *Habermas and the Public Sphere*, The MIT Press: Cambridge, Massachusetts, and London, 1999.

[542] Ruggie, John, Gerard, *Reconstituting the Global Public Domain*, 10 European Journal of International Relations (2004) 4, p. 504-505. It is interesting to note that there is also a social-democrat version of the 'return' or 're-constitution' of the public sphere narrative. In relation to the neo-liberalism's crisis, some writers argue that there is a move beyond the Washington consensus, which represented everything against what is *public* in essence. According to this view, the more it becomes apparent that liberalised trade, open markets and diminished state activities have failed to create a more equitable distribution of social goods among citizens and people the advocates of this approach have put more emphasis on strengthening the public domain (i.e. civil society, institutions and governance, democratic values and the rule of law). For a collection of texts holding this view, see Drache, Daniel (ed.), *The market or the public domain?* Routledge: London and New York, 2001

Accordingly, this new global public sphere "exists in transnational non-territorial spatial formations, and is anchored in norms and expectations as well as institutional networks and circuits within, across, and beyond states".[543] Thus, law is not any longer considered as an inter-state normative system created by states to regulate inter-state relations, but as a social field among many others, where both states and non-state actors negotiate about the validity of norms on various levels.

The increasing tendency of self-regulation can to some extent be justified on the ground of efficiency, flexibility and dynamism as well as economical in producing diminished transactional costs. However, if law is defined as the circumstantial result of multilevel negotiations between different actors then it would be difficult to distinguish law from other social norms. Just as importantly, if law is not any longer able to provide predictability, certainty, or consistency due to the oscillations between the legal and the social, one can rightly ask what is the point attributing any normative value to propositions of law?[544] There are two additional factors that enhance the criticism of uncertainty about *lex mercatoria*. The first can be related to its vagueness; despite the recent codification efforts, such as the UNIDROIT principles, there remains great doubt as to the precise regulatory content of *lex mercatoria*. Second reason is the incompleteness of codifications with regard to the legal development outside of the text of the UNIDROIT principles.[545] Also, as Zumbansen puts it, the focus on the possibility of law existing outside the norms set by states involves the risk of "seeing 'law' in every economic agreement".[546] Moreover, even when self-regulation might be considered democratic for allowing the parties to regulate their own activities, it nonetheless raises legitimacy question of its actors who empowered themselves. As Günter points out, for instance, how can fragmented procedures of self-regulation take

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[543] Ruggie (2004) p. 519. However, the author further adds that the new global public sphere is "constituted by interactions among non-state actors as well as states" and it does not replace states, but "embed systems of governance in broader global frameworks of social capacity and agency that did not previously exist" (*Ibid.*).

[544] Twining, William, *Globalisation and Legal Theory*, Cambridge University Press: Cambridge, 2000, p. 41

[545] Zumbansen (2002) p. 407

[546] *Ibid.* p. 406

into account third party interests and rights?[547] Finally, the possibility of guaranteeing that procedures of self-regulation are transparent enough to hold decision-makers responsible for decisions and their consequences is considerably limited compared to national law with one legitimate legislator and one coherent system of norms and precedents.[548]

6.6 Concluding remarks

The aim of this chapter was to analyse *lex mercatoria* as a model of spontaneous societal self-regulation and a new form of non-state legal order. Against this background, the following remarks are intended to provide an account of the significant characteristics of the new *lex mercatoria* as an example of "non-state actor" paradigm and its difference from the NIEO as an example of the state-centred international law:

(i) Contrary to the NIEO, *lex mercatoria* has not occurred out of an inter-state bargaining process, but it has spontaneously emerged from the custom, practices and behaviour of traders. Its modern version is claimed to have emerged out of the contractual activities of MNEs and the practices of transnational lawyers and other professionals engaged in international commerce. Hence, MNEs and other non-state business actors are the primary 'subjects' of this new law. (ii) *Lex mercatoria* is mainly produced by "the social peripheries" and not by the "political centres of nation-states and international institutions".[549] Hence, as a non-state, "bottom-up" model of self-regulation, *lex mercatoria* breaks the imperative link between state and law. (iii) Related to the first two points, the 'will' of state as the basis of obligation in the NIEO model is in the *lex mercatoria* replaced by the 'will' of contracting parties. In other words, the contract has become the main source of international commercial law. (iv) Diametrically opposed to the NIEO's state-led economic nationalism, *lex mercatoria* is a private, market-led economic model, whose principal conviction is that the greater

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[547] Günter, Klaus, *Legal Pluralism and the Universal Code of Legality: Globalisation as a Problem of Legal Theory*, paper presented at Colloquium in Legal, Political and Social Philosophy, New York University School of Law, 25 September 2003, available at http://www.law.nyu.edu/clppt/program2003/readings/index.html

[548] *Ibid.*

[549] Teubner (1977) p. 7

efficiencies and the generation of wealth and happiness can be generated through liberal political economy, where a distinction between politics and economics is deemed necessary. Although the latter recognises the importance of some governmental functions, especially in the domain of domestic and international security, the focus on theory and practice of international economic regulation has changed from law-making by national sovereigns or international organisations centred on the UN system to informal rule-making and self organisation by the international business community. To put it differently, the NIEO was a nation-to-nation model whereas *lex mercatoria* is a business actors-to-business actors model. (v) The NIEO intended to create a highly regulated international economic environment and legally binding rules for MNEs whereas the *lex mercatoria* model *favours* informal, flexible, discretionary, and soft regulations, which are responsive to fast changing economic conditions in the quest for enhanced market competitiveness. However, it is important to keep in mind that the last point describes a discursive tendency rather than the reality itself. As shown in this chapter, even though the law merchant itself is portrayed as autonomous, this is rather an ambivalent claim that obscures the fact that much commercial custom and practice gets 'codified' either through statue or by way of its recognition in litigation, especially in common law countries where such recognition may acquire the status of a precedent.

7 THE NON-STATE ACTOR SUB-PARADIGM: THE EVOLUTION OF INTERNATIONAL STANDARDS OF CORPORATE SOCIAL RESPONSIBILITY

7.1 Introduction

In the previous chapter the 'new' *lex mercatoria* has been described as an example of a "bottom-up" model of self-regulation. This chapter deals with the evolution of the international standards of corporate social responsibility (CSR), which is seen as an example of a "top-down" model of self-regulation. CSR, at least as it is understood today, is a relatively new form of regulation. The changing character, scope and ever-growing magnitude of corporate social responsibility can be explained by the restructuring of state-market relations that have characterised the contemporary era of globalisation and economic liberalisation, promoting self-regulatory and non-binding approaches to business regulation that relates to human rights, social and sustainable development. Therefore CSR is analysed in this chapter within the context of the decreasing power of the public authorities as regulators of economic, financial or commercial activities and as organisers/guarantors/supervisors of public services of general interest.

Section 7.2 describes the concept of corporate social responsibility, highlighting its distinctive features as a non-state normative order and gives examples of specific initiatives. The section also gives a brief account of its evolution. Section 7.3 examines the sources of CSR dividing it into three types based on its regulatory body. 7.3.1 describes the first type public international CSR instruments and identifies some of their achievements and limitations; 7.3.2 explores the second type CSR instruments authored by NGOs and examines some of the most prominent multi-stakeholder initiatives. Sub-section 7.3.3 examines the third type CSR issued by enterprises themselves or business organisations in a particular field. This section also includes a discussion on the concept of corporate governance and examines MNEs motivations to adopt CSR codes. Section 7.4 examines the shift toward non-governmental regulatory systems and assesses the

complexity of self-regulation and external regulation focusing on the role of soft law in this change. Moreover, section 7.4 assesses the motivations of MNEs to adopt CSR codes. Lastly, the conclusion part relates the concept of CSR to the 'new' *lex mercatoria* and the NIEO in order to provide an overview of the similarities and differences between these three models.

7.2 The definition, evolution and content of CSR[550]

The past twenty years have seen a radical change in the relationship between business and society. Key drivers of this change have been economic globalisation, privatisation, deregulation, liberalisation, the increased size and influence of companies, and the declining regulatory and economic policy-making capacity of the state.

It is a widely shared perception that MNEs are among the principal drivers and most important beneficiaries of globalisation, including privatisation, deregulation, and freeing of international trade and investment flows, which has led to MNEs rising influence on the development of the world economy.[551] Likewise it is generally recognised that the existing international instruments regulating the conduct of MNEs are insufficient compared to the power they have obtained in the globalisation process. The concept of corporate social responsibility (CSR), as frequently suggested, has developed as an answer to fill this perceived gap between the power and responsibility that MNEs possess. The 2001 European Commission Green Paper on CSR defines this responsibility as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis". It is also added that being socially responsible means not only fulfilling legal expectations, but also going beyond basic legal obligation.[552] It should however be noted that there is no consensus over either the definition or precise content

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[550] The concept of corporate social responsibility has several close terms, such as corporate citizenship, corporate governance as such to anti corruption obligations, consumer protection and ethical business standards, corporate responsibility, etc. In this study the term CSR is used as an umbrella term for all of these concepts, though a bit indiscriminate.

[551] United Nations Conference on Trade and Development, *World Investment Report 1999*, UN: New York and Geneva, 1999, Chapter XII, available at http://www.unctad.org/en/docs/wir1999_en.pdf

[552] "Promoting a European Framework for Corporate Social Responsibility: Green Paper", July 2001, p. 7, available at http://europa.eu.int/commm/employment_social/soc-dial/csr/greenpaper_en.pdf.

of CSR. Bearing this fact in mind, the international standards of CSR can be accepted as referring to informal and legally non-binding rules and standards adopted or issued by non-state actors as well as intergovernmental organisations to regulate business conduct especially in the domains of human rights and environment in an increasingly de-regulated or under-regulated global economy.

The proliferation and growing interest in these codes during the last two decades is intimately connected to the increasing demand for MNEs to be more socially responsible.[553] However, some scholars argue that the roots of the present form of CSR go back to a period prior to globalisation or "the last wave" of globalisation. As early as the 1930s, the question whether enterprises' responsibility is limited to their "shareholders" or if it should go beyond shareholders and also include "stakeholders" (i.e. all that may be influenced by the activities of the enterprise in question, such as workers and citizens) was passionately discussed.[554] In 1953, Bowen stated that "by virtue of their strategic position and their considerable decision-making power", the social responsibility of the businessman is "to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society."[555] In a similar vein, in a speech to the Harvard Business School, in 1969, Henry Ford II referred to CSR as the indirect obligation of business based on the concept of "social contact" between industry and society.[556] Certainly, there have been contrasting views on this matter. For instance, in 1970, in his famous article entitled *The Social Responsibility of Business Is To Increase Its Profits*,

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[553] The concept of CSR is currently enjoying an unprecedented popularity. To illustrate the almost absurdly soaring interest in CSR, Ruggie cites some calculations performed in March 204 as a part of a collaborative research project, conducted by the Center for Business and Government and Harvard University. Accordingly, the quantity of the available information on the World Wide Web that addresses various aspects of CSR amounts to nearly 15 million pages (Ruggie, 2004, p. 513).

[554] See Berle, Adolf, A. and Means, G. C., *The Modern Corporation and Private Property*, 3rd edition, Transaction Publishers: US, 1991 (The book was originally published in 1932 by Macmillan, New York).

[555] Bowen, Howard R., *Social Responsibility of the Businessman*, Harper & Brothers, Cop: New York (1953) p. 36

[556] Donaldson reformulated the idea of constructing a 'social contract' for business using the analogy of how Hobbes, Locke and Rousseau used the metaphor of "social contract" to explain state-society relationship (Donaldson, Thomas, "Constructing A Social Contract For Business" in White, Thomas, I. (ed.), *Business Ethics*, Macmillan Publishing Company: New York, 1993). See also Muchlinski, Peter, "International Business Regulation: An Ethical Discourse in the Making?" in Campbell, Tom and Miller, Seumas (eds.), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organizations*, Kluwer Academic Publishers: Dordrecht, (2004).

Milton Friedman criticised those businessmen, who employed the concept CSR, of being "unwitting puppets of the intellectual forces" and "preaching pure and unadulterated socialism".[557] For, according to Friedman, the only responsibility of business is to achieve profit maximisation for the owners of the enterprises through competitive advantage, cost minimisation, market efficiency, and optimal returns on investments and market dominance.[558]

Since then, however, the concept of CSR has been transformed considerably. Although the issues of human and workers rights and the environment are the most central, the scope of social responsibilities of MNEs is at the present stage considerably extensive. These CSR standards are ranging from the abstention from corrupted practices, seeking or accepting exemptions related to environmental, health, safety, labour, taxation, financial incentives, or other issues, to the duty of MNEs to contribute to the sustainable development of the host country and encouragement of local capacity building.[559] Therefore, some scholars maintain that the contemporary CSR standards differ from its earlier interpretations both in terms of motive and normative force these instruments possess. Before, according to this account, CSR, focused either on short-term corporate interests or on long-term corporate success strategy and has therefore essentially been a form of philanthropy. On the other hand, it is maintained that the current contemporary CSR has gained the character of 'soft law' due to the involvement of public international bodies and NGOs at some or all four levels of the self-regulation process.[560]

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[557] Originally published in "New York Times Magazine, September, 13, 1970, republished in *Business Ethics*, White, Thomas, I. (ed.), Macmillan Publishing Company: New York, 1993, p. 162. For an overview of the changing attitude of business approach to CSR and a criticism of Friedman's above-quoted interpretation, see Avery, Chris, "Business and Human Rights in a Time of Change" in Kamminga, Menno, T. and Zia-Zarifi, Saman, *Liability of Multinational Corporations under International Law*, Kluwer Law International: The Hague, 2000

[558] For a detailed survey of the so-called "shareholders approach", see Korhonen, Jouni, *The dominant economics paradigm and corporate social responsibility*, 9 Corporate Social Responsibility and Environmental Management (2002) 1

[559] See, for example, Chapter II titled "General Principles" in the revised OECD Guidelines for Multinational Enterprises, available at http://www.oecd.org/dataoecd/56/36/1922428.pdf.

[560] These four levels are standard setting, monitoring, enforcement, and adjudication. On the subject, see Bantekas, Ilias, *Corporate Social Responsibility in International Law*, 22, Boston University International Law Journal (2004), p. 317

In respect to the development of the substantive content of CSR standards, which focus on corporate human rights obligations, an analogy has been drawn between the evolution of the concept of CSR and the so-called "three generations of human rights".[561] Leisinger, for instance, argues that although human rights together represent an indivisible whole and integral unity, it is still important to distinguish between different generations of human rights obligations of business. Accordingly, the first generation is composed of civil and political rights and the obligation of MNEs is not only to make sure that MNEs do not benefit from the violations of third parties (often host state), but also to support these rights in their "sphere of influence". The second generation deals with the rights of entitlement to a life of dignity, such as food, accommodation, and medical care. The CSR obligation of MNEs with regard to these rights is to protect and promote them mainly through doing business with good management principles. Lastly, the third generation CSR refers to the so-called collective or solidarity rights, such as the right to sustainable development. In this respect the CSR obligations appear to be rather a moral than legal duty with the aim to promote the possibilities of a full realisation of human development.[562]

To sum up, CSR is based on the recognition that commercial enterprises are not only responsible to their shareholders, but also to their stakeholders, which include, among others, employees, customers, investors, suppliers, and all others, who are directly or

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[561] According to "three generations of human rights" approach, First-generation human rights deal essentially with civil and political liberty and participation in political life. They serve to protect the individual from excesses of the state. First-generation rights, which include, among other, freedom of speech and right to a fair trail, have been first enshrined at international level by Universal Declaration of Human Rights (UDHR) of 1948 and then by International Convenant on Civil and Political Rights, created in 1966 and entered into force in 1976. The second-generation human rights are related to substantive equality, social justice and security. Likewise, these rights, which among others include right to housing, work, social security and health care, are also first embodied in the UDHR and then in the International Convenant on Economic, Social and Cultural Rights, created in 1966 and entered into force in 1976. The third-generation of human rights, which existence is not widely recognised, refers mainly to the so-called 'collective rights, including the right to development and environment. For a detailed survey of the discussions concerning three-generations approach, see *The Universal Declaration of Human Rights: a common standard of achievement*, edited by Alfredsson, Gudmundur and Eide, Asbjørn, Nijhoff: The Hague, 1999

[562] Leisinger, Klaus, M., *On Corporate Responsibility for Human Rights*, the Special Advisor of the UN Secretary General on the Global Compact, Basel, April 2006, available at http://www.novartisfoundation.com/pdf/On_Corporate_Responsibility_for_Human_Rights.pdf. For further reading on the third generation rights in the context of the CSR standards developed by intergovernmental organisations, see Muchlinski, Peter, *Human Rights, Social Responsibility and the Regulation of International Business*, 3 Non-State Actors and International Law (2003) p. 133

indirectly affected by the operations of these enterprises.[563] Even though international CSR standards are undertaken voluntarily by MNEs they have essentially developed as a result of the increasing societal expectance, the pressure made by NGOs, consumer awareness and other external forces. Therefore, CSR can be considered as an example of a "top-down" informal (i.e., non-state) soft law development, driven by an external regulatory impulse.

7.3 The sources of international CSR standards

MNEs are increasingly adopting CSR codes of conduct. The incentive to do so is mainly coming from NGOs, trade unions, and consumer groups. However, the instruments dealing with the social responsibilities of MNEs have emanated not only from non-state and non-business groups, organisations or activists, but it has its origin in a much broader range of sources, including public national and international bodies as well as individual companies and business organisations themselves. This section examines the sources of CSR standards dividing them into three categories. Sub-section 7.3.1 gives an account of public international instruments containing CSR standards. This section also briefly looks at the some recent governmental attempts to regulate business' conduct related to social and human rights responsibility through domestic legislation. Thereafter, sub-section 7.3.2 outlines the CSR codes emanating from NGOs. Lastly, sub-section 7.3.3 depicts CSR codes adopted by MNEs and business organisations. This section also assesses the business' motivations to adopt these codes.

7.3.1 International instruments addressing the issue of business' social responsibility

The question of whether there is any *binding* international regulatory regime specifically and/or directly addressing the social responsibility of MNEs should be principally answered negatively. As is well known, the existing international human

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[563] For a recent survey of the "stakeholders theory", see Carroll, A. B. *Managing ethically with global stakeholders: A present and future challenge*, 18 Academy of Management Executive, (2004) 2.

rights regimes are designed to protect individuals from the power of states.[564] There are only a few multilateral conventions that regulate directly the social responsibility of MNEs as a 'legal person' in a particular business area. The most noteworthy examples are the "International Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment" (not in force)[565], the "International Convention on Civil Liability for Oil Pollution Damage",[566] which directly impose liability on legal personals including MNEs. However, it should be remembered that the former example is not in force yet, and both conventions are subject to a number of specific exemptions and reservations, which means that these conventions have a reduced capacity to be enforced. Another example of legally binding international instrument is the OECD "Convention on Combating Bribery of Foreign Officials in International Business Transactions."[567] One could also add the numerous ILO Conventions as examples of legally binding international instruments even though the enforceability of the *formally* binding obligations embodied in ILO conventions are limited due to the fact that their application has to take into consideration the specific conditions of each country.[568] As discussed in chapter 2, section 2.5 in this study, such

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[564] For instance, the International Convenant on Economic, Social and Cultural Rights, which covers all essential aspects of economic, social and cultural rights, is designed either to protect individual or group of individuals against the abuse of state power or to hold the state responsible for the improvement of these rights. Likewise, numerous subsequent 'specialised' international instruments, such as Convention on the "Elimination of All Forms of Discrimination against Women" and "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families", which govern one or more of area(s) embodied in this Convenant are designed to provide similar protection or to define state responsibility. Moreover, even when the hard treaty form of some of these instruments may invoke that they constitute hard law, it is not often the case. Since most provisions of such 'formally binding' instruments have been formulated in a general or hortatory language to reach an agreement, these instruments are in reality not enforceable. On the issue of soft provisions of hard law, see chapter 2 in this study.

[565] It has been opened for signature by the Council of Europe in 1993, not only to the member states but also to those non-member states, which took part in its elaboration, to the non-member states which were invited to do so by the Committee of Ministers and to the European Community. European Treaty Series - No: 150, available at http://conventions.coe.int/Treaty/EN/Reports/Html/150.htm

[566] Signed at Brussels, November 29, 1969, entered into force in 1975, reproduced in 64 American Journal of International Law (1970) 2. The Convention covers pollution damage resulting from spills of persistent oils suffered in the territory (including the territorial sea) of a State Party to the Convention. The Protocol of 1992 extended the scope of the 1969 Convention to also cover the exclusive economic zones of the state Parties. There have also been additional Amendments in 2000, which have raised the compensation limits for persons who suffer oil pollution damage.

[567] It entered into force in 1999 and ratified by 36 all member and 5 non-member countries as of 24 November 2005. See http://www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html#text

[568] See, ILO Constitution, available at http://www.ilo.org/ilolex/english/constq.htm

compromises give the governments the possibility to decide the content of the undertaken obligation, which makes such instruments essentially soft.

Thus, there are only a few international instruments that lay down legally binding rules that regulate the social aspects of MNEs' activities. To put it differently, MNEs have largely been able to operate in the absence of direct legal obligations on them. On the contrary, MNEs have traditionally been given rights and protection under international law. For instance, one could mention the concept of "international minimum standards of treatment for aliens and their property", which was developed during the nineteenth century particularly in relation to expropriation and compensation.[569] A more recent, though failed, attempt to formulate a binding investor protection regime at the international level is the Multilateral Agreement on Investment (MAI), which did not provide provisions as regard to environmental, social or human rights obligations of MNEs, but provisions "for the promotion of investors and their investments".[570] Another example is the rapid proliferation of bilateral investment treaties (BITs). Over the last two decades or so, BITs have emerged as an important tool in the protection of foreign investment, which enable a foreign investor to directly seek alleged damages from the host foreign government by bringing a claim before an independent arbitral tribunal.

Likewise, the International Center for the Settlement of Investment Disputes (ICSID), created by an international treaty under the auspices of the World Bank, enables MNEs to submit disputes arising from the contracts between states and MNEs to binding arbitration by the ICSID.[571] Another example of an international agreement regulating international business, whose legal framework as regard to social dimension is minimal,

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[569] For more than two hundred years international law has laid down a minimum international standard for the treatment of aliens (that is, nationals of other states). Failure to comply with the minimum international standard engages the international responsibility of the defendant state and the national state of the injured alien may exercise its right of diplomatic protection" (Malanczuk, 1997, p. 256). For a survey on business regulation in international law, among others, see Somarajah, M., *The International Law on Foreign Investment*, Cambridge University Press: Cambridge, 2004; Muchlinski, Peter, "A Brief History of Business Regulation" in Picciotto, Sol and Mayne, Ruth (eds.), *Regulating International Business: Beyond Liberalizm*, Macmillan Press Ltd.: New York, 1999; Muchlinski, Peter, T., *Multinational Enterprises and the Law*, Blackwell: Oxford UK & Cambridge USA, 1999; Lowenfeld, Andreas, *International Economic Law*, 2003: Oxford University Press: Oxford, 2002

[570] Muchlinski (2003) p. 127. See also section 3.7.2 in this study.

[571] On the subject, see section 3.7.2 in this study.

is the GATT/WTO regime.[572] Notwithstanding, some writers contend that the GATT/WTO regime trade and human rights regimes need not be in conflict, so long as the trade regime is interpreted and applied in a manner consistent with the human rights obligations of states.[573] Indeed, as the recent Doha Declaration on TRIPS and Public Health shows,[574] trade and investment related agreements and institutional frameworks might contain potentially relevant human rights provisions. Yet, such a potential should realistically be deemed as fairly limited.

The existing international instruments that cover the social responsibilities of business display essentially a soft law character. That is to say, they are on the whole legally non-binding voluntary codes or declarations. Still, it can be observed that there is an increasing demand for and interest in regulating the social aspects of MNEs activities at international level. Below, three recent examples of such normative development will be discussed, namely the Global Compact, the UN "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights" (the Norms, hereinafter),[575] and the "World Bank's Policy Guidelines and Inspection Panel". Other examples of such non-binding international instruments include notably the OECD 1976 Guidelines for multinational Enterprises (revised in 2000) and the ILO's 1977 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policies, and the long-before shelved Draft UN Code of Conduct for Transnational Corporations.[576] The issue of social responsibility of MNEs is also addressed in non-binding UN conferences, declarations and summits. The most noteworthy and influential examples are the United Nations Conference on the Human

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[572] On WTO and human rights generally, see Marceau, Gabrielle, *WTO Dispute Settlement and Human Rights*, 13 European Journal of International Law (2004) 4; Various chapters in *International Economic Law with a Human Face*, Weiss, Friedl; Denters, Erik and de Waart, Paul (eds), Kluwer Law International: The Hague (1998); and Ala'i, Padideh, *A Human Rights Critique of the WTO: Some Preliminary Observations*, 33 George Washington International Law Review (2001) 3-4.

[573] See for instance, Qureshi, Asif, "International Trade and Human Rights From the Perspective of the WTO" in Weiss, Friedl; Denters, Erik and de Waart, Paul (eds), *International Economic Law with a Human Face*, Kluwer Law International: The Hague (1998).

[574] WT/MIN(01)/DEC/2, adopted on 14 November 2001.

[575] U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, adopted on 13 August 2003, also available at http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/64155e7e8141b38cc1256d63002c55e8?Opendocument

[576] Since the OECD Guidelines and the ILO's Tripartite Declaration and the UN Draft Code have already been examined in the context of the NIEO in this study, there is no need to deal with them here once again (See section 5.4 in this study).

Environment, Stockholm, 5-16 June 1972; the 1992 Rio Declaration on Environment and Development and the Johannesburg Declaration on Sustainable Development, 25 April 2003.

The "Global Compact" represents an international initiative that brings companies together with UN agencies, labour representatives, and civil societies to support ten principles in the area of human rights, labour, the environment, and anti-corruption in 2000. As of March 2006, 2,900 companies from 90 countries had become participants in the Global Compact.[577] However, the Global Compact is not a new set of codes of conduct nor a regulatory instrument but a value-based platform using transparency and dialogue to promote institutional learning.[578] It was said that despite the absence of national governments, the Global Compact, with the involvement of the UN in its formation and the broad participation of business, trade unions and NGOs, had the potential to fill a vital gap in global governance. Yet, as should be expected, this UN initiated partnership with big business has evoked harsh criticism due to the fact that some of the most important business partners of the Global Compact are known as the worst violators of the principles that the Global Compact embodies. It is said that these enterprises are now given the opportunity to wash themselves under the UN flag. Still, albeit such weaknesses, the Global Compact can on one level be deemed important considering that it promotes principles derived from international law and that it reinforces the notion that international human rights law apply not only to states but also to MNEs.

Unlike the Draft UN Code of Conduct for Transnational Corporations, which contained provisions ranging from respect for the sovereignty to observance of tax laws of the host state, the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights" emphasises human rights. Consistent with its focus on human rights, "the Norm" originated from a human rights body within the framework of the UN.[579] The Norms", as opposed to, for instance, the

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[577] http://www.unglobalcompact.org/docs/about_the_gc/stakeholder_letter_2006.pdf

[578] http://www.unglobalcompact.org/

[579] For the background of the institutional development of "the Norm" see Weissbrodt, David, "The Beginning of a Sessional Working Group on Transnational Corporations within the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities" in Kamminga, Menno, T. and Zia-Zarifi, Saman, *Liability of Multinational Corporations under International Law*, Kluwer Law International: The

OECD Guidelines, do not emphasise their non-binding nature. However, "the Norms" incorporate by reference to a long list of not only soft and hard international instruments adopted by multilateral organisations, but also private industry or commodity group initiatives, framework agreements between MNEs and workers' organisations and corporate codes of conduct. Moreover, they display some other features common to international non-binding instruments. For instance, the implementation of their obligations is to be undertaken by MNEs themselves by adopting disseminating and implementing them as internal (i.e., non-binding, voluntary) corporation rules.[580]

The "World Bank's Policy Guidelines" covers three areas: (i) environmental protection and sustainable development, (ii) protection of indigenous people (iii) gender equality. None of these provisions have legal force, but these guidelines give the possibility to scrutinise the conduct of the Bank in these three areas. Failure by the Bank to comply with its own Guidelines may result in the Bank's withdrawal from a project. The Bank can also block companies that do not comply with the Guidelines from participating in future projects. In 1994 the World Bank established an independent "World Bank's Inspection Panel". Private individuals in the territory of the borrowing state, who have been adversely effected by a World Bank project, are entitled to register grievances with the Panel, alleging that a project does not conform with the Bank's Guidelines or operational procedure. Even local NGOs are able to lodge the claim on behalf of individuals that they have been adversely affected. If the World Bank's Board of Executive Directors approves the inspection panel has authority to investigate a particular project.[581] It can be noted that although these mechanisms incorporated in the framework may seem impressive, they are "often stronger on the paper than in reality".[582]

Against this background, it can be said that even though these above-named public international CSR instruments are all non-binding they do not constitute the same type

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Hague, 2000; Vagts, Detlev, F., *The UN Norms for transnational Corporations*, 16 Leiden Journal of International law (2003); and Muchlinski (2003), especially pages 135 to 145

[580] Section H, entitled "General Provisions of Implementation".

[581] http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,menuPK:64129249~pagePK:64132081~piPK:64132052~theSitePK:380794,00.html

[582] *Beyond Voluntarism: Human Rights responsibility and the developing international legal obligations of companies*, report published by "International Council on Human Rights Policy" in February, 2002, p. 107, available at http://www.ichrp.org

of soft law. For instance, the OECD Guidelines are the only multilateral codes addressed by governments to MNEs. The other instruments are not directed at MNEs themselves, but at states whose duty is to apply them within their jurisdiction, though this duty is not legally binding. Also, some of the standards that the Global Compact and the "Norms" contain are open-ended and general compared to provisions in the OECD Guidelines or the ILO Declaration.[583] Another difference among them is that the Global Compact does not outline a monitoring and enforcement mechanism whereas the "Norms", the OECD Guidelines and the ILO Declaration, extend beyond pure voluntarism to include the creation of a "follow-up" mechanism for implementation especially enabling MNEs conduct to be scrutinised. However, it should be stressed that the mechanisms that these instruments contain can hardly be considered as either proper or independent monitoring and implementation mechanisms, a characteristic that considerably weakens their enforceability.

Yet although the majority of public international instruments governing MNEs' social responsibility can be categorised as soft law, this should not be understood as saying that they are altogether legally or practically irrelevant. As it has been discussed in chapter 2 in this study, soft law can develop into hard law. Non-binding initiatives can pave the way for harder or legalistic initiative once particular standard is seen as constituting evidence of an emerging customary rule, as at least partly occurring in the example of the evolution of the "Universal Declaration of Human Rights". Also, international soft law, which is the basis of most CSR standards, carries a considerable moral authority. These soft law initiatives may therefore encourage or require national governments to incorporate its provisions in legislation at the national level. By the same token, soft law adopted by governments or intergovernmental processes is, often considered to have greater legitimacy and carry more legal weight than the *form* of the legal instrument may evoke, which in turn may encourage voluntary private initiatives to incorporate such standards into their policy.

As Bantekas maintains, any reference to CSR legislation at the national level can easily be deemed paradoxical considering that the whole rational behind CSR rests on de-

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[583] For instance, "the Norms" embodies the obligation to "provide workers with remuneration that ensures an adequate standard of living" without taking into consideration the wide differences in wage standards between different parts of the world (Section D, entitled "Rights of Workers"). See also, Vagts (2003) p. 801

regulation.[584] Indeed, with a few exceptions, which are essentially designed to secure the proper functioning of the market economy rather than a social concern, such as the regulation of bribery and tax evasion, the MNEs' extraterritorial operations are not subject to home state regulation. However, there have been few examples where proposals for legislation to deal directly with certain human rights obligations in the overseas activities of MNEs have been made, notably in Australia,[585] the UK,[586] and the US.[587] However, none of these have reached the statute book.

Also, beyond these examples, the US Alien Tort Claims Act (ATCA) should be considered important.[588] The ATCA allows foreign victims of serious human rights abuse abroad to sue the perpetrators in U.S. district courts. The accused perpetrator must be in the U.S. to be served court papers, but otherwise neither the victim nor the perpetrator needs to reside in the United States. However, this 200-year-old statue, which provides the sole source of detailed jurisprudence in this domain, has several procedural and substantial limitations to be able to account for MNEs' human rights violations overseas.[589]

7.3.2 CSR codes and standards issued by NGOs

NGOs have grown in number, power, and influence since the 1980s. These societal groups emanate from a variety of sources and include religious institutions, environmental groups, human rights organisations, trade unions, public health activists and groups that are concerned with global poverty. NGOs have been among the most

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[584] Bantekas (2004) p. 325

[585] Corporate Code of Conduct Bill, 2000, available at http://www.natural-resources.org/minerals/csr/docs/csr/Australia%20Corporate%20Code%20Bill%202000.pdf

[586] As introduced as a Private Member's Bill in the House of Commons on 12th June 2002, available at http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmbills/145/2002145.htm

[587] Corporate Code of Conduct Act, H.R. 4596, 106th Cong. (2000), quoted in Kinley, David and Tadaki, Junko, *From Talk to Walk*, 44 Virginia Journal of International Law (2003-2004) p. 942

[588] The US Alien Tort Claims Act, U.S. Code, Title: 28, Section: 1350. The ATCA was written in 1789, one of the first laws of the new American republic. The text of the law reads, in its entirety: "The district courts shall have original jurisdiction of any civil action by an alien for a tort (personal injury) only, committed in violation of the law of nations or a treaty of the United States", see http://caselaw.lp.findlaw.com/scripts/ts_search.pl?title=28&sec=1350)

[589] Only 13 cases remain ongoing compared to 20 dismissals and three out-of-court settlements. For an account of the ATCA, see Kinley and Tadaki (2003-2004) p. 939

influential factors on the development of the concept of CSR.[590] This has mainly been a combined result of the following two reasons: (i) Neo-liberal policy agenda and the processes of trade liberalisation, privatisation, deregulation as well as the neo-liberal focus on the reduction of fiscal deficits and the minimisation of the role of the state resulted in the growing global poverty and inequality in many parts of the world. These developments have created governmental gaps in many public policy areas. NGOs have moved in to fill the void and they have even started taking the role of government in many social service areas. (ii) The progress in the domain of communications has allowed NGOs to link up with and empower individuals and groups world-wide using Internet-based campaigns.

Business social responsibility concerns have attracted much attention among governments, business and the consumer groups in developed countries. The growing interest in this area has consequently been accompanied by a corresponding proliferation of civil society initiatives to the extent that these initiatives are increasingly overlapping each other creating a "risk of inducing a code fatigue".[591] Considering the plenitude of NGO codes of conduct on CSR, to examine them it is imperative to divide these NGO originated instruments into different categories using different criteria. One example could be to divide them by the subject-matters they cover or to divide them in terms of their organisational structures, i.e. whether they are local, national or international. The diversity of NGO codes of conduct on CSR is examined here in three broad categories based on the institutional mechanisms they are equipped with. By doing so, it is intended to provide an overview of the varying normative content of these codes.

The first category is composed of those codes, which solely express a set of CSR standards without providing any follow-up or reporting mechanisms. The examples of such guidelines that have no mechanisms for verifying whether signatories comply with the code, and has no structures in place through which a breach of the code can be

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[590] See, among many others, Broad, Robin (ed.). *Global Backlash: Citizen Initiatives for a Just World Economy*, Rowman and Littlefield, New York, (2002); and Crowther, David and Raymon-Bacchus, Lez, *Perspectives on Corporate Social Responsibility*, Ashgate: UK (2004)

[591] UNCTAD *The Social responsibility of Transnational Corporations*, p. 47, available at http://www.unctad.org/en/docs/poiteiitm21.en.pdf

reported are The Red Cross Code of Conduct[592] and the South African NGO Coalition's (SANGOCO) code of ethics.[593] The second type of category of NGO guidelines on CSR consists on those guidelines, which set down mandatory reporting requirements where signatories have to deliver copies of their annual reports and audited statements to a council or committee that scrutinises and assesses them against agreed upon standards. The Canadian Council for International Co-operation's (CCIC) Code of Ethics[594] and Global Sullivan Principles,[595] which include reporting requirements for endorsers, can be given as examples of this category of codes. The third category of codes of conduct lay down more strict compliance procedures. An example of these types of codes are the "InterAction"[596] and "People in Aid"[597] which require pledge from CEOs to certify their organisation will operate in accordance with the code standards. These codes also have complaint mechanisms in place for parties to hold organisation responsible for their compliance with their code.

It is true that NGOs can develop power and legitimacy. However, there are also some concerns about NGO's own legitimacy, transparency and accountability. For instance, earlier, NGOs operated by challenging the system. They sought to hold MNEs accountable for the negative impact that their activities created, especially in developing countries through the exposure and denunciation of MNEs in the mass media, consumer campaigns, direct actions and governmental lobbying. "They generated funds by fuelling public anger or guilt".[598] Today, the NGO-business-government relation has been transformed considerably. They do not only attempt to exert pressures on business through confrontational activism but often operate as part of the system via mechanisms

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[592] http://www.ifrc.org/publicat/conduct/index.asp

[593] http://www.sangoco.org.za/index.php?option=content&task=view&id=8&Itemid=30

[594] http://www.ccic.ca/e/001/index.shtml

[595] http://www.globalsullivanprinciples.org. The Sullivan Principles initially developed for enterprises in apartheid South Africa and then in post-apartheid era they have been transformed into general guidelines. For a detailed examination of the role of "the Sullivan Principles", see McCrudden, Christopher, "Human Rights Codes for transnational Corporations: The Sullivan and McBride Principles" in Shelton, Dinah, *Commitment and Compliance*, Oxford University Press: New York, 2003.

[596] InterAction is the largest alliance of US-based international development and humanitarian NGO. See, http://interaction.org

[597] http://www.peopleinaid.org

[598] Nalinakumari, Brijesh, and MacLean, Richard, *NGOs: A primer on the evolution of the organizations that are setting the next generation of regulations*, 14 Environmental Quality Management (2005) 4, p. 9

such as strategic alliances with companies business associations, and governmental and intergovernmental organisations.[599] NGOs are taking the lead in organising and participating in multi-stakeholder initiatives associated with standard setting, company reporting, monitoring, certification and learning about good practice. They are, among many others, certification schemes, such as the International Organization for Standardization (ISO) 14001,[600] Social Accountability International's (SAI) SA8000,[601] and the Forest Stewardship Council.[602]

Such multi-stakeholder initiatives may help with harmonising standards and implementation procedures, and to impose some order in what has become a confusing array of codes of conduct. Moreover, they can encourage companies to internalise social and environmental standards more systematically throughout their corporate structures. To some extent, they can be seen as a positive step towards an improved dialogue between MNEs and NGOs, and beneficial to democratic governance by engaging a broader range of actors or stakeholders in consultative and decision-making processes. However, such collaborations also raise concerns involving the reliability and trustworthiness of NGOs. Furthermore, the NGOs increasingly compete between each other to raise funds from MNEs, business organisations and governments, which arguably caused a shift in their accountability.[603] As Lloyd points out, NGOs' self-

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[599] For example, in 1997, the World Wildlife Fund joined with companies, among others Unilever, Marks & Spencer and Tesco to create the Marine Stewardship Council system for promoting responsible fishing practices (http://www.msc.org).

[600] ISO 14001 was first published in 1996 and specifies the actual requirements for an environmental management system. It applies to those environmental aspects, which the organisation has control and over that it can be expected to have an influence. See http://www.iso14000-iso14001-environmental-management.com.

[601] Social Accountability International (SAI), which is a non-profit organisation, promotes workers' rights primarily through voluntary SA8000 system based on the ILO standards and UN Human Rights Conventions. see http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=473

[602] The Forest Stewardship Council (FSC) is an international network to promote responsible management of the world's forest. See http://www.fsc.org/en/about.

[603] According to Krut, as of 1997, eight large NGOs controlled almost half of the US' total $8 billion resources for NGOs (Krut, Riva, *Globalization and Civil Society*, Discussion Paper no: 83, the UN Research Institute for Social Development: Geneva, 1997, p. 8). In her cited research, Krut comes to the conclusion that NGOs are increasingly differentiated to be able to act in a cohesive fashion. Krut also pints out the increasing tensions between Northern and Southern NGOs due to, among others, the power imbalance among them, limited access to technology and recourses and conflicting interests (*Ibid.* p. 14 and 50). The problematic nature of the relations between local and developed country-based international NGOs is also drawn attention to. Blackett contends that some NGOs need to safeguard close relationships with international donor agencies, because this, according to the writer, might affect their local delivery (Blackett, 2000-2001, p. 48). For more scholars questioning the accountability and legitimacy of NGOs,

regulatory initiatives are increasingly preoccupied with "clarifying and strengthening upward accountability relationships to donors and governments to the neglect of increasing downward accountability to beneficiaries".[604] Thus, it can be predicted that accountability is becoming one of the key issues determining the possibility of a continuing influence and success of NGO guidelines on CSR.

7.3.3 CSR codes as a response from business

Corporate codes of conduct, which differ substantially from industry to industry and from company to company, can be defined as a statement of a public commitment that outline the ethical standards of conduct that companies will adhere to. In the beginning of 1990s, corporation codes of conduct have appeared as a response of MNEs to the increased social pressure. Hence by adopting voluntary codes of conduct that appear to address the concerns of the critics on a wide array of human rights, human rights-related labour issues and environment the pressure is internalised. In other words, MNEs have essentially been driven by a concern for their public image and the desire to protect their brand names. However, even if the adoption of voluntary codes, to a large extent, has been a response to public pressure, they are essentially voluntary and self-regulatory in their nature. Yet, it should be added that the social pressure induced by NGO, consumer groups or trade unions is not the only explanation to the bloom of corporate codes of conduct.

A related subject to the issue of corporate social responsibility is 'corporate governance', which primarily refers to the rights and responsibilities of a company's management, its board, shareholders and various stakeholders. However, it is generally recognised that corporate governance and corporate social responsibility are closely linked to each other and to business performance. For, corporate governance plays a large part in determining the extent to which a company is accountable to shareholders

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see Anderson, Kenneth, *The Ottawa Convention Banning Landmines, The Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 European Journal of International Law (2000); Wallace, Tina, *NGO Dilemmas: Trojan Horses for Global Neoliberalism?* in "Socialist Register 2004"; Petras and Veltmeyer (2001); and Okafa, Obiora, Chinedu, *The Global Process of Legitimation and the Legitimacy of Global Governance*, 14 "Arizona Journal of International & Comparative Law (1997).

[604] Llyod, Robert, *The Role of NGO Self-Regulation in Increasing Stakeholder Accountability*, paper prepared for "One World Trust" in July 2005, available at http://www.un-ngls.org/cso/cso9/Self-Regulation.pdf

and can fulfil its responsibilities to society at large, including those relating to environmental, social and ethical issues.

Almost all large enterprises have adopted their own corporate codes of conduct.[605] Besides some independent business associations have adopted codes of conduct for their members.[606] Some of these codes outline business goals and sketch ethical boundaries. Others deal with CSR and human rights. The majority of CSR codes combine goals, ethical boundaries and duties in relation to human rights. Other issues that are incorporated in CRS cores are conflict of interest, confidential information, insider trading, labour relations, gifts, and political contributions. Moreover, most of these corporate governance codes set out some sort of procedures for self-evaluation and investigation mechanisms and possess a relatively high degree of institutionalisation.[607]

It is also interesting to note that in 1999, the OECD, which is an inter-governmental organisation, also issued (revised in April 2004) its non-binding *Principles of Corporate Governance*. They are designed "to assist governments and regulatory bodies in both OECD countries and elsewhere in drawing up and enforcing effective rules, regulations and codes of corporate governance".[608]

There are a number of factors that have been influential on the widespread adoption of corporate codes. For instance, avoiding interference by government is said to be a frequent reason for corporations adopting voluntary schemes.[609] The possibility to limit financial liability and litigation risk can also be pointed out as another reason for the increasing interest in adopting corporate codes. Of course, it would equally be possible

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[605] Ninety per cent of Fortune 500 enterprises have some type of codes (Wiley, Carolyn, *The ABC's of business ethics: definitions, philosophies and implementation*, "Industrial Management", January 1, 1995).

[606] For example, members of "Association for Investment Management and Research" are governed by the organisation's own code of ethics and practice standards (AIMR's Code of Ethics and Standards of Professional Conduct [Code and Standards], available at http://www.sec.gov/rules/proposed/s73002/dalamb1.htm).

[607] "Notes" in 116 Harvard Law Review (2003) 7, p. 2126

[608] "The Principles" also aim to provide guidance for stock-exchanges, investors, companies and others that have a role in the process of developing good corporate governance. See http://www.oecd.org/department/0,2688,en_2649_34727_1_1_1_1_1,00.html

[609] For a literature review and a three-country comparative study on the question why corporations use codes of conduct, see Bondy, Krista; Matten, Dirk; and Moon, Jeremy, *The Adoption of Voluntary Codes of Conduct in MNCs*, 109 Business and Society Review (2004) 4

to claim that codes may, by setting out duties of care, increase litigation risk. However, considering the current practices of the courts in various countries it is reasonable to say that for the time being such a risk is comparatively minor. The impact of the rediscovery of the 1789 Alien Torts Claim Acts has already been mentioned in the beginning of this chapter. Another noteworthy development is the "Federal Sentencing Guidelines for Organizations" (FSG), enacted by the US Congress in 1991. It holds the existence of corporate codes of conduct as a mitigating factor. Accordingly, if an enterprise is proved criminally liable as a result of its employees' unlawful action, the enterprise can reduce its penalty by showing that it has an established code to prevent such unlawful actions. The leniency under this act however depends on whether the internal compliance programme meets the specific instructions that have been provided by the FSG, which set up rules for how such codes should be made.[610] Thus, adopting corporate governance rules could help to escape tort liability until 2004. However, since November 2004, due to some significant changes in the FSG, it is not enough any longer to simply adopt an ethics and compliance program and then not enforce it; according to the revised FSG, companies have to prove that they are enforcing them as well.[611]

An additional reason for the proliferation of corporate codes of conduct is the internal mechanisms that bolster the adoption of corporate codes. The desire to protect or enhance company's reputation is generally seen an important motive for MNEs to adopt corporate codes. The relationship between a positive image, which increases the credentials of the company and CSR, is obvious. As it is often said, "CSR sells" by appealing to customers' consciences. CSR helps companies to build brand loyalty and develop a personal connection with their customers. Closely related to this category of CSR are the increasingly used social or eco-labelling; initiatives such as SA 8000, WRAP,[612] and SRI[613]. These initiatives are designed to contribute to the positive public

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[610] Goldsmith, Michael and King, Chad, W., *Policing Corporate Crime: The Dilemma of Internal Compliance Programs*, 50 Vanderbilt Law Review (1997) 1, p. 1786

[611] http://www.uhv.edu/compliance/pdfs/MaryLBrownFederalSentencingGuidelines.pdf

[612] Worldwide Responsible Apparel Production (WRAP) is an independent non-profit corporation dedicated to the promotion of ethical and human manufacturing. The objective of the Apparel Certification Program is to independently monitor and certify compliance with its standards. See http://www.wrapapparel.org.

perception of individual MNEs. However, brand image and good reputation is not the only motivation. By adopting such codes, MNEs may also create a cohesive company culture and a set of values that help them to develop a long-range point of view, which creates an internal company tradition.[614] Besides, CSR codes may improve crisis management within the company. Finally, the adoption of corporate codes by especially leading companies in a particular sector may create wave effect on the other companies in the same field to do likewise.

In some cases the US governmental agencies require enterprises to adopt 'voluntary' codes. For example, broker-dealers have been obliged to adopt codes of conducts on the ground of the "Insider Trading and Security Fraud Enforcement Act of 1988", which authorises the governmental agencies, among others, to 'require' enterprises or professions to adopt their codes.[615] Of course, such state involvement in market economy is hardly incompatible with the liberal ideology, which generally recognises the necessity of the governmental interference with the market especially in the occurrence of "market failure", such as monopoly power, negative externalities, or inadequate information. As Abbott puts it, "open market rules will be subject to governmental constraints that operate in the public interests, such as restricting oppressive labour conditions for children".[616] Likewise, such involvement can also be justified as a method of promoting self-regulation by encouraging enterprises or professionals to police themselves or to take safety measures against market failure. Nonetheless, one might still wonder to what extent such corporate codes could be deemed as voluntary and autonomous when the term "voluntary" is defined as "acting or done with no external compulsion or persuasion", as the OECD does in stressing voluntary nature of CSR codes.[617]

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[613] Socially Responsible Investing (SRI) intends to integrate personal values and societal concerns with investment decisions. Its basic idea is that they offer an alternative investment possibility to the socially concerned investors. Investors that seek to own profitable companies with respectable employee relations, strong records of community involvement, excellent environmental impact policies and practices, respect for human rights around the world, as well as companies producing safe and useful products. See http://www.socialinvest.org/areas/sriguide.

[614] Levis (2006) p. 52

[615] Pitt, Harvey, L. and Groskaufmanis, Karl, A., *Minimizing Corporate Civil and Criminal Liability*, 78 Georgetown Law Journal (1990), p. 1591

[616] Abbott (1999) p. 194

[617] *Corporate Responsibility: Private Initiatives and Public Goals*, OECD Publishing (2001) p. 12

Lastly, a series of corporate scandals, accounting fraud and corporate misdeeds in globally important and well known companies, such as Enron,[618] WorldCom[619] and Tyco International,[620] reinforced the idea that corporate self-governance is not enough; some sort of regulation and control mechanism is needed. It is for instance held that markets have failed to stop poor management performance and been unable to discipline the managerial function by a strong supervisory function. Often the CEO sets the business strategy and strongly influences the choice of the accounting practices that measure the success of that strategy. It is likewise argued that market have not managed to impose the use of single set of accounting standards that would reflect business performances in an objective and comparable way, which would ensure transparency and disclosure more efficiently.[621]

7.4 Assessing CSR codes within the context of self-regulation

This section aims to examine the concept of CSR within the complex interaction between self-regulation and external norm-setting processes. It critically assesses the institutional elements of self-regulatory instruments, such as competition, which is seen as the main mechanism for the non-coercive compliance, the effectiveness of self-regulation, and legitimacy issue of CSR codes. Lastly the section looks at the legal impacts of corporate codes.

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[618] Enron, was a leading an energy and energy-related product and services provider company in the US before its bankruptcy in 2001 when it was revealed that its reported financial condition was sustained mostly by institutionalised, systematic, and creatively planned accounting fraud. See, http://www.time.com/time/business/article/0,8599,263006,00.html.

[619] In 2002, WorldCom, another leading American company in telecommunication branch admitted a multi-billion dollar accounting fraud and filled for bankruptcy protection. See, http://news.bbc.co.uk/2/hi/business/2143725.stm

[620] In 2002, the international CEO, the CFO and general counsel of Tyco International were charged of orchestrating a web of deals that looted the company of at least $600 million. They failed to disclose multimillion-dollar low-interest and interest-free loans they took from the company, and in some cases never repaid. Besides, these three executives failed to disclose their personal sales of millions of dollars' worth of Tyco stock On June 17, 2005. In 2005, they were found guilty sentenced to between eight and twenty five years in prison. See http://edition.cnn.com/2002/BUSINESS/asia/09/12/us.tyco.

[621] *Corporate Governance: Does Capitalism need fixing?*, "US Bilderberg Meeting", 30 May 2002, available at http://ec.europa.eu/archives/commission_1999_2004/bolkestein/docs/speeches/20020530-governance_en.pdf

It can be maintained that even when it is accepted that self-regulatory informal soft law is the principal determinant of corporate behaviour, it should nonetheless be recognised that the interaction between self-regulation and external standard setting is an important aspect of self-regulation. For instance, governmental agencies set in many instances the standards for such self-regulatory private instruments, as exemplified by the "Insider Trading and Security Fraud Enforcement Act" in the previous section. At the international level, international organisations, in particular the UN and the OECD, have attempted to set down some soft standards of behaviour and regulation dealing with or check regulatory arbitrage by MNEs (though without laying down effective sanctions to enforce their rules and standards). Certainly, such efforts to constrain behaviour of MNEs do not originate only from states and intergovernmental organisations but both sides. As the UN "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights" (the Norms) mentioned earlier,[622] shows, the norm-like activities of non-state actors can also play a role in shaping public international regulations, though to a considerably more modest degree. For instance, the preamble of "the Norms" refers to the private or hybrid normative initiatives as its source of inspiration.

The discourse of free market ideology typically conveys that self-interest is the most natural way to motivate each citizen, with competition acting as the main regulatory device. According to this view, unlike state regulation, which is costly, anti-competitive and inefficient, the market's voluntary self-regulatory system incorporates the necessary mechanisms for generating an efficient allocation of available resources. In such a system, where consumers are considered sovereign in their choices, the self-regulating nature of competition would assure adequate levels of consumer welfare.

However, even if it were accepted that the societal ideal of free market capitalism is attainable, there would still be many questions to be answered about the basic premises and conceivable outcomes of such idealised market capitalism. Above all, it is a false assumption that business *always* favours a voluntary and flexible regulation system over a compulsory one. As the WTO-based Agreements on Trade-Related Investment Measures (TRIMs), Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Agreement on Sanitary and Phytosanitary Measures (SPS); the failed MAI, and the

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[622] See section 7.3.1

establishment of the ICSID unmistakably demonstrate, international business can aggressively support "hard" law and institutionalisation when it suits their trading interests. For instance, Braithwaite and Drahos illustrate how *Pfizer* and *IBM* have been key actors on the intellectual property trade agenda.[623] Sell also shows another TRIPS-related case, in which twelve MNEs actively sought for binding rules.[624]

Competitiveness, which is generally seen to be fundamental to enhance the efficiency of market economy, is not often an achievable or in many cases even desired condition in the market economy. It is for instance maintained that state regulation is often sought-after by established big business as a means of keeping out potential entrants in a particular sector, among others, by raising the costs of entry such as minimum wage and compulsory parental leave.[625] Thus competition is not in every circumstance a desired end for business. Since the aim of this study is not to discuss the claims and nature of the free market economy, this point will not be further elaborated here. However, it suffices to say that today a worldwide merger of already large domestic and multinational enterprises are at an all-time high. "Global oligopoly seems a near certain prospect for the commodities areas" it is no longer only the case for the oil, aluminum industries, but also for the automobile manufacture as well as telecommunication, bank, and insurance businesses.[626]

We are often reassured about the reliability of competition as the main device for the non-coercive compliance with privately set voluntary standards. A company's reputation, it is held, is potentially its most important asset, which would function as an assurance of the non-coercive compliance.[627] Thus the sense of right and wrong, which *consumers* would possibly hold, is the key corrective in this mechanism. Accordingly, if

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[623] Braithwaite and Drahos (2001) p. 200

[624] Sell, Susan, K., *Private Power, Public Law: The Globalization of Intellectual Property Rights*, Cambridge University Press: Cambridge, 2003. See also Picciotto, Sol, "Defending the Public Interest in TRIPS and the WTO" in Drahos, Peter and Mayne, Ruth (eds.), *Global Intellectual Property Rights*, Palgrave Macmillan: Basingstoke, 2002.

[625] Blundell and Robinson (2000) p. 15

[626] Branson, Douglas, M., *Teaching Comparative Corporate Governance: The Significance of 'Soft Law' and International Institutions*, 34 Georgia Law Review (1999-2000), p. 672-675. The functions of the TRIPS agreements should also be reconsidered with a view of facilitating monopoly formations.

[627] "In competitive conditions, companies have strong incentives to strive to enhance their reputations by meeting customer needs and distinguishing their products from those of others, for example by branding" (Blundell and Robinson, 2000, p. 30).

a company does not comply with its privately set voluntary standards, then consumers' purchasing decisions will determine the fate of such a non-coercive non-compliance.

It should indeed be acknowledged that CSR codes have to some extent been effective at raising public awareness because they recognise and draw upon the asymmetry of economic globalisation. As Blackett maintains, although commodities are produced in different parts of the world, the majority of these goods are imported by developed countries. Therefore, the consumer power strategy to influence the conduct of MNEs essentially targets the consumer groups in developed countries. This strategy has been particularly efficient in industries such as footwear and garment.[628] There have been more than a few examples in which customers' choice and public opinion have been influential on enterprises' CSR policies and the degree of compliance with them. It is also true that having a reputation of being ethically and socially responsible may indeed be a crucial part of the business strategy for some enterprises, since such a reputation may bring them a competitive advantage as in the cases of *Body Shop* and *Co-op*. However, the notions such as "consumers' conscience" and "public opinion" are hardly those mechanisms that could ensure consistency, generality of practice and sense of bindingness that rule and rule observance would demand. Besides, it should be kept in mind that in today's world the "necessary material resource base" for forming 'public opinion' or 'public discourse' is not dominated by the "free press model" but primarily by the big business controlled oligopolic media. As Habermas put it, "the public sphere, simultaneously prestructured and dominated by the mass media, developed into an arena infiltrated by power in which, by means of topic selection and topic contributions, a battle is fought not only over influence but over the control of communication flows that affect behaviour while their strategic intentions are kept hidden as much as possible".[629]

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[628] Blackett, Adelle, *Global Governance, Legal pluralism and the Decentred State: A Labor Law Critique of Codes of Corporate Conduct*, 8 Indiana Journal of Global Legal Studies (2000-2001) p. 425. Campaign against *Nike* is among the best-known examples of how enterprises can be forced to be responsive to consumer pressure and media exposure. Nike has been criticised for contracting with factories that apparently used sweatshop labour in countries like China, Indonesia, Vietnam, the Philippines, and Mexico. The company has often been subject to much critical coverage of the poor working conditions and exploitation of cheap overseas labour employed in the free trade zone where their goods are typically manufactured. Sources of this criticism include Naomi Klein's well-known book titled "No Logo". On the subject, see "Clean Clothes Campaign": http://www.cleanclothes.org/companies/nike.htm.

[629] Habermas, Jürgen, "Further Reflection on the Public Sphere" in Calhoun, Craig (ed.), *Habermas and the Public Sphere*, The MIT Press: Cambridge, Massachusetts, and London (1999) p. 437.

Relatedly, NGOs' influence is not always consistent and dependable not least because of their media-centred campaign strategies. One inevitable consequence is the discriminatory practice where those MNEs that may attract more media attention are more likely be targeted. To put it differently, while NGOs may raise public awareness to a certain degree, this contribution is often limited to particular situations and far from bringing a systematic and multifaceted understanding of the risks and complexities that the self-regulatory initiatives of enterprises present. Moreover, as pointed out by Levis, if NGO pressure is crucial for the adoption of CSR codes, it is then important to question NGOs' capacity to efficiently bargain with MNEs.[630]

Legitimacy is also an issue for CSR codes. Indeed, self-regulatory CSR may conflict with the principles of democratic legitimacy. One may regard self-regulatory business codes as the exercise of a legislative power that society did not give. Another question that is important to consider is how far is it justifiable to accord private enterprises, whose primary goal is to generate *private* profit and wealth, the regulatory power to design *common good* and control the direction and nature of societal development. An equally essential concern is whether *public goods* such as education, health, public transport and environmental management could (and *should*) be provided within the sphere of "business' social or *indirect* obligation", and if so, to what extent?

It can further be added that CSR codes suffer from a credibility problem mainly due to their limited or non-existing enforceability. It is a widespread perception that companies adopt corporate codes mostly as a matter of creating good public relations. These codes have been characterised as being an empty gesture, window-dressing, and even a "fig leaf".[631] In the words of Muchlinski,"Internal codes of conduct can be dismissed as little more than public relations exercises lacking any *opinio juris* from among the community of managers that they seek to regulate. This view may be reinforced by reference to the issue of enforceability (...) such codes often contain no sanctions against non-compliance".[632] Indeed, all these companies, such as Enron, which have been involved in recent financial fiascos, had ethical codes. The question therefore appears to be whether corporate codes are effective as social documents.

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[630] Levis (2006) p. 52

[631] "Notes", 116 Harvard Law Review (2003) 7, p. 2131

It should nonetheless be noted that CSR codes might create legal impact though to a limited extent. First, proclamations made by corporations of standards may have legal enforceability. The most interesting development in this regard is the perception in relation to the effect of public statements about a company's socially responsible practices on the choices of consumers. In the *Kasky v. Nike* case, Nike was sued by the consumer activist Marc Kasky in 1998, for violating California's consumer-protection laws concerning allegedly false public statement and advertisement.[633] Although the case was settled in September 2003, it is important to note that the Supreme Court of California concluded that Nike's statements were 'commercial' in nature and therefore subject to the limitations under unfair competition law.[634] Second, standards embodied in industry codes can be adopted by regulatory agencies as reporting requirements. As in the example of mandatory annual disclosure and reporting requirements for the largest MNEs under French corporation law, such standards may become indirectly binding on these enterprises.[635]

Yet, it is important to underline that the above-expressed concerns should however not be understood as suggesting that private enterprises can by definition not have larger societal concerns than to generate profits. Nor is a critical analysis of the concept of CSR as a model of self-regulation the same thing as arguing that *only* the state is able to know what is good for the society as a whole. Governmental regulation system may indeed lead to the accumulation of layers of regulation, which may result in a reduced democratic accountability.[636] It should also be evident that non-state actors can or should take part in norm-creating and standard-setting processes, especially when their

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[632] Muchlinski (1997) p. 84

[633] Prior to this case, Nike publicly stated against the criticisms concerning wages, treatment and safety conditions of Nike's workers at overseas factories. Nike v. Kasky, 79 Cal. App. 4th 165, 93 Cal. Rptr. 2d 854 (Cal.App. 2000), available at http://www.firstamendmentcenter.org/faclibrary/casesummary.aspx?case=Nike_v_Kasky

[634] The California Supreme Court, *Kasky v. Nike, Inc.* , 27 Cal. 4th 939, 45 P.3d 243 (Cal. 2002), available at http://www.firstamendmentcenter.org/faclibrary/casesummary.aspx?case=Nike_v_Kasky

[635] Bantekas gives *Nouvelles Regulations Economique* (NRE) as an example of the increasing pressure from society in all developed countries to impose legally enforceable public disclosure requirements upon enterprises. Article 21 of French Law No: 2201-152 of 2001 "imposes reporting obligations (public disclosure) on all nationally listed companies, pertaining among others to the environment, domestic and international labour relations, local community, and others" (Bantekas, 2004, p. 327).

[636] Blundell, John and Robinson, Colin, *Regulation Without State*, "Reading 52", The Institute of Economic Affairs: London, 2000 p. 2.

technical knowledge and other types of experiences within a particular business activity are needed to develop a regulatory framework in an efficient and more participatory way. Such participation may also enhance compliance level.

7.5 Concluding remarks

The last two decades have seen a proliferation of corporate codes of conduct and an increased emphasis on corporate social responsibility. This development has emerged in the aftermath of a period that saw a major shift towards policies enhancing the role of MNEs and foreign direct investment. As has been discussed in chapter 5, in the 1970s many national governments sought to regulate the activities of MNEs, whereas the 1980s were a decade of deregulation and increased efforts to attract foreign investment. These changes required a significant modification of state-market relations resulting in a decrease in the economic and regulatory role of the state and the rise of the authority of non-state actors in relation to standard setting and implementation.

The key findings of this chapter are:

(i) CSR has gained currency especially in the 1990s promoting non-state and voluntary initiatives to regulate social, environmental and human rights dimensions of business activities. (ii) As self-regulatory initiatives, both CSR and *lex mercatoria* can best be understood through the three interrelated key discourses: economic globalisation, decline of state power and legal pluralism. (iii) As opposed to the NIEO, which conceived regulation of MNEs falling strictly in the realm of public sphere, CSR has developed as a model of a self-regulated market economy, in which deregulation and increased flexibility assume a central position. Indeed, both CSR and *lex mercatoria* are favoured on the ground that they are more flexible, competitive, efficient and less expensive than other legal solutions. (iv) CSR, like *lex mercatoria*, has largely developed outside the realm of states and international organisations' political and legal structure. It involves a transfer of regulatory authority to non-state actors. Therefore, the shift from the NIEO to the 'new' *lex mercatoria* and CSR can be understood as a shift from public ordering to self-regulation. (v) Non-coercive voluntary compliance is the primary mechanism of enforcement in both CSR and *lex mercatoria*. (vi) Although CSR is often referred to as "voluntary", most CSR codes have been adopted under strong pressures from NGOs, legal and regulatory arrangements, workers' organisations, and

from the need to protect the brand or the reputational capital. Therefore, CSR can be seen as an example of "top-down" model of informal soft law. Finally, (vii) even though CSR may potentially undermine and marginalise the public nature of the issues, such as utilisation and redistribution of common resources and wealth, it can nonetheless contribute to raising awareness of certain social and environmental problems.

8 THE HEGEMONIC STATE PARADIGM: FROM THE GATT TO THE WTO

8.1 Introduction

It is stressed throughout this study that deregulation and non-state soft law development have been central to the liberal legal discourse of globalisation. In the previous chapters the trend of the transfer of regulatory authority from state to non-state actors has been exemplified as an integral part of the policy of deregulation, privatisation and economic liberalisation, promoted by neo-liberal ideology. However, it is argued in this study that this informal, flexible and soft regulatory promotion of globalisation has gone hand in hand with the hardening of governmental and intergovernmental rules to protect property rights and to minimise barriers to the mobility of goods, services and capital in the areas of international trade and investment. This hardening has been especially visible under the GATT/WTO system, the World Bank sponsored the International Centre for Settlement of Investment Disputes (ICSID), the IMF, and the regional organisation, in particular the NAFTA and the various institutions of the EU, notably European Monetary Union (EMU) and not least, bilateral agreements dealing with the issue of trade and investment.

The purpose of this chapter is to examine this rather quieter evolution involving hard law development in international economic law aiming to create a disciplinary liberalism through designing a new generation of international economic institutions and redesigning old ones, which include the mandatory dispute settlement mechanism in the WTO, the acceptance and enforcement of WTO-based Agreements on TRIMs and TRIPS, near-defining power on the terms of the IMF conditionality, and bilateral trade and investment agreements. Since these developments have been closely related to the changing international power structure, section 8.2 discusses the relations between international law and politics and assesses the constraining possibility/function of international law in general and international economic institutions in particular. Sub-section 8.2.1 on the other hand focuses on a particular aspect of power-law relations, namely, the concept of hegemonic international law. Section 8.3 looks at the

complementary roles of de-regulation and re-regulation discourses, which have been dominant in the post-1980s period as a result of the shift from state-led to market-oriented, neo-liberal economic policies, associated with privatisation and de-regulation but not so often with (re-) regulation. This section therefore proposes a framework that explains how neo-liberal reforms, along with unleashing market forces, also generate re-regulation processes. Section 8.4 sketches out a general panorama of the institutional development created to manage the world economy, including the IMF, the World Bank, and the GATT/WTO focusing on their expanded mandates, missions, and increased involvement in the process of globalisation. Section 8.4 looks closer at the exclusive role of WTO in creating a global market discipline. Section 8.5 surveys the evolution of the dispute settlement procedures of the GATT/WTO from a 'soft law' into a 'hard law' system. In the conclusive remarks, this development will comparatively be related to the other examples examined in this study.

8.2 What roles for politics in the globalisation of international economy?

In the context of neo-liberal perception, as viewed in chapter 4, section 4.3, 'economics' and 'politics' are conceived as separate spheres of social activities, where wealth is produced in the private sphere while political community is exclusively expressed in the public. In order to fully appreciate the roles of international economic institutions in the asymmetrical character of globalisation, this section intends to provide an overview of the relations between international law, politics and economy in general and to discuss the significance of the activities of the US and other advanced capitalist countries in the restructuring of neo-liberal hegemony in particular.

The connection between international law and politics is obvious but at the same time complicated. It is obvious, because international law has basically emerged as the law, made by states themselves to govern relations among themselves and international organisations that they have created. It is complicated, because the state practice (politics and policies) constitutes the content of international legal rules, whose application depends on the will (consent) of its subjects (states).

Koskenniemi has argued that international law oscillates between utopia and apology. According to him, the diplomatic history of the 19th century is a history of a fight for an international Rule of Law, which is the same as struggling to substitute politics with law.[637] The vision of establishing the primacy of law in relations between states as a means for escaping politics has been criticised by the realist approach as being too moralistic. In the realist account, the separation of international law from (power) politics would result in the fact that international law becomes a utopia and consequently irrelevant to the conflicts between states over matters of crucial national interests.[638] According to this understanding, international law is an *instrument* over which powerful nations have substantive control. On the other hand, if international law is only politically determined in the name of responsiveness to the reality (concreteness requirement) it would then hardly be possible to consider it law but just another tool for power politics and as it would lack the quality of objectivity (normativity requirement) it would be too apologetic. Krisch argued that even hegemonic power needs to be regarded as legitimate. Through this legitimacy it enhances its authority in order to reduce the difficulties and costs to maintain and enjoy its position. This trade-off between enhanced legitimacy and wider constraints would inevitably result in producing constraints on the power.[639] On this ground, it is maintained that international economic institutions, likewise international law and its institutions, are more than mere tools for power: by creating and complying with these institutions, the powerful states, or even hegemonic states, can reassure other states that they will not take advantage of them.[640]

The complexity of the relation between international law and politics is particularly obvious in the decentralised character of the legislative function (i.e. rules exist only for those nations which have recognised them) and in the lack of centrally organised

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[637] Koskenniemi (2005) p. 5. Yet, Koskenniemi further notes that efforts for putting diplomatic practice into legal rules did not hindered European powers from attempting to pursue their interests (*Ibid.* p. 6).

[638] Answering to the question why nations obey law, Henkin held that "Nations act in conformity with law not from any concern for law but because they consider it in their interest to do so, and fear unpleasant consequences if they do not observe it. In fact, law may be largely irrelevant. Nations would probably behave about the same way if there were no law" (Henkin, 1979, p.88).

[639] Krisch, Nico, *International Law in Times of Hegemony*, 16 European Journal of International Law (2005) 3, p. 375

[640] Milner, V. Helen, *Globalization, Development, and International Institutions: Normative and Positive Perspectives*, 3 Perspective and Politics (2005) 4, p. 833

sanction. As a consequence, international law encounters difficulties to restrain sovereign states to pursue their own interests using whatever instruments they may consider suitable to them. In other words, it is up to each individual state whether an international dispute is to be submitted to an international court. Besides, even in the case of such a submission, to identify an existing *valid* rule to be applied to the legal dispute in question, it can still be troublesome. Two reasons can be mentioned: First, in the case of customary international law, it is not always easy to establish applicable rules to the state parties of a legal dispute and whether they have consented to the applicable rules. Second, even when there is a rule and consent, it may still not be evident to define the precise obligation that the state parties have undertaken.[641]

Another challenge to distinguish between international law and international politics is the influence of powerful state(s) on the law creation (and law application) process. It can be argued that the togetherness rather than mutually exclusiveness of politics and law in international law making is recognised in the definition of customary international law. According to Article 38(1) (b) of the ICJ Statute, the Court shall apply "international custom as evidence of a general practice accepted as law". Hence, *state practice* (politics) and *opinio juris* (normativity -accepted as law[642]) are both essential for the formation of a customary rule.[643] In this sense, it is possible to define the process of customary law creation as a process in which state practices (expressions of power) are converted into legal obligations.[644] Therefore, politics is not only present when powerful states do not observe international legal rules, when they deem non-observance suitable to them, or when they "shift away from legal mechanisms in areas

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[641] Krisch holds that in the case of customary law creation and especially at its application stage, the formally equal position of sovereign states would likely cause comparatively less trouble for hegemonic state(s) than multilateral treaties. Because, customary law making process is flexible and customary rules usually are vague enough to allow for a broad impact of power at the application stage (Krisch, 2005, p. 377-378). However, the difficulty of defining the legal obligation does not exist only for customary international law but also treaties. For lack of precision and generality of the obligations is sometimes the only way of reaching an agreement.

[642] Of course, to say that *opinio juris* is central of customary international law does not solve all problems. The questions such as "How can this 'feeling of obligation' be identified?" remains to be answered.

[643] Besides, as Georgiev maintains, the same 'opposite' requirement applies to another source of international law, namely, "the general principles of law recognized by civilized nations" (Article 38(1) (c) of the ICJ Statute). *General principles* is completed with being *recognised* (Georgiev, 1993, p. 8).

[644] Simpson (2000) p. 445

central to dominant state's interests", without violating existing law.[645] Politics is also present in law creation and application processes, in which powerful nations' preferences generally prevail over the interests of less powerful nations. Their possibility to use their economic or political pressure and legal and diplomatic capacities to influence and shape international legal rules are incomparably stronger than the possibilities of economically and militarily weaker states'.[646] In that sense, as argued by De Visscher, "every international custom is the work of power".[647]

However, this is not to say that powerful (or hegemonic) state(s) can do whatever suits them. As stressed earlier in this section, international law is not only an instrument for power but also for constraint on power. For instance, the relatively egalitarian character of international law can be a significant obstacle to the development of hierarchical international legal order According to the principle of sovereign equality of states which is one of the constitutive principles of international law,[648] as seen in chapter 3, section 3.6, all sovereign states are equal and 'unanimity' is required in the creation of a new international legal rule. This consent-based theory of law formation on the basis of sovereign equality excludes the establishment of *formal* hierarchical relationship between sovereigns.

It is nonetheless important to note that the relationship between international law and state power often displays a more complex nature in the context of international organisations, where the principle of sovereign equality may operate in a significantly perverted way. This can be so, especially in the institutional framework of those

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[645] *Ibid.* p. 379

[646] In Byers words, powerful states are better able to enforce claims and use extra-legal techniques to acquire support for their position on legal developments (Byers, Michael, *Custom, Power and the Power of Rules*, Cambridge University Press: UK, 1999, p. 205). Likewise, according to Kwakwa, there are two broad sets of state players in the international economy. The writer refers them as the "paradigm-setting states", exemplified by the US and other advanced capitalist countries that determine the content of the international economic rules, and the "paradigm-receiving States", most of which were ex-colonies with inadequate economic-human-capital resources. In his cited work, Kwakwa examines the 'technical' reasons, such as the abundance of experienced personals, representation and financial resources that allow the first group of states to have comparatively great influence over the rule creation process in the institutional context (Kwakwa, Edward, "Regulating International Economy" in Byers, Michael (ed.), *The Role of Law in International Politics*, Oxford University Press: Oxford/New York, 2002, p. 232-240).

[647] De Visscher, Charles, *Theory and Reality in Public International Law*, 1968, cited in Schachter, Oscar, "The Role of Power in International Law", 93 American Society of International Law Proceeding (1999), p. 202

[648] As it is well familiar, the UN Charter in Article 2(1) proclaims that the UN is "based on the principle of the sovereign equality of all its Members".

international organisations, over which powerful states have control, where decision-making is formally based on the principle of sovereign equality of its members. The GATT/WTO consensus decision- making and related procedural rules is likely the most consequential example of such a complexity. For instance, despite the fact that a consensus based decision-making procedure potentially entails risk especially in an organisation, like GATT/WTO, which produces hard law and where weaker countries have formal power to influence the legislative outcomes, the US and the EU have preferred to maintain sovereign equality decision-making system of the GATT/WTO despite having the possibility to alter it in 1994, when the GATT was replaced by the WTO at the end of the Uruguay Round. Scholars have offered various explanations to clarify this complexity are discussed in section 8.4 more detailed. It is argued for instance that the institutional framework of the GATT/WTO allows powerful states to use "invisible weighting" to define not only substantive rules, but also future decision-making rules. According to Steinberg, powerful states have preferred sovereign equality rules to weighted voting in the GATT/WTO because they provide legitimisation as well as incentives and opportunities for collecting information necessary for a successful agenda-setting.[649] However, that is not to say that the possibilities of powerful states to define the outcomes of the GATT/WTO are absolute and unlimited. In the first place, the limitation comes from the need for observance of an acceptable legitimation ground. Otherwise, the outcomes of such decision-making processes would be perceived as less and less legitimate, hence less useful for powerful states. In the second place, the principle of sovereign equality may still work as a constraining method in case of a possible block formed by developing countries. Also, cooperation problems between major powers could reduce the effective use of power tactics.[650]

Against this background it can be concluded that the power-law dichotomy is not capable of embracing all aspects of the dynamic interaction between international law and politics; even though international law is not dependent on power politics by definition, it is nevertheless an integral part to the power structure of the nation-state system.

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[649] Steinberg (2002) p. 360

[650] On the subject, see Blackhust, Richard, "The Capacity of the WTO to Fulfil Its Mandate" in Krueger, Anne (ed.), *The WTO as an International Organization*, Chicago University Press: Chicago (1998) and Steinberg (2002)

8.2.1 Hegemonic international law

This sub-section deals with the concept of hegemonic international law in order to demonstrate the influence of the changing post-Cold War power structure on the functioning and outcomes of the international economic institutions.

During the 1990s, the struggle of international law "to have an existence of its own"[651] seemed to have entered a new phase. Paradoxically, in this period, two apparently competing visions of international law and the world order, namely the so-called legalist/moralist/utopian approach and the (neo-) realist approach, have simultaneously gained strength.

The former approach has been based on the hope that the UN would guide us in a new period of international relations by putting an end to power politics, arms races and the politics of spheres influence. It prophesied that humanity would enter an era of Rule of Law. This optimism has been materialised by declaring the period 1990-1999 to the "United Nations Decade of International Law".[652] However, the enthusiasm for "norm-based cosmopolitanism as an international order",[653] which arguably reached its highest moment with the *Pinochet Case*, has in the 2000s increasingly proved illusory. Instead of a united, just and a "New Global Human Order", we have been left with a fragmented, troubled and even more deeply divided world not only in terms of extreme concentration of poverty/hunger/disintegration/ in the South and wealth/power in the North, but also in terms of social/cultural exclusion and expressions such as "West and East", "we" and "the others",[654] lawful and outlaw states, liberal and non-liberal states,[655] and so forth.

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[651] Georgiev (1993) p.4

[652] U.N. General Assembly, *United Nations Decade of International Law*, A/RES/44/23, 17 November 1989

[653] Gowan Peter, *Neoliberal Cosmopolitanism*, 11 New Left Review, September-October (2001) p. 85

[654] As in the wording of President George W. Bush: "Either you are with us or you are with the terrorist", *Address to a Joint Session of Congress and the American* People, September 20, 2001, published in 25 Harvard Journal of Law & Public Policy, 2001-2002, p. XXII or Samuel Huntington's, "The clash of civilizations".

[655] Slaughter has created a division of the world's states to serve as an argument for why international law should change: "The resulting behavioural distinctions between liberal democracies and other kinds of States, or more generally between liberal and non-liberal States, cannot be accommodated within the

The "market-led" version of the liberal cosmopolitan project pictured a new world order, in which free trade and common markets would bring countries peacefully together creating the conditions for a depoliticised relationship among them. Accordingly, as a consequence of the demand for economic growth from the citizens, the necessity of the satisfaction of the required conditions of the access to the international markets and cooperation with the financial/trade institutions would be indispensable for the governments. These conditions for access and cooperation between institutions would, in turn, "lead to the rule of law, and with law come democratization and human rights".[656] However, the "unity", which this market-led civilisation offered, has in most part of the world been felt as the subordination of most nations to the powerful few. During the post Cold War period, most states have to a considerable degree lost the control over their domestic spheres as well as their power to the international institutions of 'global governance' while, as seen in the following section, there is no evidence supporting the claim that this process is influencing every country equally.

Whereas the (neo-) realist approach, which is more widespread in the US than anywhere else, understands the end of the Cold War as the triumph of American power politics and American values as well as the confirmation of the superiority of liberal democracy and free market ideology. Today, there is indeed a widespread acceptance among scholars and laymen that with the end of the Cold War, the US has become the dominant power in the world and controls or influences every important aspect of international life as well as the domestic affairs of other countries. Indeed, the economic, political and military domination of the US on the globe is unmistakably identifiable. Presently, the US has "more Westphalian/Vattelian sovereignty, more ability to exclude external authority structures than any other states"[657] to such an extent

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framework of classical international law" (Slaughter, Anne-Marie, *International Law in a World of Liberal States*, 6 European Journal of International Law, 1995, p. 504).

[656] Kahn Paul, W., *American Hegemony and International Law*, 1 Chicago Journal of International Law (2000) p. 2. Kahn exemplifies this paradigm with China policy pursued by the Clinton Administration. However, in his cited article, the writer criticises the idea that trade may replace politics maintaining that politics is not dead in the globalisation process but diversified (*Ibid.*).

[657] Krasner, Stephan, D., *Power and Constraint*, 1 Chicago Journal of International Law (2000), p. 232

that it can today define what is justice and what is peace. In Krasner's words, the US "is primarily an initiator, not a recipient, of external pressures".[658]

Besides, in parallel to the deepened and expanded US predominance, we have also witnessed an increasing US disengagement from international law. This development has gone so far that even its closest ally cannot restrain grumbling about the US' "lack of global team sprit".[659] Such "withdrawal from international law"[660] has basically two forms: (i) American unilateralism either acting alone or building an alliance with a group of countries as in the cases of the NATO's war against Serbia, the "war against terrorism" in Afghanistan, and the occupation of Iraq. Even though some assert that "peace and stability in the contemporary international system utterly depend on the American military power",[661] the uncomforting truth is that US military expenditure today is as high as it was in the Cold War period and it will likely increase further in the coming years.[662] This is hardly "Good News" for the ideal of "Perpetual Peace". (ii) The avoidance of multilateralism or the selection of "multilateralism à la carte", which is exactly the strategy employed in the examples of the "Convention on Biodiversity", the Comprehensive Nuclear Test Ban Treaty", the "Kyoto Protocol", "Anti-Personnel Mines Convention" (Ottawa Convention), "the "Biological and Toxin Weapons Convention", and the "Statute of the International Criminal Court".[663]

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[658] *Ibid.*

[659] In a foreign policy address delivered at Georgetown University in May 2006, Tony Blair, the Prime Minister of the UK, given the examples from the areas such as poverty, climate change, Middle East conflict and terrorism, reproached the US for its 'multilateralism à la carte' pointing out that" Powerful nations want more effective multilateral institutions –when they think those institutions will do their will. What they fear is effective multilateral institutions that do their own will" (quoted in The Guardian, May 27, 2006, *I'll miss his ties –Bush's tribute to tongue-tied ally*).

[660] Krisch explains the notion of "withdrawal from international law" as the tendency of predominant powers to evade a defiant legal order as even when they are shaping international law according to their interests (Krisch, 2005, p. 401-402).

[661] Krasner (2000) p. 235

[662] Stockholm International Peace Research Institute reports that in 2005 world military expenditure reached $1001 billion, which is 34 per cent more than ten years ago and US is alone responsible for 48 per cent of the world total (The yearbook 2006, available at http://yearbook2006.sipri.org/chap8/chap8). According to a report by the Friends Committee on National Legislation, The US military budget was in 2005 almost 29 times as large as the combined spending of the six "rogue" states (Iran, North Korea, Syria, Cuba, Sudan and Libya). Likewise, in the same year, Russia and China, the "potential enemies" of the US' had 'together' a military budgets of $139 billion, less than a third of the US' (http://www.fcnl.org.now/pdf/2006/mar06.pdf).

[663] Krisch evaluates the US "turn from multilateral to bilateral treaties" either in the form of their complete rejection or limiting obligations flowing hem through reservations, as the search for "forms that

Koskenniemi traces three specifically American experiences that have led to this move from 'law' and 'multilateralism' to 'values' and 'morality'. Accordingly, (i) the liberal victory during the Cold War ("There is now no risk of a mutual destruction. Thus there is no need to follow 'old rules'), (ii) In addition to the "old, well-established real legalism" the adoption of new normative concepts, such as legitimacy and justice in the American policy-analysis, and (iii) a commitment to the idea that rules or institutional forms might be policy-determining. This new tendency that Koskenniemi names "imperial naturalism", is situated between legal realism and legalism and favours legitimacy over law, governance over government, and decision over institution introducing a new vocabulary to replace the vocabulary of law: globalisation, ethics, democracy, good governance and market.[664]

It is interesting to note that Oppenheim much earlier considered balance of power as essential for an effective international law arguing that "where there is neither community of interests nor balance of power, there is no international law". [665] Oppenheim also considered balance of power as a condition for formalism in law. According to him, in case one state becomes hegemonic among others, that state would likely pursue 'anti-formalistic' policy wherever non-formalism suits it better.[666] Krisch maintains that "the international legal system resists that development; it insists on stability, equality and coherence, and dominant states thus prefer other forms of international government, thereby creating a global legal order with a more limited role of international law as such".[667] Not surprisingly, therefore, in this new world order, the concepts and institutions of the 'old' international law, such as sovereignty, sovereign

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are more amenable to unequal power and seek to reshape the international legal order so as to allow more inegalitarian elements" (Krisch, 2005, p. 389). Krisch also gives some statistics to materialise "US resistance to multilateral treaties". Accordingly, the US has become party to only 60 per cent of the treaties deposited with the UN Secretary-General since World War II whereas the other members of the G8 to 93 per cent of them. Of course it is not easy to decide on whether, and if so, to what extent, the historically and culturally rooted "isolationist" tradition of the US has played a role in its current reluctance to international treaties (*Ibid.* p. 388-389).

[664] Koskenniemi, Martti, *Between Empire and Legal Formalism*, Speech at Recife, Brazil, 18 may 2003, available at http://www.valt.helsinki.fi/blogs/eci/Recife.pdf

[665] Oppenheim, L. *International Law*, Vol. 1, 2nd ed., Longmans: London (1911) p. 193. For an interesting analysis of Oppenheim's normative positivism as political position, see Kingsbury, Benedict, *Legal Positivism as Normative Politics*, 16 European Journal of International Law (2005) 2, p. 421.

[666] Oppenheim (1911) Vol. 1, p. 275

[667] Krisch (2005) p. 407

equality of states and the notion of international law as being a framework for formal inter-sovereign relationships are increasingly challenged and seen as a formalistic obstacle against the dynamic of 'real life'.[668] This challenge however is not only due to the contrast between states' being *formally* equal with the *factual* asymmetrical power relations among them, but it is also due to the US' imperial position, "as the hegemon comes to occupy a position above the law, not under it".[669] Thus, under the circumstances where "sovereignty breaks down and globalization becomes the order of the day the dynamic of a politically oriented law will no longer tolerate formalism".[670]

Legal formalism can be described as an attempt to make the law both *autonomous*, in the particular sense that it does not depend on moral or political values of particular judges. Legal formalists also want to make law deductive, in the sense that judges decide cases mechanically on the basis of pre-existing law and do not exercise discretion in individual cases. According to Sustein, formalism is closely related to legal positivism: "If positivism is understood as an explanation of what law *is*, formalism can be said to be a positivist explanation of how law and legal systems *operate*".[671] It is interesting to note that the 'anti-formalist feeling' is not necessarily linked to the project of hegemonic international law. Even in the post-Second World War period optimism, a pragmatism arising from the "move to institutionalism", which reigned during this period, entailed a strong rejection of formalism and a near-total disregard of theory. Kennedy illustrates colourfully the mood of the period with international law education. He points out the correlation between the intellectual and theoretical disinclination of international legal academic discipline and the refusal of formalism in favour of pragmatist/managerial account in the post-war period, during which international law paradoxically seemed to develop: more rules, more rule-observance, and wider variety

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[668] Koskenniemi, *The Gentle Civilizer of Nations*, (2004) p. 488-489

[669] Krisch (2005) p. 407. A number of American scholars, such as Glennon and Slaughter overtly defended this position. Glennon held for instance that the UN Charter provisions governing the use of force "cannot guide responsible US policy-makers in the US war against terrorism or elsewhere" (Glennon, Michael, J., *The Fog of Law: Self-Defence, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 Harvard Journal of Law and Public Policy, 2001, p. 541). Orford critically reviewed such reasoning (Orford, Anne, *The Gift of Formalism*, 15 European Journal of International Law, 2004, 1).

[670] Koskenniemi (2002) p. 30

[671] Sunstein, Cass, R., *Must Formalism Be Defended Empirically?*, 66 The University of Chicago Law Review (1999) 3, p.639

of subject matters than before while there was no noticeable interest in the philosophical dimension of the field.[672] In the words of Kennedy, "The 'increasingly independent world' seemed to require management, not reconstruction", and as a result, most of the international law courses in law faculties "were about the *management* of international life, about the process and the avoidance of 'politics'".[673] In a similar vein, Purvis also points out that the post-Second World War pragmatism "sought to incorporate the modernist insights of Legal Realism (which set itself in opposition to legal formalism, emerged during the 1930s) into international law, to make legal argument contextual".[674]

Yet, there can be found a fundamental difference between *functional pragmatism*, developed after the 1950s, and the current *depoliticised pragmatism*, developed after the 1990s. The former was "a modern consequential philosophy that emphasised institutional process, functional progress, or rule centred doctrinal specificity, while denying the relevance of coherent abstraction".[675] It was related to efforts to build institutions and regimes that still were based on formal equality of sovereign states and attached to the ideal of international community. Anti-formalism in its present form, has been incorporated in the neo-liberal/hegemonic politic agenda, which aims to narrow down international public sphere and transfer power from the nation state to IEI and global capital. As Koskenniemi maintains, "the call for a dynamic, flexible and deformalised concept of law aims to facilitate decision-making in the context where American power is dominant.[676]

At a closer look, however, this is not the whole story. Slaughter, one of the most influential American scholars and the former president of the American Society of International Law, argued that instead of rejecting international institutions and treaties, the US must work to shape them so that they conform to US interests even though such

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[672] Kennedy, David, *International Legal education*, 26 Harvard International Law Journal (1985) p. 369-370

[673] *Ibid.*

[674] Purvis, Nigel, *Critical Legal Studies in Public International Law*, 32 Harvard International Law Journal (1991) 1, p. 81

[675] *Ibid.*

[676] Koskenniemi, *The Gentle Civilizer of Nations*, 2004, p. 483

involvement would inevitably entail some degree of loss of sovereignty.[677] Indeed, the US "withdrawal from international law" has hardly been uniform. As shown in the following sections, in certain areas, such as the protection of foreign investment and intellectual property rights, the US promotes the idea of the necessity of adopting *universally* binding rules and "the agreements to create open transnational markets with appropriate regulatory mechanisms"[678]

8.3 De-regulation and re-regulation

Deregulation in various forms has been widely used in the recent process of globalization to restructure the legal and political frames of the market-state relationships at national and international level seeking to reinforce the hegemony of capital globally. This section however argues that the rise of neo-liberalism in the post-1980 period has not only involved a process of de-regulation and economic liberalisation, but also re-regulation processes mainly through the international economic institutions-based multilateralism as well as inter-state bilateral trade and investment agreements in order to create a free market constitution and constitutional market discipline at the global level.

De-regulation can be defined as "reducing the number, stringency or enforcement of rules connecting it to the classical liberal conception of freedom as freedom from restriction".[679] The liberal rationale for deregulation is that fewer regulations will lead to a raised level of competitiveness, therefore higher productivity, more efficiency and lower prices overall. However it is important to note that the wording 'de-regulation' may be misguiding. The concept does not suggest a regulatory void or an 'unregulated' market as an alternative to state regulation. Nor does deregulation mean an end to all

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[677] Slaughter, Anne-Marie, *Building Global Democracy*, 1 Chicago Journal of International Law (2000) p. 225. In the same vein, Krasner and Byers, utterly sympathetic to the aspirations of the "benevolent superpower", insist on the importance and indispensability of using international law and institutions to maximise American interest (Krasner, 2000); Byers, Michael, *International Law and the American National Interest*, 1 Chicago Journal of International Law, 2000. See also Byers, Michael and Nolte, Georg [eds.], *United States Hegemony and the Foundations of International Law*, Cambridge University Press: Cambridge, 2003).

[678] Kahn (2000) p. 9

[679] Braithwaite and Drahos (2001) p. 515

regulation, but frequently less restrictive or rigid regulation, which may take diverse forms, such as the deregulation of specific industries, such as telecommunications; the privatisation of the state-owned enterprises and the economic liberalisation of previously protected segments of national economy, such as the establishment of free trade zones.[680]

As a political ideology, neo-liberalism is generally understood to have had its sources in the second half of the 1970s and early 1980s when Thatcher and Reagan came to power in the UK and the US, instituting policies based on the monetarist ideas and the criticism of the interventionist state. As viewed earlier in chapter 4, sections 4.3, the proponents of laissez-faire economy consider markets as the natural and spontaneous social orders, in which the "market-friendly state" has a limited role as a legal/regulatory power. It has been argued that through deregulation and privatisation, market forces would be set free, which, in turn, would create economic well-being for all. According to the neo-liberal discourse, state regulation is counterproductive and costly. Besides, as it has been claimed, technological revolution in the globalisation process has increased the mobility of capital and goods, which as argued consecutively has led to the diminishing regulatory power of the state. In other words, it is understood that technological advances "have produced *de facto* deregulation",[681] given that MNEs are today able to engage in regulatory arbitrage, transferring their activities or capital to another country, which offer lesser or more favourable regulation. Thus, together with the shift in ideological perspective on the role of the state, these developments have "produced a competitive dynamic between national regulators that fosters deregulation".[682] Deregulation has rapidly become a central measure within "market-friendly reforms" which are designed to enhance the competition among national governments to keep or attract MNEs' investment. First, the US and the UK showed the way to deregulate the economy, particularly in sectors such as transport, health services,

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[680] Emadi-Coffin, Barbara, *Rethinking international organization: deregulation and global governance*, Routledge: London, 2002, p. 59

[681] Vogel, Steven, Kent, *Freer Markets, More Rules*, Cornell University Press: Ithaca, NY, 1998, p. 11. Note however that Vogel criticises the proponents of the neo-liberal perspective arguing that neo-liberal theorists often overstate their case "implying that markets not only stimulate regulatory change but determine its timing and nature". He also contends "governments can respond to market pressures in a wide varieties of ways" (*Ibid.*).

[682] *Ibid.* p. 11

telecommunications, media, banking and insurance. Soon many more governments have been forced to take the same deregulatory direction.

To be sure, deregulation has been an important component of the neo-liberal "counter-revolution" which has taken place over the last two decades.[683] However, a more nuanced analysis of the relationship between state and market exposes the over simplistic and ideological character of the rhetoric of "less rules, more market". Today, there is a growing acceptance among scholars that economic liberalisation and deregulation processes have often involved a process of re-regulation "often as an international process, in the form of more elaborate legal frameworks for business"[684] rather than eradication of public regulation. Emadi-Coffin examines the establishment of free trade zones as a widely utilised policy instrument involving deregulation in the cases of South Korea, the UK and the China and comes to the conclusion that the establishment of free trade zones has necessitated a high degree of international regulation, both in its hard and soft forms, especially in the areas of monetary regulation and trade relations.[685] As Lipschutz and Fogel observe "while 'deregulation' is the mantra repeated endlessly in virtually all national capitals and international capitalists, it is *domestic* regulation that capitalists desire, not the wholesale elimination of all rules".[686] Accordingly, domestic deregulation in the forms of privatisation, the removal of tariff and exchange controls and the like has been important to the further advancement of international capital whereas at the international level the general tendency has been to enforce or create new rules wherever it is considered necessary to protect and promote their interests or ensure the orderly functioning of global markets.

In a similar vein, the authors of "Legalization and World Politics" remark a "move to law" in international relations without failing to note that this move is uneven and not

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[683] Gill considers the 1990s as a period, which represents a counter-revolution of capital that has reconstituted "state and capital as well as intensifying social hierarchies associated with class, race and gender relations on a world scale" (Gill, 2000, p. 3).

[684] Picciotto, Sol and Mayne, Ruth, *Regulating International Business Beyond Liberalization*, MacMillian Press Ltd.: New York, 1999, p. 2

[685] Emadi-Coffin (2002) p. 119. According to the writer, in this context, soft law has been used to constrain government policy regarding the level of deregulation, for instance, to harmonise the degree of competition between free trade zones in different countries (*Ibid.* p. 122). Further it is also suggested that soft law concerning free trade zones has an additional ideological function serving to the separation the economic from the political through its focus on the deregulation of the market (*Ibid.* p. 123).

[686] Lipschutz and Fogel (2002) p. 119

uniform.[687] Understanding legalisation as a particular form of institutionalisation, they detect greater institutionalisation in many areas, and in particular in international economic regimes, in the sense that the behaviour of actors has now been "more deeply regulated" by institutional rules.[688] It is possible and necessary to critically assess various aspects of the approaches, analyses and findings brought forward by the writers of "Legalization and World Politics".[689] However, for the purpose of this section, their portrayal of the tendency of "increasing legalisation" is particularly remarkable in two interconnected aspects. First, the international re-regulation in both formal hard and soft law forms and institutionalisation is a constitutive measurement,[690] which has been employed concurrently with the deregulation policies, in the recent process of the neo-liberal restructuring of international economy and politics. Second, the writers of "Legalization and World Politics" point out that the legalisation of contemporary politics has been uneven.[691] Viewing law as deeply embodied in politics and

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[687] Abbot, Kenneth W.; Keohane, Robert O.; Moravscik, Andrew; Slaughter, Anne-Marie, and Snidal, Duncan, *The Concept of Legalization*, 54 International Organization (2000) 3

[688] Goldstein, Kahler, Keohane, and Slaughter (2000) p. 387. For the criteria of the definition of legalisation, see Chapter 3 of the present study.

[689] Related to his criticism of 'regimes', for instance, Koskenniemi argues that 'legalisation' in regime theories is reduced to a policy-choice, sometimes dictated by strategic interest. And the alternation of soft law with hard law as normative politics through the variables such as 'delegation', 'obligation', and precision' corresponds to a move *from* law rather than *to* law (Koskenniemi, Martti, *International Legislation: Today's Limits and Possibilities*, speech at the conference "Speaking Law and Politics" at the University of Wiscosin-Madison, March 5-6, 2004, available at http://www.valt.helsinki.fi/blogs/eci/Madison.pdf). Likewise, Finnemore and Toope criticise this understanding of legalisation of being liberal institutionalist and positivist and limited to the bureaucratic formalism. They also object to the selection of obligation, precision, and delegation as the defining characteristics of law and conclude that such a definition of law would be too narrow (Finnemore and Toope, 2001). Picciotto takes further this criticism and holds that although the WTO agreements lay down an enormous quantity of legally binding rules, these rules are still far from being precise and unambiguous (Picciotto, 2005). Setear's criticisms are rather twofold. According to Setear, the writers of "Legalization and World Politics" make a 'biased' selection of cases involving dramatic increases in the prominence and prevalence of international law, while in reality the relevancy of international law to international politics is not always the case using the international regulation of whaling as an example of the areas where legalisation has remained either constant or diminished. Setear also argues that to single out the variables obligation, precision, and delegation arbitrarily without offering any perimeter to defend it (Setear, John, K., *Can Legalization Last?*, 44 Virginia Journal of International Law [2003-2004] 3).

[690] From the point of view of "regime theory", one could possibly complete this conclusion with the 'informal' or 'implicit' regulation resulting from the interrelations between states, international organisations, and non-state actors, in particular MNEs. According to Emadi-Coffin, regulation in regimes goes "beyond soft law" and in some cases, implicit regulation may occupy the structural level of social relations (Emadi-Coffin, 2002 p. 47).

[691] Braithwaite and Drahos also indicate "mixed fortunes" for the deregulation principle of liberalism in "global regulatory contests". Their findings show that, deregulation has prevailed only in eight areas out of fifteen key areas (2001, p. 515).

understanding legalisation as a particular form of institutionalisation that imposes international legal constrains on governments,[692] they conclude that "the most powerful actors in the international system –the United States and the European Union- are among the strongest proponents of legalization" though to varying degrees across issue-areas.[693] They furthermore contend that legalisation has been dramatically advanced in the realm of international economy due to the fact that "traders and investors demand a stable policy environment, guaranteed legalized commitments and prefer predictable dispute-settlement procedures over intergovernmental bargaining".[694]

To a large extent, increasing legalisation of international economic relations can be understood as a strategy central to the foundation of "new constitutionalism", which has both coercive and consensual dimensions to secure and expand the gains of global capitalism. According to Gill, the WTO and international financial institutions aim to create a set of forward-looking mechanisms through bilateral and multilateral trade and investment agreements to render a constitutional status to the power of capital on a world scale.[695] Thus, legalisation also aspires to prepare the long-term economical and political conditions for the future of the hegemony of capital through imposing on government decision-making autonomy. Kahler for instance observes that particularly in the policy areas of monetary, trade and investment, international legalisation functions as a substitute or reinforcement for domestic legal and constitutional restraints on government actions.[696] Therefore, it can be concluded that the consequences of legalisation are not only international but also national.

Against this background, it can safely be said that re-regulation processes have aimed (i) to restructure peripheral states to ensure that they operate under the discipline of international capital to deliver the tasks such as an improved long-term investment

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[692] Though they also recognise that in certain instances institutionalisation can occur without legalisation as in the case of the G7 and the Association of Southeast Asian Nations (ASEAN) (Kahler, Miles, *Conclusion: The Causes and Consequences of Legalization*, 54 International Organization [2000] 3, p. 662).

[693] *Ibid.* p. 666

[694] *Ibid.* p. 668

[695] Gill (2000) p. 9.

[696] Kahler (2000) p. 676

climate and better protection of private property rights[697] through the regional and international instruments such as the North American Free Trade Agreement (NAFTA), bilateral trade and investment agreements, the failed Multilateral Agreement on Investment (MAI), and the Bretton Woods institutions, i.e. the IMF, the World Bank and the WTO. (ii) To redefine and stabilise the rules of international economic/financial competition between national territorially divided country-based MNEs. (iii) Lastly, in the advanced capitalist country context, to set limits on the redistributionist capacity of the welfare state and ensure its withdrawal from the market. That is "a shift in the role of the state "from a guarantor of progress to a manager of destiny"[698] by privatising or denationalising real or financial assets as well as facilitating "the private supply of certain goods and services by 'contracting out' and 'commercialisation'".[699]

8.4 Regulating the global market

In the previous section it has been demonstrated that despite the fact that re-regulation has widely been employed as a complementary tool at both domestic and international level, "the language of deregulation has obscured (this) quieter truth"[700] due to the dominant position of the discursive arguments putting forward the virtue of the self-regulating market system. The aim of this section is to deconstruct this discourse on deregulation to illustrate its character as the language of the myth of a self-regulatory market economy and to explain the nature and direction of this neo-liberal regulatory policy. For this purpose, the section depicts two developments that took place during the 1980s and the 1990s: First, it shows that the most influential international economic institutions have been structurally transformed, their rule-based character has been strengthened and their mission expanded. Second, it demonstrates that during the same period bilateral trade and investment agreements have become commonplace tools for

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[697] Gill (2000) p. 9

[698] Donzelot, Jacques, "The Mobilization of Society" in Burchell, Graham, Gordon, Colin, and Miller, Peter (eds), *The Foucault Effect: Studies in Governmentality*, Harvester Wheatsheaf: London (1991) p. 176

[699] Schneiderman, David, *"Investment Rules and New Constitutionalism*, 63 Law and Contemporary Problems (2000) p. 83

[700] Blake, Jonathan, D., *Remarks to "The Internationalization of Legal Relations"*, 96 American Society of International Law Proceedings (2002) p. 146.

investment protection and promotion as well as for the achievement of further trade liberalisation in the process of redesigning the international economic structure to make it consistent with the neo-liberal ideology.

In the aftermath of the Second World War, several international institutions were created as a part of a planned global regulatory system for trade and finance. These institutions were established at the initiative from the US and reflected the US and British approach of how trade and finance should be regulated.[701] The most important organisations were created under the so-called Bretton Woods system, which consisted of the International Monetary Fund (IMF), the International Bank for Reconstruction and Development, widely known as the World Bank, the International Trade Organisation (ITO), which never were realised because of the concerns of the US, instead, the General Agreement on Tariffs and Trade (GATT) was created, which in 1995 expanded and was institutionalised into the World Trade Organisation (WTO).[702] The significance of this multilateralism was that "for the first time there was a codified form of rules and principles that imposed some obligations on states in the conduct of their monetary affairs".[703] As Gilpin writes; at the Bretton Woods Conference in 1944, the major capitalist powers agreed that economic activities should be regulated in a rule-based way and that states were not to interfere in the determination of international economic outcomes.[704]

The IMF was initially designed to build up a monetary system and assist the governments of *developed* countries in stabilising their exchange rates by providing them with short-term loans in order to avoid a reversion to the monetary policies of the 1930s.[705] Similarly, the World Bank, whose membership requires membership in the IMF, was originally designed to help the *developed* war-torn European countries to reconstruct or upgrade their economies and industries,[706] The voting system and the

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[701] Gilpin (2000) p. 57

[702] Braithwaite and Drahos (2001) p. 98

[703] *Ibid.*

[704] Gilpin (2000) p. 57

[705] Dillon, Thomas, J., *The World Trade Organization: A New World Order For Trade?*, 16 Michigan Journal of International Law (1994-1995) p. 352

[706] Braithwaite and Drahos (2001) p. 98

structure of the main organs are similar in both institutions; the rights and duties of members are based on quotas, which determine the level of financial contribution to be made to these organisations. This quota defines the voting power of each member.[707] That is to say, both organisations make decisions according to a weighted voting system reflecting the amount of capital each state gives as an input into these organisations. This secures the influence of the advanced capitalist countries. Since the decisions of these organisations, based on weighted voting and extensive use of special majorities, are legally binding on all members without requiring their unanimous concurrence, it is widely asserted that this is incongruent with the principle of sovereign equality.

Since their inception in 1944, the membership of these two organisations has increased from an initial 29 membership countries to 184 and most importantly, since 1979 their roles have changed considerably. The mission of the World Bank has evolved from being facilitator of post-war reconstruction to the present day mandate of worldwide economic development programs and it has expanded from a single institution to a closely associated group of five development institutions.[708] Among these new institutions within the framework of the World Bank is the ICSID, which is designed to globalise international investment law through the case law The MIGA, which entered into force in 1985, is the first multilateral system for investment insurance against political risks in the developing countries. As Muchlinski notes, MIGA, together with the ICSID, constitutes a further step of the World Bank in the creation of a multilateral system of investment protection and promotion, which aimed to move international regulation away from the NIEO in the 1970s.[709]

The IMF on the other hand has as an institution undergone little structural change, but its functions has been "silently revolutionized"[710] in order to orchestrate the changes in

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[707] http://www.imf.org/external/pubs/ft/aa/aa03.htm#1

[708] They are: the International Bank for Reconstruction and Development (IBRD), the International development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID), See http://web.worldbank.org.

[709] Muchlinski (1999) p. 519

[710] Boughton, James, M., *Silent Revolution: The International Monetary Fund 1979-1989*, the IMF: Washington, 2001. From a legal point of view, the most striking feature of the ICSID Convention is that it firmly establishes the capacity of a company to proceed directly against a state in an international forum, thus contributing to the growing recognition of MNEs as the new subject of international law. For further discussion on the ICSID, see section 3.7.2 in this study.

the world economy during the 1980s. As shown in chapter 3, these changes, involved a diametrical turn away from state-centered economic activity towards a common set of liberal beliefs and policies based on the primacy of market and private economic activity. Correspondingly, the IMF, as well as the World Bank, began to decrease their relations with the developed countries and increased their relations with the developing countries. In addition to its initial role as a monetary institution and the overseer of the international monetary system, the IMF assumed a role as a guiding force in economic restructuring of developing countries. In the mid-1970s developing countries could easily borrow money directly from the US, Japan and European countries either in the form of "sovereign borrowing" or through commercial banks in these countries to finance state-led projects and import-substitution strategies. The real interest rate was low at that time and there was a huge international capital market. In 1979 however, the circumstances changed dramatically as a result of the changing US policy involving the increase of interest rates, which "plunged the world into a severe recession in which less developed country borrowers found themselves with huge debts".[711] The developing countries that lacked access to private capital markets increasingly turned to the IMF and the World Bank to borrow more or to reschedule their debt. Both organisations were drawn into more active lending. However, they assisted the indebted countries conditionally. They "began attaching increasing number of conditions to those loans (conditionality[712]), negotiating with countries to make major changes in their domestic policies and institutions"[713] to adapt to market oriented economic policies involving *inter alia*, detailed reform in various fields, including privatisation corporate governance, banking regulation, tax reform, liberalisation of trade and capital market, eliminating ceilings on foreign investments, permitting foreign banks and companies to establish subsidiaries and price controls, more central bank independence, etc. Moreover, compared to the original tasks of the IMF, for instance "surveillance", the new policy of "conditionality", which is precise and binding on borrower countries, also entails a move towards a higher degree of 'legalisation'. Indeed, Simmons argues that the purpose of legalisation is to make "more credible monetary commitments; because,

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[711] Gilpin (2000) p. 85

[712] "Conditionality" s the principle that access to and use of a lender's funds is linked to the borrower agreeing to meet certain requirements set out by the lender (Braithwaite and Drahos, 2001, p. 125).

[713] Milner (2005) p. 836

markets prefer certainty in the legal framework". According to the same writer, legalisation of international monetary affairs has improved the compliance with IMF's monetary rules under Article VIII of the *Articles of Agreement* because legalisation increases countries' commitment to these rules and the reputational costs of reneging on them.[714]

The GATT, similar to the IMF and the World Bank, was designed as a forum for the developed countries. Originally it was set up with the specific purpose to reduce tariffs in order to promote trade liberalisation among its members. And again, like the other Bretton Woods institutions, membership in the WTO has over the years grown from 23 in 1947 to 149 countries in December 2005.[715] As will be discussed in more detail in the following section, the GATT/WTO's undertakings have widened significantly with the increasing liberalisation of the world trade in the 1980 and 1990s. With the considerable decrease of the tariffs and quotas, "many domestic policies such as intellectual property laws, environmental policy, domestic subsides, and tax law are now seen to affect trade flows and hence to reside within the WTO jurisdiction".[716]

In addition to the increased and strengthened institutionalisation, the post-1980s has also witnessed a proliferation of bilateral trade and investment agreements. The total number of international investment agreements reached about 5,500 at the end of 2005, of which 2,495 have been "bilateral investment treaties" and 2, 758 "double taxation treaties".[717] Moreover, although a growing number of bilateral investment agreements and free trade agreements are concluded between developing economies, most of these agreements have still been concluded between a developed and a developing country, imposing binding constraints on the macroeconomic, trade and investment policies of the developing countries.[718] These agreements usually require state parties to comply

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[714] Simmons, Beth A., *The Legalization of International Monetary Affairs* 54 International Organization (2000) 3, p. 573

[715] http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm

[716] Milner (2005) p. 836

[717] UNCTAD, *World Investment Report 2006*, p. 26, available at http://www.realinstitutoelcano.org/materiales/docs/WorldInvestmentReport2006_en.pdf

[718] Peterson, Luke Eric, *Bilateral Investment Treaties and Development Policy-Making*, International Institute for Sustainable Development: Canada (2004) p. 6. According to the World Investment Report 2006, at the end of 2005, the number of "South-South" bilateral investment agreements represented 26% of the total number of such agreements and developing countries have been party to 75% of all bilateral investment treaties (UNCTAD, *World Investment Report 2006*, p. 228).

with a number of key provisions, most of them centred on the principle of non-discrimination and most favoured-nation status, which binds a country to apply to the treaty contracting state party any lower rate of import duties that it may later grant to imports from some other country.[719] In addition, they embody substantive constraints on state parties including protection from expropriations and nationalisations.[720] Also, these agreements typically provide an arbitration clause whereby foreign investors are entitled to submit disputes to binding investment arbitration in order to depoliticise' investment disputes. The arbitration rules of the Washington-based International Center for the Settlement of Investment Disputes (ICSID) are most commonly referred to in these agreements.[721]

It should be added that in particular the US has busily engaged in drawing developing countries into highly uneven bilateral bargaining processes over which the developing countries have little control. The aim of these processes has been to (i) encourage the adoption of market-oriented domestic policies in partner countries, which provide greater market access and the reduce or eliminate non-tariff barriers; (ii) protect private investment and increase the protection of intellectual property; (iii) support the development of international law standards consistent with these objectives.[722] The most fundamental US strategy "has been to act tough on bilateral negotiations to set frameworks for subsequent multilateral negotiation", as in the case of TRIPS agreement, and "never go directly to seeking a multilateral agreement in the way weaker

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[719] The most-favoured-nation (MFN) clauses have become a significant instrument of economic liberalisation in the investment and trade areas. A MFN clause may cover a list of specified products only, or specific concessions yielded to certain foreign countries. Alternatively, it may cover all advantages, privileges, immunities, or other favourable treatment granted to any third country whatever. The clause is intended to provide each signatory with the assurance that the advantages obtained will not be attenuated or wiped out by a subsequent agreement concluded between one of the partners and a third country. It guarantees the parties against discriminatory treatment in favour of a competitor. See http://www.oecd.org/dataoecd/21/37/33773085.pdf.

[720] Schneiderman (2000) p. 101

[721] Parra, Antonio, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID Review – Foreign Investment Law Journal (1997) p. 297

[722] From the U.S. Bilateral Investment Treaty Program, available at http://www.ustr.gov/Trade_Agreements/BIT/Summary_of_US_Bilateral_Investment_Treaty_(BIT)_Program.html

states regularly do".[723] As Braithwaite and Drahos have famously stated; "Bilateralism is like cooking an elephant and rabbit stew. However you mix the ingredients, it ends up tasting like elephant. Multilateralism is the only prospect for constraining the elephant by rules under which it agrees to submit to binding arbitration."[724]

On the other hand, even though multilateralism is generally preferred by less powerful states for the reason that multilateralism and international institutions may exert a constraint on the role of power in determining outcomes through binding commitments on market openness and trade rules, the rules of the bargaining process however often play a decisive role in the outcomes. As Steinberg points out, "bargaining power in international organisations is derived from substantive and procedural legal endowments. Decision-making rules determine voting or agenda setting power, which shapes outcomes".[725] Therefore, multilateralism does not always ensure transparency nor provides protection against the asymmetries of power and influence. For instance, it would hardly be possible to maintain that the IMF and the World Bank may exert a constraint on the powerful states considering that decisions in these institutions are taken by weighted voting, which gives the US, Japan, the UK, France and Germany the possibility to define the outcomes of the decision-making process in these institutions. The same applies to the WTO. Even though the GATT/WTO is based on the principle of sovereign equality and decisions therefore are taken, unlike the IMF and the World Bank, not through a weighted vote system but through consensus, such a consensus-making process may still function as an "organised hypocrisy" in the procedural context by serving "as an external display to domestic audiences to help legitimize WTO outcomes".[726] As will be shown in the following section, the often-pointed out unbalanced outcome of the GATT/WTO favouring the powerful states makes evident that multilateralism does not only constrain the power, but it can also magnify it.

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[723] Braithwaite and Drahos (2001) p. 198. Elsewhere, Drahos remarks that the US and EU push bilaterally for TRIPS plus standards and standards beyond TRIPS at a time when trade rules cover a much broader range of subjects than ever before and as a result have become intertwined with non-trade issues such as human rights (the right to health especially) and environmental protection (Drahos, Peter, *Bilateralism in Intellectual Property*, paper prepared for Oxfam, available at http://www.oxfam.org.uk/what_we_do/issues/trade/downloads/biltateralism_ip.rtf

[724] *Information Feudalism: Who Owns the Knowledge Economy?*, Braithwaite, John and Drahos Peter, Earthscan: UK, 2002, p. 194

[725] Steinberg (2002) p. 342

8.5 The Primacy of the WTO

There seems to be a consensus that the GATT/WTO has become one of the most influential international institutions in the process of globalisation.[727] Since the formation of the GATT in 1947 the trading regime has gradually evolved from a moderately legalised negotiation forum to a highly legalised adjudication regime as a result of the Uruguay Round negotiations in 1994 ("The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations"). The most important features of the "Final Act" can be listed as follows: (i) The Final Act established the WTO. (ii) It created new international obligations in the area of services with the General Agreement on Trade and Services (GATS). (iii) It extended the obligations of the GATT to protect intellectual property rights with the Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS Agreement). (iv) The Final Act both clarified and extended the existing GATT obligations, by providing a method to interpret them. (v) The Final Act created a unified dispute resolution system through the so-called Dispute Settlement Understanding (DSU), whereby the GATT's consensus-based dispute settlement system has been transformed into a quasi-judicial form.

Against this background, it seems reasonable to arrive at two conclusions: First, the new multilateral obligations go beyond the GATT's original scope of trade in goods, within which the GATT's mandate was to lower trade barriers between nations – such as custom tariffs, quotas, and other border measures.[728] It now includes the GATS and TRIPS, whereby the WTO puts in effect the "globalisation of law" in the meaning that a wide spectrum of domestic laws regarding economic regulation is now pushed into a

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[726] *Ibid.*

[727] Among others, see for instance, Bronckers, Marco and Quick, Reinhard (eds.), *New Direction in International Economic Law*, Kluwer Law International: The Hague (2000); Guzman, Andrew, T., *Global Governance and the WTO*, 45 Harvard International law Journal (2004) 2; Picciotto, Sol, *The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance*, 18 Governance: An International Journal of Policy, Administration and Institutions (2005) 3; Dillon, Thomas, J., *The World Trade Organization: A New World Order For Trade?*, 16 Michigan Journal of International Law (1994-1995); Abbott, Frederick, M., *Incomplete Rule Systems, System Incompatibilities And Suboptimal Solutions*, 16 Arizona Journal of International and Comparative Law (1999) 1; Kelly, Claire R., *Power, Linkage and* Accommodation, 24 Berkeley Journal of International Law (2006); and Van den Bossche, Peter and Alexovicova, Iveta, *Effective Global Economic Governance by The World Trade Organization*, 8 Journal of International Economic Law (2005) 3.

[728] Reich, Arie, *The WTO As a Law-Harmonizing Institution*, the University of Pennsylvania Journal of International Economic Law (2004) 1, p. 324

convergence process with the WTO rules backed up by a neo-liberal agenda of regulatory reform globally.[729] Also equally important, with the extensive obligations on state members, WTO has moved from a system of rules prohibiting trade measures to a system of rules requiring affirmative government actions.[730] This development has gone so far that the new system obliges the governments to incorporate its rules and standards into their national economic regulations. The TRIPS agreements, which have been concluded as part of the Uruguay Round in 1994, may exemplify the gradually developed interventionist approach of the neo-liberal institutionalisation. As Reich points out, the subject matter of the TRIPS can hardly be classified as international trade measures, but rather domestic laws and policies. Under the TRIPS agreement, all member states, whose domestic legal systems do not provide the minimum standards of legal protection of intellectual property, are required to amend their laws accordingly.[731] Furthermore, as will be shown in the following section, to ensure compliance with its commitments, "the WTO agreements give its dispute settlement system very extensive powers to decide whether national regulation complies with a variety of international standards".[732]

Second, the transformation of the GATT into the WTO system in some crucial aspects displays a transition from soft law to hard law. Even though the GATT had a legal status of an international agreement on "basic trade policy goals combined with a code of relatively detailed rules governing the major instruments of trade policy", the GATT system of 1947 was essentially a soft law system.[733] GATT rules were basically unenforceable; it did not lay down the nature and scope of its obligations, but imposed only an obligation to negotiate. As Abbott points out, the GATT operated through a

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[729] It is also maintained that the impact of the WTO system is felt in areas that are not subject to any specific WTO regulation; for example, environmental policy, human rights, labour and competition policy (Guzman, 2004, p. 304).

[730] See Ostry, Sylvia, "WTO: Institutional Design for Better Governance" in Porter, Roger, B.; Sauve, Pierre; Subramanian, Arvind; and Zampetti, A.B. (eds.), *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium*, Brookings Institutions Press: Washington, 2002

[731] Reich (2004) p. 338

[732] Picciotto, Sol, *The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance*, 18 Governance: An International Journal of Policy, Administration and Institutions (2005) 3, p. 481

[733] Carlson (1984-1985) p.1227, footnote 174

flexible process of political bargaining as opposed to a fixed set of rules.[734] Moreover, disputes in the GATT system were resolved by consensus. As Braithwaite and Drahos point out, while compliance was generally obtained by non-legal means in the GATT system, in case a significant dispute arose there was so much flexibility "in deciding what matters that the GATT (was) hardly a rule-of-law regime".[735]

The rules and standards laid down within the WTO agreements, by contrast, are frequently specific, clear and legally binding even though they may require some degree of interpretation for which the "Appellate Body" is delegated as an adjudicator.[736] Also, these rules and standards are backed-up by an automatic and compulsory dispute settlement system, which consists of the "Panel" and the "Appellate Body". As Pauwelyn holds, at least in this sense the dispute settlement system makes WTO law "hard law" that can be enforced.[737] Indeed, according to Picciotto, the dispute settlement system of the WTO is "a full-blown trade court in all but name".[738]

On the other hand, it is also true that the WTO system lacks certain basic powers of a court. For instance, the "Appellate Body" does not have the power to award compensation[739] or automatic recognition of the binding character of its decision, which have to be approved by the "Dispute Settlement Body" (DSB). Moreover, this system does not have the authority to impose sanctions directly on those who violate WTO obligations. Furthermore, as Wolf stresses, the remedies of the WTO dispute settlement system are in practice of little use to less powerful countries since the countries with big markets have greater ability to market access and deter actions against their exporters.[740] Besides, as it is argued, at the end of the day, rule-breakers do not have to

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[734] Abbott, Frederick, M., *Incomplete Rule Systems, System Incompatibilities And Suboptimal Solutions*, 16 Arizona Journal of International and Comparative Law (1999) 1, p. 195

[735] Braithwaite and Drahos (2001) p. 185

[736] Picciotto (2005) p. 478

[737] Pauwelyn, Joost, *The Role of Public International Law in the WTO*, paper presented at "Sustra International Workshop, Berlin 9-10 December 2002, p. 2

[738] Picciotto (2005) p. 481

[739] Article 3.7 of the DSU stresses that the first objective of the dispute settlement mechanism is to secure withdrawal of the WTO-inconsistent measure. The compensation may be resorted (as a "last resort) to only if "the immediate withdrawal of the measure is impracticable" and subject to authorisation by the DSB.

[740] Wolf, Martin, *Globalization and Global Economic Policy*, 20 Oxford Review of Economic Policy (2004) 1, p. 76

pay any damages for past inconsistency; and in case of persistent wrongdoers, the aggrieved member can only be allowed to retaliate to re-balance the scale of concession, and nothing more.[741] However, it should be underlined that lack of 'direct' enforcement is by no means 'non-enforcement'. Indirect and 'informal' enforcement may occur when one or more actors (states, international organisations, and others) impose costs on a rule-breaker. Such indirect or informal enforcement can employ not only retaliation, but also 'diminished reputation and credibility' and 'manifestations of reciprocity'. And also, even though the decisions of the "Appellate Body" need to be approved by the DSB, this requirement should be deemed as hypothetically so, since rejection of a decision of the "Appellate Body" is only possible by 'consensus'. As discussed in the following section in detail, even the aggrieved party (or parties) is represented in the DSB and therefore it is highly unlikely that the complaining country (or countries) would vote against a report of the "Appellate Body" in favour of the complaining side. It can therefore be concluded that the WTO now stands at the point where it is almost a self-enforcing regime whose members commit to a series of precise obligations, which "can be adjudicated and compliance can be sought through means that fairly automatically impose real costs on regime defectors".[742]

The WTO system assaults the principle of state sovereignty at several levels. The most visible occurrence of such an assault is that as shown above, the WTO constrains the policy autonomy of less powerful states mainly by forcing countries to harmonise their domestic law and policies with the principles of the free market economy. Yet, interesting to note, the decisions of WTO are based on the (formal) consent of sovereign states. As mentioned in section 8.2, when the GATT was replaced by the WTO in 1994, the powerful states did not choose to adopt a weighted vote system as in the IMF and the World Bank but have preserved the principle of sovereign equality, which entails by definition "decision by consensus" principle, according to which all the WTO members, regardless of their political and/or economic influence, are at least theoretically given the possibility of blocking a decision by formally objecting to it. The 'veto right' gives a guarantee to (in particular small) member countries that WTO decisions cannot be

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[741] Pauwelyn (2002) p. 3

[742] Kelly, Claire R., *Power, Linkage and* Accommodation, 24 Berkeley Journal of International Law (2006) p. 81

imposed on them despite their opposition to a particular rule. Steinberg explains the apparent contradiction between powerful state hegemony and the consensus-based decision-making in the WTO by the fact that the procedural mechanisms make it possible for the powerful states to achieve the outcome they desired within the WTO system. These mechanisms and strategies are: (i) "invisible weighting", (ii) "relative market size", (iii) "coercion" in various forms, like a threat to exit or withdrawal from the deadlocked organisation and reconstituting a new organisation under different terms, and (iv) the domination over the formal and informal "agenda-setting" process (the formulation of proposals that are difficult to amend).[743]

Of course, as the "Seattle protests" in November 1999 symbolically showed,[744] the asymmetrical outcomes of the WTO system, favouring the powerful states and MNEs, have created considerable frustration and encountered growing criticism. The critical voices argue for example that the WTO essentially serves MNEs' interests, and it increases inequality, undermines the sovereignty of less powerful states and destroys the environment.[745] The WTO has also been accused of having a highly undemocratic and secretive decision-making and dispute resolution mechanisms.[746] The issues regarding transparency, democratic control, and accountability must be considered fundamental to the legitimacy of the WTO, bearing in mind that the rules agreed on within the framework of the WTO extend deeply into national economic and social order and even more importantly they are legally binding and enforceable.

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[743] Steinberg (2002) p. 341

[744] Estimated 100.000 protesters ranged from human rights groups, students, environmental groups, religious leaders, labor rights activists, etc gathered to protest the current rules and implementations of the "corporate-led free trade", which sideline developing countries to a large extent. See, http://www.guardian.co.uk/wto/article/0,2763,195956,00.html.

[745] For an overview of such criticisms and the response of the WTO, see http://www.wto.org/english/theWTO_e/minist_e/min99_e/english/misinf_e/00list_e.htm

[746] See for instance, http://www.foe.co.uk/resource/briefings/wto_disputes_res_mech.pdf and http://www.greenpeace.org/international/campaigns/trade-and-the-environment/why-is-the-wto-a-problem/secretive-and-undemocratic.

8.6 The evolution of the GATT/WTO dispute settlement procedures

There is no doubt that one of the key events in the establishment of the World Trade Organisation was the creation of the dispute settlement system, which presents a markedly significant change compared to the GATT's consensus-based dispute resolution system. The adoption of the Dispute Settlement Understanding (DSU) within the WTO has created a unified dispute settlement system, which virtually resembles a national court system.[747] It contains rules on the pre-panel phase, called 'consultation' as well as detailed working procedures for the panel phase.[748] Two novel and distinctive features of the DSU are (i) the reverse or negative consensus rule for the adoption of Panel reports, which means that any member intending to block the decision to adopt the report(s) has to persuade all other WTO Members (including the adversarial party in the case) to join its opposition or at least to stay passive. Therefore, a negative consensus is largely a theoretical possibility and, to date has never occurred. For this reason, one may speak of the quasi-automaticity of these decisions in the DSB. This contrasts sharply with the situation that prevailed under GATT 1947 when panels could be established, their reports adopted and retaliation authorized only on the basis of a positive consensus. Unlike under GATT 1947, the DSU thus provides no opportunity for blockage by individual Members in decision-making on these important matters. [749] (ii) The establishment of an Appellate Body (AB). The AB has been established for the review of legal issues decided by the panels. Article 17(13) of the DSU defines the powers of the AB in the following terms: "The Appellate Body may uphold, modify or reverse the legal findings and the conclusions of the panel".[750] What is radically different in this procedure is that according to Article 17(14) of the DSU, AB decisions (reports) must be "unconditionally accepted by the parties to the disputes unless the

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[747] Davey, William, J., "WTO Dispute Settlement: Segregating the Useful Political Aspects and Avoiding 'Over Legalization'" in Bronckers, Marco and Quick, Reinhard (eds.), *New Direction in International Economic Law*, Kluwer Law International: The Hague, 2000, p. 291

[748] The panels are not standing bodies but *ad hoc* tribunals that must be established for each case by the WTO "Dispute settlement Body" (DSB), which is composed of member state representatives. However, even though the establishment procedure of the panels may evoke arbitration, their actual functioning leaves no doubt that panels are judicial in nature. (Pauwelyn, Joost, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 American Journal of International Law [2001] p. 535).

[749] See, http://www.wto.org/English/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm

[750] http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf

DSB decides by consensus not to adopt the Appellate Body".[751] As Picciotto observes, this reverses the GATT rule, which required a positive decision to adopt panel reports including the assent of the disputing parties. This of course would give governments a power to block adverse ruling.[752] In other words, AB operates as a judicial tribunal in international law. Moreover, states are obliged to implement the decisions of the AB within a reasonable period (Article 23/2). If the state at issue fails to comply with the decision, the complainant may request mutually acceptable compensation, in the absence of such an agreement, the complainant may request trade sanctions. To end with, it is possible to claim that although the WTO Dispute Settlement system lacks the power to enforce directly its judgement, its existing power still makes the AB exceptional as an international body.

The hard law transformation of the GATT/WTO dispute settlement mechanism has become one of the central pillars of the multilateral trading system. This development reflects WTO's evolution into a more legalised and thus powerful institution. Yet, this more potent and 'legalistic' development of the WTO dispute settlement system is hardly unique. Considering the recent proliferation of international and supranational tribunals, such as various dispute settlement mechanisms within the system of the NAFTA, the ICSID, and international commercial arbitration, it becomes evident that the hard law development of the WTO dispute settlement system should be interpreted within a broader tendency towards a more disciplined and regulated international economy. For, as Abbott puts it, dispute settlement mechanisms may function as regulatory/disciplinary mechanism in international economy; "they may promote open market conditions, and they may also be used to restrict markets, for example by the acceptance of market/quota allocations".[753]

8.7 Concluding remarks

This chapter has shown that the employment of the deregulation and re-regulation policies that served as tools to pave the way for the neo-liberal constitutionalisation

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[751] http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf

[752] Picciotto (2005) p. 478

[753] Abbott (1999) p. 194

project, has been designed to secure internationally guaranteed private property rights and create the necessary discipline for markets through redefining the terms of international competition. In the chapter it is argued that in the process of market liberalisation and deregulation there is an inbuilt and simultaneous process of re-regulation rather than the total eradication of regulations of state/international organisation. The re-regulation process as part of disciplining market that has developed in the international institutional context took two distinctive forms: (i) an extended scope and broader mandate of the international economic institutions; (ii) the changing nature of these institutions both in terms of a deepening hard legalisation and interventionist approach in the domestic law and policies of the member states. Examples of such a development are abundant: IMF for instance, has evolved into a financial institution, handling payment systems, banking, capital markets, and financial crises, from initially being an international monetary institution. Moreover, through the mechanism of 'conditionality', both the World Bank and the IMF have imposed the policies of market economy on borrower countries. Likewise, the WTO has evolved from being an organisation, whose mandate was to lower trade barriers into a principal actor in the harmonisation of national laws in the fields of trade, intellectual property rights and services. The "new generation" of multilateral provisions addressing these issue-areas has turned into veritable standard setting. These standards are prescriptive in nature, setting standards and defining outcomes of how national law must be shaped.

The institutional evolution of the GATT/WTO from a soft law to a hard law system bears the basic characteristics of what this study labels the "hegemonic state" paradigm. In this model, inter-state relations are reordered based on the post-Cold War hierarchical power structure. As exemplified by the development of the Bretton Woods institutions, the neo-liberal ideas associated with globalisation, such as liberalisation, deregulation and privatisation, have been institutionalised through a multilateral rule-based framework that has substantial authority over national governments of developing countries. In other words, globalisation is not disconnected from the Bretton Woods institutions.

Thus, considering that those international institutions, which are regulating and governing globalisation, were initiated and still to a considerable extent are controlled, by the US and a few other powerful states, it can be assessed that in the 'hegemonic state' paradigm, like in the NIEO, the state has a central role. Yet, these two "statist"

models are significantly different in a number of aspects. First, the NIEO was initiated by developing countries whereas the WTO/hegemonic state-model represents a developed country initiative. Second, although both initiatives are based on the principle of sovereign equality, in the NIEO-model this principle is rather asserted in a nearly aspirational sense whereas in the WTO/hegemonic state-model this principle is preserved due to its effect on the legitimacy of the process and the effect on the generation of information necessary for a successful agenda-setting process.[754] Third, the NIEO-model categorically discarded any vital role for MNEs either as norm or rule makers whereas the WTO/hegemonic state-model actively encourage an active participation of private entities. In a sense, the NIEO was a product of the ideological conditions of power balance between capitalist and socialist block whereas the power balance on which the WTO/hegemonic state-model is based is between powerful states-MNEs and (to a lesser degree)- NGOs. Both models entail a highly regulated international economy. However, the NIEO endeavoured the international regulation to regulate the activities of MNEs as well as to ensure financial and technology transfer from North to South whereas the purpose of regulation in the WTO/hegemonic state-model has been to promote the activities of MNEs. Therefore along with deregulation, re-regulation has also been an essential policy. Another reason for the increasing regulation of international economy in this model is to regulate the competition between countries and developed country-based MNEs. As in the example of the OECD "Convention on Combating Bribery of Foreign Officials in International Business Transactions", when defining the rules of the proper functioning of international business competition, international organisations favouring market-based mechanisms become willing to endeavour hard law solutions. Lastly, in the NIEO-model, the regulatory outcome originated from the numerical majority of the developing countries in the UN General Assembly. Since it was based on a sort of "majority voting" model against economically powerful states, the legal outcome of this process was soft law whereas the WTO/hegemonic state-model is based on hard law development and the legal outcome has to a large extent been hard law.

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[754] Steinberg (2002) p. 361

9 ANALYSIS: THE EVOLUTION OF SOFT LAW IN ECONOMIC REGULATION

9.1 Introduction

This chapter aims to analyse the relationship between the two legal paradigms identified in this study; the "state-centric" and the dual "globalist" paradigms. The analysis will focus on the development of international economic regulation and examine the changing nature and role of soft law within each of these paradigms.

Section 9.2 gives a brief overview of the examined paradigms and the underlying reasons for the paradigm shift. As stated in chapter 1, section 1.2, a paradigm is in this study understood as a device for explaining the pervasiveness of world views. Each paradigm is seen to be composed of an underlying discourse and its connected practices. Section 9.3 maps the basic characteristics that distinguish the discourse and the social and institutional practices of the state-centric paradigm. In order to identify the conditions that made this discursive formation possible this section also examines the context upon which the state-centric paradigm is based. Section 9.4 discusses the underlying reasons for the paradigm shift. Section 9.5 maps the basic characteristics that distinguish the discourse and the social and institutional practices of the dual globalist paradigm. This section also analyses the interrelation between the two globalist sub-paradigms. Section 9.6 examines the relations between two paradigms and the changing nature and role of soft law as a result of the paradigm shift.

9.2 An overview of the structure of the paradigms

The state-centric paradigm had two main sources:

(i) Decolonisation

(ii) The need for restructuring the national economies of the developed countries of Europe.

The common grounds of these two sources were the Cold War (balance of power in international relations) and the Keynesian commitment to create national economic policies that were directed towards creating a steady economic growth and full employment backed up by international economic institutions centred around the Bretton Woods institutions. At this time these institutions were charged with constructing an institutional infrastructure of financial stability and multilateral free trade, i.e., 'embedded liberalism'.

Figure 2 pictures the main characteristics of the examined paradigms and the underlying reasons for the paradigm shift.

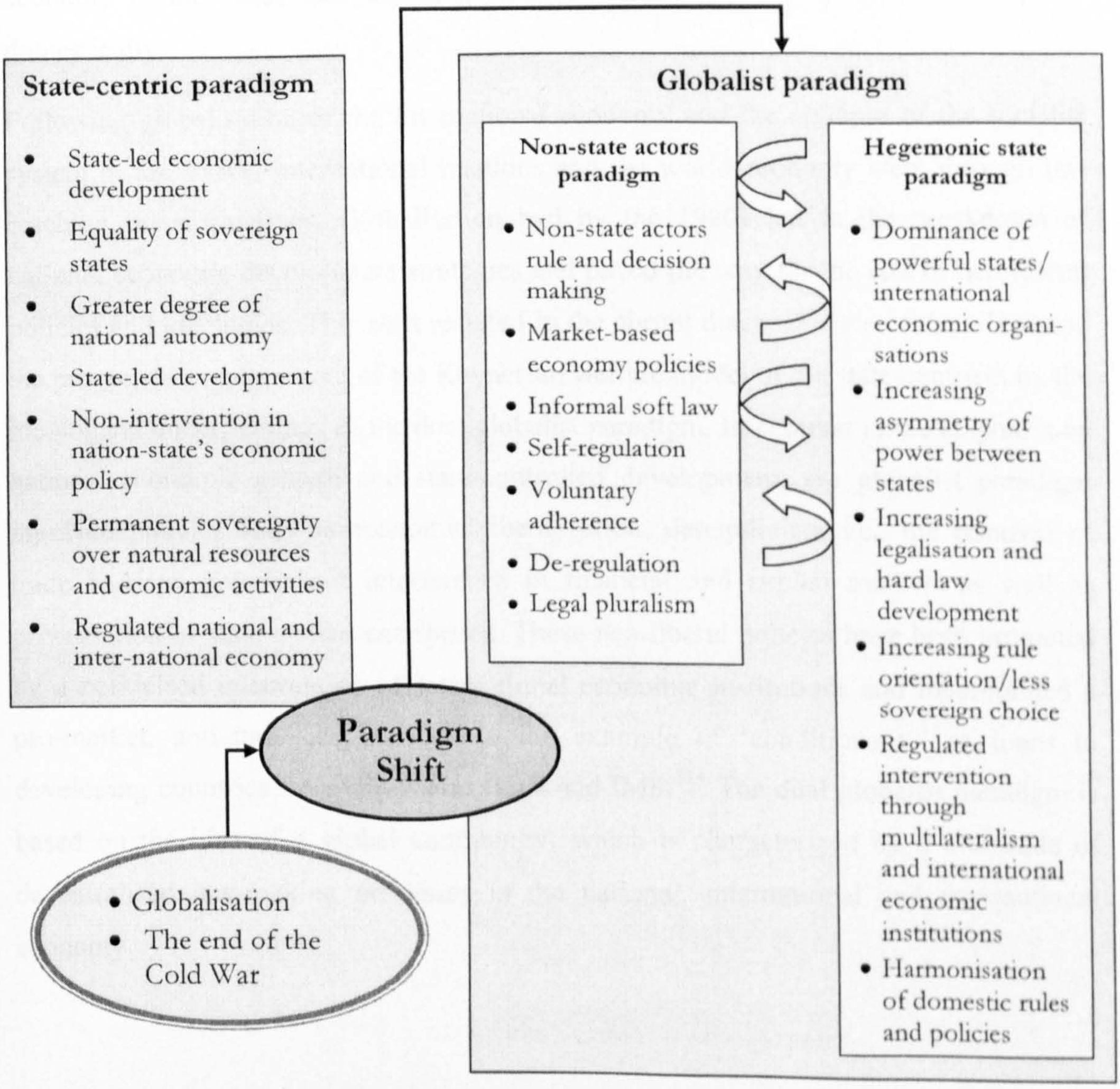

Figure 2. The structure of the paradigms and paradigm shift
Source: Original formulation based on the analysis in chapter 3-8

While the process of decolonisation gave rise to the developing country model of state-centrism, which is exemplified by the NIEO in this study, the second source that involves the need for reconstruction of the national economies, brought about the European type of welfare state model; a combination of liberal democracy and capitalism, which sees government intervention in the economy as necessary for the stability and development. In both variations of the state-centric paradigm, the nation-state was seen as the primary and legitimate institution of policy creation, enactment, and enforcement and the only agent in economic development through public sector and planned investment and. This entailed a relatively segregated and self-sustained national economy in the sense that the major part of economic activity had to take place domestically.

Following globalisation of the international economy and the collapse of the socialist system in the 1980s, international relations and the world economy went through far-reaching transformations. Globalisation had by the 1980s led to the breakdown of national economic development strategies and paved the way for the rise of neo-liberal policies and ideologies. This shift resulted in the abrupt disappearance of the NIEO and the progressive replacement of the Keynesian welfare model of the state-centrism by the ideological underpinnings of the dual globalist paradigm. In contrast to the emphasis on national economic growth and state-controlled development, the globalist paradigm involved policies such as economic liberalisation, deregulation, i.e., the removal of trade barriers, government interference in financial and capital markets as well as privatisation of state-owned enterprises. These neo-liberal policies have been promoted by a politicised intervention of international economic institutions and incorporated a pro-market, anti-state emphasis as in the example of 'conditionality' of loans to developing countries from the World Bank and IMF.[755] The dual globalist paradigm is based on the idea of a global community, which is characterized by a multitude of decentralised law-making processes in the national, international and *trans*national economy.

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[755] Pender, John, *From 'Structural Adjustment' to 'Comprehensive Development Framework': Conditionality Transformed?*, 22 *Third World Quarterly* (2001) 3, p. 399

9.3 The discourse formation and practices of the state-centric paradigm

As discussed in chapter 5, the NIEO was a negotiation process between countries of North and South. It involved a comprehensive package of multilateral policy options that aimed to improve the position of Third World countries both by revising the existing international economic policies and reforming international economic institutions. This included the reform of the power relations within these institutions, which were seen to generate and sustain international asymmetries and to reproduce the structures of underdevelopment. According to the perceptions underlying the state-centric paradigm, of international economic relations should be based on the principles such as respect of sovereign equality of states, the right of every state to freely exercise full and permanent sovereignty over all of their natural resources and economic activities and non-interference in internal affairs.

The programs of the NIEO were designed to achieve national economic development of developing countries through a wide range of policy measurements, which paradoxically required the autonomy of the nation-state and the inter-national cooperation through revising international economic policy and restructuring international economic institutions. The autonomy of the nation state meant that states should retain sufficient autonomy to pursue economic and social objectives domestically providing social welfare for their citizens. International cooperation was seen as a tool to increase the influence and endorse the demands of the increasing number of "free" developing countries. To achieve this goal these countries made recourse to a variety of international forums and institutions, in particular the UN General Assembly. At the domestic level, the state-centric model had five basic elements:

(i) The state had the primary responsibility for the development of national economy through planning all important aspects of the economy and to guide and direct various policies and actors in an integrated way. At this point, it should also be remembered that central planning is a way of making law, not just commodities.[756]

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[756] Cooter, Robert, D., *Decentralized Law for a Complex Economy*, 144 University of Pennsylvania Law Review (1996) 5, p. 1644

(ii) States did not only plan the economy but they also played as a principal economic actor by creating public enterprises in various sectors ranging from manufacturing and service to insurance and transportation.

(iii) The promotion of industrialisation was a primary function of the state in developing countries where capital is scarce and the economy is dependent on agriculture and raw materials. Hence, state investment was seen as the only means of capital accumulation.

(iv) As a consequence of state planning and reliance on public enterprises, both domestic, but especially foreign private enterprises were subjected to large-scale regulation on every important aspect of business operation, such as business formation, technology transfer, price and currency exchange.

(v) In order to achieve a complete independence, developing countries also pursued policies that would lead to self-reliance and economic independence through adopting economic policies including expropriation of foreign investment, restriction and control of capital inflow, and a controlled import of foreign goods through high tariffs and exchange controls. "The basic thrust of these measures was to restrict foreign influences on developing economies and to control economic interactions with the outside world."[757]

Figure 3 depicts the conditions for the formation of the discourse underlying the state-centric paradigm as well as its key characteristics. Moreover the figure illustrates the legal and political tools as well as the legal outcomes of this paradigm:

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[757] Salacuse, Jeswald, W., *From Developing Countries to Emerging Markets*, 33 The International Lawyer (1999) p. 879

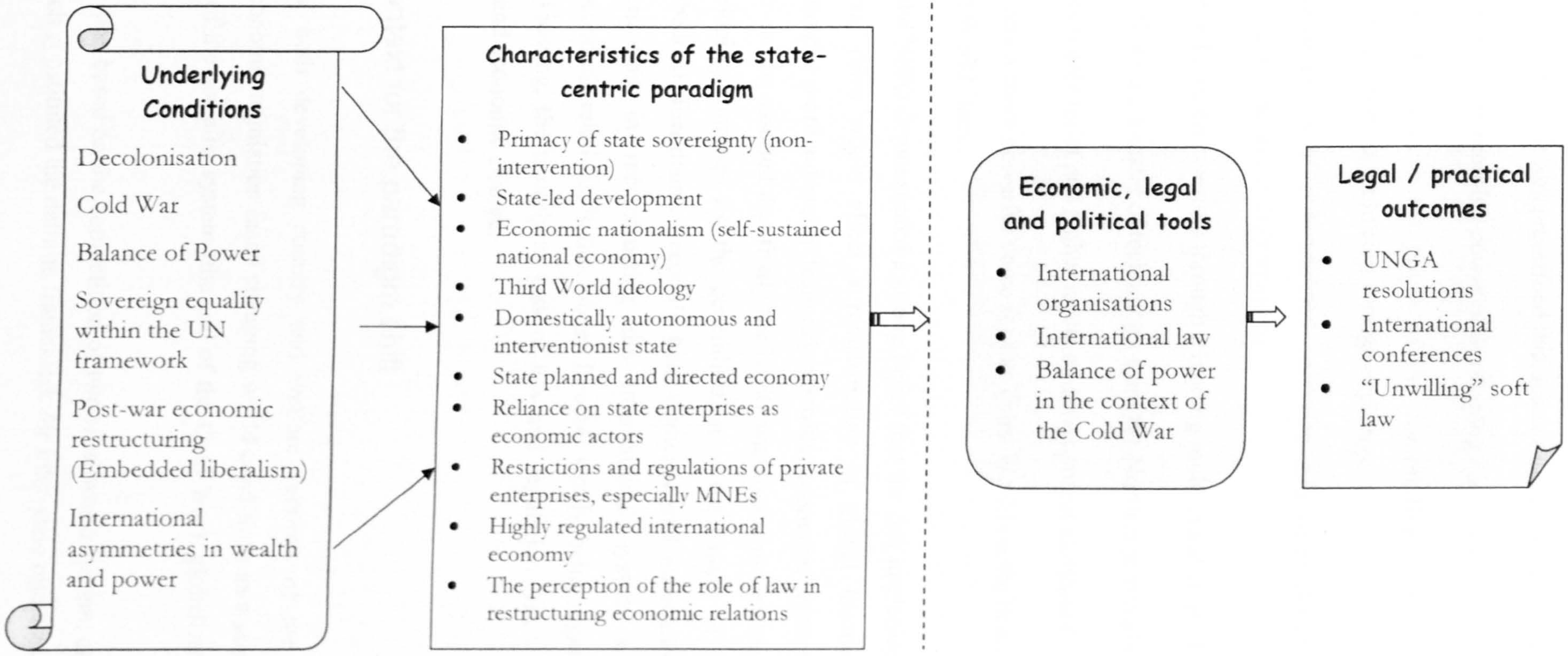

Figure 3. The structure of the state-centric paradigm: characteristics and outcomes
Source: Original formulation based on the analysis in chapter 3-8

At the inter-national level, it was prescribed that states should cooperate to:

(i) Improve the purchasing power of developing countries;

(ii) Stabilise and raise the prices of the commodities developing countries generally relied upon to earn foreign exchange;

(iii) Reduce tariffs of industrialised countries and offer Southern exporters preferential access to their markets;

(iv) Control foreign investors through a binding multilateral code of conduct;

(v) Facilitate the transfer of technology from the North at minimal costs;

(vi) Obtain debt relief and higher levels of development assistance; and

(vii) Secure a more powerful voice for the Third World on the boards of the IMF and World Bank.

To conclude, the NIEO demonstrated a strong belief that the full implementation of the new multilateral rules would effect a redistribution of global income and allow developing countries more autonomy from asymmetrical economic relationships. Thus, in this sense, it can be asserted that firstly the NIEO was to a considerable extent a call made by developing countries for the generalisation of the benefit of the European model of 'embedded liberalism'. Secondly both domestic and international law was seen as determinant in reconstructing the international system and changing international economic relations, in this model. In other words, being regarded as a tool for social engineering, the underlying task of law and regulation was to bring about desired social and economic change.

9.4 The context for the paradigm shift

By the 1980s, both developing country and welfare versions of the state-centric approach to economic regulation faced changing world conditions as a *combined* result of the demise of the socialist system (the end of the Cold War), globalisation and debt crisis.

The Cold War was based on the competition of two rival world system, capitalism and socialism, which constituted the definite framework for inter-state relations. The demise

of the socialist system had consequently profound implications on international relations in general and international economic and legal order in particular. Above all, the possibility of developing countries to play two rival camps against each other in order to pursue their objectives has disappeared with the collapse of the socialist system. Related to this, the end of the socialist system deprived many developing countries of sources of psychological and material support. This was particularly critical within the framework of the UN. Equally importantly, with the demise of the socialist system, the centrally planned economic model was discredited in most developing countries. Although this 'victory' of liberalism did not alone cause a shift towards a liberal economic reform, it nonetheless reinforced the claim of the market economy of being the superior solution in managing the global economy.

The increasing globalisation of international economy has been pointed out as another crucial reason for the shift examined in this study. Globalisation has involved the fragmentation and decentralisation of national productive processes and the dismantling of national economies. It has also implied a shift from an inter-national economy, in which national production systems were linked to each other through trade and financial flows, to a globally integrated world economy.[758] In the new globalised era, the notion of development is no longer meant national economic growth, but successful participation at the world market. In other words, in the globalisation process of the world economy, the notion of 'economic development' has been decoupled from the national connotation it had within the state-centric model.

This new approach to development advanced mainly by the IMF and World Bank and other policy-making circles, such as G7, found its intellectual ground in the neo-liberal ideology, which prescribed that the route to development passed through deeper integration of the world economy (the so-called "export-led development"). By the 1980s, developing countries uniformly adopted this new approach to development, which meant a shift from the central role of the state basing the societal development on welfare goals to the neo-liberal principles that emphasised the importance of the market forces. The most important reason for this shift in approach to Third World development was the necessity of developing countries to obtain financial assistance

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[758] Robinson, William, I., *Remapping development in the light of globalisation*, 23 Third World Quarterly (2002) 6, p. 1056

from the IMF and the World Bank due to the deep economic crisis and huge debt problem the developing countries were struggling with in the end of the 1970s. These economic problems included budgetary, inflationary, and debt servicing burdens. The resources that were made available by the IMF and the World Bank to combat these severe payments problems were made conditional through the adoption of the Structural Adjustment Program (SAP). The conditionality linked to the SAP basically entailed:

(i) The liberalisation of trade and financial systems and the reduction of trade and investment barriers, opening the economies to the world market;

(ii) Deregulation, which removed the state influence on macro-economic decision making;

(iii) The privatisation of public owned enterprises;

(iv) The withdrawal of all subsidies; and

(v) The protection of property rights protecting investors from expropriation of private property.

Thus, SAP generally called for the elimination of state intervention in the economy and the regulation of individual nation-states over the activities of international capital within their territories.

Between 1978 and 1992 more than 70 developing countries undertook 566 stabilisation and structural adjustment programmes imposed by the IMF and the World Bank.[759] Developing countries adjusted themselves to these new conditions to varying degree, depending on diverse factors specific to each country's population, history, culture, geo-political location and then existing level of capital/technological accumulation. This has resulted in an increased economic and developmental differentiation between different groups of developing countries resulting in increasingly contradictory agendas of these countries. Especially some East Asian countries performed well in this rather dramatic restructuring of the world economy. As a consequence this has lead to a decreasing incentive for these countries to stick together to promote the same development and goals within the international organisations and forums.

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[759] http://www.imf.org/external/np/pdr/cond/2001/eng/collab/comment.pdf

9.5 The discourse formation and practices of the globalist paradigm

A central debate in the neo-liberal globalisation process has involved discussions on the capacity of states to independently and effectively pursue domestic economic strategies. According to the neo-liberal accounts, the forces of globalisation have increasingly rendered the nation-state less powerful as well as less meaningful. Many have also claimed that non-state actors have acquired an unchallenged power and implicitly been accorded a legitimate authority as a result of:

(i) Changes in information, communications, and financial technologies, which have altered the basic relationship between authority and market;

(ii) The emergence of new global problems, such as transnational environmental problems that require transnational action; and

(iii) The decline of the nation-state as regulatory power as a result of privatisation and de-regulation.

These developments have resulted in a greater participation from MNEs and NGOs in rule and policy-making processes as well as a turn to markets as mechanisms to allocate society's resources. As a consequence, the 1980s and 1990s have witnessed shifts from binding to increasingly voluntarist, non-state/hybrid and self-regulatory frameworks involving non-binding standards and rules, and public-private co-operation.

Neo-liberal approach to the economy basically involves the policies of market deregulation, state decentralisation, and reduced state intervention in economic affairs. Its two central elements are the self-regulating market, i.e., a categorical belief in market performance as the governing mechanism for allocating goods and services and the rejection of state interference in economy, i.e., regulation. On the other hand, the actual practices of neo-liberal globalisation have showed that the transformation of international economic relations has not only entailed de-regulation, informal and voluntary normative development corresponding to the rising authority of non-state actors as rule makers and the emergence of a multilayered governance, but also an increasing legalisation, in the forms of re-regulation and hard law development. In other words, the shift from state-centred economic development and regulation to market-based mechanisms should not be conceived as an overall conversion from 'public' to 'private'. For, this shift entails not a definitive rolling back of state intervention, but it

should rather be interpreted as the political, economical and institutional re-organisation of the role of the state. Thus, even though free markets and deregulation are presented by the neo-liberal ideology as a way to exclude state involvement in economic regulation, the process of globalisation has entailed both deregulation and re-regulation.

Figure 4 depicts the conditions for the formation of the discourse underlying the dual globalist paradigm as well as its key characteristics related to each of the two sub-paradigms, the non state actor paradigm and the hegemonic state actor paradigm. Moreover the figure illustrates the legal political tools and the legal outcomes of each sub-paradigm.

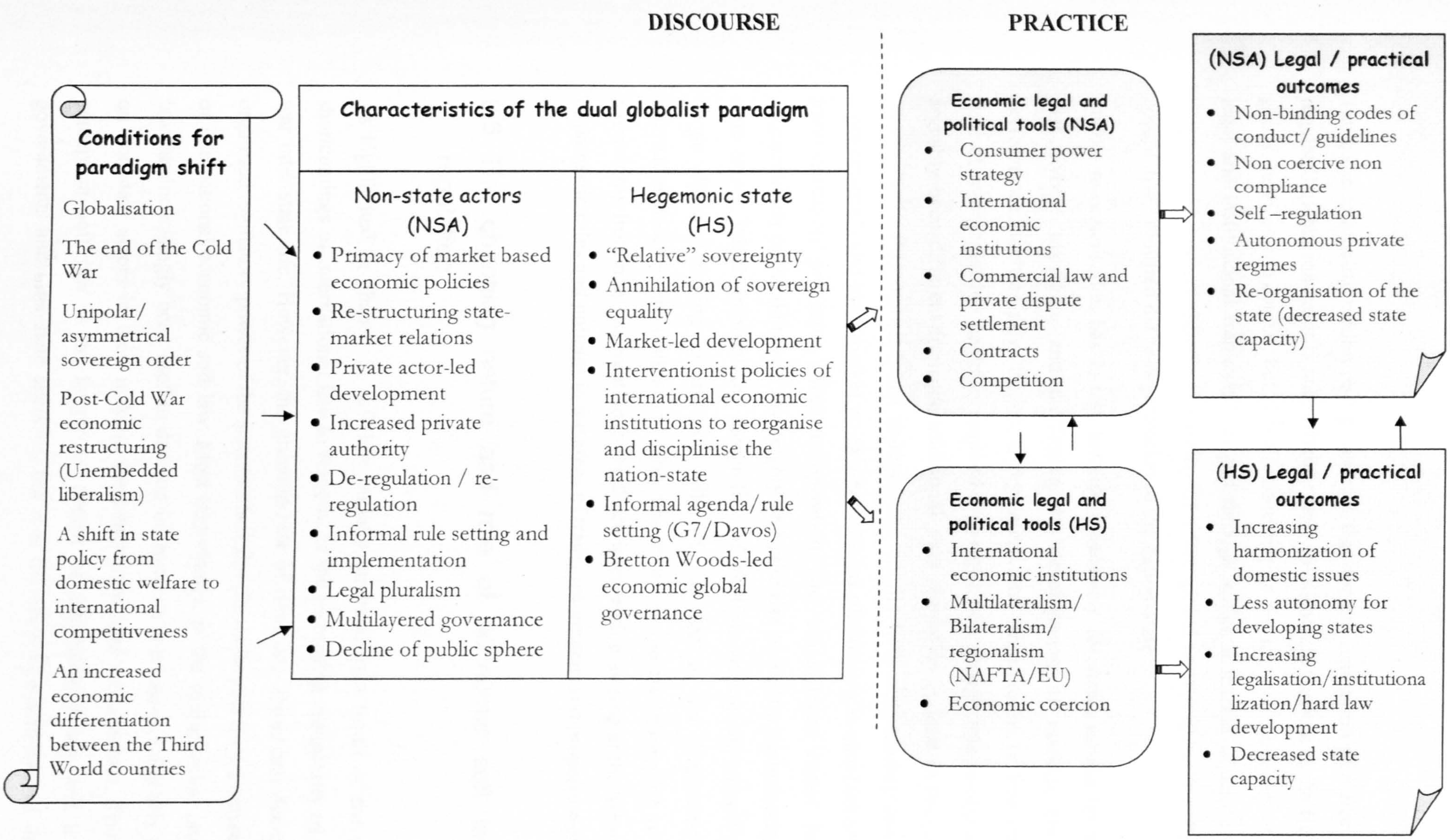

Figure 4. The structure of the dual "globalist" paradigm: characteristics and outcomes
Source: Original formulation based on the analysis in chapter 3-8

The basic rationality behind re-regulation is that for the realisation of a free and self-regulated global market it is not sufficient only to dismantle barriers to the free flow of goods, services and capital, but also it is necessary to put in place the essential political, legal and institutional framework in and through which a market is constituted, like property and contract rights. The reality of a free global market place "not being self-constitutive" required the re-organisation of the nation-state.

Such a re-organisation has in turn entailed a necessity for states to take up new roles that involve managing and facilitating the development of markets and market performance, such as privatisation, deregulation, and negotiations of free trade. This type of re-organisation has also required a re-regulation though this re-regulation has arguably been different from the traditional state regulation at least in two important ways: Firstly this market-based re-regulation entails both state-market co-operation ('governance') and state-market co-existence ('legal pluralism') in standard setting and implementation processes. Such co-operation and co-existence hence imply the fragmentation of the domestic sovereignty and give rise to a growing authority of non-state actors, which imposes the recognition of multiple sources of authority and no single decision-making centre. Secondly, it has led to an interventionism of international economic institutions. This has involved the transformation of external sovereignty from non-intervention to regulated intervention aiming at the harmonisation of domestic rules and policies in the areas of trade, investment and property rights.

9.6 The changing nature and role of economic soft law and regulation

As highlighted in chapter 2, soft law initially emerged as a result of the structural shortcomings of international law to respond to the increasing complexity of the post-war inter-state life. However, the growing role of non-state actors and decreasing/re-organised regulatory power of the state has had significant impact on the nature and role of international economic soft law. Most importantly, in the globalisation process soft law has increasingly been used to develop instruments and regimes that rely primarily on non-state actors in their making, implementation and enforcement. Thus, in this perception soft law is no longer a concept of international law and a tool for governments and inter-state agencies, but it is the norm-like activities of the private

actors within a combined public-private transnational realm. Due to this conflicting nature and role of law and regulation as understood and employed in the two paradigms described in this thesis, the shift from state-centric to globalist paradigm has had important implications for the development of soft law.

The NIEO is an outstanding example where law and regulation is perceived as a tool for social engineering. Within the NIEO it is understood that domestic and inter-national legislation can bring about social/economic changes. Whereas in the *laissez-faire* economy promoted within the globalist paradigm, it is held that the actions of private individuals, motivated by self-interest, will work together for the greater good of society as long as markets are free and competitive. The supporters of this latter conviction traditionally argue in favour of reducing or eliminating state interventionism in the economy. This line of reasoning maintains that state regulations wrongly protect companies from competition at the expense of consumers. In practice, however, *laissez-faire* principles have not prevented private interests from turning to the government and international economic organisations for help on various issues including accepting grants and public subsidies appealing for protections through trade policy, and seeking for investment protection when facing strong competition from abroad.

A summary of the main differences in the approach to law and regulation between the two paradigms are described in table 2.

Table 2: A summary of the differences in approach to law and regulation between the state centric and the Globalist paradigm
Source: Original formulation based on the analysis in chapter 3-8

State-centric paradigm	Globalist paradigm
• Law is a tool for social engineering (legal interventionism) • Non-interventionism is an important basis for creating domestic law • Legal centrism; state is the only law-maker • A move from contract to law and regulation • Demand for international binding rules for regulating MNEs and for securing financial and technological transfer from developed to developing countries • Formally and highly regulated domestic and international economies	• Law is a tool for creating discipline for international markets and to secure the interest of global capital • Regulated interventionism by international economic institutions to homogenise domestic law • Decentralised law-making and legal pluralism; non-state actors, international economic institutions and arbitration/dispute settlement mechanisms are also law-makers along with states • A move from law and regulation to custom and contract • Less state-based rules for regulating business (deregulation, self-regulation); more and harder rules facilitating international business activities and protecting property rights • Deformalisation of the international norm making process

The NIEO was associated with the Westphalian model of the international society, based on the idea that sovereign nation-states comprise the exclusive actors of international sphere, in which intervention is considered as legally and morally unacceptable. Chapter 1 of the Charter of Economic Rights and Duties of States, entitled "Fundamentals of International Economic Relations", expressly says: "Economic as well as political and other relations among States shall be governed, *inter alia*, by the principles of (b) Sovereign equality of all States, (d) Non-intervention". Likewise, Article 1 of this Charter reads: "Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever." On the other hand, the hegemonic state sub-paradigm entails interventionism in various forms. One example of this type of interventionism is the structural adjustment programs of the IMF and World Bank, and the policy of

conditionality associated with it. This system arguably constituted an infringement on the sovereignty of mainly developing states because it constrains and undermined their ability to manage, accumulate, and redistribute economic resources within their own territory. Similarly, the convergence/harmonization of domestic laws under the WTO regimes, especially the TRIPS and GATS agreements can be considered as constituting a limitation on the national policy choice of sovereign states as it mainly focuses on shrinking the role played by domestic politics. In other words, the harmonisation and supra-nationalisation involved in adding conditionality to loan agreements and the WTO regime challenge the effectiveness of both domestic and international state policies.

Another major consequence of the paradigm shift for the role of law and regulation is that the "non-state actor" sub-paradigm represents a movement from plan to contract, from public ordering to private ordering of economic activities. State-centrism involves the intervention of the state in domestic and international economic activities in various degrees and forms using law and regulation in which governments formulate the goals of the state(s) and force other actors to conform to these goals. Such a centralised top down law-making process crowds out any bottom up initiative of regulatory mechanisms and especially self-regulation. For instance, during the post war period when the state-centric paradigm was prevailing, there was a rapid increase of new laws and regulations where none had existed before: public enterprises law, foreign investment codes, currency control regulations, nationalisation decrees, price regulations which meant that there were little space for bottom up initiatives. "This new public law, not the commercial code, became the basic law of economic and business activity in the Third World".[760] Conversely, the globalist paradigm has emphasised the role of markets and private ordering and has consequently promoted a decentralised law making, which promulgates the rule-making of non-state actors. This shift in state-market relations that has characterised the contemporary era of globalisation and economic liberalisation is particularly evident in the arena of *lex mercatoria* and CSR, where the norms arise outside of the state's law making apparatus. In the case of *lex mercatoria*, business actors have gained increased autonomy through regulating their economic transactions with contracts. In the example of CSR, self regulatory, voluntary

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[760] Salacuse (1999) p. 881

and soft approaches to business regulation has been promoted in an attempt to improve aspects of company performance that relate to social and human rights responsibility. In short, in both occurrences of self-regulatory regimes the emphasis is put on the market-based mechanisms developing as an autonomous process in which the rules are elaborated in a decentralised way.

Central to the discourse that proclaims the superiority of the market in relation to legalistic approaches involving state-based regulation, the globalist paradigm has required a new approach to the notion of regulation. In addition to an enhanced role for non-state actors in standard setting, implementation and enforcement which mainly can be seen as a result from deregulation and privatisation, this process has also involved (re-)regulation of markets and private transactions due to the necessity to provide rules for a proper functioning of the global market. However, unlike the state-centric paradigm, in which regulation was to direct the nature and principles of private transactions, the role of regulation in the globalisation paradigm is to keep a close watch on the functioning of transactions in order to "protect the participants in the market from fraud, coercion, and abuse by other participants".[761] Such a regulatory mechanism can be seen as the states' attempt to set up institutional conditions under which business or non-state/hybrid institutions operate in a self-regulatory manner.[762] In this regard, the shift from a state-centric to a globalist approach implies a shift in focus from directive regulation to supervisory regulation, which is primarily concerned with laying down standards and general regulatory principles rather than directly regulates business behaviour.

Lastly, the rational behind the characterisation of the regulatory efforts as soft law within the NIEO model can hardly be explained barely with the international law-making 'technique'. This study argued that such a classification has been used by the developed countries as an instrument to challenge to the strategy of developing countries to use UNGA resolutions to put pressure on developed countries in order to restructure international economic legal order. Since developing countries tried to force developed countries to adopt the objectives of the NIEO by using their numerical

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[761] *Ibid.* p. 887

[762] Teubner describes this development with the concept of the "regulation of self-regulation" (Teubner, Gunther, *Substantive and Reflexive Elements in Modern Law*, 17 Law and Society [1983] p. 239).

superiority in the UN system, developed countries used soft law as a mechanism to reduce the legal effect of the NIEO. In other words, in the NIEO model, the occurrence of soft law was as a result of the ideological differences between developing and developed countries mainly in relation to how the underlying principles of international economy should be organised (centrally planned economy versus market economy). In the globalist paradigm, on the other hand, soft law and informal rules have been created and promulgated as a result of the neo-liberal prescription characterised by a multitude of decentralised law-making processes in international economy. In this model, international economic soft law mainly originates from (i) voluntary standards, such as those issued by MNEs or NGOs, (ii) international governmental, quasi-governmental or informal institutions that depend on voluntary compliance and participation by non-state actors or other governments, such as ISO, and finally, (iii) non-state custom and practices that have emerged independently from nation-states, such as law merchant.

Against this background, it can be concluded that the shift to the globalist paradigm has involved the transformation of state sovereignty on at least at two levels: First, there is an increasing gap between the Westphalian model of domestic-sovereignty and its actual effects on governance of territorial economic activities in the face of the emergence of non-state economic legal orders. Second, the shift from inter-*national* economy towards global economy has also fragmented the Westphalian model of international sovereignty as a result of both the interventionism by international economic institutions and non-state international regulatory regimes.

10 SUMMARY AND REFLECTIONS ON THE DEVELOPMENT OF SOFT LAW

10.1 Introduction

This study aimed to explore the changing nature and role of soft law in international law in general and in international economic law in particular. It is contended in the study that the evolution of international economic law in the 1980s has experienced a paradigm shift from state-centric towards a dual globalist paradigm. This move has also entailed a change in the nature and role of international economic soft law.

Section 10.2 summarises the paradigm shift and the changing nature and role of international economic soft law examined in the thesis. Section 10.3 reflects on the possible courses that soft law development may follow in the context of the present de-formalisation of international law, which refers to the increasing management of the world's affairs by flexible and informal non-territorial networks, *lex mercatoria*, and private dispute-settlement.[763]

10.2 Summary

As a matter of fact, soft law has long existed in international law, in the first place, as a result of the problem of the doctrine of sovereignty. Soft law initially emerged in inter-sovereign relations through an inherent tension in the very concept of international law. This tension has its origin in the so-called normativity demand, i.e. a *formal* process wherein states create law, and the behaviour, will or interests of sovereign states. Hence, soft law was born as a 'by-product' of the need to reconcile sovereignty with the normativity of law. Not surprisingly, therefore, the tension between the *external* (binding) normative order and a continued autonomous sovereign authority has given

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[763] Koskenniemi, Martti, *Global Governance and Public International Law*, speech delivered in Frankfurt, 9 February 2004, available at http://www.valt.helsinki.fi/blogs/eci/Frankfurt.pdf

rise to the arguments that the normative structure of international law is essentially 'soft' as a whole. Thus the aforesaid reason for the emergence of soft law concerns "inter-sovereign life". In other words, soft law was a mean of sovereign states to reconcile the incompatibility of autonomous sovereignty with normative authority (or 'international reality').

However, as many other 'living' social institutions, soft law did not remain in its initial form or nature. It has gradually evolved from being a relatively simple concept to a more complex one in parallel to the growing heterogeneity of international society and increasing complexity of the international social order. The present study has identified two important changes in international life that have been particularly influential on the evolution of international law in general and soft law in particular: (i) the foundation of the UN and the subsequent decolonisation process in the context of the Cold War; (ii) the process of globalisation in the context of post-Cold War.

The United Nation system, established in the aftermath of the war, has aimed to create a new world order based on not only state sovereignty but also "peaceful" and "friendly" "coexistence" of international society (Article 1 and 2 of the Charter of the UN). In this new era, sometimes called the "UN Charter law",[764] the number of states increased almost twofold reaching 130 in 1960. At the same time the UN General Assembly adopted the Declarations on the Granting of Independence to Colonial Countries and Peoples, which resulted in the creation of a more pluralistic and heterogeneous international society. Even though this Declaration gave more independence and power to the new countries the Western states retained their dominant position in the Security Council and in the relevant international financial institutions, such as the World Bank and the International Monetary Fund, as weighted voting applied according to the share of financial contribution.

During the "UN Charter law" era, international law has experienced a series of substantive changes. Along with states, international organisations, individuals, multinational enterprises (MNEs) and non-governmental organisations (NGOs) have appeared as new actors in international arena and been claimed to might have obtained certain degree of international legal personality. Moreover, compared to the period prior

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[764] Cassese (2001) p. 4

to 1945, a period during which the primary concerns of international law were rules of conduct of diplomatic relations and immunities, the adjustment of territorial sovereignty, and the regulation of war, the scope of international law has also broadened. In addition to these domains international law is now engaged in international economy, social/technological/ human development, regulation of international organisations, nuclear energy, environment, and human rights. This broadening of domains has also resulted in a broadening of 'participants' in the international legal order and this has been a major challenge to the traditional sources of international law enumerated in Article 38 of the Statute of the ICJ.

It is generally held that the concept of soft law in the "UN Charter era" comprises two types of international instruments and norms: First, those instruments which are formally binding but nonetheless lack the required normative content to create *enforceable* rights and obligations. International treaties with vague obligations or weak commands are the typical examples of such soft law. The soft characteristics of such instruments may be evident from the employed language or the explicit indication that the nature and degree of adherence to the norm(s) is a matter of national discretion. Hence, the legal form is not decisive in this category of soft law: even though the form is treaty, which is by definition binding, the rules embodied in treaties with more open-textured or general in their content or wording can thus be seen as soft. Consequently, treaties may be either hard or soft, or often both. Second, there are those instruments, which do not strictly fall within any category of the traditional sources of international law embodied in Article 38 of the Statute of the ICJ, nevertheless they are capable of creating certain legal effects. Soft law instruments in this category may take a number of different forms, including 'declaration of principles' or 'guidelines' that they explicitly state that compliance with the norm is voluntary, like "the OECD Guidelines"; declaration of intergovernmental conferences, like "the Rio Declaration on Environment and Development"; resolutions of the UN General Assembly; or codes of conduct, guidelines and recommendations of international organisations, like "the United Nations Environment Programme" and "the Food and Agriculture Organization". The study has demonstrated that the legal effect of these different soft law instruments is not the same and may vary to a considerable degree.

It has been noted that soft and hard law are not always alternative to each other. They may be a part of the same international law-making process or they may interact among

them. Likewise, it has been stressed that the 'softness' of an international instrument does not necessarily and always entail that soft law does not have a bearing in practice because matters subject to soft law are essentially within the discretion of states. It has been held that by undertaking obligation(s) embodied in a soft law instrument, states join in the expectation that the rules at issue will be respected, even though the breach of this 'shared expectation' does not amount to a breach of legal obligation.

The legal nature of the resolutions or declarations of international organisations particularly became an important issue and a source of a continued tension in the North-South bargaining process during the 1970s, when developing countries attempted to restructure the asymmetrical international economic legal order by adopting resolutions within the UN system calling for a new international economic order. The most prevailing examples of soft law created on the basis of lack of legality are the UN General Assembly resolutions which set down the principles of the so-called New International Economic Order (NIEO) and the subsequent Charter for the Economic Rights.

Developing countries saw the NIEO as a legal means that would lead to greater equality in the global distribution of wealth. Developed countries on the other hand held that international law should not interfere with liberal market forces contending that the fewer interventions in the market, the better. They therefore showed no enthusiasm to be legally bound by the NIEO principle through the established law-making mode of international law, i.e., multinational treaty and custom, since the 'consent' of each state is traditionally seen as the constitutive condition for a new international norm's coming into being. As a consequence developing countries had to find another legal strategy in their search for a legally binding NIEO. The basis of this new legal strategy was the unanimously or near-unanimously adopted UN General Assembly resolutions. Some pro-Third World lawyers argued that such resolutions have to be considered as a new source of law while some others argued that such resolutions could be a step towards the formation of customary law. Considering the slowness of the process of forming customary law, some lawyers in the latter group even argued that these resolutions could amount to 'instant customary law'. However, even though such normative activities have had some legal significance and influence on the content of international economic law, in view of Article 10 of the UN Charter, which states clearly the nature and limit of the power of the UN General Assembly, in the absence of concordant

consent of the industrialised Western countries, the principles of the NIEO could hardly be seen as having attained a sufficient level of legality to be considered legally binding.

On the other hand, it can be claimed that the soft law labelling of the principles of the NIEO can be seen as the strategy of developed countries, aiming to diminish the legal effects of the NIEO principles on the conduct of developed countries. Otherwise, as Carlsson argues, "the industrialised states have generally been willing to give a positive response to the NIEO demands, but "only in principle."[765] In other words, the disagreement between developed and developing countries in this regard did not arise from the principles of the NIEO, but their intended legal nature. Thus, industrialised capitalist countries wanted to retain the power to decide on how and to what extent they would comply with the principles of the NIEO. Examples of such "only in principle" soft law endorsement by developed countries could be found in the legal provisions dealing with non-reciprocity, preferences and generalised system of preferences in the GATT. In the framework of the GATT, developing countries demanded for *obligatory* non-reciprocity and preferential treatment. Developed countries were indeed ready to accept these demands only "in principle" and as a matter of "purposeful effort".

As exemplified by the NIEO, this study has argued that the leading paradigm in international economic law in the post-war period was "state-centrism". In this period soft law exclusively belonged to the inter-state domain and its proliferation was primarily related to the increasing activities of states and international organisations as well as to the extension of the scope of international law into new areas, such as international economy, environment and human rights. The NIEO, as a model of state-centrism, typically advanced the idea that governments had the primary responsibility for bringing about economic development through public ordering, state planning and public enterprises at the domestic level while at the international level it promoted the idea of the necessity of restructuring of international economic legal order through inter-national solidarity based on the legally binding international economic rules.

However, during the 1980s, the state-centric paradigm was, as a result of diverse factors that occurred in international relations and economy, replaced by a dual 'globalist' paradigm, which consists of two sub-paradigms, namely the "non-state actor" and the

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[765] Carlson (1984-1985) p. 1274

"hegemonic state". The factors that were most influential on the replacement of paradigm were (i) the end of the Cold War, (ii) the globalisation process (iii) the reconfiguration of the roles of the nation-state, (iv) the growing role of international economic institutions, especially that of the WTO, the IMF and the World Bank, and (v) the reordering of state-market relations and the expanding activities of non-state entities on the international scene.

The "non-state actor" sub-paradigm, which has been boosted up by the liberalisation of national economies, privatisation and deregulation policies, entails multiple sources of authority and consist of a dispersed power structure that promotes new forms of soft law whose "defining features are dominance by actors and by sources of authority other than governments".[766] Soft law in this sub-paradigm relies primarily on the non-state actors even though state involvement in some stage and to some extent is also required. The non-state actor sub-paradigm is in this study exemplified by the so-called "new *lex mercatoria*" and international standards of corporate social responsibility. Although both examples have occurred as a result of the gradual shift from public to private/hybrid ordering, the former nonetheless represents the so-called "bottom-up" type of self-regulation, evolving spontaneously from the practices of commercial actors themselves while the latter is categorised as a "top down" informal soft law, driven essentially by a regulatory impulse.

The so-called new *lex mercatoria*, which is presented by its proponents as the revival of the mediaeval merchant law, refers to a transnational legal order for global markets. This legal order has developed outside national or international law through the self-regulation by the business community. It is claimed that the revival of *lex mercatoria* as a self-regulatory mechanism is an answer to the need for flexible legal instruments to meet the demand of economic actors that operate in the dynamics of transnational networks of production and distribution. Providing such flexibility as it is stated, commercial contracts have become the main source of *lex mercatoria*. These contracts often include non-state arbitration for 'transnational' business and the application of a transnational common code or law that is independent of any national legal order. This common code or law is claimed to be a form of 'global law without a state'. Yet, the

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[766] Kirton, John, J. and Trebilcock, Michael, John (eds.), *Hard Choices, Soft Law*, Ashgate: UK, 2004, p. 10

very existence of such a code as an autonomous private legal order of the new *lex mercatoria* has been disputed. Although some scholars contend that there is a "de-nationalising" of international commercial arbitration, this study has argued that national courts and national laws continue to play a central supporting and supervising role in the operationalisation of this regime. In other words, on the one hand, the dynamics of international/transnational commercial transactions is seen as requiring a different, informal, softer and flexible approach to business regulation. On the other hand, the actual business practices show that economic transactions are still strongly based in the nation state's provision of a statuary system of legal enforcement and granting stability to commercial actors. Thus, *lex mercatoria* could hardly be understood as law of transnational economic transactions organised in a decentralised fashion. Instead, *lex mercatoria* should be seen as the formation of self-regulatory standards for business that are materialised within the legal order of the nation-state.

The proliferation of CSR instruments in the last two decades have generally been associated with the rising power of MNEs in relation to the increase of FDI, the lack of international legal framework regulating MNEs activities, the pressure from NGOs to induce MNEs to become more accountable for their actions, and MNEs' desire to respond to societal expectations. However, this study holds that it would hardly be possible to explain the increasing use of CSR codes solely in terms of such factors. Instead, CSR codes should be interpreted in the larger context of economic globalisation, legal pluralism and the decentred state. Moreover, within the ideological context of the neo-liberal consensus, CSR and internal legal regimes of MNEs (corporate governance) are considered as the signs of fairly established and commonly practised private governance or as a prominent examples of new forms of normativity, which are not principally anchored and legitimated by formal legal structures. Yet, claims about the existence of a broad consensus on CSR or other types of voluntary self-regulatory model that "have emerged from *multifaceted dialogue* in a variety of forums"[767] should be approached with prudence. Because, the consent and consensus building process always embodies explicitly and implicitly the 'truth' and interest of the dominant ideology. To put it differently, the discourse of "decentralised regulation"

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[767] Cragg, Wesley, "Multinational Corporations, Globalisation, and the Challenge of Self-Regulation" in Kirton, and Trebilcock, 2004, p. 214

does not simply entail the fragmentation of the state power and the blurring distinction between the public and private spheres, but it also functions as a rhetorical devise that is "used in attempts to persuade others of the discursant's view".[768] This study has therefore argued that the discourse of CSR has essentially developed as a globalist strategy employed in response to either repeated crises of legitimation, like corporate scandals, or the growing societal demand and criticism involving business social practices, or market pressures such as the drive for competitiveness and increased exposure to social and environmental expenses and liability, or reducing the risk for binding international corporate regulation.

The study has further argued that many of the political-economy aspects of globalisation can be seen as the reorganisation of the international economy via global regulation. The "hegemonic state" sub-paradigm, as used here, refers to the tendency of increased institutionalisation and legalisation of international economic relations, which has taken both hard and soft law forms (neo-liberal institutionalism). Starting from the end of 1970s, market-based economic policies have been institutionalised mainly through international economic institutions, which were created at the Bretton Woods Conference in 1944 under the initiative of the US. The initial missions of these so-called "Bretton Woods institutions" were to support the fixed exchange system in the developed capitalist countries (IMF); to reconstruct the war-worn developed capitalist European countries (World Bank); and to promote trade liberalisation by fostering negotiation among member countries to reciprocally lower their trade barriers and provide information about member countries' trade policies (GATT). As it has been demonstrated, however, in the 1980s and 1990s, the missions of these organisations have been transformed, targeting now mainly developing countries and their full integration into the ongoing neo-liberal process of globalisation while the GATT/WTO has additionally been concerned with making international markets work well.

The "hegemonic-state" sub-paradigm has been exemplified in this study by the evolution of the WTO system, which has replaced the GATT in 1994. It has been shown that the WTO has increasingly involved both domestic and international policy-making

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[768] Black, Julia, *Regulatory* Conversations Journal of Law and Society (2002) 1, p. 192. Indeed, in Cragg's examples, the participants of the "multifaceted dialogue" in regard to CSR are International Chamber of Commerce (ICC), the OECD, the IMF, the World Bank, and Pax Christi International. One could tempt to call such a 'dialogue' a 'trouble-free monologue'.

related to not only trade, but also intellectual property rights, tax, domestic subsidies and services. It has also been seen that the WTO has moved from a system of rules prohibiting trade measures to a system of rules requiring affirmative government actions. Moreover, the evolution of the GATT to the WTO has involved a radical change in the dispute settlement process. Unlike pre-WTO trading system, WTO law is backed up by an automatic and compulsory dispute settlement mechanism. Under the GATT a consensus of member states was required ("positive consensus") in order for dispute rulings to become binding. With the WTO, on the other hand, dispute rulings are accepted as binding unless all the members – including the winning party – vote against its adoption, meaning that to achieve a "negative consensus" has become only a 'theoretical possibility'.

Sir Joseph Gold once argued against the hardening the law of exchange arrangements in the context of the IMF stressing that "firmer rules of law would be undesirable because they would reduce the choice of policies available to governments".[769] Indeed, one of the most prevailing implications of the evolution of the GATT to the WTO has been that the whole WTO disciplines, but in particular its dispute settlement mechanism, has become an effective tool for constraining domestic political autonomy of the member states. Yet, although the WTO primarily relies on a "hard law" approach of sanctions and binding rules and procedures to enforce members' WTO commitments rather than a "soft law" approach of ongoing dialogue and negotiation with noncompliant nations, this study has nonetheless maintained that the new "WTO discipline" displays some "soft" features. For example, even though the WTO rules are legally binding upon its members, there still exist some safeguards, exceptions and possibilities to re-negotiate concessions in a way that allows the member states to deviate from the undertaken legal obligations thereby making WTO disciplines to some extent "soft". Likewise, as the collapse of the competition policy at Cancun has confirmed, in certain policy domains, like competition law and its enforcement, national governments can reject the negotiation of hard rules in favour of softer alternatives, leading to the agreement of non-binding recommendations on regulatory standards and enforcement practices.[770]

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[769] Gold, Joseph, *Strengthening the Soft International Law of Exchange Arrangements*, 77 American Journal of International Law (1983) p. 482

[770] The "International Competition Network" (ICN), created in 2001 is a highly successful example of soft law alternative for 'hard competition law'. The ICN, whose rules are 'non-binding' upon its 85

Lastly, as shown in chapter 8, even the dispute settlement mechanism of the WTO has become more potent and more legalistic than ever before, it notwithstanding bears signs of 'soft' institutionalisation. For instance, the WTO system still has a relatively weak sanction, which organises and disciplines the unequal capacity for self-help of member states rather than perform the functions of a 'traditional' court.

This study has further drawn the attention to the relative incompatibility and tension between the principle of state sovereignty, which includes policy autonomy that basically refers to the ability of a national government to implement and sustain domestic and international economic policies of its own choosing and the transnationalisation and supranationalism involved in the use of conditionality in relation to loans given by the IMF and the World Bank and the increasing interventionism of the WTO. It has consequently been argued that the increasing de-formalisation, which encompasses liberal policies like de-regulation and self-regulation on the one hand, and the increasing legalisation and regulated interventionism on the other, are two seemingly contradictory yet complementary tendencies of the process of globalisation. To that extent, globalisation is understood by this study as constituting the political-juridical expression of the structural transformation of the international economy and relations that aspire to establish a 'new constitutionalism' of the neo-liberal ideology.

10.3 What future for soft law?

In this study it has been argued that since the 1990s the function of soft law as a bridge between facts and norms in inter-state relations has entered a new era. A number of significant and interrelated changes, such as globalisation, the end of the Cold War, the hegemony of neo-liberal ideology, the rise of non-state actors, and the re-configuration of the nation-state, have transformed the structure of international relations significantly. A central theme within the liberal legal discourse of globalisation is the creation of a deformalised yet universal system of legal norms as a means to acquire greater flexibility and dynamism in the name of a continued relevancy of the role of

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competition enforcement agencies, aims to encourage cooperation on competition law and enforcement matters and promote greater procedural convergence of among competition agencies (See, http://www.internationalcompetititonnetwork.org).

international law. It is claimed by many that the currently dominant mode of traditional state-centred understanding of authority is becoming less and less able to capture the increasing private authority and its regulatory power. The trend to reconstruct the relationship between state and capital through privatisation, deregulation, re-regulation, and globalised production and finance has resulted in the privatisation of international rules. Moreover, the strategy of the dominant states to reinforce private property rights through multilateral and bilateral trade and investment agreements has strengthened the idea that asymmetries of power between states has a significant bearing on the functioning of international law.

The development of informal non-state soft law is not all that is happening in the changing nature and role of soft law. Even in the realm of inter-state relations, the role of soft law has notably altered. Since the end of the Cold War, soft law and soft institutionalisation in international public sphere have effectively been used to achieve a less formal hence less constraining form of rules that have been seen as useful by hegemonic power(s). Likewise, Kingsbury observes: "A US scholarly focus on 'governance', 'regimes', 'managerial compliance', 'decision process', and the like, and a US tendency to negotiate detailed multilateral rule-making treaties which it does not ratify, may reflect in some areas of international law a US preference for anti-formal malleability (softness) that is influenced by the aura of preponderant power.[771]

In this post-"balance of power" era, in which the US has emerged as the sole dominant power, a continuing search for the creation of a new legal status quo that would reflect the recent structural changes in *realpolitik* more accurately should be expected. One of the most convenient techniques of such a search is an increasing deformalisation of international law that would deliver more flexible law-making, interpretation and implementation possibility for the dominant states enabling them to shape international social processes and outcomes according to their interests ("intrumentalisation of international law"). Aside from a handful of international domains, above all economy, where the interest of powerful states in reinforcing international law is greatest, in a foreseeable future the quest for a softer international law and informal policy networks that serve decision-makers' "preferred values by facilitating decision-making in

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[771] Kingsbury, Benedict, *Legal Positivism as Normative politics*, 16 European Journal of International Law (2005) 2, p. 421

contexts where they were dominant",[772] will continue to be the prevailing tendency. Just as Krisch observes, "informality allows the strictures of sovereign equality to be circumvented in the formal law-making process, and it thus is a far more suitable tool of hierarchy".[773]

Associated with the rising neo-liberalism, deformalisation in the field of international economy has occurred mainly in the forms of market deregulation (reduced state intervention into economic affairs), decentralisation of norm-making (privatisation of law and legal pluralism), and the emergence of a multilayered and transnational economic governance. The most salient outcome of this process has been the emergence of "informal soft law", whose defining features are claimed to be flexible, discretionary, ad-hoc, voluntary, non-binding and unenforceable rules. Indeed, the whole rationality of the economic globalisation discourse can be characterised by an informal/softer vocabulary that includes 'governance', 'market', 'efficiency', 'flexibility', 'voluntary standards', 'customer orientation', 'speed' and 'self-regulation'.

One important implication of these developments on the conceptual evolution of soft law is that soft law has ceased to be the "substitute" (or "second-best" solution) for hard law alternative in inter-state relations and it has become the major 'legalisation form' of the norm-like activities of private and public-private crossbreed authorities. Closely related to the emergence of private authority and the proliferation of informal or hybrid institutions on the international scene, the new type of informal soft law has come to primarily rely on private (i.e. non-state) and public-private mixed authorities. Therefore, by implying the multiplicity of legal sources and subjects of international law and giving rise to a flexible and context-dependent norm-making process, informal soft law has been a central mechanism in privatising public power.

On the other hand, this development has not been directed to eliminate the nation-state, but rather to reorganise it. As a political project, neo-liberalism has also been concerned with institutional changes at both domestic and international levels aiming at dismantling social welfare state and transforming it into a 'competitive national state', which refers to "the capacity of a state to compete with other states for shares of so-

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[772] Koskenniemi, Martti, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge University Press: Cambridge, 2004, p. 483

[773] Krisch (2005) p. 399

called footloose investment capital".[774] In addition, neo-liberal integration of national economies creates an international competitive dynamic, in which institutional change in one or more countries induces similar changes in other countries, which lead to the reductions in all sorts of policy-driven barriers between economies, from capital controls to tariff and non-tariff barriers on trade.[775] Hence, further deregulation as an incentive is to be the likely outcome of the economic pressures from the necessity of the formation of a 'competitive national state' for attracting financial capital and enhancing their competitive performance.

It can be anticipated that in this process the voluntary self-regulatory initiatives will become more important, mainly because of the following reasons: (i) national policy-makers are increasingly reluctant or unable to intervene in markets due to free market ideology and the re-problematisation of the concept of the 'competition state'; (ii) the possibility of creating new markets, such as green products by adopting voluntary standard setting; (iii) business is also focusing more on their relations with governments and civil society, as they want to avoid the costs of state regulation, litigation and bad publicities. A similar course can also be expected for co-regulatory activities, which refers to some form of relationship between state regulation and voluntary agreements in a particular area, especially to limit the negative consequences of market-failure; correct distortions or imbalances in the markets, for example by promoting competition, rooting out fraud or enhancing safety and consumer confidence.

One significant factor that should be considered when assessing the possible future course that both formal and informal soft law development may take is that markets do need a regulatory response to survive. Contrary to the neo-liberal rhetoric involving the arguments about inevitability that the world economy has been integrated through expanded trade and capital flows usually promulgated by technological determinism, and that the integration of the global economy is making national boundaries obsolete and is laying the basis for a new and truly global era, this study has drawn attention to the critical involvement of the state and international economic institutions as the

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[774] Fougner, Tore, *The state, international competiveness and neoliberal globalisation*, 32 Revirew of International Studies (2006) p. 166

775 Helleiner, Eric, *Explaining the Globalization of Financial Markets: Bringing States Back*, 2 Review of International Political economy (1995) 2, p. 315

regulatory agencies in paving the road to the free market either by removing restrictive regulations or re-regulating domestic and international economy whenever deemed necessary. As Polanyi stated, "laissez-faire was not a method to achieve a thing, it was the thing to be achieved".[776] This implies that states and international economic organisations are ascribed a central role in granting the proper functioning of a competitive global market place and securing private property rights. As the example of inclusion of competition policy on the WTO's agenda makes it evident,[777] the basic principles of the so-called free and self-regulating market economy cannot be left to the 'natural' mechanisms of the free market, but rather should be regulated and controlled on a continuous basis by the state, the global economic policy-making institutions including informal ones, like the World Economic Forum. The regulatory implication of this reality is to be the continued efforts to govern the world economy via bilateral and multilateral trade and investment agreements, the increasing conditionality attached to structural adjustment loans and other means of a creeping multilateral investment regime and the broadening and strengthening of the existing multilateral trade and property regimes.

Final words

This study has conceded the risk that the increasing calls for an informal, context-dependent and socially responsive international law on the basis of a more speedy and flexible international law to respond to the ever-increasing dynamism of world's affairs may undermine the role of international law as a regulatory (thus, restrictive) apparatus for the hegemonic power(s). In the same vein, this study has also argued against the increasing informalisation of soft law and its proliferation in international economic legal order as a facilitator for the neo-liberal deregulatory impulse. However, soft law should not necessarily be understood as an alternative to the 'traditional' law making, but rather as a complement to it where it is designed as preparatory instrument as to the

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[776] Polanyi (1957) p. 139

[777] At the Fifth WTO Ministerial meeting held at Cancun in September 2003, negotiations on competition policy was failed, mainly due to the opposition of developing countries. Of course, this collapse at Cancun does not mean that competition policy negotiation has been dropped off the WTO's agenda altogether.

future adoption, or interpret as a 'post-law' instrument, which may provide interpretation for its application, such as the "General Comments of the Human Rights Committee" on various issues, or a steering instrument in establishing and advancing the effect to the law's objectives, such as many declarations and general recommendation of international organisations. Moreover, the present study recognises the potential of soft law in reforming traditional sources of international law and the modalities for their creation by allowing wider participation and opening up new channels for further legalisation. Without doubt, against the instrumentalisation of law in the hand of powerful states, it is important to insist on the rule-based decision making in international life. Yet, it is equally important to bear in mind that the strictly Westphalian legal order is after all not the best-of-all-possible worlds.

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