



# Handbook on Multi-level Governance

Edited by **Henrik Enderlein,**  
**Sonja Wälti and Michael Zürn**



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# Introduction

*Michael Zürn, Sonja Wälti and Henrik Enderlein<sup>1</sup>*

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## I.1 INTRODUCTION

Scholarship on multi-level governance has developed into one of the most innovative themes of research in political science and public policy. From 2000 to 2009, multi-level governance has been a central topic of 150 articles in academic journals, with a steady 15 to 20 articles coming out every year.<sup>2</sup> Striking is how research on multi-level governance has broadened over time and spilled over into many different substantive areas. While seven journals featured articles on multi-level governance in 2000, publications about multi-level governance appeared in 15 different journals in 2009, many of which report on different policy fields such as planning and the environment.

Aside from scholarship on European integration, the multi-level governance vocabulary has spread to subfields such as comparative politics, international relations, public policy, political economy, public administration and normative political theory. Multi-level governance has helped scholars of vastly different research traditions; methodological foci, policy interests and geographic specializations develop strikingly similar concepts when researching phenomena beyond the centralized territorial state. Although often labeled differently, their contributions have produced similar insights which point to an interplay between institutions that are differentiated in a functional (as opposed to segmented) fashion. As a result, multi-level governance has contributed to reconnecting somewhat autonomous subfields in political science.

This Handbook takes stock of the vast array of multi-level governance theory and research developed in the subfields of political science and public policy. We have asked the contributors to report on the ways in which their fields of specialization have been or may be affected by multi-level governance, how the related concepts and terminology are used, and how the developments in their field may in turn affect the conceptualization of multi-level governance. This Handbook starts in Part I by introducing different theoretical and conceptual approaches to multi-level governance. It then moves on in Part II to offer a closer look at the use of multi-level governance in the domestic context, thereby reviewing both origins and developments of theories on (comparative) federalism and their multiple linkages to multi-level governance. Part III looks at European integration recognizing that its unique setting served as the key catalyst in the development of multi-level approaches, followed by Part IV that chronicles the spread and use of multi-level governance in other parts of the world. In Part V we shift our attention to global governance. The Handbook concludes in Part VI with a cross-cutting presentation of six policy fields and instruments affected by multi-level governance, including social policy, environmental policy, economic policy, international taxation, standard setting and policing.

This Introduction sets the stage by presenting a common definition and analytical framework that has served as a guide for many of the contributing authors, before

focusing on the central themes and concepts that the contributors report as having marked multi-level governance innovations in the various subfields.

## I.2 THE CONCEPT OF MULTI-LEVEL GOVERNANCE

Is it useful to analyse federal political systems, the European Union, other world regions and even global governance under one conceptual roof? More importantly, is it possible? It is useful because, while multi-level governance has helped reconnect increasingly separate fields of political science and public policy, that cross-fertilization will remain limited without a common vocabulary and a reasonably unified conceptual take. It is possible because not only has the terminology become increasingly similar across subfields, the research questions have too. Under what conditions do multi-layered institutional arrangements yield effective regulations and compliance? Which type of hierarchical order and instruments fosters compliance? Is enforcement across governance levels possible? What roles do non-governmental 'spheres of authority' and private actors play in such governance arrangements? How is it possible to maintain representative and democratic accountability in such governance structures? What role do constituent units play within and beyond federations; and what role are nation states to play in global governance structures? In each case, (how) does the concept of sovereignty need to be redefined?

We suggest using the term 'governance' generically to denote the sum of regulations brought about by actors, processes as well as structures and justified with reference to a public problem (see Benz 2005; Mayntz 2005; Zürn 2005; Schuppert 2007). First, governance encompasses the sum of regulations, including policies, programs and decisions designed to remedy a public problem via a collective course of action (minimum wage policy, for example, is understood as a component of labor market governance). Second, a problem is public when the participating actors need to claim to act in the name of a collective interest or the common good. While this definitional component excludes private solutions to private problems – that is, pure market transactions to purchase goods or services – it does not exclude private solutions to public problems (see Ostrom 1990). At the same time, the reference to the public good does not require that there are actors who pursue the public good or that all governance arrangements in fact foster the public good. In our definition, it is only the justificatory use of the concept of the public good that qualifies it as governance. For example, while wage bargaining can be seen as a private market transaction between a firm and its workers, the negotiations, and possibly the outcomes, may be part of a welfare maximizing or equity enhancing economic policy strategy. When this is the case, the actors involved typically argue in the name of the common good that distinguished governance from pure market transactions.

Third, governance encompasses the actors and processes that make up a collective course of action, including the political negotiations, coalition building, lobbying, persuasion and threats that accompany the policymaking and implementation process. Any collective actor, public or private, can be party to these processes. We expect public actors to be commonly present, and indeed often dominant. However, a governance arrangement composed solely of private collective actors – such as corporate governance or associative governance – is conceivable. The aforementioned governance content helps

us distinguish between private governance for private purposes and private governance aimed at solving public problems. For example, a corporate social responsibility agreement between private firms falls into the latter category if the participating stakeholders practice it in the name of the common good.

Lastly, governance encompasses structures, including the comparatively stable institutional, socio-economic and ideational parameters as well as the historically entrenched actor constellations that shape policy processes in a particular context. In order to proceed in defining multi-level governance, it is useful to recall Carl Joachim Friedrich's inclusive definition of multi-tiered structures in federal systems: 'We have federalism only if a set of political communities coexist and interact as autonomous entities, united in a common order with some autonomy of its own. No sovereign can exist in a federal order system; autonomy and sovereignty exclude each other in such a political order . . . . No one has the last word' (Friedrich 1968, p. 7). The multi-level aspect can be seen here as primarily specifying the nature of governance structures. Yet, Friedrich also saw federalism as an adaptive political process rather than an 'iron constitutional principle' (*ibid.*). His definition thus emphasizes the ongoing interplay between different autonomous entities without assigning sovereignty to any one of them, as do scholars examining multi-level governance today. Regarding actors, too, his understanding differs from traditional state and government-centered perspectives and is indicative of a non-hierarchical understanding of governance. However, by depicting the autonomous entities as 'political communities,' Friedrich implies that the constituent units of a federal polity are local and subnational general-purpose jurisdictions. In contrast, with our governance definition in mind, we claim that multi-level systems may be also composed of non-political, functional jurisdictions whose authority is limited to specific tasks. By the same token, our definition also includes multi-level spheres of authority dominated by private actors.

Broadening the definition of multi-level governance to include functional jurisdictions and private actors is conceptually and empirically interesting; and it is novel compared to both the concept of governance and that of federalism.

It remains to be defined what constitutes a level. According to Friedrich, the decisive criterion for a level to exist is autonomy, which means one level's legitimate decision cannot be reversed by other levels without triggering a political, institutional or even a constitutional crisis. Thus, a meaningful level must be legitimized and capable to govern, with some degree of autonomy in one or more policy areas. Autonomy within the nation state has traditionally been equated with various degrees and forms of federalism. Aside from the irreversibility and roughly dual nature of power-sharing between the central (federal) and the subnational level, federalism places citizens in a Russian-doll-like 'set of nested jurisdictions, where there is one and only one relevant jurisdiction at any particular territorial scale' (Marks and Hooghe 2004, p. 16). Significant variation may exist in the degree of centralization or decentralization, in the degree of interlocking between levels, and in the symmetry or asymmetry of powers jurisdictions may enjoy at any given level.

Autonomy at levels beyond the nation state, where policies can be shaped by means of conventions or supranational organizations such as dispute settlement organs and often including private bodies, can be defined in much the same way. For it to be a distinct level, an international body must enjoy some autonomy that compels individual

nation states to comply with institutional rule. Individual states have no institutionalized legitimacy to veto or disregard a decision, or at least not all states do.

Besides decision autonomy, a level of its own requires a certain degree of organizational identification on the part of those who govern a given level. For example, those who decide at the subnational level or in the name of an international organization must have their primary identification with this organization and must see their purpose in serving the community at that level. In other words, there must be a level-specific understanding of the collective good.

The picture we have drawn so far of different governance levels emphasizes the scope of authority at each level. While this depiction helps to highlight the distribution (and reallocation) of policy competencies across different levels – for example, education policies governed at the local level, university policy governed at the subnational level, defense policy governed at the national level, trade and environmental policy governed at the supranational or global level – it fails to capture the complexity of how jurisdictions and levels connect, interact and, most notably, overlap. It is this interconnectedness of decision arenas that sets multi-level governance apart from the more restrictive definitions of federalism or decentralization.

We can now define multi-level governance as a set of general-purpose or functional jurisdictions that enjoy some degree of autonomy within a common governance arrangement and whose actors claim to engage in an enduring interaction in pursuit of a common good. Such a governance arrangement need not be engrained constitutionally; rather, it can be a fluid order engaged in an adaptive process. However, it is useful to distinguish between those arrangements composed of general-purpose jurisdictions, to which we refer as multi-level polity, and those composed of (overlapping) functional jurisdictions, which we term multi-level regime (see Zürn, Chapter 5 in this volume) This builds on the distinction by Liesbet Hooghe and Gary Marks (2003, 2004, pp. 16–17) between two ideal types of multi-level governance arrangements. What the authors call Type I describes a general-purpose governance arrangement with a limited number of non-overlapping jurisdictional boundaries at a limited number of levels. Such a governance arrangement follows a relatively stable system-wide architecture. This ideal-type includes, but may not be limited to, federal polities. In contrast, Type II describes a complex, fluid patchwork of innumerable, overlapping and functionally specialized jurisdictions. This governance structure is task-specific and thus not constitutionalized.

We assume a certain durability to distinguish it from mere issue networks emerging across governance levels. We also assume that its actors pursue (or claim to pursue) a common good to distinguish multi-level governance from multi-tiered corporate governance structures with purely private aims. The common good can pertain to any public purpose ranging from tending to common property resources to regulating labor markets or coordinating planning and development efforts. Hierarchies may play a role but are necessarily limited by the autonomy of the other jurisdictions and levels. The decision-making competencies may be shared by many different public and private actors across different levels rather than monopolized by one central actor (see also Schmitter 2004, p. 49). Institutionally speaking, no one has the last word.

This multi-dimensional definition not only delimits what is and what is not multi-level governance but also encourages the development of more differentiated typologies. One can distinguish multi-level governance according to the number of jurisdictions or

levels, or the number and type of actors. Are only public actors involved, or does the governance structure include private actors? One may differentiate constitutionalized systems with formal, but limited, hierarchies from adaptive, more or less informal, networks. Moreover, the relationship between jurisdictions depends on the degree to which decision-making powers are overlapping or concurrent. Another underlying dimension is the scope: aside from the distinction between multi-level polities and multi-level regimes, of interest is also to what extent a governance arrangement involves mainly private rather than public actors. Based on these analytic dimensions, a more elaborate typology could provide a helpful heuristic tool to foster comparisons across different areas of research on multi-level governance.

### I.3 MULTI-LEVEL GOVERNANCE AS AN INNOVATIVE APPROACH TO POLITICAL SYSTEMS

Research on multi-level governance has spurred innovation in at least three main subfields of political science: European integration, comparative federalism and international relations. In each of these subfields, multi-level governance has been applied in roughly two different ways. On the one hand, scholars have used multi-level governance as a theory from which they derive falsifiable hypotheses and test propositions, often calling on rational choice, to explain policymaking and its outcomes in a multi-level context. Notable examples include work on fiscal federalism (see Geys and Konrad, Chapter 2 in this volume), the theory of ‘joint decision traps’ in poorly designed multi-level systems (see Scharpf, Chapter 4 in this volume) and the theory of two-level games (see Mayer, Chapter 3 in this volume). On the other hand, scholars have relied on multi-level governance as a conceptual device to grasp the functioning of newly emerging and mostly national borders transcending spheres of authority in order to explore and understand new polities and eventually develop a full-scale theory. Prominent examples are the conceptualization of the European Union as a multi-level governance system (see Benz, Chapter 13 in this volume), attempts to conceptualize global governance as multi-level politics (see Zürn, Chapter 5 in this volume) and comparative analyses of federalism (see Stein and Turkewitsch, Chapter 11, Braun, Chapter 10 and Wälti, Chapter 27 in this volume). We will review some of the key innovations and findings in each subfield before detailing the contents of this Handbook.

#### I.3.1 Innovation in the Study of European Integration

In the early 1990s, multi-level governance emerged as a new approach in the analysis of the European integration process that sought to extend its perspective beyond the inter-governmental or supranational perspectives through the inclusions of additional institutional layers. In the early 1990s, Gary Marks described ‘the emergence of multi-level governance, a system of continuous negotiation among nested governments at several territorial tiers . . . , as the result of a broad process of institutional creation and decision reallocation that has pulled some previously centralized functions of the state up to the supranational level and some down to the local/regional level’ (Marks 1993, p. 392). This perspective marked a move away from focusing on European integration as either

driven by negotiations among states (intergovernmentalism) or by international institutions (supranationalism). This research brought in findings from comparative federalism and depicted the European Union as a unique (quasi-federal) system characterized by a distinctive interconnection among multiple levels of governance (for example, Scharpf 1988, 1999; Börzel and Hösl 2003). Subsequent research on multi-level governance paid close attention not only to the increasingly independent role of European-level actors, the strengthening operation of subnational actors in both the national and the supranational arena, and the continuing upward and downward dispersion of power within the European polity (Marks and Hooghe 2004), but also on the ‘interconnected rather than nested’ political arenas (Hooghe and Marks 2001, p. 4).

Research on European integration also brought about a focus on new actors, both state and non-state actors. By focusing on horizontal and vertical interactions among state and non-state actors and emphasizing the dynamics of ‘power-sharing between levels of government’ to better understand European integration (Benz and Eberlein 1999, p. 329). In line with neo-functionalism – or arguably in replacing it (George 2004, p. 112) – its central claim was that the European Commission could form coalitions with subnational public sector actors, thus playing an independent role and circumventing national executives (Hooghe 1996, p. 93). As Benz and Eberlein (1999, p. 329) put it, the rise of the regional level has opened ‘viable escape routes from potential deadlock’ (see also Bauer and Börzel, Chapter 16 in this volume). If this is the case – or rather, when this is the case – pure intergovernmental dynamics are no longer a credible explanation for policy change.

The main conceptual finding from the research on the European integration process is quite simply that collectively binding decisions are achievable without a hierarchically superior authority, even if those decisions impose losses to some of the actors involved in the joint decision process (see Benz, Chapter 13 in this volume). In trying to explain this finding, most scholars, one way or another, rely on the multi-level approach. What remains a key question is whether the European Union will preserve its *sui generis* character or instead develop into a federation-like polity with its own parliamentary structure (see Rittberger, Chapter 15 in this volume) and own party system (see Hix, Chapter 14 in this volume). Comparative regionalism has emerged recently to challenge this assumption. Comparisons across different processes of regional integration help to identify the differences and commonalities between them. The integration processes in North America (see Sbragia, Chapter 17 and Clarkson, Chapter 18 in this volume), in Asia (see Schreurs, Chapter 20 in this volume) and in post-Soviet Eurasia (see Obydenkova, Chapter 19 in this volume) are clearly different from the European experience, yet prove comparable.

### **I.3.2 Innovations in the Study of Federal Polities**

At the domestic level, equally interesting trends are visible. Earlier definitions saw federalism as ‘a political organization in which the activities of government are divided between regional governments and a central government in such a way that each kind of government has activities on which it makes final decisions’ (Riker 1975, p. 101). European integration scholars have always rejected this definition because it hinges on an unrealistic delineation of the scope of authority at the central and subnational levels,

and because they have found it virtually impossible to identify the 'highest' level of government in any policy field. Even the term 'confederation,' which is frequently used when 'constituent units join efforts to create a common government that has very limited and well-defined powers and is fiscally and electorally dependent on them' (Beramendi 2007, p. 5), fails to fully account for the multi-level character of current governance practices. Comparative federalism scholars have been more successful at categorizing federal systems in these terms but they, too, have struggled with the complexities of overlapping authority and tasks (see Elazar 1991; Watts 1999).

Multi-level governance has made several innovative contributions to the comparative study of federal systems. First of all, new levels of government shifted into view. Especially in European federal systems such as Germany and Switzerland, multi-level governance points to the increasingly significant interplays between different domestic and supranational governance levels (see Braun, Chapter 10 in this volume). Comparable patterns are conceivable in other parts of the world such as the USA and Canada (see Stein and Turkewitsch, Chapter 11 in this volume). At the same time, multi-level governance research brought a renewed interest in subnational units, departments and urban areas. The subnational levels are seen as 'polycentric' governance arrangements (for example, Hall and Pain 2006) or as 'functional overlapping and competing jurisdictions' (Frey and Eichenberger 1999) that play an important role within a multi-level context (see Sellers 2002).

Second, multi-level governance opened the door for federalism scholars to consider federal systems not only as more or less centralized polities or as being characterized by a certain distribution of authority and resources, but also as driven by varying patterns of interaction. Thus, questions have shifted from the study of federal constitutions to the interplay among actors at multiple governmental tiers and, therefore, to the investigation of such features as the participation of subnational units (see Swenden, Chapter 6 in this volume), parties (see Jeffery, Chapter 8 in this volume) and organized interests (see Hassel, Chapter 9 in this volume). The field of international standard setting (see Büthe and Mattli, Chapter 30 in this volume), for example, demonstrates multi-level interplay between private and public actors in international policymaking. This actor-centered take on federalism contributed to the revitalization of comparative federalism research including a wide variety of federal and non-federal systems (Braun 2000; Keman 2000; Wachendorfer-Schmidt 2000; Wälti 2004).

Third, the focus on multi-level governance spurred an increased attention to individual policy areas and policy performance. Comparative research on economic performance, the political economy of federalism and fiscal federalism took center-stage due to the crucial role of decentralization in promoting economic development and good governance across the globe (see Beramendi 2007; see Rodden 2007 for an overview of the literature; see also Hallerberg, Chapter 7 and Enderlein, Chapter 28 in this volume). Fiscal federalism developed two key prescriptions for effective governance across multiple levels (see Geys and Konrad, Chapter 2 in this volume). First, it suggests a causal link between decentralization and higher overall efficiency (Tiebout 1956; Weingast 1995; Oates 1999, p. 1122). Second, and as a consequence, it advocates a clear separation ('dual sovereignty') between different levels of revenues and expenditures, which should be allocated according to the 'principle of subsidiarity' (ibid.). A similar claim was put forward by Olson (1969) with the principle of 'fiscal equivalence,' which is to prevent



free-riding among jurisdictions and their beneficiaries by aligning the geographical scope of government benefits with their financing. These claims have been called into question by the practical workings of multi-tiered fiscal frameworks, which are in reality often characterized by intertwined patterns of revenue and expenditure sharing and a blurred separation or overlap of authority between governance levels.

### **I.3.3 Multi-level Governance and Global Governance**

Although multi-level governance and global governance have developed largely alongside each other, they have greatly benefited from one another. The two areas have met because of the understanding of a political world in which the separation between domestic and international politics has lost significance.

The analysis of so-called two-level games, a notion introduced into the field of international relations by Robert Putnam (1988), provided the starting point for the engagement between multi-level governance and global governance (see Mayer, Chapter 3 in this volume). In conceptualizing national executives as brokers between the international level and the domestic level, a new line of analysis was born (see also Evans et al. 1993; Zangl 1999). It was shown how national government leaders can use the international level to shift the domestic balance (Moravcsik 1994; Wolf 2000). These powerful yet informal networks raised the question whether such governance arrangements are legitimate and accountable to the voter and public (Zürn 1996). The two-level metaphor helped to overcome the false dichotomy between a mere interstate system (intergovernmentalism) and a world state (supranationalism). It triggered research on the interaction between different governmental levels beyond the nation state and provided new avenues to explore governance along the domestic-foreign frontier (Rosenau 1997).

The analysis of international institutions continued. After two decades of research on international regimes (see Krasner 1983; Keohane 1984; Rittberger 1993), we can say that international rules and norms in connection with the respective program activities of international agencies exert a significant influence on international relations (see Breitmeier et al. 2006). Against the background of this research, the concept of global governance gained importance. This perspective looks at the sum of international regulations and goes beyond the issue-area-specific orientation of regime analysis. In doing so, the problem-solving orientation of international regimes was supplemented by a look at their political order (Zürn 1998; Jachtenfuchs 2003). Subsequently, analysts wrote about the 'legalization of international relations' (Abbott and Snidal 2000), the 'internationalization of the rule of law' (Bryde 2003; Zangl 2006) or the development towards a 'constitutionalization of international trade' or even 'constitutionalization of international law' (for example, Hilf 2003) and 'transnational governance' (Joerges et al. 2004). Although the concept of multi-level governance is rarely used explicitly (but see Welch and Kennedy-Pipe 2004), it raises the same questions as it did regarding regional integration, namely, what constitutes a governance level. Thomas Cottier and Maya Hertig (2003) speak of a global multi-level governance system that consists of up to five levels, the local level, the level of the states in a federal system, the federal level, the level of regional integration and the global level. Research points to a growing role of legislation in global governance and problems that arise when different governance levels are involved in law-making (Humrich and Zangl, Chapter 22 in this volume). At the same time, the role of

informal arrangements of governance with a growing role of non-governmental actors can be observed (see Scholte, Chapter 25 in this volume), leading either to a variety of forms of self-regulation or to public-private partnerships (see Beisheim et al., Chapter 24 in this volume). Subnational units seem to engage increasingly in transgovernmental networks as part of a new world order (Slaughter 2004; Slaughter and Hale, Chapter 23 in this volume). Common to these analyses is the observation that international norms gain in relevance and constitute a level of their own that is subject to growing autonomy from the constitutive elements of this order, the nation states.

Since global governance is conceived increasingly as a political order, instead of mere issue-specific problem solving, normative aspects have become more important. Important points of contention are what effect international institutions may have on national democracies (Dahl 1994; Habermas et al. 2007; Keohane et al. 2009) and whether and how it is possible to democratize international institutions (Held 1995; Zürn 1996; Archibugi 2008; Koenig-Archibugi 2008). This debate has brought international relations closer to normative political theory, in particular to the study of transnational fairness and justice (Beitz 1979; Rawls 2002; Forst 2007; Pogge 2007).

Although research about the central features of the political order beyond the nation state falls short of a fully developed new theory of world politics – be it normative or positive – it has brought about testable behavioral implications. As a result, applied policy research is often seen through the lens of concepts and theorems developed about the multi-level character of global governance. This holds true namely for economic and environmental policies (see Enderlein, Chapter 28 and Wälti, Chapter 27 in this volume). Yet even the study of issue-area governance in such traditional domains of the nation state such as policing, taxation and social policy show to what extent national policies are embedded in larger governance structures (see Jachtenfuchs and Kohler-Koch 2003; see also Graser and Kuhnle, Chapter 26, Herschinger et al., Chapter 31 and Rixen, Chapter 29 in this volume).

## I.4 OUTLINE OF THE HANDBOOK

As multi-level governance has evolved from a descriptive concept about the workings of the European Union into an approach spanning local, urban, regional, national and international governance, the intent of this Handbook is two-fold. It is designed to provide easy access to the various theories about, approaches to, uses, applications and criticisms of multi-level governance. It does so by highlighting the key findings of that literature cutting across different levels of government and different issue areas. Thus, this Handbook covers the various theoretical approaches to multi-level governance, provides entries on the main topics in domestic and European politics, reviews regional integration processes elsewhere in the world, assesses the importance of multi-level processes in international relations and finally presents succinct overviews of multi-level governance in different policy areas.

The architecture of the Handbook follows this simple logic. In Part I, different conceptual and theoretical approaches to multi-level governance are presented. Hooghe and Marks present the concept in its broadest sense, before chapters about fiscal federalism (Geys and Konrad) and joint decision traps (Scharpf) present the most influential

concepts in the modern analysis of federalism. The concept of two-level games (Mayer) and the conceptualization of global governance as multi-level governance (Zürn) present the major theorems that have been introduced by the study of multi-level governance systems beyond the nation state.

Part II presents the state of the art in the study of multi-level governance in the domestic context. This part systematically discusses the most important domestic political actors and how they behave in a multi-level context: subnational units (Hallerberg and Swenden), parties (Jeffery) and organized interests (Hassel). Moreover, two of the best-known European federal systems, Switzerland and Germany, are compared (Braun) as well as the USA and Canada (Stein and Turkewitsch).

Part III takes a closer look at the European Union as a multi-level governance system. Chapters about its overall design (Jachtenfuchs and Benz) are supplemented by chapters that focus on specific components such as parties (Hix), parliaments (Rittberger) and regions (Bauer and Börzel). Part IV focuses on other regional arrangements such as North America (Clarkson and Sbragia), the region of the former Soviet Union (Obydenkova) and East Asia (Schreurs). In Part V different elements of global governance are analysed: the role of non-governmental organizations (Scholte), of transgovernmental networks (Slaughter and Hale), of public-private partnerships (Beisheim et al.) and, in a more general fashion, the development of governance through legislation on the international level (Humrich and Zangl).

Part VI offers insight into a number of policy areas that are crucially affected by multi-level governance: social policy (Graser and Kuhnle), environmental policy (Wälti), economic policy (Enderlein), taxation (Rixen), international standard setting (Büthe and Mattli) and policing (Herschinger et al.).

With this content, this Handbook aims at providing a fresh look at politics and policies that have been addressed under related headings from the specific perspective of multi-level governance. In doing so, we aim at bringing the above-mentioned strands of research together and at stressing commonalities between them, thereby developing a deeper understanding of a governance structure which, in a globalized world, has become a common feature of modern politics. Many, indeed probably most, issues of modern politics are handled in a multi-level governance structure, and hardly an individual or societal group is not confronted with rules that have emanated from and are implemented in a multi-level structure. In this sense, multi-level governance seems a *conditio politica* of current world affairs. The crucial variance is not so much whether or not a governance structure contains elements of multi-level governance but what form it takes.

## NOTES

1. We would like to thank Gabriele Brühl, Julia Kronberg and Joslyn Trowbridge for their support in writing this chapter and in putting together and editing this Handbook.
2. These figures are based on a count of the number of academic journal articles referenced in Academic Search Premier (EBSCO) carrying 'multi-level governance' (or 'multilevel governance') in their abstract.

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# PART I

## ANALYTICAL APPROACHES





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# 1 Types of multi-level governance

*Liesbet Hooghe and Gary Marks<sup>1</sup>*

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Centralized authority has given way to new forms of governing.<sup>2</sup> Formal authority has been dispersed from central states both up to supranational institutions and down to regional and local governments. A survey finds that 63 of 75 developing countries have been undergoing some decentralization of authority (Garman et al. 2001, p. 205). An index of regional authority in 42 democracies and semi-democracies reveals that 29 countries have regionalized and only two have become more centralized since 1950 (Hooghe et al. 2010). The last two decades have also seen the creation of a large number of transnational regimes, some of which exercise real supranational authority. At the same time, public/private networks of diverse kinds have multiplied from the local to the international level.

The diffusion of authority in new political forms has led to a profusion of new terms: multi-level governance, multi-tiered governance, polycentric governance, multi-perspectival governance, FOCJ (functional, overlapping and competing jurisdictions), fragmentation, the post-national state, consortio, and condominio, to name but a few. The evolution of similar ideas in different fields can be explained as diffusion from several literatures – federalism, public policy, urban studies, and international regimes.

These literatures agree that the dispersion of governance across multiple jurisdictions is both more efficient than, and normatively superior to, central state monopoly. The core belief is that governance must operate at multiple scales in order to capture variations in the territorial reach of policy externalities. Because externalities arising from the provision of public goods vary immensely – from planet-wide in the case of global warming to local in the case of most city services – so should the scale of governance. Multi-level governance is necessary to internalize spillovers across jurisdictions while tailoring policy to local circumstances.

However, beyond the presumption that governance has become (and should be) multi-jurisdictional, there is no agreement about how multi-level governance should be organized. We detect two contrasting visions.

The first conceives of dispersion of authority to jurisdictions at a limited number of levels. These jurisdictions – international, national, regional, meso, local – are general-purpose. That is to say, they bundle together multiple functions, including a range of policy responsibilities, and in many instances, a court system and representative institutions. The membership boundaries of such jurisdictions do not intersect. This is the case for jurisdictions at any one level, and it is the case for jurisdictions across levels. In this form of governance, every citizen is located in a Russian Doll set of nested jurisdictions, where there is one and only one relevant jurisdiction at any particular territorial scale. Territorial jurisdictions are intended to be, and usually are, stable for several decades or more, though the allocation of policy competencies across levels is flexible.

A second vision of governance is distinctly different. It conceives of specialized jurisdictions that, for example, provide a particular local service, solve a common pool

Table 1.1 *Types of multi-level governance*

<b>Type I</b>	<b>Type II</b>
<i>general-purpose</i> jurisdictions	<i>task-specific</i> jurisdictions
<i>non-intersecting</i> memberships	<i>intersecting</i> memberships
jurisdictions organized on a <i>limited number of levels</i>	<i>no limit</i> to the number of jurisdictional levels
<i>system-wide architecture</i>	<i>flexible design</i>

resource problem, select a product standard, monitor water quality in a particular river or adjudicate international trade disputes. The number of such jurisdictions is potentially huge, and the scales at which they operate vary finely. And there is no great fixity in their existence. They tend to be lean and flexible – they adapt as demands for governance change.

Table 1.1 summarizes these visions of governance as logically consistent ideal-types. The first two attributes in Table 1.1 describe variation among individual jurisdictions, while the final three describe systemic properties. We call these types simply Type I and Type II to avoid burdening readers with yet more jargon in an already jargon-laden field.

## 1.1 TYPE I GOVERNANCE

The intellectual foundation for Type I governance is federalism, which is concerned with power sharing among general purpose governments operating at just a few levels. The unit of analysis is the individual government, rather than the individual policy. In the words of Wallace Oates, dean of fiscal federalism, ‘the traditional theory of fiscal federalism lays out a general normative framework for the assignment of functions to different levels of government and the appropriate fiscal instruments for carrying out these functions’ (Oates 1999, p. 1121). Functions are bundled; membership is non-intersecting; levels of government are limited in number; the framework is system-wide. Type I governance shares these basic characteristics, but is not confined to national states. We discuss these characteristics below.

- **General-purpose jurisdictions.** Decision-making powers are dispersed across jurisdictions, but bundled in a small number of packages. Federalists and students of intergovernmental relations tend to emphasize the costs of decomposing authority. This concern is especially strong in Europe where local government usually exercises ‘a wide spread of functions, reflecting the concept of general-purpose local authorities exercising comprehensive care for their communities’ (Norton 1991, p. 22).
- **Non-intersecting memberships.**<sup>3</sup> Membership is usually territorial, as in national states, regional and local governments, but it can also be communal, as in consociational polities.<sup>4</sup> Such jurisdictions are defined by durable memberships that do not intersect at any particular level. Moreover, the memberships of jurisdictions at lower tiers are fully encompassed in those of higher tiers. This extends

the Westphalian principle of exclusivity into the domestic arena (Caporaso 2000, p. 10). The same principle is present in the international arena, where the United Nations, the World Trade Organization (WTO) and the European Union (EU) encompass national states.<sup>5</sup>

- Limited number of jurisdictional levels. Type I governance organizes jurisdictions at just a few levels. Among students of intergovernmental relations, it is common to distinguish a local, an intermediate and a central level although, in practice, the number of levels varies. In Europe, they vary between two general-purpose governmental tiers in the case of Malta, Iceland or Luxembourg to five for France and six for Germany.
- System-wide, durable architecture. One does not arrive at general-purpose, non-intersecting and nested jurisdictions by accident. Systemic institutional choice is written all over Type I governance. In modern democracies, Type I jurisdictions usually adopt the *trias politicas* structure of an elected legislature, an executive (with a professional civil service) and a court system. As one moves from smaller to larger jurisdictions, the institutions become more elaborate but the basic structure is similar. Though the institutions of the German federal government are far more complex than those of a French town, they resemble each other more than they do the Type II arrangements described below.

Type I jurisdictions are durable. Jurisdictional reform – that is, creating, abolishing or radically adjusting new jurisdictions – is costly and unusual. Change normally consists of reallocating policy functions across existing levels of governance. The institutions responsible for governance are sticky, and they tend to outlive the conditions that brought them into being.

Type I governance is not limited to federalism and intergovernmental relations. It captures a notion of governance common among EU scholars. Elsewhere, we have described the reorganization of authority in the EU as ‘a polity-creating process in which authority and policy-making influence are shared across multiple levels of government – subnational, national, and supranational. While national governments [remain] formidable participants in EU policy making, control has slipped away from them’ (Hooghe and Marks 2001, p. 2). Alberta Sbragia observes that ‘The decision-making process evolving in the Community gives a key role to governments – national government at the moment, and . . . subnational government increasingly in selected arenas’ (Sbragia 1992, p. 289). European integration and regionalization are viewed as complementary processes in which central state authority is dispersed above and below the national state (Marks et al. 1996; Scharpf 1994; Jeffery 1996; Le Galès and Lequesne 1997; Bomberg and Peterson 1998; Börzel 2001; Kohler-Koch 1998; Bache and Flinders 2004; Piattoni 2010). Few observers expect the outcome to be as neat and orderly as a conventional federation. Yet even fewer believe that the final product will resemble an Escher-like polity characterized by territorially variable, functionally specific, overlapping, non-hierarchical networks. Governments, according to Sbragia, ‘will continue to be central actors’ because ‘the territorial claims that national governments represent . . . are exceedingly strong. It is nearly impossible to overestimate the importance of national boundaries as key organizers of political power and economic wealth in the European Community’ (Sbragia 1992, pp. 274, 289).

Type I governance dominates thinking in international relations among those describing the modification – but not elimination – of the Westphalian state (Caporaso 2000). These scholars do not deny that transnational movements, public-private partnerships and corporations play important roles in international regimes, but they highlight the staying power of national states. Robert Keohane and Joseph Nye argue that ‘Contrary to some prophetic views, the nation-state is not about to be replaced as the primary instrument of domestic and global governance. . . . Instead, we believe that the nation-state is being supplemented by other actors – private and third sector – in a more complex geography’ (Keohane and Nye 2000, p. 12, see also Zürn 1998).

## 1.2 TYPE II GOVERNANCE

An alternative form of multi-level governance is one in which jurisdictions are task-specific rather than general-purpose; memberships are intersecting; jurisdictions are aligned not on just a few levels, but operate at numerous territorial scales; and where jurisdictions are intended to be flexible rather than durable. This conception is predominant among neoclassical political economists and public choice theorists, but it also summarizes the ideas of several scholars of federalism, local government, international relations and European studies.

- Task-specific jurisdictions. In Type II governance, multiple, independent jurisdictions fulfill distinct functions. ‘[E]ach citizen . . . is served not by “the” government, but by a variety of different public service industries. . . . We can then think of the public sector as being composed of many public service industries including the police industry, the fire protection industry, the welfare industry, the health services industry, the transportation industry, and so on’ (Ostrom and Ostrom 1999, pp. 88–9). In Switzerland, where Type II governance is quite common at the local level, these jurisdictions are aptly called *Zweckverbände* – goal-oriented/functional associations (Frey and Eichenberger 1999).
- Intersecting memberships. ‘There is generally no reason why the smaller jurisdictions should be neatly contained within the borders of the larger ones. On the contrary, borders will be crossed, and jurisdictions will partly overlap. The “nested,” hierarchical structure of the nation-state has no obvious economic rationale and is opposed by economic forces’ (Casella and Weingast 1995, p. 13).

Frey and Eichenberger (1999) coin the acronym FOCJ (functional, overlapping and competing jurisdictions) for this form of governance. ‘Polycentricity’ was initially used to describe metropolitan governance in the USA, which has historically been more fragmented than in Europe. It is applied by Elinor and Vincent Ostrom as a generic term for the co-existence of ‘many centers of decision-making that are formally independent of each other’ (Ostrom et al. 1961, p. 831). Philippe Schmitter uses the term ‘condominio’ to describe ‘dispersed overlapping domains’ having ‘incongruent memberships’ that ‘act autonomously to solve common problems and produce different public goods’ (Schmitter 1996, p. 136).

- Many jurisdictional levels. Type II governance is organized across a large number of levels. Instead of conceiving authority in neatly defined local, regional, national

and international layers, public choice students argue that each public good or service should be provided by the jurisdiction that effectively internalizes its benefits and costs. The result is jurisdictions at diverse scales – something akin to a marble cake. Students of Type II governance generally speak of multi- or poly-centered governance, which, they feel, have less a ring of hierarchy to them than the terms multi-level or multi-tiered governance.

Several scholars highlight the proliferation of Type II governance in the international arena, task-specific regimes or institutions that address transnational problems. A critic of the traditional statist view of governance describes this process as ‘fragemegration’ – a neologism suggesting ‘the simultaneity and interaction of the fragmenting and integrating dynamics that are giving rise to new spheres of authority and transforming the old spheres. It is also a label that suggests the absence of clear-cut distinctions between domestic and foreign affairs, that local problems can become transnational in scope even as global challenges can have repercussions for neighborhoods’ (Rosenau 1997, p. 38). In this conception, there is no up or down, no lower or higher, no dominant class of actor; rather, a wide range of public and private actors who collaborate and compete in shifting coalitions. The outcome is akin to Escher’s famous lithograph of incongruously descending and ascending steps.

- Flexible design. Type II jurisdictions are intended to respond flexibly to changing citizen preferences and functional requirements. The idea is rooted in Charles Tiebout’s argument that mobility of citizens among multiple competing jurisdictions provides a functional equivalent to market competition (Tiebout 1956). In a subsequent article, Vincent Ostrom, Charles Tiebout and Robert Warren describe a polity in which groups of citizens band together in ‘collective consumption units’ to procure public goods. Individual citizens can join or leave particular collective consumption units, and these units can acquire a public good in one of several alternative ways – for example, by producing it themselves, hiring private producers, subsidizing local community groups or joining up with other jurisdictions (Tiebout 1956; Ostrom et al. 1961; Ostrom and Ostrom 1999). A defining characteristic of polycentric governance is ‘the concurrence of multiple opportunities by which participants can forge or dissolve links among different collective entities’ (McGinnis 1999, p. 6). In their advocacy of FOCJ, Frey and Eichenberger emphasize a similar jurisdictional flexibility: ‘FOCJ . . . are flexible units which are established when needed. . . . [And] FOCJ are discontinued when their services are no longer demanded as more citizens and communities exit and the tax base shrinks’ (Frey and Eichenberger 1999, p. 18). ‘FOCJ are an institutional way to vary the size of public jurisdictions in order to minimize spillovers. A change in size is, therefore, a normal occurrence’ (ibid., p. 41).

Under Type II governance, the capacity to take collective decisions, and make them stick, is diffused among a wide variety of actors. As Elinor Ostrom and James Walker put it, ‘The choice that citizens face is not between an imperfect market, on the one hand, and an all-powerful, all-knowing, and public-interest-seeking institution on the other. The choice is, rather, from among an array of institutions – all of which are subject to weaknesses and failures. . . . These include families and clans, neighborhood

associations, communal organizations, trade associations, buyers and producers' cooperatives, local voluntary associations and clubs, special districts, international regimes, public-service industries, arbitration and mediation associations, and charitable organizations' (Ostrom and Walker 1997, p. 36). Type II governance comprises dispersed self-rule on the part of diverse voluntary groups. Collective action problems are dealt with in heterogeneous arenas mobilized by many kinds of groups.

Several writers point out that Type II governance resembles pre-modern governance. John Ruggie identifies commonalities between contemporary and medieval 'multiperspectival' governance (Ruggie 1993). Students of polycentric governance trace the prevalence of special districts and other forms of polycentric governance in the USA back to the conception of federalism anchored in the US constitution. Analysts of multi-centered governance in Europe find inspiration in pre-modern theories of federalism. The father of societal federalism, Johannes Althusius, formulated his ideas against Jean Bodin's unitary conception of the state.

### 1.3 LOCATING TYPE I GOVERNANCE

Type I governance predominates in conventional territorial government up to the national level. While measures of decentralization vary, cross-national analyses reveal a robust trend towards greater decentralization since the end of World War II. Decentralization has been particularly impressive in Europe, but it has permeated the developing world as well. Data on taxation and spending confirm this. *Government Finance Statistics* of the International Monetary Fund (IMF) show that the share of subnational expenditure in total government expenditure has risen from 20 percent in 1978 to over 32 percent by 1995. Fiscal decentralization has been most pronounced in Spain and Latin America (Rodden 2004). The same trend appears when one examines policy making. Vernon Henderson has traced the extent to which central government can override decisions of subnational governments. The proportion of countries in which central governments have this formal power has decreased from 79 percent in 1975 to 40 percent in 1995 (Henderson 2000). There has been a steep rise in political decentralization. Thirty percent of local governments were directly elected in 1970; 86 percent were directly elected in 1999. The proportion of regional governments that are elected has increased from 25 percent to 55 percent in the same period (Henderson 2000; Rodden 2004).

Subnational dispersion of authority follows the logic of Type I – not Type II. The overall structure in the EU is relatively simple, even elegant. There are few rather than many tiers. The territorial scales of government across the EU range between two and six. This is a far cry from the near infinite jurisdictional dispersion conceived in Type II governance.

In Europe, Type I multi-level governance has been pressed forward by the simultaneous empowerment of supranational and subnational institutions. An index summarizing the formal authority of regions, special territorial autonomy for minorities, the role of regions in central government and whether the regional government is elected reveals a deep and broad reallocation of authority from central states to regions in the EU (Hooghe et al. 2010). This index does not capture decentralization to local government.

Local empowerment has been particularly pronounced in northern Europe, although recent local government reforms in several southern European countries have begun to narrow the gap (Page and Goldsmith 1987; John 2001).

Once one reaches beyond the national state into the international arena, one finds very little Type I governance – with one major exception: the EU. The EU bundles together policy competencies that in other parts of the world are handled by numerous, overlapping and functionally specific jurisdictions. Most EU policies, with the major exceptions of monetary policy and border controls, have a single unified jurisdiction.

However, some salient features of EU architecture are consistent with Type II governance: variable territorial jurisdictions as a result of treaty derogations; distinct governance systems or ‘pillars’ for different policies; the multiplication of independent European agencies; and the flexibility clause of the Amsterdam and Nice Treaties specifying the conditions under which a subset of member states can engage in greater integration. As Richard Balme and Didier Chabanet point out, ‘the competencies of the European Union in different sectors (environment, agriculture, competition . . .) are very different. . . . Even in the same policy area the decision rules are variable and ad hoc’ (Balme and Chabanet 2002, p. 44). Philippe Schmitter regards these characteristics as defining features of the European polity: ‘The core of the emerging Euro-polity’s novelty lies in the growing dissociation between territorial constituencies and functional competencies’ (Schmitter 2000, p. 15).

## 1.4 LOCATING TYPE II GOVERNANCE

Type II governance tends to be embedded in legal frameworks determined by Type I jurisdictions. The result is a large number of relatively self-contained, functionally differentiated Type II jurisdictions alongside a smaller number of general-purpose, nested Type I jurisdictions.

### 1.4.1 The National/International Frontier

Type II governance is ubiquitous in efforts to internalize transnational spillovers in the absence of authoritative coordination. Most target specific policy problems ranging from ozone layer protection, to shipment of hazardous waste, to migratory species. Task specificity is a common feature of international regimes.

International governance is a layered network of Type II arrangements of varying institutional durability, fixity and geographical scope, which are broadly coordinated by (a) relatively durable institutional arrangements among sets of national governments and (b) a small number of Type I international organizations. The bulk of international governance consists of bilateral or multilateral agreements without agency. Of 35 269 post-World War II international agreements filed with the United Nations up to 1999, 2330 are multilateral and the remainder bilateral (Koremenos 2005). In addition, there are, according to the Correlates of War dataset, 332 self-standing international organizations having at least three member states, a permanent secretariat and headquarters, and a plenary session at least once every ten years (Pevehouse et al. 2004). Some 50 of these can be described as authoritative, having a formal constitution, a supreme legislative



body, a standing executive, a permanent professional administration, and some formal mechanisms for enforcing decisions and settling disputes. Of these, eight might be described as general-purpose in that they have authority over a diverse range of policies from security or political cooperation to trade, culture, health, human rights or police and judicial cooperation: the United Nations, the EU, the African Union, Caricom, the Nordic Council, the Arab League, the Association of Southeast Asian Nations (ASEAN) and Ecowas (Hooghe and Marks 2009).

Type II jurisdictions at the national/international frontier are more fluid than Type I jurisdictions. This is even so for the more durable components of international governance. A count of international governmental organizations shows steep growth over the past half century, but also sizeable fluctuation. For example, of 1063 organizations existing in 1981, only 723 survived a decade later, while an additional 400 or so came into being. The mortality rate for international governmental organizations is estimated to be five times higher than for domestic Type I organizations such as American federal bureaucracies (Shanks et al. 1996, p. 143).

While public-private partnerships are found in Type I jurisdictions, they are more common in Type II<sup>6</sup> and particularly in the international arena. Tanja Börzel and Thomas Risse distinguish five types of public-private partnerships. In the first type, private groups are merely consulted or co-opted by public actors. This is the case for the WTO, the IMF and the World Bank, all of which have recently reached out to civil society representatives. A second form includes private actors as negotiating partners next to public actors, as in the Transatlantic Business Dialogue, which brings together business and government representatives from both sides of the Atlantic. Public actors may also delegate functions to private actors, as is the case for many standardization bodies, for example, the European Committee for Standardization (CEN). A fourth form authorizes self-regulation among firms in the shadow of hierarchy (for example, the World Business Council for Sustainable Development). The final type of public-private partnership is one in which private actors predominate and in which the role of government is restricted to adopting, post hoc, privately negotiated regimes, as, for example, the regulation of domain names in the Internet (Börzel and Risse 2005).<sup>7</sup> A sixth type consists of transnational private partnerships without government participation – ‘governance without government.’ The Forest Stewardship Council (FSC) accredits timber companies that follow the association’s standards of environmental sustainability. The FSC, an organization set up by 150 environmental, business and human rights groups, runs a global forest certification program which promotes sustainable forestry through the market mechanism (Arts 2006). However, as Zürn and Archibugi note in their survey of global governance arrangements across issue areas, ‘pure forms of transnational governance seem relatively rare; in many cases, an element of public involvement, support or oversight can be identified’ (Zürn and Koenig-Archibugi 2006, p. 242). Such public involvement is nearly always in the form of a Type I government – be it national or international such as the EU.

Hence at the national/international frontier, Type II governance tends to predominate. The EU is an exception that proves the rule. It is extremely difficult to tie national states into authoritative transnational jurisdictions that are general-purpose, rather than designed around particular policy problems. Type II jurisdictions are instrumental arrangements which do not directly challenge state authority, nor do they demand

a strong sense of identity on the part of their members. Most successful international regimes focus on pareto optimality and avoid explicit redistribution. As we discuss below, this is both a virtue and a limitation of Type II governance.

#### **1.4.2 Cross-Border Regions**

Type II jurisdictions are common in cross-border regions, especially in North America and Western Europe. Ad hoc, problem-driven jurisdictions in the form of inter-regional commissions, task forces and inter-city agencies have mushroomed over the past three decades. In the Upper Rhine Valley, for example, the Swiss cantons of Basel-Land and Basel-Stadt, the French department Haut Rhin and the German region Baden have created a web of transnational jurisdictions, involving meetings of regional government leaders, a regional council of parliamentary representatives, a conference of city mayors, boards of regional planners, associations of local authorities, agricultural associations, chambers of commerce, cooperation projects among universities, joint research projects on regional climate change and biotechnology, teacher exchange programs and school partnerships. Dense cross-border cooperation has also emerged along the Californian/Mexican border and the US/Canadian border (Blatter 2001).

Governance arrangements that straddle national borders are usually functionally specific, and overlap with existing jurisdictions in order to solve particular collective action problems. Such jurisdictions operate within Type I architecture. Cooperation is difficult when regions and local authorities in different countries have dissimilar competencies or resources. This has constrained one of the European Commission's best-known programs, Interreg, which aims to facilitate inter-regional networks along the EU's internal and external borders. Contrasting Type I architectures in Europe and the USA help explain why cross-border cooperation has evolved differently. Joachim Blatter notes that in Europe, cross-border arrangements show a tendency to evolve in a Type I direction – under the influence of relatively resource-rich, general-purpose local and regional governments. In contrast, cross-border cooperation in North America has remained task-specific, territorially overlapping and dominated by non-governmental actors, and thus complements uncoordinated, relatively resource-poor, Type I governments (*ibid.*).

#### **1.4.3 Local Level**

Type II governance is widespread at the local level. In Switzerland, Frey and Eichenberger identify six types of functional, overlapping, competitive jurisdictions that complement or compete with general-purpose local governments. According to the authors' calculations, in 1994, 178 Type II associations provided specialized services such as local schooling, electricity or street lighting in the canton of Zurich alone (Frey and Eichenberger 1999, pp. 49–53). The closest functional equivalent in the USA consists of 'special districts,' which, as in Switzerland, have intersecting territorial boundaries and perform specific tasks. Special district governance is particularly dense in metropolitan areas: in 1992, the metropolitan area of Houston had 665 special districts, Denver 358 and Chicago 357 (Foster 1997, p. 122). Overall, the number of special districts has risen three-fold from 12 340 in 1952 to 35 356 in 2002. Ninety-one percent of these districts perform a

single function concerned with natural resources, fire protection, water supply, housing, sewerage, cemeteries, libraries, parks and recreation, highways, hospitals, airports, electric power or gas supply, or public transit. These figures do not include several interstate special districts, such as the New York and New Jersey Port Authority; nor do they include independent school districts, of which there were over 13 500 in 2002 (Foster 1997, pp. 1–22). Type II governance at the local level is more common in Switzerland and the USA than in Europe, though ‘partnership between a whole variety of service providers and levels of [local] government is the normal practice in most West European countries’ (Batley 1991, p. 225).

Type II special districts are generally embedded in Type I local government, but the way this works varies. There is no general blueprint. The legal context is decisive for the density of special districts in the USA. A tally of district-enabling laws in California in the early 1980s counted 206 state statutes enabling 55 varieties of special districts for 30 government functions (Foster 1997, p. 11). No less than 200 pages of the most recent US Census of Government were devoted to ‘a summary description’ of local government variation across US states (US Bureau of the Census 1999, pp. 73–277). Some districts are created by state legislatures, others are set up by one or more counties or municipalities, while others are initiated by a citizen petition. Special districts may be governed by appointed or elected boards; for some elected boards, only property owners rather than residents can vote. Some special districts levy taxes or fees, while others do not. The geographical scope varies from interstate, to regional and submunicipal, but the majority of special districts are (a) smaller than the county and (b) overlap with other local governments (Foster 1997, pp. 9–15). The result is a baroque patchwork of Type II jurisdictions overlaying a nested pattern of Type I jurisdictions.

Type II governance may also appear where local communities are faced with local common pool resource problems, that is, where scarce, renewable resources – for example, a water basin, a lake, an irrigation system, fishing grounds, forests, hunting grounds, common meadows – are subject to depletion because it is difficult to restrict access. As Elinor Ostrom has argued, diversity of ecological systems is an important source of multi-level governance. Around the world, communities have developed task-specific governance structures, often self-generated, to cope with locally specific common pool resource problems (Ostrom 1990).

## 1.5 BIASES OF GOVERNANCE

The types of governance that we outline in this chapter frame basic political choices. Type I and Type II governance are not merely different ways of doing the same thing. Their contrasting institutional arrangements give rise to contrasting virtues and vices. We list these in Table 1.2, and describe them below.

### 1.5.1 Biases of Type I Governance

- **Intrinsic community.** Type I jurisdictions express citizens’ identities with a particular community. Intrinsic communities represented in Type I jurisdictions are often based in national, regional and/or local identity, but they may also reflect

Table 1.2 Biases of Type I and Type II governance

Type I	Type II
intrinsic community	extrinsic community
voice	exit
conflict articulation	conflict avoidance

religion, tribe or ethnicity. Such jurisdictions satisfy a preference for collective self-government, a good that is independent of citizens' preferences for efficiency or for any particular policy output.

- Voice. Type I governance is biased towards voice, that is, political deliberation in conventional liberal democratic institutions. Type I jurisdictions are determined in a deliberative multi-issue process in which conflicts are highly structured and articulated. Rules about rules (*Kompetenz-Kompetenz*) are decided consciously, collectively and comprehensively. Conversely, barriers to exit are relatively high. Exit in a Type I world usually means moving from one locality, region or country to another. Where jurisdictions are designed around religion or group membership, exit demands that one change one's identity.
- Conflict articulation. Bundling issues in a limited number of jurisdictions facilitates party competition and the articulation of dimensions that structure political contestation, first and foremost a left/right dimension tapping greater versus less government regulation of market outcomes and, in many communities, a new politics dimension tapping communal, environmental and cultural issues. This promotes meaningful choice for citizens. Type I governance is well suited to deal with zero-sum issues, that is, distributional bargaining, because it facilitates logrolling and cross-issue trading. And because barriers to exit are high, it is also well suited to provide non-excludable public goods.

### 1.5.2 Biases of Type II Governance

- Extrinsic community. Type II jurisdictions are instrumental arrangements. They solve ad hoc coordination problems among individuals sharing the same geographical or functional space. Individuals relate to jurisdictions as members of fluid, intersecting communities – for example, as professionals, women, parents, homeowners, nature lovers, sports fans, consumers and so forth.
- Exit. Type II governance is biased towards exit. Voluntary membership allows citizens, or the collective units of which they are members, to exit jurisdictions when these no longer serve their needs. To the extent that they facilitate entry and exit, Type II jurisdictions approximate markets. Jurisdictions may be created, deleted or adjusted through interjurisdictional competition for citizens' participation or dues. Voice is secondary. The narrow focus of Type II jurisdictions concentrates the costs of liberal democratic institutions within small constituencies. Deliberation is focused on the production of a particular public good rather than on broader value choices.

- **Conflict avoidance.** By decomposing decision making into jurisdictions with limited externalities, Type II governance insulates decision making from other, potentially cross-cutting, issues. This jurisdictional fragmentation raises the bar for articulating ideological conflict, but it concentrates the mind on improving efficiency. Type II jurisdictions are well suited for decisions characterized by a search for pareto-optimality.

Type I and Type II governance are not just different means to the same end. They embody contrasting visions of collective decision making. Type I jurisdictions are suited to political deliberation about basic value choices in a society: who gets what, when and how. Because Type I governance bundles decision making in a limited number of jurisdictions at a few levels, it reaps economies of scale in translating citizen preferences into policy. Type I jurisdictions are at the heart of democratic elections, party systems, legislatures and executives. Type I jurisdictions sustain a class of professional politicians who mediate citizen preferences into law.

Type II jurisdictions, in contrast, emphasize problem solving. How can citizens obtain public goods that they are unable to create individually? What are the most efficient means to public ends? How can market efficiency, based on consumer choice and competition among producers, be translated into the provision of public goods? The assumption underlying Type II jurisdictions is that externalities among jurisdictions are sufficiently limited to sustain compartmentalized decision making.

## 1.6 CONCLUSION

How should multi-level governance be organized? Who should be included in a jurisdiction, and what should that jurisdiction do? What criteria are relevant to these choices, and what are the implications of such choices?

The main benefit of multi-level governance lies in its scale flexibility. Multi-level governance allows jurisdictions to be custom-designed in response to externalities, economies of scale, ecological niches and preferences. Both Type I and Type II governance deliver scale flexibility. But they do so in contrasting ways. Type I governance does so by creating general-purpose jurisdictions with non-intersecting memberships. Jurisdictions at lower tiers are nested neatly into higher ones. Type II governance, in contrast, consists of special-purpose jurisdictions that tailor membership, rules of operation and functions to particular policy problems.

Each type has distinctive virtues. Type I governance is oriented to intrinsic communities and to their demands for self-rule. It is predisposed to the articulation and resolution of conflict, including conflict on redistributive issues. Type II jurisdictions are well suited to achieve pareto-optimality when redistribution is not salient. Yet, despite these differences – or more accurately, because of them – Type I and Type II governance are complementary.

With the Eastern enlargement of the EU, pressures for jurisdictional flexibility have intensified. Will it be possible to stretch a Type I jurisdiction over an EU of 27 or more countries? Will there be more variable geometry – in our terms, Type II governance? These questions take us beyond the scope of this chapter, but the conceptual framework presented here appears to be relevant to their resolution.

## NOTES

1. This chapter is adapted from Liesbet Hooghe and Gary Marks (2003), 'Unraveling the central state. But how? Types of multi-level governance', *American Political Science Review*, **97** (2), 233–43. We wish to thank Michael Zürn for comments.
2. We define governance as binding decision making in the public sphere.
3. While membership of Type I jurisdictions is non-intersecting, competencies are often shared or overlapping. There has, for example, been a secular trend away from compartmentalization in federal polities.
4. Other examples of non-territorial Type I governance are the clan system in Somalia, communal self-governance in the Ottoman Empire and religious self-governance in India.
5. There are a few exceptions. For example, Greenland and the Faroe Islands, self-governing parts of Denmark, are not members of the European Union.
6. Neocorporatism is an example of a Type I public-private partnership.
7. Public-private partnerships also play a growing role in the security realm. Private military companies (PMCs) refer to private firms selling military services including combat, consulting and logistics. Their significance is contested, but some argue that '[PMCs] increasingly shape which issues and problems are "securitized" – turned into existential threats – and which kind of (re-)action is to be considered most appropriate. They are part of a general process in which security is not only *privatised* but also *remilitarised*' (Leander 2005, p. 804, emphasis in original; see also Singer 2003; Chesterman and Lehnhardt 2007).

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## 2 Federalism and optimal allocation across levels of governance

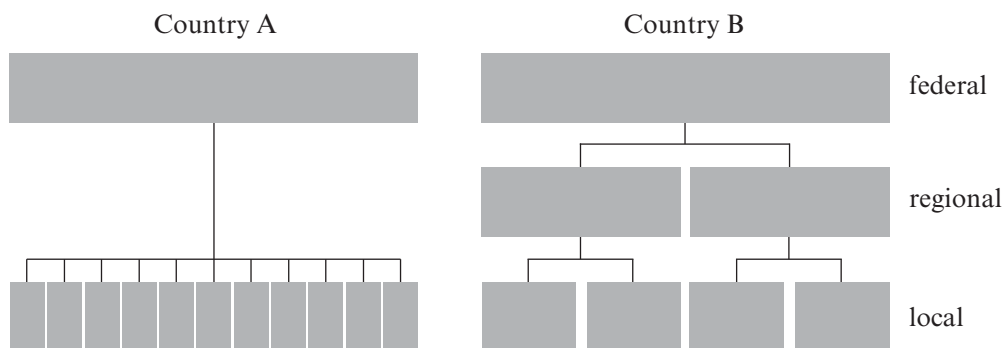
*Benny Geys and Kai A. Konrad*

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### 2.1 INTRODUCTION

Countries differ in their governmental architectures and in the rules that describe the allocation of tasks, rights and duties across the various levels of government. Figure 2.1 displays the architecture of two (hypothetical) countries by way of illustration. Country A on the left-hand side has two levels of government: a central government at the highest level and many small jurisdictions at the lower level. Country B on the right-hand side has three layers of government: a central government at the highest level, two ‘regional’ governments representing an ‘intermediate’ level of government and several small jurisdictions at the third and lowest level. Clearly, these are only two possible constellations. Treisman (2000) analyses a large set of countries and finds government architectures involving between one (Singapore) and six layers of government (Russia). Many of these real-world government architectures are (significantly) more complicated than the ones depicted in Figure 2.1.

Moreover, countries’ government architectures are not static, but subject to often substantial change. Such reforms are habitually the focus of intense political debates. *Föderalismusreform* I (in 2006) and II (in 2009) in Germany and the debates about a further reorganization (or, more specifically, regionalization) of the government architecture in Belgium since the federal elections of June 2007 are illustrative. Similar debates exist also in many developing countries, and are high on the agenda of international organizations such as the World Bank or the International Monetary Fund (IMF), which often act as consultants in the transformation process of developing countries. The development process of the European Union (EU) – with debates on the EU



*Figure 2.1 Two possible government architectures*

constitution, EU enlargement and the transfer of powers from the national to the EU level (for example, concerning a common social, fiscal or foreign policy) – represents an important example of the fluidity of governmental architectures at the international level. Further, it illustrates that the nation state itself may be imbedded into larger governmental structure, with the EU and international organizations being prominent examples (see, for example, Zürn 2000, 2004).<sup>1</sup>

Interestingly, opinions concerning the instigating forces of these reform debates differ. Bolton and Roland (1997) and Alesina and Spolaore (2003) argue such debates are a consequence of increased globalization. Others, however, argue that globalization hinders decentralization (Garrett and Rodden 2003). The theory of federalism needs to address both positive and normative questions regarding the choice of governmental architecture and the assignment of tasks, rights, responsibilities and so on among different government levels.<sup>2</sup> These include, but are not limited to, the assignment of (a) rights to choose, collect or spend different types of taxes; (b) rights to issue debt and the responsibilities for repayment of debt within the federation; (c) decision rights on public expenditures for goods that benefit only a subgroup within the federation (local public goods); and (d) expenditures that affect all members of the federation (nationwide public goods). While these four examples are confined to the rights to tax and spend, similar choices concerning the optimal allocation of tasks obviously also apply to regulation of public issues more generally: for example, education, environmental issues, cultural policy, defense, police and so on. Moreover, governance rules and the interdependencies and structure of democratic decision-making (division of power, election rules, and so on) must be chosen or designed. Still, for ease of exposition, we refer mainly to fiscal policies in what follows. The reason is that this is a theme most often returned to in the (fiscal) federalism literature. Nonetheless, it is important for the reader to keep in mind that the arguments presented are usually of a much more general nature and apply to the ‘assignment problem’ in a broad sense (and not just to the ‘fiscal frame’ within which they are presented).

We first start with a standard analysis of what is known as Oates’s Decentralization Theorem (1972), which highlights an important trade-off in these allocation decisions.<sup>3</sup> Even though this theorem does not provide the ultimate answers, it is useful as a frame of reference or point of departure. Also, it evened the ground for what Oates (2005) and Weingast (2006) call ‘Second Generation Fiscal Federalism,’ which allowed analysis of aspects such as commitment power, time consistency issues and problems of information, as well as differences in political decision-making on different levels of government. Then, we discuss problems related to suboptimal task assignment (in Section 2.3) and departures from the uniformity assumption made in Oates’s (1972) analysis (in Section 2.4). Finally, in Section 2.5, we briefly elaborate on strategic effects of a country’s decentralization in the international sphere.

Overall, the short and necessarily selective survey offered in the present chapter illustrates that the theory of optimal allocation of rights and duties in federations cannot provide unambiguous one-size-fits-all recommendations. Especially the more recent contributions to this vast and fast-developing literature – based on insights derived from contract theory and political economy – clearly show that various trade-offs need to be considered simultaneously. As such, it is clear that the decentralization question is not resolved easily, suggesting that bold policy recommendations are unwarranted at this stage, and that more work is needed to develop a more solid ground for policy advice.

## 2.2 THE DECENTRALIZATION THEOREM

The public sector is generally involved in a wide variety of tasks, including, for instance, social security, health care, defense, education and welfare benefits. Which level of government should take up a given task? In a very influential study, Oates (1972) provided an answer based on the observation that some public goods – such as national defense – benefit the entire population of a country, while others – such as local parks or street lighting – mostly benefit the population of a very small region within a country (and might entail spillover effects). With this in mind, Oates argued that ‘the provision of public services should be located at the lowest level of government encompassing . . . the relevant benefits and costs’ (Oates 1999, p. 1122; see also Musgrave 1959; Tullock 1969; Breton and Scott 1978 for early contributions to this debate and, for an overview, Inman and Rubinfeld 1997). This idea became generally known as the Decentralization Theorem and underlies, for example, the principle of subsidiarity in the Maastricht Treaty of the EU.

To see how Oates’s ‘solution’ comes about, consider Figure 2.2 where we depict public provision of the per-capita quantity of a good  $E$  in a country  $G$ . Country  $G$  consists of two (equal-sized) regions  $G_1$  and  $G_2$ . Provision of the good can either be taken up by the national government or by the governments of the two regions. Importantly, while the population of the country is split evenly across both regions and preferences for the publicly provided good are homogeneous within each region, inhabitants of region  $G_2$  have a stronger preference for the good than those in region  $G_1$ . To fix ideas, one could think of the good  $E$  as education, and the population in region  $G_1$  consisting of only elderly people while that in region  $G_2$  is dominated by young families. Naturally, residents of region  $G_2$  would, for any given price, demand more of the good than those of region  $G_1$  (who might be more interested in social provisions for the elderly). This is reflected in the ‘demand curve’ for region  $G_2$  (denoted  $D_{G_2}$ ) lying further to the upper left corner compared to that of region  $G_1$  (denoted  $D_{G_1}$ ).

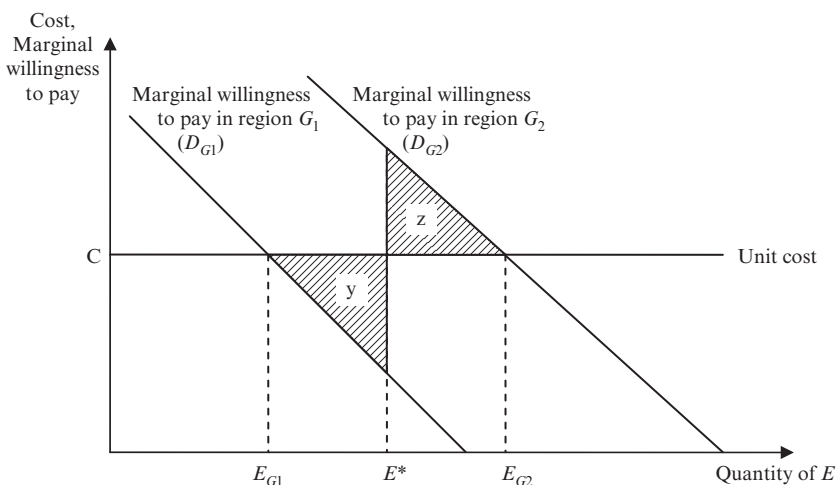


Figure 2.2 *Graphical representation of the Decentralization Theorem*

For simplicity, assume that the good can be produced at a constant cost  $C$  per unit and per user (which is also the price charged to inhabitants, for example, via taxes). At this price, region  $G_1$  would demand quantity  $E_{G_1}$ , while region  $G_2$  would prefer to consume  $E_{G_2}$ . Under central undifferentiated provision, however, each region would obtain  $E^*$ . This is clearly unsatisfactory for both regions. Region  $G_2$  cannot fully exploit its consumer surplus, while region  $G_1$  suffers a 'coercion loss' from being provided with too much of the good (or, more precisely, a good it cares too little for). These welfare losses are represented by triangles  $z$  and  $y$ , respectively. These welfare losses become larger as the preferences of both regions diverge further. Under regional provision, on the other hand, such welfare losses do not occur as each region will supply the amount demanded by its population. Hence, when preferences differ across regions and benefits of a public good are local, provision should be 'located at the lowest level of government encompassing . . . the relevant benefits and costs' (Oates 1999, p. 1122) to avoid welfare losses.

Through his analysis, Oates was the first to point at an important and intuitively evident trade-off between (i) interregional spillovers and a lack of full internalization on the local level on the one side and (ii) a tendency of the central government to be 'remote' from, and inattentive to, local needs on the other side. He thereby initiated a research program that studies questions deriving from this fundamental trade-off with the tools of modern incentive theory, contract theory and the theory of political economy. In what follows, we will go deeper into several questions that have received particular attention.

Still, before we do so, it should be pointed out that Oates's initial analysis clearly does not provide final answers. Indeed, the above line of argument rests strongly on the assumption that the central government is itself unable to differentiate the supply of the public good across both regions. This evidently is a very strong assumption. Nevertheless, in its absence, it becomes unclear whether centralized or decentralized provision is preferable from a welfare point of view. One early scholarly debate following the analyses of Tiebout (1956), Musgrave (1959), Tullock (1969), Oates (1972), Breton and Scott (1978) and Bewley (1981) therefore tried to generate deeper insights concerning the conditions under which decentralization may be beneficial – or not. Among the arguments discussed are information asymmetry and increasing returns.

Standard arguments raised when discussing decentralization often stress that state and local governments, being closer to the public, tend to be more responsive, accountable and aware of the preferences of their constituents than the central government (Oates 1999; Tanzi 2002). If the local government has information about local preferences, taxable income or other relevant variables which are not available to the central government, this can potentially cause principal-agent problems between the local and the central government.<sup>4</sup> Decentralization of local public good supply and its financing may then be a natural design.<sup>5</sup> This asymmetric information assumption has, however, been criticized on a deeper theoretical ground (see, for example, Lockwood 2006, p. 38). If information is available at the local level, there typically exist information revelation mechanisms which a benevolent central government could use to obtain this information. In cases where the central government has sufficient enforcement power, it can even implement very inexpensive revelation mechanisms (for example, the 'shoot the liar' mechanism), as it is typically true that several players at the local level have the relevant information.

A second argument concerns economies of scale in the production of a given public

good and internalization of externalities. When local, small-scale production of the public good is much more expensive than central, large-scale production, it may be beneficial to organize provision of the public good at a higher level of government. Spillovers from local policies reinforce this point. Central governments are likely to internalize such interjurisdictional externalities, whereas local governments have no incentive to do so. Such spillovers can be important in policy areas such as, for example, police protection or pollution abatement. Hence, scale economies and spillovers appear to go against decentralization. Nonetheless, regions may cooperate and purchase the public good from the same supplier, which would be able to exhaust economies of scale. When such cooperation is feasible, decentralization may still be viable even under the presence of significant economies of scale.

### 2.3 LOSSES FROM SUBOPTIMAL TASK ASSIGNMENT

While many theories have been developed from the normative point of view (that is, arguing how tasks should ideally be allocated), an ideal allocation of actual tasks across levels of government is difficult, if not impossible, to attain. One reason is that the presiding allocation of tasks is often the result of historical incidents (or ‘critical junctures’) and path dependence (in the spirit of Mahoney 2000; Pierson 2000). It may be less than ideal (and all parties involved might even agree about this point), but it will be hard to change the existing configuration since no level of government is (usually) very willing to give up tasks and/or see its influence reduced. Related, central governments often are found to benefit from an ‘attraction of power’ known as Popitz’s Law, in which they exploit their ‘constitutional power . . . to take over state tax legislation’ (Blankart 2000, p. 27; see also Grossman and West 1994; Vaubel 1994). This implies that even when an ideal allocation of powers could be reached at some point, this need not be an equilibrium that is easily maintained.

Another reason is that the trade-off between ‘closeness’ to local needs and potential for spillovers is difficult to resolve in practice. For example, some police tasks (such as local traffic regulation) can probably be safely assigned to local governments. However, other aspects of police enforcement (such as prevention of drug trafficking) are likely to entail considerable spillovers to other jurisdictions, which may ask for an assignment of this task to a higher level of government. Resolving such problems by the creation of two independent types of police may also not be optimal, as there may be economies of scope.<sup>6</sup> Similarly, local measures against environmental pollution may improve the environment in neighboring jurisdictions. Medical, recreational, cultural or educational facilities can be used by citizens of neighboring jurisdictions. Generous welfare programs may attract recipients from neighboring jurisdictions. Finally, local taxes have externalities due to mobile tax bases. As shown by Mansoorian and Myers (1993), sometimes local politicians may internalize some of these externalities fully. When such interregional externalities are not, or only partially, accounted for, underinvestment in policies with positive externalities and overinvestment in policies with negative externalities may, but need not, occur in the absence of negotiations. A ‘race to the bottom’ may materialize (see, for example, Brueckner 2000, 2003; Fredriksson and Millimet 2002).<sup>7</sup>

Spillover problems can be remedied by allocating the task to a central government,

which internalizes the externalities and makes the optimal (collective) decision. Also, intergovernmental grants that are governed by the central government and distributed to the local governments can remedy such problems. Such grants have indeed been recurrently argued to help at internalizing spillover benefits from given policy decisions. However, their use is not entirely unproblematic. The design of these transfer schemes should be faced with due care (Inman 1999; Bird and Smart 2002). Matching grants, earmarked grants and block grants may affect jurisdictions' expenditures in different ways. Also, intergovernmental transfers may not invoke the same response from local politicians as increases in self-generated revenues (for instance, from local taxes). Theoretically, and using a median voter model, Bradford and Oates (1971) show that unconditional (or 'block') intergovernmental grants and private income should have equivalent effects on local public spending (since block grants only have an income effect). Empirical studies, however, fail to substantiate this prediction: grants often strongly increase public spending while private income mostly fails to do so (for example, Gramlich and Galper 1973; Heyndels and Smolders 1994; Heyndels 2001; or, for a review, Hines and Thaler 1995). This phenomenon has become known as the 'flypaper effect' and indicates that the incentive structure of block grants needs to be carefully considered when introducing such schedules.<sup>8</sup>

Rather than for the internalization of spillovers (or promoting spending on certain public goods), grants can also be used to increase fiscal equality between various governments. Providing grants through such fiscal equalization schemes is extensively employed in countries such as Canada and Germany and may 'limit tax competition among subnational governments [and] correct fiscal externalities' (Bucovetsky and Smart 2006, p. 119). However, less positive, they may at the same time distort incentives for local governments to increase local economic growth (Weingast 2006) as well as increase government spending (Bucovetsky and Smart 2006). Grants can create incentives for local jurisdictions that may or may not be fully in line with those desired by the granting higher-level government. An efficient provision of services requires transfers to be designed such that 'those receiving them have a clear mandate, adequate resources, sufficient flexibility to make decisions and are accountable for results' (Bird and Smart 2002, p. 899). Given its importance, the optimal design of the financial structure within a federal state and the incentives this provides to local government officials remains a hot topic of research to date.

Governments of local jurisdictions generally do not act in isolation, passively suffering from, or imposing externalities on others, but they interact strategically along many dimensions, including tax rates (for reviews, see Wilson 1999; Fuest et al. 2005), welfare benefit levels (for a review, see Brueckner 2003), environmental standards (for example, Oates and Schwab 1988; Fredriksson and Millimet 2002), drug policy (for example, Konrad 1994) and law enforcement (for a review, see Teichman 2005). Also, the interdependence may derive from various sources (which are empirically hard to disentangle, for example, Brueckner 2003; Allers and Elhorst 2005; Werck et al. 2008). One source is externalities among welfare-oriented governments in strategic games. Second, in political competition, yardstick competition (cf. Shleifer 1985) may develop when voters use neighboring jurisdictions to assess the quality of their own incumbents – and re-elect or substitute them accordingly (for example, Salmon 1987; Besley and Case 1995; Bivand and Szymanski 1997).<sup>9</sup> Finally, Ashworth and Heyndels (2000) argue that the use of

neighboring governments' policies as a reference point generates so-called transaction (dis)utility to voters (Thaler 1985). As this transaction utility is likely to also affect voting behavior, the (rational) response of politicians is to follow each other's lead (for example, Ashworth and Heyndels 2000; Geys 2006).

The existence of these spatial interactions between jurisdictions at the same level of government is by now generally acknowledged (for reviews, see Brueckner 2003; Revelli 2005). Whether or not this intergovernmental competition leads to more efficient governments is, however, a moot point of discussion (for example, Belleflamme and Hindriks 2005); a similar discussion exists for the relation between the extent of expenditure decentralization, legal autonomy and efficiency (see, for example, Barankay and Lockwood 2007). Sinn (1997), for example, argues that tax competition, and fiscal competition more generally, is dysfunctional between lower levels of government if the respective governments are assigned tasks that, from an allocation point of view, should be assigned to them. On the other hand, it has been shown that more/less efficient jurisdictions tend to have more/less efficient neighbors as well (see, for example, Geys 2006; Revelli and Tovmo 2007). This suggests that efficiency is used as a competitive device between local governments, and tends to lead to better performance. A similar finding can be distilled from recent work by Revelli (2010), who shows that performance of British local jurisdictions improved strongly after (relative) performance ratings by the central government were made public.

It is important to mention at this point that most studies in this field concentrate on 'horizontal' competition between jurisdictions at the same level of government. In reality, however, interaction obviously also occurs between governments of different levels (that is, vertically). Despite the real-world importance of such vertical interdependence, the effect of overlapping competencies across levels (that is, in a vertical sense) has received relatively little emphasis in the federalism literature (for example, Curry 2006) – with some important exceptions.<sup>10</sup> Solé-Ollé and Esteller-Moré (2001) and Devereux et al. (2007), for example, show that the vertical dimension of intergovernmental relations is important for excise taxation in the USA (other empirical tests of vertical rather than horizontal tax competition include Besley and Rosen 1998; Revelli 2003; Andersson et al. 2004; Brülhart and Jametti 2006; Rizzo 2009). Kessing et al. (2006, 2009) develop theoretical arguments for why vertical competition may deter foreign direct investment and Kessing et al. (2007) find empirical evidence in line with these arguments. Also, Withers (1979) and Jenkins and Austen-Smith (1987) study the relation between public cultural spending by different levels of government (arguing that, say, federal arts outlays in a given jurisdiction affect state and local expenditures in that same jurisdiction). Interestingly, however, in the European integration literature in political science, a long-standing debate concerns the question of whether European integration 'hollowed out' or strengthened the individual nation states within the Union (see, for example, Milward 1992; Marks 1993; Moravcsik 1994; Zürn 1996).

Likewise, interactions in the form of so-called 'multi-level games' (based on the initial contribution concerning two-level games by Putnam 1988) have not been extensively dealt with in the federalism literature. In this respect, federalism scholarship diverges to an important extent from the extensive literature on 'multi-level governance' (MLG), which analyses 'contemporary structures in EU Europe as consisting of overlapping authorities and competing competencies' (Aalberts 2004, p. 23). Future research would

in our view certainly benefit from a further integration of insights from the MLG literature with respect to the vertical ‘coordination’ or ‘competition’ between levels of jurisdictions into the federalism literature (which has predominantly concentrated on the horizontal dimension of competition between jurisdictions).

## 2.4 DEPARTURES FROM ‘UNIFORMITY BY ASSUMPTION’

A cornerstone assumption for Oates’s decentralization rule is uniformity of public good provision by the central government. Lockwood (2002, p. 313) suggests that this assumption is ‘not consistent with the evidence in that, typically, spending by central governments is not uniform across regions in per capita terms’ and in his (2006, p. 38) survey, he concludes that the uniformity assumption is ‘clearly incorrect.’ This may point to the fact that vertical decentralization involves more than the uniformity-versus-spillovers trade-off. In this section, we therefore briefly discuss findings from a recent branch of the political economy literature, which, strongly influenced by contract theory, considers different trade-offs which emerge from the institutional structure of governments.

Lockwood (2002), for example, assumes that centralized policy-making occurs through an assembly of delegates from all regions. The assembly decides about (possibly non-uniform) provision of public goods in the different regions, which is financed by an income tax that is uniform across regions. The legislative rules within the assembly are clearly important, and he discusses several modes of legislative rules. In doing so, a trade-off emerges between spillovers that occur in a decentralized assignment and the difficulties in the legislative process of centralized decision-making. Note that uniform treatment of all regions may occur in the equilibrium, but as an outcome, not by assumption. A consideration of the political decision-making process on the regional level may also be important. Ihuri and Yang (2009) apply a citizen candidate model for the election of the decision maker on the local level. They show that heterogeneity of capital ownership on the regional level may lead to strategic citizen candidate choices of higher capital income taxes than in a framework with politicians who maximize the welfare of the region. This can counterbalance the effects of tax competition.

Accountability of politicians becomes an important subject in a political economy framework. An interesting accountability problem may emerge even when (a) all politicians are *ex ante* identical, (b) have incentives to behave selfishly, and (c) the only mechanism for inducing them to perform well is the re-election mechanism. Seabright (1996) essentially exploits insights gained from the study of the organization of firms to address this problem. He starts from the observation that ‘contracts’ between voters and politicians are incomplete, giving politicians an incentive to behave opportunistically. The only way a voter can sanction a politician is by not re-electing them for a second period. In a decentralized country, each jurisdiction has an incumbent politician who decides about the policy in this jurisdiction. Under centralization, however, one politician makes many policy choices (that is, one for each jurisdiction). As the politician needs only the votes from a majority of jurisdictions to be re-elected, they need to behave accountably only to a majority of jurisdictions and can extort the remaining jurisdictions. The reason is that the latter are unable to exert any sanction given that they are in a minority position. One might call this a redundancy effect. Some jurisdictions and their votes become



redundant to the politician. Instead of behaving accountably vis-à-vis these, the politician may take advantage of them.

Seabright's insight concerning the risk faced by multiple jurisdictions submitting to a centralized system with majoritarian re-election has instigated significant further research. Wrede (2006), for example, illustrates that a uniformity requirement may be a countermeasure to undesirable implications of the redundancy effect. Cai and Treisman (2009) consider governments' incentives for experimentation and innovation (see also Strumpf 2002; Ashworth et al. 2006). With decentralized decision-making, each incumbent politician decides about whether to experiment in their jurisdiction, weighing the benefits and costs. Experimenting has a cost borne by the politician and the jurisdiction, but may have positive spillovers for other jurisdictions (as these may imitate successful experiments). As a result, there is a tendency for too little experimentation if this is decided decentrally. If, instead, a central politician chooses the number of different experiments and allocates these among various jurisdictions, the politician benefits from making use of successful experiments in other jurisdictions. Hence, the central politician is more able to internalize the positive spillovers from local experimentation. Also, the politician may be willing to run experiments in some jurisdictions (that is, depart from uniformity of policies across jurisdictions), even if these experiments are unlikely to be successful and very unpopular among the voters in this jurisdiction, simply because the votes of this jurisdiction may be redundant, and not needed for his re-election.

## 2.5 STRATEGIC INTERNATIONAL EFFECTS OF A COUNTRY'S DECENTRALIZATION

So far, we have discussed the allocation of tasks or decision power within a country in isolation. However, countries, whether they are centralized or comprise many vertical layers of government, interact with other countries. The allocation of tasks within a country has implications for a country's performance in the strategic interaction with other countries. For example, a particular federal structure may yield commitment for this country in a strategic game with other countries, and depending on the nature of the strategic game, this commitment can be beneficial or detrimental.

Wilson and Janeba (2005) apply this idea to international tax competition. They show that a suitable delegation of tasks inside one country and decentralized tax financing of these tasks provides desirable commitment in this context. It has a strategic effect on the tax choices in other countries and may lead to an equilibrium with higher welfare. Kessing et al. (2006, 2007, 2009) apply the same general logic to the competition between countries for foreign direct investment (FDI). They show that the allocation of taxation rights and policy decision-making along several vertical layers of government is disadvantageous for the country. For instance, if several levels of government jointly contribute to the subsidies offered to a potential foreign direct investor, then the governments from the different levels face a collective action problem. Also, when the governments from the different levels decide about taxing business activity, vertical tax externalities may lead to suboptimally high taxes. These two effects also reinforce each other and jointly make the country less able to attract FDI in a competition with other countries. They also find strong empirical support for their theory.

Strategic effects of a different kind also emerge from centralizing or decentralizing decision rights for policies that have interregional and international spillovers. Among the examples that have been analysed are fiscal stabilization policy (Sørensen 1996), environmental policy (Buchholz et al. 1998) and capital income tax policy (Konrad and Schjelderup 1999). Decentralization of decision-making for these policies in one country tends to change the country's total activity level. In an international context, this change in behavior is anticipated by other countries, and the governments in these other countries may, in response, adjust their own activity level. Consider, by way of example, activities against global warming – e.g., CO<sub>2</sub> emission reductions – in Europe. Allocating emission reduction legislation to the European level may lead to substantial emission reductions in Europe (for example, because such a coordinated solution may reduce free-rider effects). As a result, the need for emission reductions in non-European countries becomes lower. Anticipating the amount of emission reduction by European countries, the equilibrium reaction of non-European countries is to choose little emission reduction. On the other hand, allocation of decisions on emission reduction inside the EU to national or even regional governments will imply that none of these governments will engage very actively in reduction policy. The reason is that each will attempt to free-ride on others' decisions, and invest too little in its own emission reduction. Anticipating that Europe will not reduce emissions by much, non-European countries may then feel that they need to reduce emissions more strongly.

These examples show that the international perspective must be added to gain a more complete picture of the optimal allocation of rights and duties in a federation. Decentralization or centralization decisions that might have desirable properties for the functioning of a country in isolation are likely to affect the interaction of the country as a whole with other countries in the international arena. These effects may go in the same direction as regards welfare, or may point into the opposite direction.

## 2.6 SUMMARY

In this chapter we gave a short and selective survey of the development of the theory of optimal allocation of rights and duties along the vertical dimension in federations. The results showed that the message derived from this theory is not clear. Multiple trade-offs became visible, in particular in the more recent developments drawing on contract theory and political economy: for example, between the potential for interregional spillovers and closeness to local needs or between spillovers in a decentralized assignment and the difficulties in the legislative process of centralized decision-making. These multiple trade-offs make that, in reality, an ideal allocation of actual tasks across levels of government might be difficult, if not impossible, to attain. Moreover, even if attained, scholars have pointed to strong forces which might make such a situation difficult to sustain over time.

Clearly, a suboptimal allocation of tasks entails that there might be spillover effects across jurisdictions. While intergovernmental grants (governed by the central government and distributed to the local governments) may be used to remedy such spillover problems, the federalism literature has shown that such grants are not miracle solutions and involve significant problems of their own. Indeed, this 'remedy' requires careful

planning and deliberation, and the optimal design of intergovernmental grants as well as the incentives they generate for local government officials remains a hot topic of research to date.

If left unresolved, spillovers between local jurisdictions may engender various forms of strategic interaction or intergovernmental competition. To date, opinions vary concerning whether or not such competition leads to more or less efficient (local) governments – and more work is clearly needed on this topic. Also, most studies have thus far focused on ‘horizontal’ competition (that is, between jurisdictions at the same level of government), while vertical interdependence has been relatively neglected. However, such vertical interactions are a reality and the federalism literature would do well to more extensively discuss their causes and consequences. One potential means to do so would be through integration of insights from the MLG literature and the theory of ‘multi-level games’ into the federalism literature.

With the advent of the ‘second generation’ fiscal federalism literature, more attention has been awarded to incentives, goals and opportunities of local public officials rather than assuming them to be benevolent (as was the case in the early stages of the fiscal federalism literature). However, this literature is, in a sense, only in its infancy and more work is clearly needed on aspects such as commitment power, time consistency issues and problems of information. We also need to know more about, for example, the effects of (differences in) political decision-making processes on various levels of government, political accountability and the effects of (de)centralization in one country on the strategic interactions between countries. Overall, the present survey therefore showed that the decentralization question is not resolved easily, suggesting that bold policy recommendations are unwarranted at this stage, and that more work is needed to develop a more solid ground for policy advice.

## NOTES

1. In what follows we disregard important distinctions such as, for instance, between a federation of nations and a federal state, and focus on the intergovernmental issues that emerge within the same layer or between different layers of government in such structures and are common to both structures.
2. The discussion on the division of tasks and power across different levels of government is known as the ‘assignment problem’ (for example, Stigler 1957; Musgrave 1959; Oates 1972, 1999; McLure 1983; Inman and Rubinfeld 1997; Tanzi 2002).
3. See, for instance, Rosen (1988), Hindriks and Myles (2006) or Blankart (2008).
4. Contributions that follow this line of argument are, for instance, Bucovetsky et al. (1998), Cornes (2000), Bordignon et al. (2001), Huber and Runkel (2006) and Breuillé and Gary-Bobo (2007).
5. Nonetheless, complete information about citizens’ preferences is unlikely even at the local level. In the theoretical model, revelation of preferences can be achieved by introducing mobility (cf. Tiebout 1956). People then sort themselves according to their preferences and all such information is revealed. Overall, however, the theoretical assumptions required for an efficient outcome are considerable (see, for example, Bewley 1981). Moreover, in practice, lack of expertise or training as well as ‘administrative weaknesses at the subnational level’ may do much to counteract the benefits of decentralisation (Ter-Minassian 1997, p. 22; see also Geys and Moesen 2009).
6. Related, the allocation of tasks that minimizes social welfare losses may entail a proliferation of local governments of different size for the various public goods with different regional outreach. Indeed, assuming that geographic spillovers of no two public goods are equal, the decentralization principle states that each public good should be provided by a different level of government (Mueller 2003). More intuitively, if everyone lives in their own region and decides individually on public good provision, there is no heterogeneity of preferences within each region. It follows from Figure 2.2 that there will likewise

be no welfare losses in such a setting. While clearly taking the issue to its limit, it illustrates that optimal allocation of tasks is likely to be untenable in reality as it would induce enormous administration and coordination costs. As a result, allocation of tasks is – in reality – likely to be imperfect most of the time in most countries (or regions).

7. We return more extensively to such intergovernmental competition below.
8. An alternative interpretation – although not unequivocally implied by the flypaper effect – is that the public sector suffers fewer inhibitions to spend grant revenues than funds obtained from private income. The latter interpretation suggests that revenues from intergovernmental grants might be spent less carefully (or more inefficiently) than revenues from, say, local taxation (see De Borger et al. 1994; De Borger and Kerstens 1996). The reason is that the cost of such inefficiencies falls on a much broader constituency (Silkman and Young 1982). Studies on public sector (in)efficiency have provided some empirical support for this view by uncovering a strong (and mostly negative) relation between grants and government efficiency (for example, Silkman and Young 1982; De Borger et al. 1994; De Borger and Kerstens 1996; Grossman et al. 1999; Worthington 2000; Bishop and Brand 2003; Geys and Moesen 2008; Kalb 2010).
9. Specifically, performance of politicians in other jurisdictions may be used to detect ‘bad’ types of politicians, even though they may try to mimic ‘good’ politicians. That is, federalism and the interjurisdictional comparison allows the generation of useful (comparative) information that makes it easier to discern whether poor performance is due to bad luck or to bad behavior (even when exogenous shocks that affect politicians’ performance are correlated).
10. For a discussion of vertical and horizontal tax competition, see Keen (1998), Keen and Kotsogiannis (2002) and Wrede (1997, 2000).

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### 3 Multi-level games

*Frederick W. Mayer*

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Governance is almost always a multi-level problem, as other chapters in this volume attest. This is perhaps clearest when dealing with the global challenges that require international cooperation. Whether establishing global trade rules that both facilitate economic growth and distribute the gains of globalization fairly, negotiating a climate change regime that balances the interests of developed and developing countries or ending the destructive cycle of violence among nations in the Middle East, the great difficulty is not just to address the international problem, but also and fundamentally to manage complex interaction between domestic politics and international relations. All of these issues would be hard to solve were nations unitary actors. But they are ever so much harder to address because the parties involved are not monolithic, because in every case internal politics makes rational action at the international level immensely more difficult.

Since its invention by von Neumann and Morgenstern in the mid-twentieth Century, the theory of games has been enormously successful in modeling all manner of social interactions, including many of the central issues of global governance (von Neumann and Morgenstern 1944). Mainstream game theory, however, whether two-party or multi-party, competitive or cooperative, one-shot or iterative, simultaneous or sequential, has assumed that the parties involved are unitary rational actors. Applied to international relations, therefore, game theory has generally assumed this of nations. Treating nations (or for that matter legislatures, bureaucracies, interest groups and other collectives) as if they were individuals can be a very useful simplifying assumption. As long as a collective ‘can be thought of as having a unitary interest motivating its decisions [it] can be treated as an individual’ (Luce and Raiffa 1957, p. 13). But when parties in a game are themselves composed of members with differing interests and with power, the expressed ‘interests’ of the collective will depend on the outcome of an internal game, an outcome that may deviate considerably from the behavior expected from a unitary rational actor.

The issues involved in interactions among internally divided parties have long been familiar to practitioners of course. As former US Labor Secretary John Dunlop is reported to have put it, every negotiation is really three negotiations, the external one across the table between the parties, and the two internal negotiations within each party alongside the table (Raiffa 1982). And the idea of divided parties has long been implicit in much academic literature. Schattschneider’s classic analysis of the politics of tariff setting explains international trade policy behavior in terms of the contest among domestic interests (Schattschneider 1935). Allison’s alternative explanations for the interaction of the USA and the USSR in the Cuban Missile crisis are really two-level models (Allison 1971). There is a considerable literature on the domestic determinants of international relations (Gourevitch 2002) as well as of the ways in which international relations redounds in domestic politics (Gourevitch 1978; Keohane and Milner 1996). But for the



most part the problem of how internally divided parties interact has been largely ignored by game theorists. It is this shortcoming that the multi-level games approach seeks to address.

The literature on multi-level games has been almost exclusively concerned with cooperative games, most notably negotiations. It developed out of negotiation analysis, largely associated with Raiffa (1982), a framework for characterizing negotiations in terms of parties, interests, issues and alternatives to negotiation. Like more formal game theoretic approaches, negotiation analysis was largely focused on the problem of interactions between or among monolithic parties with well-specified interests. Seeds of the multi-level problem were present from the outset in the negotiation analysis literature, however. In *The Strategy of Conflict* (1960), Schelling considered the potential bargaining advantages from internal division. Walton and McKersie's *A Behavioral Theory of Labor Negotiations* (1965) explored the relationship of external negotiations between labor and management to internal negotiations, particularly within labor unions. These ideas were subsequently developed by Raiffa (1982), Lax and Sebenius (1986) and Mayer (1988).

In political science, the ideas percolating in the negotiation analysis community found voice in Robert Putnam's massively influential 1988 essay in *International Organization*. The great appeal of Putnam's 'two-level game' framework was its promise for connecting the subfields of international relations and comparative politics. For international relations scholars in particular, the approach seemed to offer a way of addressing the 'level of analysis' problem, the problem of thinking simultaneously at the international, domestic group and individual level, long an issue for international relations scholars (see Waltz 1959; Singer 1960; Moravcsik 1993). The two-level games approach also provided an alternative way of explaining governance failures in the international arena, particularly failures to negotiate effective regimes for global public goods, as an artifact of constraints imposed by domestic bargaining. The theoretical approach was subsequently developed by multiple scholars (Mayer 1992; Evans et al. 1993; Iida 1993, 1996; Mo 1994; Milner 1997; Pahre and Papayounou 1997a; Hammond and Prins 1998; Tarar 2001, 2005; Stasavage 2004).

The multi-level games framework has proved useful for analysing a wide range of international issues, including international trade (Milner 1988; Friman 1993; Schoppa 1993; Milner and Rosendorff 1997; Paarlberg 1997; Mayer 1991, 1998; Odell 2000), international debt (Lehman and McCoy 1992), security (Knopf 1993; Trumbore 1998; Trumbore and Boyer 2000) and European Union (EU) policymaking (Wolf and Zangl 1996; Pahre 1997, Pahre and Papayounou 1997; Patterson 1997; Hosli 2000). This listing, however, considerably understates the influence of the multi-level game idea, which has served as an organizing metaphor for a vast body of work concerned with issues of multi-level governance.

In this chapter, I sketch out the basic elements of the theory, address some elaborations on the basic theory and discuss the utility and limitations of the approach for the problem of multi-level governance.

### 3.1 KEY ELEMENTS OF THE THEORY

As noted above, the theory of multi-level games is largely concerned with cooperative games, particularly negotiations, in which there are both the possibility of joint gains from cooperation and the incentive to compete over the distribution of those gains. As with negotiations among monolithic parties, a central issue is to explain why it is that parties often fail to exploit fully their possibilities for joint gain, either by failing to reach agreement when they should or by reaching less than efficient agreements. Whereas ‘one-level’ theory explains such failures in terms of inter-party bargaining dynamics, multi-level failures locate the causes of failure in the obstacles presented by internal bargaining.

The nature of the bargaining problem depends on the number of issues and the number of parties. When the negotiation involves one issue, the central problem is to distribute a fixed amount, whereas when it involves two or more issues, there are likely to be possibilities for creating value by integrating the parties’ differing interests with respect to those issues. When a negotiation (whether one issue or multi-issue) is between two parties, agreement by definition requires consensus, but when more than two parties are involved, agreement may be possible with less than consensus and, therefore, there may be more than one winning coalition. These distinctions establish four categories of negotiation: two parties, one issue; two parties, more than one issue; more than two parties, one issue; more than two parties, more than one issue. To explore the implications of multi-level structures, therefore, it is useful to consider each of these possibilities separately.

### 3.2 TWO PARTIES, ONE ISSUE

I begin with a simple one-level example involving two parties and one issue. Two parties, A and B, are negotiating over one issue, X, on which they have competing interests. In the international arena, two countries might be negotiating over the size of a trade quota, the location of a border or some other single issue on which their interests are opposed. Assume that the parties have well-defined alternatives to reaching agreement, and that they will only agree to outcomes that are of greater or equal value to their Best Alternative to a Negotiated Agreement, or BATNA (Raiffa 1982). Each BATNA establishes a reservation value (sometimes “reserve value”), the limit of what is acceptable for the party. Agreement is only possible on those outcomes that lie in a zone of possible agreement, or ZOPA, in which the payoffs are better than or equal in value to both parties’ reservation values.<sup>1</sup> Figure 3.1 illustrates this basic structure.

Now consider what might happen if one of the parties, A, is composed of two factions,  $A_1$  and  $A_2$ , and that for A to reach agreement with B, the support of both factions is needed. Assume further that the value of the alternatives to agreement differs for  $A_1$  and  $A_2$ , and that, therefore, their reservation values in terms of the issue under negotiation differ. In the case of a negotiation over A’s quota level for goods produced by B, for example, one faction might be more protectionist than the other, and indeed more protectionist than the monolithic A would be, and therefore require a higher level of protection to accept an agreement with B. The consequence is that A’s

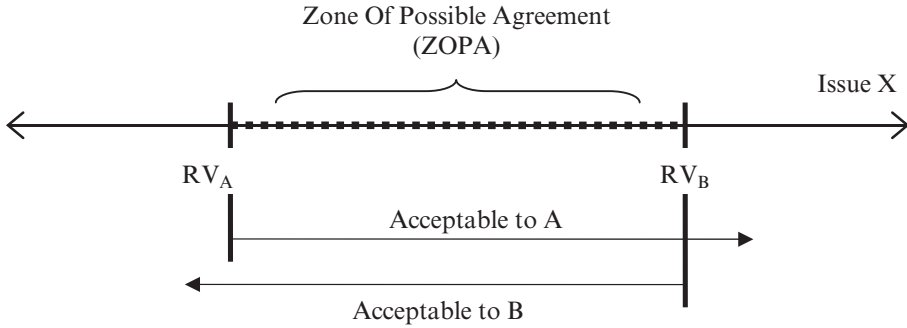


Figure 3.1 *A two-party, one-issue negotiation*

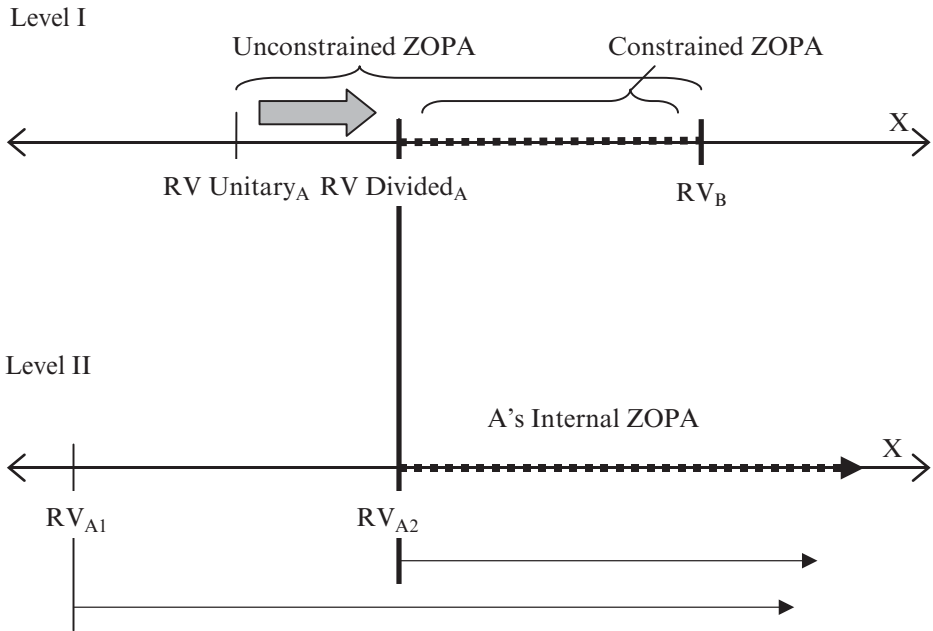


Figure 3.2 *A two-level, two-party, one-issue negotiation, party A divided*

effective reservation value will now be determined by the more extreme of its internal factions.

There are two logical possibilities. One is that the internally divided A's effective reservation value is so extreme there is no overlap between points acceptable to A and points acceptable to B, in which case the original ZOPA at Level I is entirely blocked by the internal bargain at Level II. The other is that A's effective reservation value constrains the ZOPA but does not eliminate it. Figure 3.2 illustrates this second possibility. The ZOPA at Level I, the external negotiation between A and B, is now constrained by the impact of the internal game between  $A_1$  and  $A_2$  one level down, since only values of X better than  $A_2$ 's reservation value are acceptable to A.

A considerable literature has been focused on the question of whether or not internal division conveys an advantage to the divided party or not, a question first addressed by Schelling (1960). Even in the case of one-issue, distributive bargains, however, the answer depends on the specific configuration of the negotiation in question. If a ZOPA remains, it may be shifted in a direction favorable to A and, therefore, internal division might constitute a bargaining advantage for A.<sup>2</sup> But it is also possible that the more extreme internal faction will block the entire ZOPA, in which case there is no advantage to A.<sup>3</sup>

It is important to note that the size of the ZOPA does not correlate with the probability that agreement will actually be reached. Obviously, if there are no acceptable points, there will be no agreement. But it may be the case that a very small ZOPA, if its location is transparent to the parties, actually facilitates agreement, since it reduces room for bargaining and simplifies the choice as between no agreement and a well-defined agreement preferred by both parties to the alternative. Well-functioning markets, with many buyers and many sellers, facilitate transactions by collapsing the ZOPA to a single point, the market price, thus eliminating the need to bargain.

The example developed here is of a divided party negotiating with a monolith. Clearly, if both parties are divided, there is the added complication that the claiming advantages of internal division will offset each other and the greater likelihood, all else equal, that the entire ZOPA will be blocked (Tarar 2001). In the case of border disputes, for example, if both sides have “dovish” and “hawkish” internal factions, both of whose consent is needed for the A and B to agree, the probability of no agreement rises since hawkish factions at Level II can block agreement at Level I.

The impact of internal division will also depend on whether or not there are internal side payments available for ‘winning’ factions to compensate ‘losers,’ whether there is complete information available regarding the nature of the internal constraint and a variety of behavioral factors, points to which we will return.

### 3.3 TWO PARTIES, MORE THAN ONE ISSUE

The consequences of division at one level on negotiations at another, higher, level become more complicated when there is more than one issue at stake. In multi-issue negotiations, the game is not only about claiming value, but also about creating value by finding efficient tradeoffs through integrative bargaining (Walton and McKersie 1965). To illustrate, consider two monolithic parties, A and B, negotiating over two issues, X and Y. These issues might be land (border location) and peace (security guarantees) in the context of the Israeli-Palestinian talks, or quota levels for two goods in a bi-lateral trade negotiation between the USA and a trading partner. Assume further that the interests of the two parties are opposed on each issue, but that there are differences in their relative preferences for them. For example, we might assume that although Israel and Palestine have opposing interests on the extent to which Israel withdraws from occupied territory and on the level of security guarantees Palestine might offer, Israel cares relatively more about security and Palestine cares relatively more about land. Each party’s BATNA defines its reservation value. In this negotiation, the reservation value, rather than establishing a fixed price, translates into a reservation schedule, the indifference

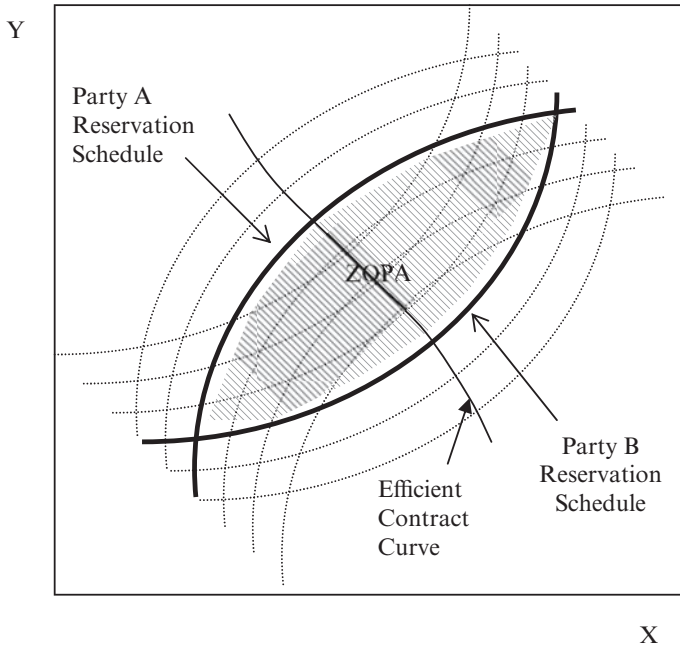


Figure 3.3a Two parties, two issues, in issue space

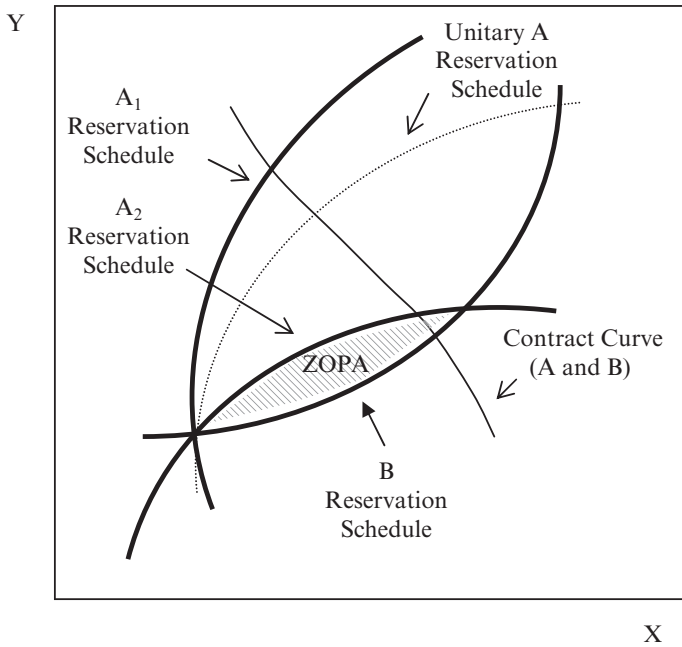


Figure 3.3b Two parties, two issues, party A internally divided, in issue space

curve in terms of  $X$  and  $Y$  of equal value to the BATNA. Figure 3.3a illustrates this case in two-issue space as an Edgeworth box.

Party A's interests are in increasing  $X$  and decreasing  $Y$ , so moves towards the bottom right are to higher indifference curves. (The curves assume decreasing marginal utility for increases in  $X$  and decreases in  $Y$ .) Conversely B's interests are in decreasing  $X$  and increasing  $Y$ , so that its higher valued indifference curves are towards the top left in this diagram. A familiar feature of an Edgeworth box is the contract curve, the set of efficient outcomes for the two parties, graphically the set of points at which the two parties' indifference curves are tangential and at which the rate of trade between the two issues is equal for both parties.

Figure 3.3a can be translated from issue space to value space, as illustrated in Figure 3.4a, with value to A on the horizontal axis and value to B on the vertical axis. The contract curve now defines the efficient frontier. The no agreement alternative is at the origin, and the ZOPA includes all the points above and to the right of no agreement, and on or below the efficient frontier.

Before turning to the implications of multi-levelness to the two-party, two-issue case, it is worth noting that the outcome of even the unitary party case is indeterminate. If both parties are rational and there are no barriers to effective negotiation, we assume that agreement will be somewhere on the efficient frontier. Where on the frontier is another matter. One common approach is to assume that the parties will agree to the Nash Solution (Nash 1953), which is the point that maximizes the product of the normalized surplus above reservation value for the two players.<sup>4</sup> This is a normative concept, however, and not a predictive one. There is no particular reason to believe that parties would actually settle at this point.

Moreover, in practice parties often fail to reach the frontier at all. The bargaining problem with more than one issue is not just about distribution of a fixed surplus (claiming) but also about integration of interests for joint gain (creating), a more demanding task in many ways. Asymmetric information, mistrust, complexity, overly aggressive claiming tactics and other factors can all impede the ability of negotiators to exploit fully the potential for joint gains. Particularly tricky is managing the temptation to use tactics useful for claiming value without compromising the ability to cooperate for joint gain, a tension Lax and Sebenius (1986) have called the 'Negotiators' Dilemma.' Nevertheless, many multi-issue negotiations would be relatively easy to "solve" if the two parties were unitary, rational actors. Were there no domestic politics to trade negotiations, for example, the outcome would likely be close to free trade without restrictions, as the negotiators traded away protection on one good for reduced protection on another.

With these caveats in mind, now consider the case that A is internally divided, again between factions  $A_1$  and  $A_2$ , and that consensus is needed between them for A to agree. The two internal factions have different preferences with respect to  $X$  and  $Y$ , and therefore different reservation schedules, that is, combinations of the two issues of equal value to the BATNA. For simplicity, B is assumed to be monolithic.

Figure 3.3b illustrates in issue space the case in which the conflict between internal, Level II factions at the lower level might be said to be moderate.  $A_1$ 's interests are almost entirely in increasing  $X$ ,  $A_2$ 's in decreasing  $Y$ . Since only points acceptable to both  $A_1$  and  $A_2$  are now possible, the consequence of internal division is that A's effective

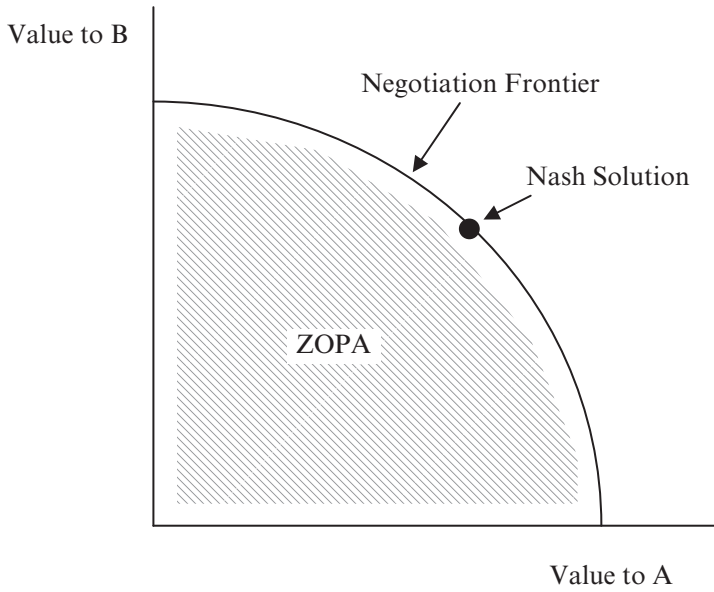


Figure 3.4a *Two parties, two issues, in value space*

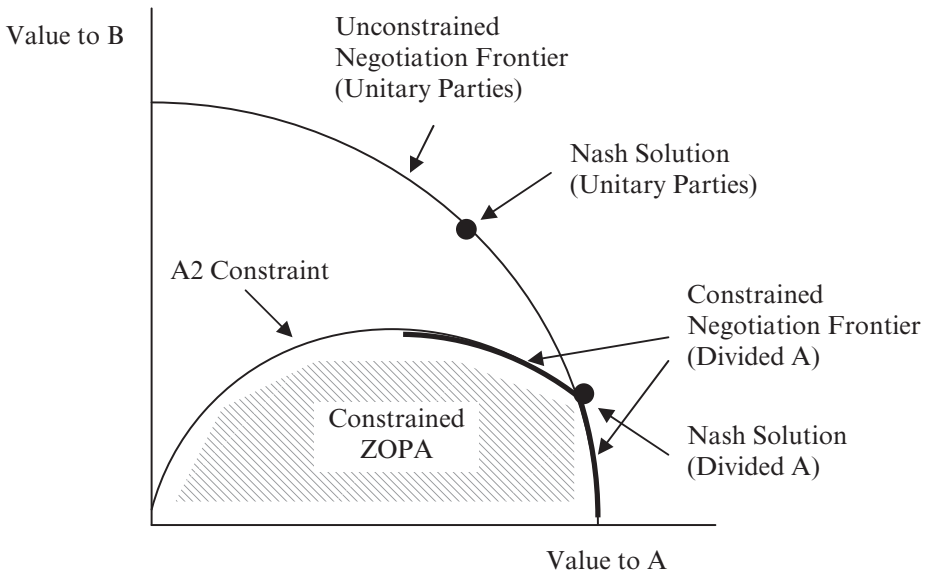


Figure 3.4b *Two parties, two issues, party A internally divided, in value space*

reservation schedule is determined by  $A_2$ , the faction whose interests conflict most sharply with those of party B. The effect is to constrain the ZOPA, in this case in a way that advantages A.

The implications of the constrained ZOPA are most easily understood in value space, as illustrated in Figure 3.4b. Given this particular specification of the factional interests, the effect is to constrain the ZOPA in ways that block portions of the efficient frontier that were more favorable for B, including the original Nash Solution, while leaving available the efficient outcomes of greatest value to A. As drawn, the new constrained Nash Solution is the corner point where  $A_2$ 's constraint meets the original frontier, which would clearly be an improvement for A.

But even in this case, the consequences for A of internal division are ambiguous. Assuming that all actors are rational, and that there are no barriers to effective negotiation, we would expect agreement on the new, constrained frontier. But note that a portion of the constrained efficient frontier is defined by  $A_2$ 's constraint, and that it lies behind the original frontier. An 'efficient' agreement less desirable for both A and B than the original Nash Solution is now a logical possibility.

This particular illustration hardly exhausts the possibilities. Consider the case in which factional interests were more sharply in conflict, and in which factional constraints imposed by internal division were more severe. In this case, the entire original contract curve (efficient frontier) between A and B could be blocked by A's internal faction. The implications of such a conflict at the lower level on the higher-level negotiation are again ambiguous for A. One could still argue that A's internal factional division gives it some claiming advantages in terms of the distribution of joint gains, in that only points relatively favorable to A are now available. But there is a clear cost to efficiency, since now the entire original frontier is blocked. Of course, with even more extreme factional differences,  $A_2$  might block the ZOPA entirely, thus eliminating any plausible advantage to A.

So far we have considered only situations in which one side of a negotiation is internally divided. The extension to the two-sided case is straightforward (Tarar 2001). The obvious point is that internal division on both sides will tend to countervail whatever claiming advantages either side enjoys while raising the probability that either agreement will be inefficient or that no agreement is possible. Examples of the efficiency costs of factional blocking on both sides include failures to negotiate free trade agreements, to settle long-standing international disputes and to manage shared ecosystems.

Of course, as noted earlier with regard to one-issue bargains, shrinking the ZOPA can have the effect of making it easier to reach agreement; by limiting the range of possible outcomes, domestic constraints may simplify the external negotiation problem. Eichenberg (1993) makes this point in explaining how narrowing of the ZOPA ('win-set') made it easier for Reagan to conclude an Intermediate Nuclear Forces agreement with the Soviet Union than for his predecessor Carter.

To the question of whether or not having one's hands tied by internal constituencies when negotiating outside does or does not constitute an advantage, there can be no general answer. If the external negotiation is largely distributive, and internal interests are configured in particular ways, divided parties may have an advantage. If, on the other hand, the external game is largely integrative, whatever claiming advantages there may be are more likely to be offset by foregone opportunities for joint gains, particularly



if both parties are divided. And from a global perspective, the efficiency costs are more salient than the potential claiming advantages: internal division, unless resolved effectively, is a likely impediment to desirable international agreement.

### 3.4 MULTIPLE PARTIES

So far, we have explored the implications of the multi-level dynamic for two-party games. But in the international arena, whether in dealing with trade, finance, arms control, security or climate change, the problem is multi-lateral. As is well known, there are significant differences between two-party and multi-party games. First, greater numbers raise the transactional cost of negotiating, as observers of the multi-party, multi-issue trade negotiations at the World Trade Organization (WTO) can attest. Second, because agreement may be possible with something less than consensus, there may be more than one possible winning coalition, thus introducing coalition dynamics that can greatly complicate the negotiation process (see Raiffa 1982). And even when consensus is required, coalitional dynamics will affect which of many possible agreements are reached. Third, and perhaps most significantly, when negotiations involve collective goods, the difficulty of reaching and maintaining agreement increases, since every party has an incentive to defect and free-ride on the efforts of others. Much of the literature on global governance is at its heart concerned with this fundamental problem.

For all that, arguably the greater problem in many real-world situations is not complexity, or shifting inter-party coalitions, or even the temptation to free-ride in the Level I negotiation, but rather the difficulty of managing all of this when the parties are internally divided and the game is not only multi-party but also multi-level.

When the game is on two (or more) levels, the greater complexity of dealing with multiple parties on one level is compounded by the need to negotiate with players at the next, lower, level. In some circumstances, almost every move in the outside game may need to be negotiated among multiple players inside. The failure, to date, of the Doha Round of WTO talks can be traced in large measure to the constraints imposed on the USA's and the EU's negotiating positions on agricultural issues by powerful agricultural interests, on the one hand, and on the equal difficulty faced by many developing countries in overriding domestic interests opposed to market opening in services and industrial goods, on the other. In the absence of domestic politics, the multi-party negotiations in Geneva, complicated as they are, would be much more likely to conclude successfully. Similarly, the problem of reaching global consensus on climate change, hard enough given national interests at the international level, is greatly complicated by limits imposed on key parties such as the USA by powerful domestic factions opposed to significant concessions.

### 3.5 MULTIPLE LEVELS

Two-level models can capture important dynamics that one-level models miss. But the real world comes in multiple levels. Just as nations are composed of executive branches and legislatures, labor unions and business associations, and contending political parties,

each of these subnational actors is itself internally divided. The executive is composed of multiple ministries, the legislature of many caucuses. Labor unions often have sharp internal differences. Parties have their splits. And so on. The EU presents the issue baldly. Clearly the EU, when it acts externally, is expressing the outcome of an internal game among its member nations (Meunier 2000). But why stop there? The EU's stance in agricultural negotiations at the WTO cannot truly be understood without considering France's stance in agricultural negotiations one level down within the EU, which in turn reflects the power of French farm interests in the game within France at yet a third level. In the North American Free Trade Area (NAFTA) negotiations, the outcome of the negotiations on the environment obviously reflected the US position in those talks, which in turn reflected the position of a coalition of environmental groups, which in turn reflected the position of the key environmental groups, which in turn reflected internal negotiations among their members (Mayer 1998).

Although most of the literature on multi-level games has modeled only two levels, some aspects of the extension from two levels to many are straightforward. First, all else equal, additional levels add additional constraints, with the likely consequence that otherwise acceptable outcomes from a Level I perspective may be blocked by actors playing a game two or more levels below. Under certain very particular circumstances, the constraints imposed on a party by a powerful sub-faction operating deep below may constitute an advantage in claiming value in the Level I negotiation, for now familiar reasons, but the greater likelihood is that the costs in the form of lost flexibility needed to create value will outweigh the benefits. The EU negotiator at the WTO does not usually view constraints imposed by French farmers as helpful.

Second, the necessity of playing a game on more than two levels adds considerable procedural complexity and raises transaction costs, which may cause negotiations to fail even if a ZOPA remains. If positions taken by actors at Level I require negotiations among players at Level II, whose positions in turn require negotiations among players at Level III, and so forth, the problem of conducting an effective negotiation is much greater. Thinking on three or more levels highlights the value of institutions capable of enabling tradeoffs and resolving conflicts at lower levels of aggregation, so as to minimize both the blocking power of narrow interests and to facilitate effective negotiation processes.

For the modeler, the question is whether the additional complexity of modeling at three or more levels comes at the expense of clarity. All politics is multi-level, but every model need not be. If a collective actor has few internal differences and can authorize an agent to negotiate on its behalf with minimal consultation, there is little to be gained by modeling its internal dynamics. If, on the other hand, a collective actor has significant internal differences (or in the case of collective goods there are strong incentives for internal entities to defect) and weak institutions incapable of adjudicating among the contending interests, then there is a good case for including another level in the analysis. And if the purpose of the model is not merely to explain outcomes but to inform strategy, a multi-level analysis may be crucial for identifying the precise location of obstacles to agreement, and therefore potential points of leverage in such contexts.<sup>5</sup>

## 3.6 THEORETICAL ELABORATIONS

A number of theoretical elaborations on the basic analytical framework are possible, most of which involve foregrounding issues that are assumed away in the basic model. Some of these elaborations have been partially explored in the multi-level games literature. Others remain largely ignored.

### 3.6.1 Side Payments and Issue Linkage

In multi-level games, there are rarely any possibilities for Pareto improvements at all levels. Even global public goods from the perspective of nations create winners and losers within them. As we have seen, the ability of internal losers to block externally desirable outcomes can be a severe impediment to solving these problems.

Logically, if there are sufficient benefits available to a collective at one level of negotiation, it should be possible for internal factions that gain to compensate those who lose by making side payments in some other currency of value to both. That currency is provided by linking another issue on which the factions can trade. For example, in trade negotiations, worker adjustment assistance is commonly linked to trade deals as a way of compensating workers who might lose jobs as a consequence of free trade. The effect of such linkage will be to relax, partially or completely, the constraints imposed on the higher-level negotiation imposed by factions at the lower level.

Consider the game illustrated in Figure 3.3b, in which faction  $A_2$  imposed a severe constraint on the ZOPA between A and B. Note, however, that  $A_1$ 's interests are such that it can gain considerably from agreements that  $A_2$  would reject. If  $A_1$  can compensate  $A_2$  in the currency of an issue on which A and B have no interests (for simplicity imagine a cash transfer from  $A_1$  to  $A_2$ ), the effect is to shift  $A_2$ 's reservation schedule back towards that of A, thus expanding the ZOPA and making available more opportunities for joint gain between A and B. Figure 3.5a illustrates the effects of the possibility of internal side payment in XY issue space.

The possible consequences of the internal side payment for the external negotiation can be more clearly inferred from Figure 3.5b, which depicts the same bargain in value space. As depicted, the relaxation of the constraint imposed by  $A_2$  enlarges the ZOPA and reopens areas blocked by the internal negotiation. From the perspective of A and B, there are now more opportunities for joint gains and the (monolithic two-party) Nash Solution is now available. On the other hand, in this illustration, A loses some of the potential claiming advantages it enjoyed without the side payment, since there now are efficient outcomes less desirable to A than those that were previously available.

Obviously, the balance of these effects depends entirely on the particular configuration of the game. Had the factional constraint been more severe or had there been factional constraints within both parties sufficient to block the ZOPA entirely without side payments, there would be no cost to an internal side payment.

Side payments, since they involve issue linkages, are rarely completely neutral. Linking an issue may add or subtract total value from the package, may impact the external negotiation and may serve also to bring in other actors, thus further changing the bargaining dynamic. These issues are explored more fully in Mayer (1992) building on Sebenius (1983).

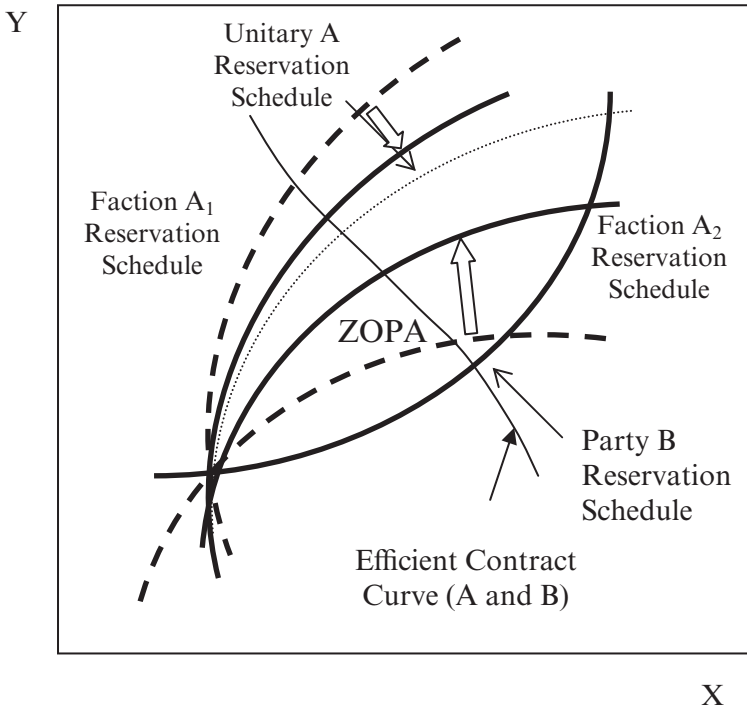


Figure 3.5a Effect of internal side payments on the ZOPA, in issue space

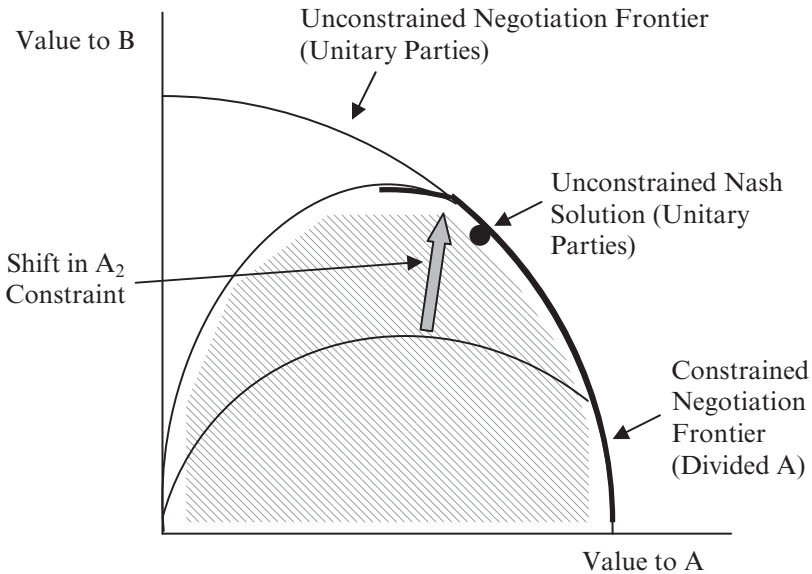


Figure 3.5b Effect of internal side payments on the ZOPA, in value space

### **3.6.2 Internal Decision Processes**

Internal decision processes can vary considerably, given that they are typically structured by well-established political and social institutions. One dimension of variation is the relationship between the negotiator, the agent and the internal actor (or, more often, actors) ultimately empowered to commit the party to an agreement in the external negotiation, the principal(s). Is prior approval needed for every move the negotiator makes or does the negotiator have significant latitude but face an uncertain ratification process at the end of the game? The former case likely makes it more difficult for negotiators to find joint gains in the external negotiation but limits the risk of ultimate rejection; the latter case involves the opposite tradeoffs. Of course, one might have the worst of both worlds if negotiators have two sets of principals, one holding them on a “short leash” during negotiations, the other empowered to ratify or reject what is negotiated.

A second and vast domain of variation has to do with the decision rules of the internal negotiation, for instance, whether ratification requires a simple or a super majority in a legislative body, and whether, further, the support of particular subgroups (committees) or individuals (committee chairs or party leaders) is necessary for agreement. The greater the degree of consensus required, and the larger the number of essential actors, the more “veto players” there are (Tsebelis 2002). In negotiation analytic terms, more veto players in the internal (Level I) negotiation translates into more constraints on the external (Level II) ZOPA, with by now familiar implications for creating and claiming value.

### **3.6.3 Transparency and Imperfect Information**

So far, we have implicitly assumed that the actors involved are operating with perfect information about interests of actors at all levels. But the possibilities for imperfect information in multi-level negotiations are many. First, external negotiators on long leashes may be uncertain about the outcome of their own internal negotiation, reaching agreements externally that are not acceptable internally. As Iida (1993) explores, executives with uncertainty about what will be acceptable to legislatures may reach international agreements that cannot be ratified.

A second possibility is that internal, Level II, actors may misapprehend what is possible in the external, Level I, game and commit themselves to positions that are, in fact, outside the real ZOPA. This would seem to be a very common problem in practice, since internal groups lack information available to external negotiators about the interests and alternatives of the other Level I parties, particularly the extent to which other parties are constrained by internal negotiations that are not transparent from the outside. One possible consequence is that internal actors may not fully trust the information they receive from their own negotiators, setting up what Walton and McKersie (1965) refer to as ‘boundary role conflict,’ the difficulty negotiators have in managing the tension between internal and external demands.

### **3.6.4 Behavioral Considerations**

The outcome of any negotiation is not simply a function of the ‘hard’ limits that define the ZOPA. Even when there is a large ZOPA, where the parties will end up is not determined

and will depend on social and psychological factors. Many outcomes are equally efficient. Moreover, in practice, parties often reach less than efficient agreements or fail to reach agreement entirely as a consequence of any number of behavioral reasons, among them positional rigidity, high levels of distrust and failure to share information. Multi-level dynamics tend to exacerbate these issues, as well as add some additional factors that contribute to dysfunctional negotiations.

A central tenet of Fisher et al.'s popular tract on negotiation, *Getting to Yes* (1991), is that negotiators should avoid the common mistake of focusing on specific positions rather than on general interests. Positional bargaining tends not to surface information that could lead to creative joint gains, and because parties commonly commit to positions once taken, the consequence is an unhelpful rigidity. This problem can be more acute in multi-level games if internal negotiations result in agreements among factions that bind the external, Level I, negotiator to a particular position in the external negotiation. In theory, these positions should be renegotiable, but in practice, because reopening internal negotiations is difficult, there is a strong tendency for internal negotiations to anchor parties to positions that may or may not be helpful (Mayer 1988).

Second, to the extent that structural constraints imposed on parties by their internal factions are not fully transparent to other parties, there will be a strong tendency to attribute to motive observed behaviors that are really the consequence of structure, with negative implications for trust between the parties. And as Samuel Johnson wrote in 1759, "it is difficult to negotiate where neither will trust." This would appear a nearly ubiquitous problem in international diplomacy, which is perhaps why negotiators spend so much of their time trying to educate their counterparts about the nature of their internal problems.

Third, there is evidence that efforts to encourage internal cooperation, useful perhaps for resolving internal differences, lead to less cooperative attitudes outside. As Bornstein and Rapoport (1989) find, strong in-group solidarity leads to greater out-group competition.

### 3.7 USES AND LIMITATIONS OF THE APPROACH

As with any theoretical framework, the multi-level games approach has its limitations. First, because the multi-level framework generates predictions that are highly contingent, the approach does not easily lend itself to general testable propositions. For example, the extent to which internal division constitutes a claiming advantage for a divided party depends on the characteristics of the external, Level I, negotiation – notably the extent to which the game is largely distributive or largely integrative – and on the nature of the internal, level II, game – including the degree of conflict among contending factions, the ability of minority factions to block agreement and the potential for side payments. With so many variables, it is not possible to generate sweeping generalizations about the relationship between processes on one level and those on another; it depends.

A second critique is that formal multi-level models are too unwieldy to apply to real-world negotiations that involve many issues, many players and many levels. In particular, the domestic 'game' is rarely simple. The constraints imposed on nations in the Level I game commonly reflect complex interactions among bureaucracies, legislatures and

interest groups operating in the domestic, Level II, arena, all of which are themselves complex parties with internal games at yet a lower level. Specifying the location of the ZOPA in a complex game requires a great deal of information about parties, interests, issues and alternatives, and is mathematically and graphically challenging. On the other hand, simple formal models run the risk of being too reductionist. For scholars who follow the politics of international security, trade, the environment or other issues, models simple enough to actually specify inevitably strip out institutional richness.

A third critique relates to the limitations of all rational choice models. The technology of multi-level games assumes that the actors, at one level at least, have well-defined, consistent and stable interests and that they act in ways that maximize their utility. This may be a reasonable assumption for a manufacturer seeking tariff protection but it may not work as well for modeling the behavior of participants in a social movement, for example, the behavior of members of radical Islamic factions. It is worth noting, also, that a multi-level game cannot be rational at all levels. If a nation's behavior in the international arena is determined by a game among rational actors in the domestic, then the nation itself cannot be treated as a rational actor.

Perhaps for these reasons, most applications of multi-level game theory have been more metaphorical than formal, as Peter Gourevitch (2002) has pointed out. There is certainly value in the metaphor as a reminder of the fundamental interconnection of domestic and international politics. But the multi-level game approach can be more than simply metaphor. As a tool for analysing particular events, the approach provides a way of thinking systematically about the multi-level structure of actors, about institutions that determine who plays and who has power at each level, about the implications of issue linkage and side payments, about communication rules that affect how actors perceive their circumstances and, ultimately, about the location of constraints that determine what is possible. Even if not formally modeled, by providing a vocabulary of relevant factors and a mechanism to map from those factors to outcomes, the framework allows for 'analytical narratives' (Bates et al. 2000) that can provide richer, more satisfactory explanation than either single-level analyses or less analytically structured explorations of the interaction between domestic politics and international relations typically yield.

Not surprisingly, the framework works best when applied to circumstances such as trade negotiations in which there are well-defined issues, parties with clear interests and a well-structured ratification process. Examples include Schoppa's (1993) analysis of US-Japan trade negotiations and Mayer's (1998) analysis of the NAFTA negotiation. The framework is hardest to apply rigorously to more ideologically driven issues in which neither international nor domestic processes are clearly structured.

It is unclear whether the theory could usefully be developed further. As noted earlier, there has been relatively little theoretical advance since Putnam in the political science literature. In part this may be attributable to the inherent limitations of the approach in producing the kind of general laws much favored by social scientists. But if the ambition is to further develop a framework useful for analysing the particular, there may well be avenues to explore. One such unexplored dimension of considerable policy significance is latitude accorded an external negotiator. At one extreme, external negotiators might be said to be on a 'long leash,' in that they accorded complete flexibility to make offers and accept them, subject only to an up-down ratification vote by a legislature (or other principal or principals). At the other extreme, negotiators might be said to be on a 'tight

leash’, in that every move they make in the external negotiation must first be negotiated internally with their principals. One would expect that a long leash would be more likely to value creating agreements but also more likely to be rejected at the point of ratification, while a short leash would eliminate or greatly reduce the odds of ratification failure but raise the likelihood that negotiators would fail to reach agreement or that agreements would be far from efficient. To the extent that the degree of negotiator latitude can be influenced by policymakers, this hypothesis, if correct, could have significant policy implications. Other factors that might be studied more thoroughly include the transparency of negotiations – whether outside parties can see the workings or the internal negotiation and whether internal parties can see the workings of the external – and the implications of bundling or decoupling issues, at both the international and domestic level.

### 3.7.1 Multi-level Games and the Problem of Multi-level Governance

If, as Keohane (2001) has argued, the challenge of “governance in a partially globalized world” is to devise global institutions that are not only effective, but also accountable, participatory and persuasive, it is necessary to think simultaneously on multiple levels. The multi-level games framework provides a tool for understanding how governance structures at the domestic and international level interact. Strengthening domestic capacities to resolve internal conflict, for example, can be essential to international cooperation. And building international institutions that anticipate the legitimate concerns of affected domestic interests can not only improve the probability of reaching international agreements, but also, and importantly, embed those institutions in systems of domestic governance.

## NOTES

1. Raiffa’s ZOPA is equivalent to what Putnam (1988) called the “win-set.”
2. Once we introduce factions it is no longer clear what it means to say that ‘A’ has well-defined interests. The approach adopted by Putnam (1988) and Evans et al. (1993) is to evaluate the impact of internal bargaining from the standpoint of the “statesman” rather than the state or the nation. Implicit in the models developed here is a potential compensation (Kaldor-Hicks) criterion, in which A’s interests are those which the factions would support unanimously if there were efficient ways for winning factions to compensate losers.
3. An alternative configuration (of many) is to model the game as one in which the executive negotiates but must obtain approval from a domestic actor, usually a legislature. See, for example, Mo (1995).
4. The primacy of the Nash Solution is not uncontested. Raiffa (1982) argues for an alternative solution.
5. It is useful to note the similarities between this approach and that of Tsebelis’s “nested negotiation” approach (1990). Tsebelis is less focused on hierarchical structures, but also demonstrates the ways in which constraints in one game affect play in other, linked, games.

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## 4 Multi-level Europe – the case for multiple concepts

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The complexity of the multi-level European polity is not adequately represented by the single-level theoretical concepts of competing ‘intergovernmentalist’ and ‘supranationalist’ approaches. In contrast, empirical research focusing on multi-level interactions tends either to emphasize the uniqueness of its objects, or to create novel concepts – which are likely to remain contested even among Europeanists and have the effect of isolating European studies from the political science mainstream in international relations and comparative politics. These difficulties are bound to continue as long as researchers keep proposing holistic concepts that claim to represent the complex reality of the European polity as a whole. It is suggested that the present competition among poorly fitting and contested generalizations could be overcome if European studies made use of a plurality of simpler and complementary concepts, each of which is meant to represent the specific characteristics of certain subsets of multi-level interactions – which could also be applied and tested in other fields of political science research. The chapter goes on to describe four distinct modes of multi-level interaction in the European polity – ‘mutual adjustment’, ‘intergovernmental negotiations’, ‘joint decision making’ and ‘hierarchical direction’ – and to discuss their characteristics by reference to the criteria of problem-solving capacity and institutional legitimacy.

The European Union (EU) and its member states have become a multi-level polity whose characteristics are poorly understood in public debates that are shaped by our conventional understanding of national politics and international relations. Hence there is no realistic understanding of the extent and the limitations of both the institutional capacity and the institutional legitimacy of the European polity. However, the state of affairs in academic political science is not much better. There are, it is true, many highly knowledgeable and perceptive empirical accounts of European institutions and policy processes, but when it comes to theoretical explanations and normative assessments, we still find unresolved controversies between ‘neo-functionalist’ and ‘realist,’ or ‘supranational’ and ‘intergovernmental’ approaches in the opening chapters of every dissertation. One reason is that the conceptual tools with which the political science sub-disciplines of international relations and comparative politics are approaching the study of European institutions are ill-suited to deal with multi-level interactions.

From the ‘intergovernmental’ perspective of international relations theory, which presumes that nation states are the only theoretically relevant actors, the EU appears as a – more highly institutionalized – specimen of the genus ‘international organization.’ Such organizations are created to serve the purposes of their member states; and to the extent that they do so, their actions are legitimated by the agreement of member governments. At the same time, these actions are fully explained by the interests, relative bargaining powers and bargaining strategies of these governments (Hoffmann 1966, 1982; Garrett

1992, 1995; Moravcsik 1998). In other words, the multi-level polity of the EU is conceptualized in a single-level model of intergovernmental interactions.<sup>2</sup>

In contrast, students of comparative politics are led by their own disciplinary bias to emphasize the ‘supranational’ characteristics of the Union, and to analyse its governing institutions as if it was, or ought to be, a polity resembling the models of democratic nation states. To be sure, these models differ greatly in their normative and descriptive characteristics, emphasizing either accountability through competitive or consensual party systems (Lijphart 1999), or the responsiveness of pluralist, corporatist or clientelist systems of interest intermediation (Truman 1951; LaPalombara 1964; Schmitter and Lehmbruch 1979). In any case, however, the focus is on the interactions between a single, autonomous and potentially omnipotent government and its constituents. Hence normative studies will focus on the relationship between European-level (‘supranational’) actors and constituents – emphasizing either the lack of democratic accountability (Greven 2000) or the existence (or feasibility) of institutional mechanisms facilitating responsiveness to constituency interests (Abromeit 1998; Eichener 2000; Grande 2000), whereas empirical research will either focus on the salience of European elections and the influence of the European Parliament, or on the channels of successful lobbying at the European level, the representation of ‘diffuse’ interests, the role of deliberative problem solving in European ‘comitology’, and the inclusiveness of European ‘policy networks’ involving business associations, large firms, environmental and consumer groups and other NGOs involved in processes of interest intermediation (Mazey and Richardson 1993; Joerges and Neyer 1997; Pollack 1997; Joerges and Vos 1999; Kohler-Koch and Eising 1999).

Admittedly, our knowledge of the structures, processes and outcomes of European integration was often advanced by good research designed from either one of these competing perspectives. But the continuing controversies between ‘intergovernmental’ and ‘supranational’ perspectives suggest that these insights had to be achieved in spite of the poor ‘goodness of fit’ of their paradigmatic assumptions. Thus the intergovernmental international relations perspective must be pushed to the limits of its plausibility when it is asked to explain constellations where supranational actors are empowered to act against the manifest preferences of member governments; where member states are subject to increasingly tight European constraints in the exercise of their own governing powers; where interactions among their citizens and corporations are increasingly governed by European law; and where the range of problems for which solutions are being sought at the European level seems to increase continuously (Burley and Mattli 1993; Jachtenfuchs and Kohler-Koch 1996; Sandholtz and Stone Sweet 1998; Schmidt 1998; Eichener 2000; Pollack 2000).

Similarly, however, the supranational perspective of comparative politics theories cannot easily represent a European polity in which member states continue to be endowed with a full range of governing powers; in which the limited competencies of supranational actors are derived from agreement among member states; in which European legislation depends primarily on the agreement of member governments; and in which member states are in control of the actual implementation and administration of European regulations (Moravcsik 1998). Nor are these difficulties eliminated in studies approaching the EU from a comparative federalism perspective (Scharpf 1988; Wessels 1990; Sbragia 1992, 1993; Schmidt 1999; Nicolaidis and Howse 2001).

In the face of these paradigmatic difficulties, some of the best work on Europe is either self-consciously a-theoretical or it attempts to structure research through a variety of innovative concepts and metaphors characterizing the European polity as a 'condominio', a 'consortio', a 'fusion' of governing functions, a structure of 'network governance' and the like (Marks et al. 1996; Schmitter 1996; Wessels 1997; Kohler-Koch and Eising 1999). In general, such concepts do indeed take account of the multi-level nature of European institutions and governing processes, but they also emphasize their uniqueness and thus have the effect of carving out a separate and theoretically distinct domain of 'European Community Studies.' Even within this domain, however, it seems fair to say that many of these novel conceptualizations seem to be fitting the cases at hand, but have not yet found broad acceptance among fellow Europeanists (Branch and Øhrgaard 1999; Sandholtz and Stone Sweet 1999), let alone among political scientists who are interested in theoretical propositions of more general applicability.

That seems an unfortunate and unnecessary state of affairs. It is unfortunate because it tends to immunize European studies against theoretical criticism from other quarters while depriving more general political science theories of the empirical challenges arising from the growing body of research focused on Europe. It also seems unnecessary since, even if the European polity is *sui generis* in the sense that there is no other institutional constellation quite like it, it should still be possible to analyse its institutions and policy processes with the use of theory-based concepts and propositions that are also useful in comparative politics and international relations. From what I have said so far, however, it also would follow that the reintegration of European studies into the mainstream of political science cannot be achieved through holistic concepts attempting to equate the EU to any of the reasonably well-understood, but internally complex macro-models or ideal types which political scientists use as a first cut in distinguishing among political systems.

Certainly, the EU is not a majoritarian or a consociational democracy, but neither are its structures and processes of interest intermediation generally congruent with ideal types like pluralism, corporatism or even network governance, nor do its intergovernmental structures and processes generally conform to the legal models of federation, confederacy or international organization. Instead, I suggest that we should work with a plurality of lower-level and simpler concepts describing distinct governing modes in the European polity – which, however, should also be useful as theoretical modules in studies of national government or international relations. The ones I will discuss here focus on the vertical relationship between European and national levels of government. It is clear that they could and should eventually be complemented by other lower-level concepts focusing on structures and processes of interest intermediation and on the political interactions between governmental actors at both levels and their constituencies. In the present chapter, however, my focus will be on vertical interactions among governments which I will describe – in the order of increasing supranationalism – as the modes of 'mutual adjustment', 'intergovernmental negotiations', 'joint decision making' and 'hierarchical direction.'<sup>3</sup>

Moreover, I suggest that we should explain the progressive Europeanization of governing functions by reference to theoretical propositions that are useful for describing and explaining similar upward shifts of governing functions in federal national states or, for that matter, similar processes of political unification involving nation states.<sup>4</sup>

By the same token, I find it important that the institutional capacity and legitimacy of Europeanized governing should be evaluated by reference to the same normative criteria that we generally use for the evaluation of governing institutions.

## 4.1 MODES OF EUROPEANIZATION

It makes a great difference whether Europeanization is merely the outcome of strategic actions among governments that are aware of their mutual interdependence – which I describe as the mode of ‘mutual adjustment’ – or whether Europeanized governing functions are exercised in one of the modes of institutionalized interaction – where I distinguish among the modes of ‘intergovernmental negotiations,’ of ‘joint decisions’ or of ‘hierarchical direction.’ In what follows, I will discuss the characteristics and consequences of these modes by reference to two evaluative criteria, institutional capacity and institutional legitimacy, both of which need to be understood in a relational sense. The first is used to evaluate the decision rules and incentive structures of Europeanized governing modes in relation to the specific range of problems that are supposed to be resolved through Europeanization. Similarly, the second criterion should be used to evaluate those Europeanized governing functions that are in fact effectively performed in the light of legitimating arguments that are generally considered pertinent for the evaluation of governing institutions at the national level (Lord 1998). Both of these criteria should and could be elaborated further (Scharpf 1999, 2000), but I trust that their intended meaning will become sufficiently clear in the following discussion.

## 4.2 MUTUAL ADJUSTMENT

The default mode of Europeanized policy responses to increasing economic interdependence is ‘mutual adjustment.’ Here, national governments continue to adopt their own policies nationally, but they do so in response to, or anticipation of, the policy choices of other governments. Hence these strategic interactions among governments can be analysed as a non-cooperative game.<sup>5</sup> In theory and in the real world, there is of course a great variety of possible game constellations. In some of them, the expected outcomes (or equilibria) of strategic interaction are mutually beneficial (Genschel 1997), in others they will benefit some parties at the expense of others, and in still others all parties may be worse off (Rapoport and Guyer 1966; Rapoport et al. 1976; Scharpf 1997b). By the same token, there also cannot be a general verdict on the problem-solving effectiveness of mutual adjustment in Europe.

Economists who are impressed with the benefits of market competition, it is true, would generally ascribe beneficial efficiency effects not only to the competition among political parties, but also to constellations in which mutual adjustment forces national governments to engage in forms of ‘systems competition’ (that is, tax competition and regulatory competition) against each other (Sinn 1993; Vanberg and Kerber 1994). However, one should not ignore the important differences between the competition among firms (which presumably benefits all consumers), the competition among political parties (benefiting all voters) and the locational competition between territorial governments – which

tends to benefit mobile firms, investors and taxpayers at the expense of the less mobile members of national constituencies, and which reduces the capacity of national governments to perform those market-correcting functions which, in economic theory, justifies the establishment of governments in the first place (Sinn 1994; Scharpf 1998).

Moreover, economic theory tends to discount the effect on democratic self-determination if 'systems competition' should prevent all governments from adopting policies that would reflect the preferences of their constituencies. As the European internal market has approached completion, these same competitive pressures are now constraining member states in taxation, in the regulation of employment relations, in social policy, in the environmental regulation of production processes and in other 'market-correcting' policy choices (Scharpf 1999). These constraints may not only reduce the problem-solving effectiveness of national polities, but they also affect their institutional legitimacy by preventing the adoption of (otherwise feasible) policies responding to the manifest demands of national electorates (Scharpf 2000).

In response to these tightening constraints, member states have been trying to move away from the mode of mutual adjustment, and to control systems competition through the coordination or centralization of governing functions at the European level. Within the democratic nation state, however, politics at the national level tends to have the greatest political salience, and the clearest procedures assuring democratic accountability. Hence a shift of market-correcting governing functions from the subnational to the national level is generally associated not only with a gain in problem-solving capacity but also with a gain in democratic legitimacy. In contrast, neither of these effects is ensured when competencies are shifted from the national to the European level. In both regards, moreover, there are significant differences between the three modes of institutionalized European governing functions that I am considering here.

### 4.3 INTERGOVERNMENTAL NEGOTIATIONS

At the lowest level of institutionalization, Europeanized governing is realized in the mode of 'intergovernmental negotiations.' Here, national policies are coordinated or standardized by agreements at the European level, but national governments remain in full control of the decision process, none of them can be bound without its own consent, and the transformation of agreements into national law and their implementation remains fully under their control. This is emphatically true of policies requiring treaty revisions that must be ratified in all member states. Beyond that, the mode applies in the second and third pillars of 'common foreign and security policy' and of 'police and judicial cooperation in criminal matters,' and it is also approximated in those policy areas in the first pillar where the Council of Ministers must still decide by unanimity.

Since all participating governments have a veto, the legitimacy of policies so adopted can be indirectly derived from the legitimacy of democratically accountable national governments (Lord 1998).<sup>6</sup> By the same token, however, the problem-solving capacity of negotiated policy is strictly limited to solutions which are preferable to the status quo from the perspective of all participating governments. If such solutions are not available, side payments and package deals may still facilitate agreement under favorable circumstances (Scharpf 1997a, chapter 6). More generally, however, solutions will be blocked

by major conflicts of interest – which is exactly what governments seem to want in the second and third pillars, where sovereignty issues are extremely salient.

For the resolution of problems generated by regulatory and tax competition in the integrated European economies, however, the mode of intergovernmental negotiations seems to offer little promise in all constellations where existing national solutions differ significantly from one another, or where some countries are actually benefiting from competition. If evidence were required, the unending history of efforts to harmonize the taxation of capital interest or of corporate profits through unanimous agreement should suffice. But how, then, did these same governments manage to achieve the degree of market integration that is generating these competitive pressures?

#### 4.4 HIERARCHICAL DIRECTION

In discussing this question, I now turn to ‘hierarchical direction,’ the mode in which competencies are completely centralized at the European level and exercised by supranational actors without the participation of member-state governments. Within federal nation states, such centralized competencies are generally exercised by majorities in national parliaments, cabinet ministers and prime ministers whose legitimacy is directly derived from electoral accountability. In the EU, in contrast, functions which are performed without the participation of member governments are also removed from the influence of democratically accountable political actors. They are exercised by the European Central Bank (ECB), by the European Court of Justice (ECJ) and by the European Commission (EC) when it is acting as a guardian of the treaty in infringement procedures against national governments.

Since these functions are exercised without the participation of either the European Parliament or of member-state governments, their legitimacy must depend entirely on shared beliefs in the authority of the law and in the capacity of professional authorities to realize shared norms, values or goals (Majone 1989, 1996). For the ECB, these goals were explicitly and quite narrowly defined as a commitment to price stability in the Maastricht Treaty (now Article 105 of the EC Treaty), whereas the independent governing powers of the Court and the Commission are derived from their responsibility for interpreting the law of the Treaty in the process of applying it in specific legal proceedings.

Non-democratic legitimacy also plays a role in democratic nation states where constitutional courts, independent central banks or independent regulatory agencies are performing governing functions for which they are thought to be better suited than politically accountable governments. At the national level, however, this form of legitimacy is inherently precarious and would collapse if non-accountable actors should exceed the limits of the ‘permissive consensus’ on which their governing powers depend (Bickel 1962) – in which case the policy choices of independent actors, or even their institutional independence, would become vulnerable to correction by legislative action or constitutional amendment.<sup>7</sup> In the EU, in contrast, such reversals would be much more difficult to achieve. The independence of the ECB is protected by the Maastricht Treaty to a degree that exceeds the institutional autonomy of any national central bank (Elgie 1998; Haan and Eijffinger 2000), while Treaty-based decisions of the ECJ could only be reversed by Treaty revisions that must be ratified by all member states. Moreover, the



ECJ has been able to establish the doctrines of 'direct effect' and 'supremacy' by which its interpretations of European law will override not only acts of government, but also parliamentary legislation and even the constitutions of all member states (Weiler 1982).

In terms of substantive policy, the supranational governing functions exercised by the Court and the Commission have been most effective in policy areas where economic integration could be advanced by applying fairly explicit prohibitions in the Treaties against national policies constituting barriers to the free mobility of goods, services, capital and persons or distortions of free competition. In interpreting these rules of 'negative integration,' the Commission and the Court have certainly gone beyond the original intent of negotiating parties at the conferences of Messina and Rome (Scharpf 1999, pp. 54–62). Nevertheless, governments have by and large continued to support the moving goal of ever increasing economic integration (Moravcsik 1998), even though the Amsterdam Summit attempted to impose some limits on the reach of European competition law which, however, have not been very effective.

So how should we judge the problem-solving effectiveness and legitimacy of those governing functions whose exercise has been centralized? As for effectiveness in achieving their assigned or self-chosen goals, the record of hierarchical policy choices adopted by the Commission and the Court is indeed impressive: national courts have generally accepted the authority of the ECJ as the ultimate interpreter of European law (Burley and Mattli 1993), and even the German constitutional court has finally abjured its claim to act as a court of last resort when individual liberties are in issue.<sup>8</sup> As a consequence, European law is routinely enforced in ordinary cases and controversies by the judicial systems of member states. Moreover, this law goes further in eliminating non-tariff barriers to free trade and free movement than is true in long-established federal states like the USA, Australia or Switzerland. Even more significant is the fact that European competition law is effective in imposing much narrower restrictions on public subsidies granted by member states than federal states are imposing on subnational governments (Wolf 2000; Zürn 2000), and that it also is enforcing competition in public services and public utilities which, within nation states, had everywhere been exempted from anti-trust and competition law (Scharpf 1999, chapters 2 and 3).

In short, if there should be reason for concern, it is not about the lack of effectiveness of negative integration, but rather about the single-minded perfectionism with which the ideal of perfectly competitive markets is pursued by the Commission and the Court.<sup>9</sup> But what of the legitimacy of centralized European governing functions? Here it is remarkable that concerns about a European democratic deficit have rarely been addressed to those policy areas where Commission and Court were advancing negative integration without the participation of either national governments or the European Parliament. Since these policies are carried out in the form of legal actions, they are by and large accepted with the affirmative support or the grumbling respect<sup>10</sup> with which winners and losers tend to respond to court decisions at the national level. In other words, market-making supranational policies benefited not only from the ascendancy of neo-liberal and free-trade doctrines in academe and in the media, but also from the customary respect for 'the Law' and from the legitimacy credit granted to judicial interpretations in the constitutional democracies of member states.

The implication is that for the most centralized and 'supranational' governing mode of the multi-level European polity neither problem-solving effectiveness nor legitimacy are

seriously disputed. But in comparison to the full range of public policies that are in place at the national level in advanced capitalist democracies, the reach of the supranational mode is essentially restricted to the ‘market-making’ enforcement of ‘negative integration’ by the Commission and the Court and to control over the currency by the ECB. It was not, and could not be used to achieve market-correcting ‘positive integration’ by non-political hierarchical fiat.<sup>11</sup> Instead, policies that might be effective in dealing with the negative consequences of regulatory and tax competition depend on ‘political’ regulations, directives and decisions that can only be adopted with the participation of member governments.

#### 4.5 JOINT DECISIONS

The ‘joint decision mode’ combines aspects of intergovernmental negotiations and supranational centralization. It applies in most policy areas of the ‘first pillar’ that includes the market-making as well as the market-correcting competencies of the EC. Here, European legislation generally depends on initiatives of the Commission which must be adopted (unanimously or by qualified majority) by the Council of Ministers and, increasingly, by the European Parliament. Assessments of the institutional capacity and legitimacy of this mode vary considerably in the academic literature and in political debates – which reflects the fact that policy choices depend, at the same time, on the institutional resources and strategies of supranational actors, and on the convergence of preferences among national governments – both of which are likely to vary from one policy area to another.

If member governments are united in their opposition to Commission initiatives, or if highly salient national interests are strongly divergent, European solutions will be blocked, regardless of the involvement of Commission and Parliament. The role of supranational actors will be significant, however, in constellations where national interests diverge but are not highly salient or – more important in theory and practice – in constellations where member governments disagree over the substance of a European policy, but still would prefer a common solution over the status quo.

Under these conditions – which can be analytically represented by a Battle-of-the-Sexes game – common solutions that would be beneficial for all could still be blocked by intergovernmental haggling over the precise content of European rules. It is here, therefore, that qualified majority voting should be most acceptable to governments. By the same token, it is here that the capacity for European action will benefit most from the Commission’s agenda-setting monopoly, from the expanding co-decision rights of the Parliament (Tsebelis 1994), from the good services of national representatives in the Committee of Permanent Representatives (COREPER) (Hayes-Renshaw and Wallace 1997; Lewis 2000) and from the work of ‘Europeanized’ national experts in the hundreds of committees preparing, or specifying the details of, Council directives (Joerges and Neyer 1997; Joerges and Vos 1999).

By the same token, however, the institutional legitimacy of joint decision procedures loses its ‘intergovernmental’ foundation. By the logic of the original treaties, European legislation was primarily legitimated by the agreement of democratically accountable national governments. Yet these legitimating arguments are undermined the more the

role of non-accountable 'supranational' actors and procedures are emphasized in the literature and perceived by political actors and their publics. If it is true that infringement proceedings initiated by the Commission can compel national governments to change their positions on politically salient issues (Schmidt 1998), that national representatives in COREPER will conspire to block domestic opposition to European compromises (Lewis 2000) and that 'comitology' favors agreements among national experts that are de-coupled from the positions of their governments (Joerges and Neyer 1997), then the formal agreement of a majority of governments in the Council will no longer have much legitimating force.

As a consequence, the focus of legitimating arguments in the literature has shifted. What is now emphasized is the openness of European decision processes to the demands and the expertise of plural interests, the flexibility of European 'networks' of interest intermediation and the 'deliberative' qualities of interactions in comitology (Jachtenfuchs and Kohler-Koch 1996; Marks and McAdam 1996; Marks et al. 1996; Joerges and Vos 1999; Kohler-Koch and Eising 1999; Schmalz-Bruns 1999). Regardless of the descriptive accuracy of these accounts, however, their normative persuasiveness must rest on the proposition that the accommodation of special interests and the substantive quality of European standards could be a legitimating substitute for democratic accountability based on general and equal elections and public debates. But since effectiveness of European policy must frequently be achieved by 'subterfuge' in processes that are completely intransparent to the public (Héritier 1999), there is no assurance that all affected interests will even be aware of what is going on at the European level.<sup>12</sup> For politically salient issues, at any rate, it is hard to see how informal networks of interest intermediation and anonymous expert committees could be considered satisfactory substitutes for the democratic accountability of representatives whose mandate is derived, directly or indirectly, from general elections based on the formal equality of all citizens (Weiler 1999; Greven 2000).

In light of these legitimacy problems, it is perhaps good news that the success stories celebrating the effectiveness of supranational mechanisms and the problem-solving capacity of European policy (Pollack 1997; Eichener 1997, 2000) are considerably exaggerated or at least over-generalized. They are true as far as they go, but their empirical domain is limited to a range of policy areas in which conflict over divergent national interests is overshadowed by a common interest, or where decisions tend to have low political salience for the general public. This is true for 'market-making' directives harmonizing national product regulations<sup>13</sup> and for a few other policy areas where common interests are stronger than divergent interests (Scharpf 1997a, 1999). But where it is not true, national governments remain fully capable of blocking European decisions even if the decision rule is qualified-majority voting in the Council (Golub 1996a, 1996b).

From a legitimacy point of view, therefore, all seems to be well: In the joint decision mode, the Union can deal only with problems where European action is supported by a broad consensus involving democratically accountable national governments, a directly elected European Parliament and those affected (and organized) interests that are able to influence the agenda-setting functions of the Commission. Where this consensus exists, the legitimacy of policies so adopted is not seriously in question, even though the procedures do not conform to standard models of democratic accountability in the nation

state. Where it does not exist, European action is blocked, and problems are left to be resolved by national governments in institutions and procedures with presumably impeccable democratic credentials.<sup>14</sup> But all is not well from a problem-solving perspective if the market-making policies on which Europe can agree (or which can be imposed through hierarchical direction) will damage the capacity of national governments to adopt those ‘market-correcting’ policies on which the Union cannot agree. Unfortunately, this European problem-solving gap tends to exist in precisely those policy areas where national governing functions are most vulnerable to systems competition.

One reason is that constellations of tax competition and regulatory competition do not generally resemble either a Battle-of-the-Sexes game or a symmetrical Prisoner’s Dilemma – in which case agreement on common rules regulating competition should be possible. In tax competition, for instance, small countries may actually increase their revenue through tax cuts which bigger countries could not reciprocate without incurring massive revenue losses (Dehejia and Genschel 1999). Similar asymmetries may favor competitive deregulation in other policy areas. In such constellations, the winners are clearly not interested in having their competitive advantages harmonized away by common European rules. But even in the absence of winner-loser asymmetries, harmonization may be blocked by conflicts arising from politically salient differences among member states in economic development, policy legacies, institutional structures or ideological preferences.

Thus, environmental regulations considered necessary in Denmark, Germany or the Netherlands may simply not be affordable in less rich member states like Greece, Spain or Portugal, let alone countries on the threshold of Eastern enlargement. The same would be true if the Union attempted to standardize the provision of social transfers and of public social services at the level that is considered appropriate in the Scandinavian countries. If that were all, it might perhaps be possible to agree on relative standards reflecting these differences in the ability-to-pay of member states at different stages of economic development. Yet even though Britain and Sweden may be similarly wealthy, their institutions and political preferences are so diverse that they could still not agree on common European welfare state solutions (Scharpf 2002).

## 4.6 TO CONCLUDE

The European polity is a complex multi-level institutional configuration which cannot be adequately represented by theoretical models that are generally used in international relations or comparative politics. Worse yet, its complexity also seems to defy all theoretical efforts based on holistic concepts. The present chapter suggests that these difficulties could be overcome by a modular approach using a plurality of simpler concepts representing different modes of multi-level interaction that are characteristic of subsets of European policy processes. I have tried to show that these modes exist and that they have specific implications for the institutional capacity and legitimacy of European governing functions. My further claim (which was not developed here) is that the same conceptual tools should also be useful for the analysis of subnational, national, transnational and other supranational policy-making institutions.

## NOTES

1. This text is a shortened version of a paper by the same author 'Notes toward a theory of multi-level governing in Europe' (2000), Discussion Paper 00/5, Max-Planck-Institut für Gesellschaftsforschung, Köln.
2. Moravcsik's (1993, 1998) 'liberal intergovernmentalism', it is true, also has a domestic module attached in which the preferences of national governments are shaped by the interests of major national producer groups which, however, are not assumed to be actors in their own right on the European level.
3. These concepts correspond to the 'modes of interaction' discussed in Scharpf (1997a). The list is not complete, however, since the mode of 'majority voting' does not – and cannot (Lord 1998; Scharpf 1999) – play the same central legitimating role in the European polity that we have come to associate with the majority rule in democratic nation states.
4. For an early and still convincing attempt to explain European integration through concepts and propositions claiming general applicability to processes of 'political unification,' see Etzioni (1965).
5. As I have pointed out elsewhere, even constellations where governments merely adjust their own policies to economic conditions affected by the interdependent policy choices of other governments can usefully be analysed as a non-cooperative game (Scharpf 1997a, pp. 107–12).
6. Strictly speaking, that is only true for the initial agreement. Once a common policy has been adopted, it can only be changed by unanimous intergovernmental agreement. Hence individual governments are no longer able to respond to new circumstances or changing constituency preferences (Scharpf 1988).
7. The historical cause célèbre is President Roosevelt's 'court packing plan' of 1937, which caused the US Supreme Court to reverse its line of anti-New-Deal decisions. It should also be noted that the much celebrated independence of the German Bundesbank was never protected against ordinary legislation.
8. Bundesverfassungsgericht 2 BvL 1/97, 6 June, 2000.
9. That is certainly the view of the German Länder which, in the run-up to the Nice Summit, even threatened to block Eastern enlargement in the absence of Treaty amendments protecting their infrastructure functions against European competition policy.
10. That may be about to change as the discretionary character of extensive interpretations of European competition law, and their lack of political legitimation, are publicly asserted by (sub)national political actors in cases where interventions by the Commission are clashing with politically salient (sub)national industrial, infrastructure and cultural policies. In Germany, these clashes give rise to double-pronged demands for institutional reforms increasing the democratic accountability of the Commission and limiting the scope of its competencies.
11. Exceptions are policies promoting gender equality in employment and preventing discrimination against migrant workers, both of which can be directly derived from the Treaty.
12. Similar claims to legitimacy were advanced by theorists of American pluralism (Truman 1951; Latham 1952), but it is fair to say that they were ultimately rejected on empirical as well as normative grounds (Mills 1956; Dahl 1961, 1967; Bachrach and Baratz 1963; Olson 1965; McConnell 1966; Lindblom 1977).
13. When that is not true – as in the BSE case or for genetically modified foodstuffs – national governments tend to take control again, since it is they, rather than the anonymous experts on the Commission's Veterinary Committee, who must face the brunt of political protest at home.
14. Strictly speaking, this legitimating argument applies only to first-round European policy choices. Once a European rule is in place, its supremacy and direct effect will prevent national action even though it could not be changed against the opposition of the Commission or a small minority of Council votes.

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## 5 Global governance as multi-level governance

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### 5.1 INTRODUCTION

‘Global governance’ is an amorphous term which draws a lot of attention partially because the concept is open to many interpretations. Common to all uses of the term global governance is the notion that it is distinct from international anarchy – the unrestricted interplay of states driven by self-interest. In global governance contexts, states and other social actors recognize the existence of obligations and feel, at least to some extent, compelled to honor them.<sup>2</sup> This spin of the term governance is specific to the field of international relations. While governance in other academic disciplines often refers to the replacement of state regulations by public–private partnerships and market mechanisms and is thus sometimes seen as part of a neo-liberal program (Offe 2008, p. 65), in international relations it has been connected to the notion of more, not less, regulation. However, this regulatory spin is not only idiosyncratic to a specific academic subdiscipline, but also points to the core of the concept of governance, namely to regulate collective problems and achieve common goals (Mayntz 2008).

Governance refers to the entirety of regulations – that is, the processes by which norms, rules and programs are monitored, enforced and adapted, as well as the structures in which they work – put forward with reference to solving a specific problem or providing a common good (see Benz 2005; Schuppert 2007; Zürn 2008). Governance activities are justified with reference to the common good, but they do not necessarily serve it. While government refers to an actor, governance describes an activity independent of the kind of actor carrying it out (Rosenau 1992). The term governance thus encompasses structures, processes and policy content, which the common distinction between policy, polity and politics may help to disentangle.

What follows from this for the notion of global governance? To begin with, the need to distinguish governance structure from contents is especially important. All forms of governance beyond the nation state lack a central authority or a ‘world state’ equipped with a legitimate monopoly of the use of force.<sup>3</sup> Thus global governance cannot take on the form of governance by governments; rather, it needs to be a form of governance with governments such as we see in intergovernmental institutions, or governance without government as in the case of transnational institutions.

Governance with (many) governments regulates, via intergovernmental agreements, state and non-state activities, the effects of which extend beyond national borders. Central to governance with many governments are international regimes, defined as social institutions consisting of agreed-upon and publicly announced principles, norms, rules, procedures and programs that govern the interactions of actors in specific issue areas. As such, regimes contain specific regulations and give rise to recognized social practices in international society.<sup>4</sup> Regimes comprise both substantive and procedural rules and are thus distinct from mere intergovernmental networks which frequently

only include procedural rules. Such networks meet on a regular basis and may develop coordinated responses to specific situations, but they do not govern behavior in a certain issue area over a prolonged period of time.<sup>5</sup> Other components of international governance are international organizations, which are material entities and can be the infrastructure for both international regimes and intergovernmental networks.<sup>6</sup> Any of these components of international governance beyond the nation state can be regional or global in scope. The transgovernmental form of governance can be seen as a subtype of governance with governments, comprising ‘informal institutions linking regulators, legislators, judges, and other actors across national boundaries to carry out various aspects of global governance’ (Slaughter and Hale, Chapter 23 in this volume).

Although the role of governance without government has increased over the last two decades (see Beisheim et al., Chapter 24 and Scholte, Chapter 25 in this volume),<sup>7</sup> it is arguably still less significant than government with many governments. Some of these transnational organizations are standard-setting associations that work as part of a larger international institution established by intergovernmental agreement, while others are part of an issue-area-specific policy network with national governments still in the position to accept or veto agreements. In some issue areas the roles of transnational regimes, organizations and networks are central. Civil society is a necessary prerequisite for transnational regulation. However, transnational regulation is only a minor part of all civil society activities. Civil society represents the whole ‘arena of politics where associations of citizens seek . . . to shape rules that govern social life’ (Scholte in this volume).

Overall, the sum of all institutional arrangements – be they international, transgovernmental or transnational – beyond the nation state is usually considered to constitute regional or global governance systems.

The way I have conceptualized global governance is not necessarily identical with multi-level governance.<sup>8</sup> In order to speak of global governance as ‘multi-level’ two additional conditions have to be met. First, the global level must be autonomous. It must be more than just intergovernmental coordination with no delegation of powers to spheres outside the member states. As long as international relations are structured by the consensus principle, according to which states only comply with what they have agreed to, it does not make sense to speak of a multi-level governance system. A system of sovereign nation states is not characterized by a political agent outside of the nation state with significant autonomy or some powers, even if some of the states do cooperate closely.<sup>9</sup> Second, the global level must be part of a system that is characterized by the interplay of different levels rather than work independently from other governance levels. Before we can speak of a multi-level governance system, it thus needs to be shown that the system includes some form of differentiation, be it functional or stratified. The whole notion of a multi-level governance system is based on the idea that segmentary differentiation of similar states, each of which controls a certain territorially defined part of the world – typical for the international system – gets replaced by one that is at least to some extent characterized by functional and stratificatory differentiation.

In this chapter, I want to argue that global governance can indeed be described as a specific form of multi-level governance. Consequently, the virtues and flaws of federal political systems are not particular to them, but are to some extent globalized. Some of the problems of federal political systems thus re-emerge on the global level; at the same

time these problems are accentuated on the national level. Multi-level governance thus becomes – so the most fundamental thesis of this contribution – the *conditio politica* of the twenty-first century.

Against this conceptual backdrop, three issues will be tackled in the ensuing sections. The first two sections are devoted to showing that global governance can be adequately described as a partially autonomous element of a more comprehensive multi-level governance system. It is argued that political institutions on the global level today possess a significant level of autonomy (Section 5.2) and that those international institutions only achieve their effect by interacting with other political levels (Section 5.3). Next, the specific features of the global multi-level governance system compared to other national or regional multi-level governance systems are discussed (Section 5.4). In the concluding section (Section 5.5), the systematic outcomes and the built-in deficiencies of such a system are examined.

## 5.2 BEYOND INTERGOVERNMENTALISM

Intergovernmentalists do not see the international system as a multi-level governance system. They argue that international organizations are tightly controlled by member states. The administrative apparatus and the budget of most of these organizations are indeed tiny. They do not levy taxes and do not become involved in redistributive issues. International organizations are thus considered as institutions with delegated authority, but do not constitute a political level in their own right (see, for instance, Kahler 2004).

This intergovernmentalist argument is based on a Westphalian notion of sovereignty,<sup>10</sup> which emphasized the principle of non-intervention into domestic affairs and – closely related – the consensus principle (see also Humrich and Zangl, Chapter 22 in this volume). This notion involved three components: first, that the ruler of a state exercises sole authority over the territory of that state; second, that all states are judicially equal; and third, that state parties are not subject to any law other than their own, to which they do not consent (Sadat 2000, p. 22; cited in Deitelhoff 2006, p. 162). It still applies to a model of international institutions that became especially relevant after World War II. The substantial principle behind these post-World War II international institutions was summed up in the term ‘embedded liberalism’ (Ruggie 1983). This term describes an orientation towards free trade and open borders while, at the same time, remaining firmly rooted in national political systems which are able to absorb the shocks and irregularities of the world market. International institutions thus established a form of intergovernmental governance which enabled national governance to function effectively, and initially even led to an extension of state activities.

Embedded liberalism came with a distinctive method of international decision making and thus also contains a procedural component that I suggest calling ‘executive multilateralism.’ This term is used to describe a decision-making mode in which governmental representatives (mainly cabinet ministers) from different countries coordinate their policies internationally but with little national parliamentary control and away from public scrutiny. On the one hand, multilateralism refers to a decision-making system that is open to all states involved, includes a generalized principle of conduct, creates expectations of diffuse reciprocity and is seen as indivisible (Ruggie 1992). On the other hand

– and this aspect was neglected for a long time – multilateralism after World War II was heavily executive-centered, since the rules of embedded liberalism were negotiated internationally and implemented nationally without the contribution of the legislatures and without the systematic incorporation of national or transnational societal actors.<sup>11</sup>

This changed in the age of globalization, because embedded liberalism has displayed a dynamic of its own: the growing number of international institutions since World War II has made national borders less significant for societal transactions, and this in turn has led to an increase in the number and political scope of international institutions. It is this institutional dynamic that has brought the establishment of an expedient political order onto the international political agenda.

What characterizes this institutional dynamic? One measure of its extent is the growth in numbers of international multilateral agreements. Indeed, there was a linear increase from 150 in 1960 to 517 in 2005 (UNTC 2009).<sup>12</sup> A further measure of institutional dynamic is the new quality of international governance. This development becomes manifest when one contrasts the typical traditional multilateral institutions of embedded liberalism with the new international institutions in the age of globalization. The General Agreement on Tariffs and Trade (GATT) regime is a good example of a traditional international institution. Its form of regulation has three distinctive features:

- The states are the ultimate and exclusive addressees of the regulation. They are issued with directives not to increase customs tariffs or to apply them in a discriminatory way. The objective of the regulation is therefore to influence state behavior in order to solve the problem in question, in this case, protectionism.
- Such regulations take effect at the borders between states, and in this sense they primarily constitute a form of interface management, regulating the transit of ‘goods and bads’ out of one national society into another.
- There is a relatively high degree of certainty about the effects of such regulations. The actors are able to make relatively precise, empirically sound predictions about the economic consequences of their tariffs.

Today international institutions have different features. International regimes for overcoming global environmental problems are typical examples here.

- The ultimate addressees of regulations issued by international institutions are largely societal actors. While the states act as intermediaries between the international institutions and the addressees, it is ultimately societal actors such as consumers and businesses who have to alter their behavior in order to, say, reduce CO<sub>2</sub> or CFC emissions (see Parson 2003).
- The new international institutions are no longer merely concerned with interface management. The reduction of pollutants requires regulations that take effect behind the national borders within the national societies. In this sense, the international climate regime regulates behind-the-border issues (Kahler 1995) and the new international trade regime, with its focus on the prohibition of subsidization and overcoming discriminatory product regulations, has also developed in this direction. Equally, United Nations Security Council measures have been increasingly directed at intrastate rather than interstate wars.

- International institutions today are for the most part concerned with finding solutions to highly complex problems. There is, therefore, a high degree of uncertainty as to the ecological and economic consequences of, say, a particular climate regime (see Dessler and Parson 2006, Chapter 2). The same is also true for financial agreements and regulations on product safety as well as security issues.

In order to successfully tackle highly complex behind-the-border issues with societal actors as the ultimate addressees, a more sophisticated institutional design is needed as in the days of embedded liberalism. This leads to a relative rise of institutional features in international and transnational governance, which increase their autonomy vis-à-vis their member states. Three mechanisms are of special importance here.

- A high density of international institutions gives rise to collisions between different international regulations as well as between national and international ones. In such cases a supranational arbitration body is a reasonable means of settling differences. The dispute settlement procedure of the World Trade Organization (WTO), for instance, decides in the case of a collision between WTO rules and domestic regulations as well as in the case of a collision between environmental and commercial goals (for instance, with reference to the Codex Alimentarius). Furthermore, the increased complexity of issues also gives rise to a greater need for independent dispute settlement bodies.<sup>13</sup> In a similar vein, the relative rise of majority decision making in international organizations can serve the need to resolve deadlocks between different levels and issue areas.<sup>14</sup>
- Supranational features also gain in importance as the number of regimes that are concerned with behind-the-border issues and that specify societal actors as the ultimate addressees grow. In such cases verification problems become more complicated. The more difficult compliance and monitoring become, the greater the need for independent agents to gather and provide reliable information on compliance rates. Hence, many international secretariats have been assigned the task to gather information about rule compliance; at the same time, transnational NGOs like Amnesty International are most active in this area.<sup>15</sup>
- Finally, the growing need for international institutions to gather and distribute impartial knowledge and information on complex international problems also strengthens the trend towards supranational features of international and transnational governance institutions. The conferences and institutes created by the United Nations Environmental Program such as the Intergovernmental Panel for Climate Change are good examples for this development.<sup>16</sup> In such cases, one transnational knowledge network advises many national governments and thus pre-structures national responses in top-down fashion.

As a result of the need for new institutional forms, a dense network of international regulations and organizations of unprecedented quality and quantity has developed. These new international institutions are far more intrusive than conventional international institutions. They can circumvent the resistance of most governments via decision-making and dispute settlement procedures, through the interaction of monitoring agencies with transnational society, and by dominating the process of

knowledge generation in some fields. With the – most often consensual – decision to install international institutions with such features, state parties become subject to a law other than their own, to which they have either not agreed upon (mission creep) or do not agree any more (costly exit option) (see also the contribution of Humrich and Zangl in this volume). Given the extent of the intrusion of these new international institutions into the affairs of national societies, the notion of ‘delegated, and therefore controlled authority’ in the principal-and-agent sense no longer holds.<sup>17</sup> At least in some issue areas, the global level has achieved a certain degree of autonomy and has thus partially replaced the consensus principle of the traditional international system.

### 5.3 TOWARDS A MULTI-LEVEL SYSTEM

The nation state has been characterized by the bundling of different aspects of governance into one political organization. Governance by government has for a long time been possible since one political organization – the territorial state – could provide a complex set of different governance functions. The territorial state, for instance, has the monopoly on the use of force, the ability to collect taxes, the authority to recognize other states and the capability to design policies that reflect the public interest. Kenneth Waltz (1979) therefore pointed out that the traditional interstate political system was internally not characterized by institutionalized functional differentiation. In Waltz’s view, all functional differentiation took place within the state; there was no recognized division of labor between different states. Territorial segmentation was thus the dominant mode of differentiation in the international political system.<sup>18</sup>

However, the challenges of, and responses to, globalization appear to be transforming this Westphalian or national constellation.<sup>19</sup> The new constellation seems to be characterized more by an unbundling of the governance functions of the territorial state and their reassignment to different governance levels. It is therefore based on the interplay between different levels, which in turn is constitutive for the reproduction of each level. In this sense, the interplay of these different levels resembles the logic of a multi-level governance system.<sup>20</sup>

Waltz did not explore the question of whether or not the lack of internal functional differentiation within the political system might also inhibit the external functional differentiation between different subsystems such as economy, law, science, art and so on (see Albert and Buzan 2007 for this point). I would argue that the lack of any functional differentiation in the political system, that is, the lack of any checks and balances and the exclusive focus on power as the decisive means to prevail, leads to a dominance of the political system over other societal systems. Therefore, the lack of functional differentiation in the political system prevented, for a long time, the full-scale development of worldwide societal subsystems along sectoral lines. In this perspective, it is the growing differentiation and interdependence in the political sphere which only allows the development of functional differentiation driven by the inner logic of different subsystems like economy, science, art and law. A functionally differentiated multi-level governance system makes the arbitrary intervention into other societal subsystems much more unlikely than a system of competing, territorially defined political units. Therefore,

functional differentiation within the international political system may be seen as a driver of functional differentiation of the international system as a whole.

I will differentiate between three governance functions in order to elaborate the internal functional differentiation of the international political system.<sup>21</sup>

1. **Decision making and regulation.** Nation states have increasing difficulties in designing unilateral policies or regulations that are of use in attaining governance goals such as security, legal certainty, legitimacy or social welfare. The incongruence of political and social spaces leads systematically to challenges to the effectiveness of national policies (Held 1995; Beck 1997). Governments and other political groups react to these unintended consequences of social change, which were partially encouraged by national policies. The primary response is the formation of international institutions that help to readjust political and social spaces, and thus to regain the effectiveness of policies, either by directly regulating cross-border activities or, more often, by coordinating national decisions on a larger scale. Hence, systems of interest mediation that are restricted to the nation state lose importance, especially since political actors such as national executives who are active on both levels can use their privileged position (Moravcsik 1994; Zürn 1996; Wolf 1999). A secondary response of the more powerful interest groups is therefore to participate directly at the level of international institutions – something that occurs increasingly, as indicated by the rise of transnational governance actors. In this sense, the formulation of policies for most of the issue areas affected by the challenges of globalization has been deferred to levels beyond the nation state.
2. **Implementation and resources.** However, the changes regarding regulation should by no means be read as an indication of the demise of the nation state. First, the developments described here apply only to certain denationalized issue areas; others still follow the logic of the national constellation. Second, and more importantly, it is hard to see how governance goals can be achieved without the nation state even in strongly denationalized issue areas. To put it in terms of functional theories: the increasing inability of an institution to fulfill a function can only be seen as an indicator of its impending extinction if there are rival institutions which can be expected to fulfill all the functions of the old institution more efficiently (Spruyt 1994). For instance, the elimination of the problems relating to global financial markets, organized crime or global environmental risks is hardly conceivable without nation states. Especially for the implementation of policies the nation state seems to be indispensable. This is due to its control of resources based on its legal monopoly on the use of force and its capacity to raise taxes.<sup>22</sup> The high degree of cooperation between governmental agencies and the rise of transgovernmental networks indicates that many governments see their counterparts in other countries less as competitors in a hostile environment than as allies in the search for effective policy implementation and efficient administration.
3. **Acceptance and recognition.** The most complicated and important changes seem to have occurred with regard to recognition. External recognition as a sovereign state, once attained, was, in principle, permanently valid. States disappeared only because of internal developments or brute force from outside, overriding the principle of sovereignty. Nowadays, the recognition of a state increasingly seems to depend

upon its respect for individual rights and freedoms, for which a state can be sued by its citizens before the European Court of Justice and, under certain circumstances, before the European Court of Human Rights. In extreme cases, violations of human rights can even be regarded as justification for intervention – some instances of United Nations involvement, especially in the 1990s, may be seen as cases in point. Moreover, the growing use of international observers on the occasion of national elections indicates a trend towards making critical elections global events (Rosenau 1997, p. 259), and the concept of ‘good governance’ is now also used to evaluate national policies through international institutions like the World Bank (1997). In light of these developments, it seems that the recognition of a state as such now tends to be less a one-shot constitutive act and more the result of permanent legitimacy monitoring. Thomas M. Franck (1992, p. 50) pointed out nearly two decades ago: ‘We are witnessing a sea change in international law, as a result of which the legitimacy of each government someday will be measured definitely by international rules and processes.’

The subject performing this monitoring function today is not only the international society of states, but increasingly also an emergent transnational civil society as well as supranational bodies that act with some autonomy from national governments. Supranational bodies set the standards of behavior and sometimes determine whether deviant state behavior is defensible via quasi-judicial bodies. Transnational society most often provides the relevant information and, in extreme cases or repeated instances of deviant behavior, responds to such outrage. One such response reflecting the indignation of transnational society may be to question the legitimacy of a nation state. Along these lines the former United Nations Secretary General, Kofi Annan, also adopted the perspective that states must serve people. ‘If they fail to do so and permit serious human rights abuses,’ he said, ‘they open themselves to justified intervention by the international community in form of the UN itself.’<sup>23</sup> In this scenario, however, actions of the United Nations depend on an empowerment by the society of states and the transnational society. Taking this notion further, the authority that grants sovereignty, that is, the exclusive right to set or adopt the rules for a given territory, appears to have changed: it is no longer only states, but also transnational groups who are essential in recognizing nation states as legitimate. What seems to be in the process of changing in world politics is thus both the criteria for recognition and the subject with the authority to recognize a state.

In denationalized issue areas, effective and legitimate governance depends on the interplay of different political levels. It often requires transnational recognition of legitimacy, decision making in global forums and the implementation of these decisions at the national level. Global governance thus does not run parallel to other levels of governance: rather, it is constituted by the interplay of different levels and organizations, whereby each level and organization cannot work unilaterally. In this sense, the national constellation has transformed into a post-national entity.

The concept of multi-level governance promises to better grasp the complex arrangements of governing institutions, with or without national governments, than does the notion of sovereign states. In this constellation nation states will not relinquish their resources such as monopoly on the use of force or the right to exact taxes in a given



territory. Nevertheless, while the nation state will play a significant role in multi-level systems of governance, it will no longer be the paramount political institution being able to perform all functions, but only one among others carrying out some of these tasks. Not only will policy formulation in most denationalized issue areas be transferred from the nation state to loci beyond it, but legitimacy will also no longer be conferred solely by nation states (externally) and national societies (internally). To a greater extent than ever before, transnational society and international institutions will play a decisive role in the recognition of nation states. The concrete mode of politics within such a polity can still vary greatly as it does among and within nation states.<sup>24</sup> In any case, political systems themselves will become functionally differentiated in the post-national constellation, and it is likely that the convergence of different governance dimensions in one political organization will come to an end. In this sense, most politics in a globalized world will become multi-level politics.

#### 5.4 FEATURES OF THE GLOBAL MULTI-LEVEL GOVERNANCE SYSTEM

If global governance is to be seen as a form of multi-level governance, it is necessary to distinguish it from other multi-level systems. What is special about global governance? How does global governance differ from federal systems? There are many features according to which a multi-level governance system can be described and categorized. In the Introduction to this handbook, we have identified some of them (see also Hooghe and Marks, Chapter 1 in this volume). For the purposes of the argument in this chapter, two distinctions are especially important, which are used to build a typology of multi-level governance systems. The aim here is to identify those features of global governance that would qualify it as multi-level governance system.

First, Fritz W. Scharpf (2009) distinguishes different multi-level systems on the basis of their authority relationships.<sup>25</sup> In every governance structure, there is a basic authority-exchange relationship. On the one hand, individuals and societal actors transfer legitimacy to decision makers who must publicly justify their decisions; in return they receive a general public willingness to accept these decisions. On the other hand, the decision makers have to implement these decisions by using laws, incentives, programs or even coercion; this thus requires interaction with the societal addressees of the decision. From this perspective, any multi-level governance system consists of at least three components: the higher level, the level of constituent member organizations, and the individuals and societal actors who are affected by the decisions. While within a unitary nation state the national government directly regulates societal actors and societal actors transfer legitimacy to the national government, this relationship is at least partially mediated by actors in between levels in a multi-level governance system.

In addition to the authority relationships, multi-level governance systems may be categorized by the location at which the coordination of different policies and societal subsystems takes place. Governance is more than the sum of all regulation. It also involves the coordination of different policies which have been formulated on the same level or at different levels. Coordination takes place via formal procedures on the side of decision makers, for instance, via cabinet rules or supreme courts, and through public

debate on the side of the addressees of a regulation. The term ‘public’ implies that an exchange of opinions takes place, and that views and positions are not just issued, but that a discourse among competing claims occurs. One may distinguish further between broad publics referring to an ideal-typical democratic discourse among citizens of a given political system, which is mediated through mainly newspapers, radio and television. Broad publics often debate about conflicting goals and thus about the coordination of different sectors. Sectoral publics, in turn, comprise formal and informal groups generated through functional differentiation, which devote themselves to specific issues. Here, the medium of interaction is often the Internet, specialized press, or personal exchanges or communications at conferences and meetings (Zürn and Neyer 2005, p. 201). Sectoral publics by definition are not able to mediate intersectoral conflicts.

On the basis of these distinctions, a first group of multi-level systems is defined by the existence of at least one direct authority relationship between the regulatory center and societal actors. This is typical for multi-level governance systems within the nation state, usually combined with the federal level granted a monopoly over the use of force. Within this group one can further distinguish between dual federal and unitary federal systems (Scharpf 2009, p. 252). In dual federalist systems, there are some issue or policy areas which are the exclusive domain of the federal government; in others the state members of the federal system can act independently. While in some issue areas such as foreign policy the individuals are directly connected to the central level in terms of both decisions and implementation, on the one hand, and acceptance of those decisions, on the other, the same applies to the regional level in other issue areas, most prominently in the field of education, for example in Germany. In dualist federal systems, two completely developed governance systems operate – at least in the ideal world – in parallel.<sup>26</sup> They take full responsibility for their policy fields. Therefore, effective mechanisms of policy coordination including supreme courts and broad public exchanges about what general policy direction is right or wrong can be found on both levels.

In a unitary federal system, the situation is different. The individual and societal actors transfer legitimacy to the center, yet the center uses decentralized governance levels for the implementation of their policies. Most of the policy coordination takes place at the central level. This is also true for broad public debates and political discourse in general. Typically, even regional elections are mostly determined by issues contested at the central level.

In a second group of multi-level systems, the higher level of governance is almost completely dissociated from the societal addressees of regulations. These multi-level governance systems have mainly developed beyond the nation state and do not contain a centralized power structure with a monopoly on the use of force at the higher level. In these systems, societal actors confer legitimacy to constituent members of the system, which interact with each other to constitute the higher level beyond the nation state. In return, almost any decision taken at the higher level needs to be organized and implemented through the lower levels. Citizens of nation states therefore rarely have direct contact with the higher levels of multi-level governance systems which reach beyond the nation state.<sup>27</sup> Again, two subtypes can be distinguished. On the one hand, multi-level governance systems which reach beyond the nation state can have the features which Liesbet Hooghe and Gary Marks (see Chapter 1 in this volume) characterize as MLG Type I. This describes a multi-issue-area governance arrangement with a limited number

of non-overlapping jurisdictional boundaries at a limited number of levels. Such a governance structure follows a system-wide architecture which is relatively stable and clearly public in character. Whereas broad public debate is possible, such debates occur most frequently at the constituent member level and are therefore often fragmented. They nevertheless provide for some policy coordination as an expression of some minimal sense of a polity. However, sectoral publics can emerge at the higher level. One can label such systems – of which the European Union is the most relevant, if not the only, example – as post-national multi-level polities.<sup>28</sup>

In contrast, MLG Type II describes a complex and fluid patchwork of overlapping jurisdictions. In these cases, each issue area has developed its own norms and rules, and the membership varies from issue area to issue area. Debates and discourses take place almost exclusively within sectoral publics. Nevertheless, the interrelationship between the different issue areas becomes denser and frequently takes place informally on different levels and in different spheres but, at the same time, it has not been strongly constitutionalized. One may label such governance arrangements sectoral multi-level regimes and the emergent system as a global multi-level governance system or just global governance. The sum and interplay of many of these multi-level regimes constitutes the global governance structure.

These distinctions lead to the following typology of MLG systems (see also Scharpf 2009).

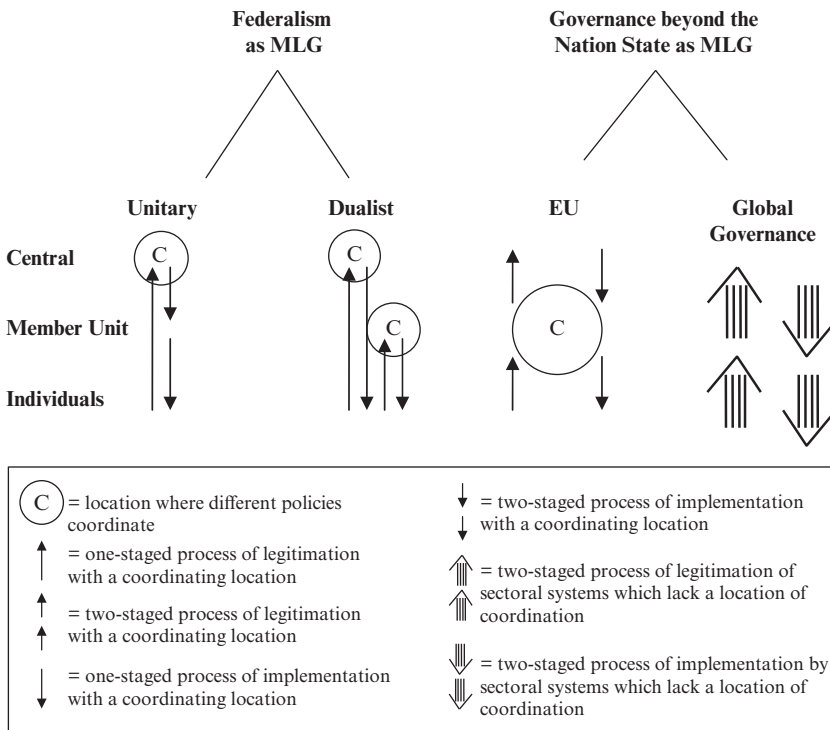


Figure 5.1 *MLG systems*

## 5.5 THE LIMITS OF THE GLOBAL MULTI-LEVEL GOVERNANCE SYSTEM

Can we derive any testable conjectures from this typology? If so, what do they tell us about the working of the global multi-level governance system? Do they contain good news? Will global governance deliver the goods? There are a number of reasons to be skeptical about this. To begin with, the above sketch of a global multi-level governance system is based on an extrapolation of current trends. While multi-level systems of governance may be functional to some extent, the transition from 'national equilibrium' to 'global multi-level equilibrium' may entail problems and disadvantages, with no guarantee that a new and workable equilibrium will ever be reached. More importantly, the global multi-level governance system, even when fully developed, displays some systematic weaknesses. These weaknesses relate to the two-step authority relationship and the absence of a location to coordinate the different fields of regulation.

The first component of the two-step authority relationship denotes the functional differentiation between decisions made on the global level, which are implemented on the constituent member level through the administration, and the resources of the territorial member state. From these features of the global multi-level governance system we can derive two implications. On the one hand, the global multi-level governance system is able to create significant levels of compliance by constituent units and individuals, with regulations agreed upon at the higher level. On the other hand, compared to other multi-level systems, it is to be expected that the possibility of non-compliance will remain a permanent problem in such a system.

The decoupling of the level of decision making from the level that controls resources for implementation of these decisions raises the question about the independence of the levels beyond the nation state. Is it not the capacity for the enforcement of norms and rules that is decisive? The traditional view is indeed that high rates of compliance with regulations depend to a significant extent on an agent that can enforce those rules through a superior availability of material resources. Many consider the legitimate monopoly on the use of force even as a prerequisite for the existence of law at all (Kelsen 1966; Koskeniemi 2002; Chapter 6). This stance has been shown, however, to be empirically unwarranted. Good reasons can be advanced for the position that the traditional linkage of governance to a sanction-endowed, superordinate central body derives more from our traditional, retrogressive nation state view than from an analysis of post-national systems.

To begin with, law-like rules have a compliance pull of their own. It is therefore possible to envision beyond the nation state a community of law (*Rechtsgemeinschaft*) without a community of enforcement (*Zwangsgemeinschaft*), to use this early characterization of the European Union by Walter Hallstein.<sup>29</sup> In addition, 'good governance' can often increase compliance with regulations without having to resort to enforcement at all. Moreover, compliance can be induced by a number of institutional features short of enforcement (see Chayes and Chayes 1995) since non-compliance by nation states is not always the result of deliberate cheating. Finally, the preference for hierarchical enforcement does not take into account the possibility of horizontal, reciprocal compulsion deriving from social interdependence. The European Union experience over the last decade has made it clear that governance with significant rule compliance is, in certain

circumstances, possible even without a force-equipped, hierarchically superior agent. In other words, the horizontalization of governance can be accompanied by a horizontalization of enforcement (Zürn and Wolf 1999). In rare instances, legitimate monopoly on the use of force can also be replaced by a hegemonic power distribution, in which one member state or a small group of member states has the resources and the authority to generate rule compliance as well as the willingness to do so.

Whereas the view that high rates of compliance are an absolute prerequisite for reliable social regulation has been shown as too extreme, the generation of compliance nevertheless remains a systematic problem for global multi-level governance systems. All of the alternatives mentioned for ensuring compliance depend on specific scope conditions. In the case of alternative mechanisms, such as legalization, legitimacy and compliance management, compliance depends on the willingness of a non-compliant actor to be responsive to good reason and concerns of legitimacy. In cases of non-hierarchical enforcement mechanisms, the enforcing actors need to be willing to bear the costs of enforcement, and the addressees of sanctioning and blaming need to be vulnerable to such strategies. Obviously these conditions do not always hold. As a result global multi-level governance systems are inherently selective vis-à-vis the implementation of norms and rules. This violates the fundamental notion of normative equality, according to which like cases should be treated alike, and thus undermines the social acceptance for such an order significantly (Zürn and Joerges 2005).

The second component of the two-step authority relationship refers to the delegation chain in global multi-level regimes. The individuals and societal groups which are most often the targets of regulation delegate the preparation of directives, justified on the grounds of the common good, to the level of the constituent member. Member states in turn delegate the authority further to the global level. Again, at least two potentially testable propositions follow from this feature of the global multi-level governance system. First, as a response to this lack of direct legitimation, global multi-level regimes tend to be increasingly inclusive in terms of participation and quite consensus oriented in terms of decision making. Second, as a result of this, global multi-level regimes tend to move slowly and are not able to take decisions vis-à-vis a strong minority. In other words, the responsiveness of multi-level regimes is not very high.

As long as the intergovernmental level was restricted to merely coordinating policies, requiring the consent of each member state, the two-staged process of legitimation was no problem. The decisions taken on the level beyond the constituent members were legitimated through the legitimacy of their representatives. With the rise of a multi-level system and the autonomy of the global level undermining the consensus principle, this has changed. There is an increasing need to legitimate decisions more directly in order to make the two-step authority relationship viable.

Free elections, discursive will formation, party systems favoring those parties that represent a broad range of interests and majority decision making are mechanisms that made political participation of broad segments of the public possible in the territorial state and through which legitimacy was transferred to the central decision bodies. Only through these mechanisms was it possible to strengthen and broaden the public interest orientation of democratic nation states during the nineteenth and twentieth centuries. Not only are such mechanisms lacking beyond the nation state – the level where most policies are formulated in multi-level systems of governance – they also seem to be partially

dependent on socio-cultural prerequisites such as political community identity (see Dahl 1994; Kielmansegg 1996; Miller 2006). Whereas it seems premature to categorically rule out transnational political communities, it can safely be said that they have not unfolded to their fullest extent.<sup>30</sup> Broad political debates about political principles and the general direction a society ought to take occur only on the constituent member level. On the level beyond the nation state, at best sectoral or issue-area-specific publics arise.

Global multi-level regimes respond to this problem by developing two mechanisms. On the one hand, the roles of NGOs – that is, societal groups influencing international decisions directly by arguing mainly in terms of the global common good (as opposed to member interests) – is growing. The rise in the numbers of NGOs is dramatic,<sup>31</sup> and their influence has grown in many global issue areas such as environment, trade and security.<sup>32</sup> NGOs are an important element of sectoral publics, which help to connect the global level of regulation with the addressees of the regulations in the constituent members.

On the other hand, decision making in global networks often emphasizes consensus to an extent which goes further than formal procedures require. Even when majority decisions are possible, real-world negotiations seek consensus. Adjudication mechanisms also take great care to hear all addressees and to strike compromise if possible. There are very few direct interventions at the global level without prior consultation at the constituent member level. In this sense, the system is more autonomy preserving than some formal rules seem to suggest.<sup>33</sup>

However, this comes at a cost. Given this inclusive and consensual orientation of multi-level arrangements, it can be expected that global multi-level systems will be less majoritarian and less controlled by public interests than was possible in the national constellation. Moreover, redistributive and strongly interventionist policies will be more scarce, and policies will rely more heavily on market-compatible instruments and private agencies, since it is thus easier to achieve consensus on disputed issues (Leibfried and Pierson 1995; Streeck 1995; Scharpf 1996). This means global multi-level regimes tend to be slow and are hardly able to take decisive steps.

The lack of a central place for the coordination of different policies points to a third structural deficiency in the global multi-level governance system. We can again derive two expectations from this feature. On the one hand, global multi-level governance seeks to develop functional equivalents to the central coordination mechanisms of the nation state. On the other hand, given the structural features of the system, these functional equivalents are primarily the result of emergent processes and lack accountability.

There is no world government with a head of government who is responsible for coordination. Moreover, one of the major functions of a broad public – namely, to decide in cases of goal conflicts between different sectors such as growth and clean environment, or security and freedom – cannot be fulfilled by sectoral publics which, by definition, are tied exclusively to either growth, environmental protection, security or freedom. Given the functional and to some extent technocratic limits of such sectoral publics, there is a tendency to neglect the effects of regulations on other societal subsystems which are not part of the decision networks.

Therefore, the global multi-level governance system has produced some substitutes. There are international institutions which sometimes seem to play the role of a coordinating agent for all policies. The United Nations Security Council in particular has aspired to such a role vis-à-vis the goals of peace and human rights protection. Also,

the G8 and increasingly the G20 seem to define themselves by giving other international institutions a sense of direction and by taking up those pressing issues which are not sufficiently dealt with by existing international institutions. These attempts, however, have remained limited. Moreover, they generate resistance on the side of many other actors, because membership in these institutions is not only restricted, but also highly exclusive. The members of these institutions are self-nominated in the role as coordinator. These institutions therefore lack a broad mandate to fulfill the role of global governance coordination. The rise of transnational and national dispute settlement bodies points as well to the lack of coordination in the global multi-level governance system. While such adjudicatory bodies still rarely mediate between different global subsystems, they play an important role in the coordination between the global and the national level. The quantitative rise of such dispute settlement bodies indicates the growing autonomy of the global level, but also the lack of coordination between different sectors of the global level.

All three mechanisms available for coordination between different sectors – the United Nations Security Council, the G8/20 and the dispute settlement bodies – share two features. First, they are completely detached from societies. There are no formal and hardly any informal channels available through which societal actors can make these institutions responsive to their demands. Moreover, these institutions were in the first place not created for the purpose of coordination. They are probably the most emergent elements of an emergent order. Global governance therefore is troubled by a strange lack of subjects: something happens, but no one has done it (Offe 2008). If no one governs, however, no one can be made responsible. This lack of accountability of the global multi-level governance system is another source for the systematic deficit in the ability to gain social acceptance.

## 5.6 CONCLUSIONS

Global governance can be described as a multi-level governance system. The global level contains a sufficient degree of autonomy, and the interaction between levels is functionally differentiated. In this way, the rise of a global multi-level governance system seems to be the logical response to the process of societal denationalization. The advantages of such a governance system have not been systematically explored in this chapter, because they do not seem to differ much from those of federal systems. In the age of globalization, the logic of a multi-level polity is shifted to the level beyond the nation state. It connects domestic governance levels with levels of governance that lie beyond sovereign nation states, and thus has the potential to provide effective and legitimate policies in the age of globalization. It facilitates dual responses to both globalizing and localizing trends, and therefore respects the fact that while problems are global, political participation remains essentially local. The global multi-level governance system also permits more competition between different institutions as a means to finding the best solution to problems. By maintaining room for maneuver on the lower levels of governance, there is always the possibility to compare the success of different policies and to find different ways to implement central principles. The global multi-level governance system does not follow a rigid design. It is the emergent result of a permanently adaptive process between the different

levels, seeking at the same time the strengthening of central and local institutions. Given these advantages, multi-level governance arrangements seem to be without alternative and represent therefore the decisive component of the post-national constellation.

In this chapter, I have tried to identify the construction principles of the global multi-level governance system by comparing it to other multi-level systems in order to identify its specifics. It is those specific features – the lack of direct relationships between the higher level and the societies of the constituent members, and the lack of a location for the coordination of the policies – which cause the major deficits in global governance, namely, compliance problems, legitimacy problems and unrestricted sectoral externalities. Two questions follow from this directly: do these observations reflect structural deficits in multi-level systems of governance, or do they represent problems of transformation? And what can be done about this? Being skeptical about structural explanations and believing in the importance of social reflectivity, I tend to believe that civil society and public interests will in the long run find ways to bind multi-level governance more closely to the attainment of the common good. There are increasing signs that the institutions of the multi-level governance system are becoming politicized (see Zürn and Ecker-Ehrhardt 2009). People and societal actors are beginning to bring transnational and international issues into the public realm, which were previously handled by mainly administrative or technocratic bodies. International institutions are confronted with more societal resistance than ever, but they are also used more often by interest groups and non-governmental institutions. They are increasingly judged by political criteria such as legitimacy and fairness, in addition to efficiency and functionality – the yardstick of international affairs so far. In this sense, history is, as it always has been, open. If so, one of the most important tasks will certainly be to investigate the ways in which and the extent to which new ideas and intelligent institutional designs can be developed that help to avoid the inadequate attainment of governance goals in global multi-level governance systems.

## NOTES

1. I want to thank Matthias Albert, Xinjuan Dai, Markus Jachtenfuchs, Fritz W. Scharpf, Thomas Rixen and especially Sonja Wälti for most helpful comments on an earlier draft.
2. Rosenau (1992). See also Kohler-Koch (1993), Mayer et al. (1993) and Young (1994).
3. See Young (1978) for arguments why a world state is neither possible nor desirable. See Wendt (2003) for an argument that challenges this point of view. Albert and Stichweh (2007) and Albert and Schmalz-Bruns (2009) want to redeem the term ‘world statehood’ for emergent polities on the global level which look different from territorial states.
4. See Krasner (1983, p. 3). See also Rittberger (1993) and Levy et al. (1995) for further elaborations on the definition of international regimes.
5. The distinction between international regimes and international networks is similar to the one drawn by Mayntz (1996) between networks for the management of ad hoc problems and institutions for the regulation of recurring problems.
6. The formal term is international governmental organizations (IGOs), as opposed to transnational non-governmental organizations (NGOs). The latter consist of any kind of professional association, for instance, the International Political Science Association, and also profit-seeking NGOs, that is, multinational enterprises.
7. See the data from the Union of International Associations that indicate a rise in the number of conventional NGOs from 5121 in 1996 to 7306 in 2005/06 (UIA 2009).
8. The concept of multi-level governance was developed in the context of the European Union. See Marks



- et al. (1996) and Jachtenfuchs and Kohler-Koch (1996) as the two most important early statements of the concept.
9. The feature that the institutions beyond the nation state need before I assign them the status of a 'level of its own' is described as 'powers' in the theory of federalism (see the contribution to federalism in this volume by Geys and Konrad). In the principal-agent theory the relevant term is 'autonomy.' For an overview see Hawkins et al. (2006).
  10. See Krasner's (1988) distinction of different types of sovereignty.
  11. Keohane and Nye (2002, p. 226) have used the term 'club model' to describe the procedural element of this system.
  12. These figures derive from United Nations Treaty Collection (UNTC 2009), 'Overview. Databases: status of multilateral treaties deposited with the Secretary-General,' <http://untreaty.un.org/English/overview.asp> (accessed August 2009). The text here refers to a series of regularly updated publications, 'Multilateral treaties deposited with the Secretary-General,' which includes all of those instruments formally submitted to the Secretary-General, reflecting their status as regards, inter alia, signatures, ratification, reservations or objections.
  13. Judicial, quasi-judicial and dispute settlement bodies have grown from about 20 in 1960 to about 80 today (Simmons 2009).
  14. Nowadays, roughly two-thirds of the international organizations with major power participation entail majority or qualified majority voting (Blake and Payton 2008). A similar picture emerges with respect to international environmental regimes (See Breitmeier et al. 2006). See also Murphy (1994) for a long-term perspective on the development of voting rules in international organizations.
  15. It is fair to say that a certain share of NGOs are exclusively or mainly concerned with the monitoring of international norms. Therefore, the rise in the number of NGOs indicates a rise of monitoring agencies. See especially Dai (2007) for an insightful elaboration of monitoring issues.
  16. See Biermann and Pattberg (2008) for an overview.
  17. See also Hafel and Thompson (2008) who define the independence of international organizations as the absence of complete control by other actors and consider autonomy, together with neutrality and delegation of authority, as constitutive elements.
  18. See Waltz (1979, p. 97); see also Albert and Buzan (2007).
  19. See Habermas (1988) and Zürn (1998). Zangl and Zürn (2003, p. 149) define the national constellation through the bundling of all relevant governance functions in one unit (see also Leibfried and Zürn 2005).
  20. It should be added that this focus on functional differentiation does not preclude the persistence – and even possibly the accentuation – of stratified differentiation between different territorial states (see Zürn 2007).
  21. See the work of the Bremen research group on transformations of the state (Genschel and Zangl 2008). See also Zürn (1999) and Schuppert (2005).
  22. Even in this respect, however, some notable changes have taken place (Genschel and Zangl 2008).
  23. 'People first,' *Financial Times*, 22 September 1999, p. 13.
  24. See Helen Wallace (1999) for a very useful distinction between five modes of policy development in the European Union, based on the relative importance of major actors, on the one hand, and the kind of policy in question, on the other.
  25. 'Authority relationship' is an attempt to translate the Weberian term "*Herrschaftsverhältnisse*." Authority in this sense is different from mere power or domination in that it involves an expectation on the part of the decision maker that those affected by a decision they make will obey it. This requires, therefore, that the decision maker be recognized as legitimate to some extent by the persons impacted by their decisions.
  26. If the levels of dualist federalist systems would function completely independently – which never happens in the real world – it would not be, according to our definition, multi-level governance, since both levels would work independently of each other.
  27. There are, however, notable exceptions to this rule such as the international administration of war-torn societies (see Heupel 2009) and the International Criminal Court of Justice (Deitelhoff 2006).
  28. These elements of MLG Type I are used by Mayntz (2001) to argue that the European Union differs fundamentally from global governance. See also Tömmel (2008).
  29. See the discussion of these concepts in von Bogandy (1999, p. 53).
  30. See Zürn (2000) for an argument along these lines and for further references.
  31. According to the UIA (2009) the total number of NGOs rose from 36054 in 1996 to 51 509 in 2005/06 (see note 7).
  32. See, for example, Joachim (2001) on human rights, Price (1998) on security, and Betsill and Corell (2001) on the environment.
  33. The famous comitology in the European Union highlights this point. In conjunction with more formal

European Union decision making, a parallel apparatus has developed, which assures the participation of the member states in the implementation process (Joerges and Neyer 1997; Huster 2008).

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## PART II

# MULTI-LEVEL GOVERNANCE IN THE DOMESTIC CONTEXT



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## 6 Subnational participation in national decisions: the role of second chambers

*Wilfried Swenden*

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Second chambers have been among the most frequently described institutions of federal government. They are said to represent subnational interests (interests of the states, provinces, Länder, cantons, Autonomous Communities, Regions and Communities, Republics or oblasts) in decision-making at the national level. In the current context of multi-level governance, a growing number of policies cross-cut across levels (vertical entanglement) and policy sectors (horizontal entanglement). For instance, regulations to combat climate change cross-cut various ministerial departments (agriculture, environment, energy, transport, housing, finance) and levels of government (global, European, national, regional, local). In this chapter, we are only interested in the latter type, that is, vertical coordination, with a special focus on patterns of state – sub-state (but supra-local) coordination. For instance, in climate change policy, the national level may play a key role in determining the appropriate national environmental targets and in representing its interests in supranational or global forums. However, it may not be able to reach these targets without the cooperation of subnational actors who are responsible for implementing them. Therefore, involving the latter in the process of setting climate change regulations is crucial if the state is to reach its objectives and fulfil its international commitments. Second chambers could be the structural or institutional intergovernmental device in which vertically joined-up policies such as climate change regulations are discussed and decided upon.

The key objectives of this chapter are (a) to provide an overview of the diversity of second chambers in terms of their composition and powers and (b) to consider the extent to which these features contribute to second chambers that are effectively representing subnational interests in policies of mutual central-regional concern. The chapter is divided into four sections. In Section 6.1, I briefly demonstrate the clear connection between federalism and second chambers. In Section 6.2, I provide an overview of second chambers based on two key criteria: composition and powers. In Section 6.3, I demonstrate how both of these criteria affect the role of second chambers as channels of subnational representation in national decision-making. The final section considers other institutional arrangements that could complement or substitute second chambers in their role of subnational representation.

### 6.1 FEDERALISM AND SECOND CHAMBERS

In 2000, 66 states possessed a bicameral national legislature (Russell 2000, p. 25). Not all of these states are democracies and only a minority of them are federal democracies. Yet the relationship between federalism and bicameralism is a strong one. As Table 6.1



*Table 6.1 The relationship between federalism and bicameralism*

	Federal Democracies		Non-Federal Democracies	
Unicameral Legislatures			Costa Rica	Luxembourg
			Denmark	Malta
			Finland	Mauritius
			Greece	New Zealand
			Hungary	Norway
			Iceland	Papua New
			Israel	Guinea
			Latvia	Portugal
			Lithuania	Slovakia
				Sweden
	Bicameral Legislatures	Argentina	India	Bahamas
Australia		Russia	Barbados	Jamaica
Austria		Spain	Botswana	Japan
Belgium		Switzerland	Colombia	The
Brazil		USA	Czech	Netherlands
Canada			Republic	Poland
Germany			France	Trinidad
			Ireland	UK

*Source:* Swenden (2004), p. 26.

demonstrates there is not a single federal democracy without a second chamber, whereas unitary states (particularly when they are relatively small) frequently adopt a unicameral structure (Lijphart 1999, pp. 200–215).

The strong relationship between federalism and bicameralism corresponds with the role federal theory attributes to second chambers in a multi-layered state. For instance, motivating the then still indirectly elected nature of the US Senate by state legislators, James Madison argued that the Senate would be able to give ‘state governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two [federal and state] systems’ (Federalist No. 62, p. 317). More recently, Smiley and Watts conceived of second chambers as one important mechanism of ‘intra-state federalism’. By this they mean a set of ‘devices and processes through which subnational interests are channelled into the operations of central government’ (Smiley and Watts 1985, p. xv). In other words, second chambers (may) give subnational actors (or their representatives) the ability to participate in federal decision-making on matters of subnational concern (Russell 2001).

Arguably federations that emerged from a ‘coming together’ of previously sovereign states expressed the strongest desire to have such mechanisms in place and phrased this as a precondition to pool or transfer sovereignty to a newly created federal state (Stepan 2001). Yet, it follows from Smiley and Watts’s definition that the need to establish mechanisms of intrastate federalism will be higher, the more the activities of the centre impinge on subnational interests. When the first federal second chambers emerged, federal centres tended to provide a limited set of tasks (national defence, national currency,

foreign affairs, customs or excise). Today, most federal governments assume more important functions: often they raise the largest share of income, provide social security, set out a regulatory framework in policy areas which generate high levels of externalities (such as the environment or energy) or spend heavily on health or education. Sometimes these activities may directly encroach upon the domain of constitutionally allocated subnational competencies. Subnational governments which rely on federal income resources for half of their revenue or more, or which implement federal legislation as ‘agents’ of the federation will prefer to be involved in federal decisions that determine how much money will come their way or which federal policies they are expected to implement.

As the Introduction to this volume made clear, in today’s complex environments all federal systems have grown away (albeit to varying degrees) from dual federalism. ‘Marble cake’, ‘co-operative’ or even ‘organic’ have been listed as adjectives to capture the higher levels of interdependence between the centre and the subnational levels of government characterizing most contemporary federations (see Grodzins 1966; Sawyer 1976; Watts 1999; Hueglin and Fenna 2006, pp. 145–78). Yet, a growing interdependence between levels could generate a process of centralization when the intrusion of the federal government in subnational policies is not offset by a strengthening of subnational influence in decision-making at the centre. However, do second chambers live up to their expected role of subnational representation at the centre?

The key argument of this chapter is that the extent to which second chambers effectively engage in subnational representation depends on whether their members have the ability (powers) and incentives to advance interests that are either linked to the subnational constituents whom they represent or to the collective, fiscal or administrative interests of a subnational (branch) of government with whom they can be associated. A first step therefore is to look at two classic variables on the basis of which bicameral legislatures are typically classified: composition and powers.

## 6.2 THE STRENGTH OF BICAMERALISM IN FEDERAL DEMOCRACIES

Although all federal democracies have a bicameral legislature, federal second chambers vary significantly in how they are composed and in the type of powers which they possess. Combining both variables, Lijphart has distinguished between strong and weak bicameralism. A bicameral system is strong when both chambers are composed on distinct principles yet share roughly equal powers (Lijphart 1999, pp. 200–215).

There are several ways in which a second chamber can distinguish itself in compositional terms from the lower house. In general, lower houses are directly elected and tend to respect the principle of ‘one person, one vote’ (yet, see Samuels and Snyder 2001, p. 661 for some exceptions). By comparison, the election or renewal of the second chamber may not coincide with that of the lower house, its members may serve different (usually longer) terms, different age requirements may apply and membership renewal of the second chamber may take on a ‘staggered’ character. Furthermore, elections to the second chamber may be held on the basis of a different electoral system. In addition, representation in the second chamber may not follow the principle of one person one vote, but favour the smaller subunits (in the extreme case by providing equal representation

for each subunit irrespective of its demographic size in the federation; alternatively by over-representing the smaller units, yet not at the level of equal subnational representation (Stepan and Swenden 1997; Samuels and Snyder 2001; Stepan 2001, p. 344). Finally, several second chambers are indirectly elected, for instance, by (and from within) the subnational legislatures or executives; a few of them are even appointed by the federal prime minister or government.

For bicameralism to be strong, the second chamber must have roughly the same powers as the lower house. Yet, in reality few second chambers are as powerful as the corresponding lower house. For instance, not all second chambers can introduce or amend legislation, veto legislation, convene a bicameral mediation committee, amend or veto budget of finance bills, determine their own agenda or decide on who will chair its committees. Similarly, not all second chambers are involved in amending the constitution, endorsing treaties or selecting high public officers such as ambassadors or members of the Constitutional Court.

When mapping bicameral strength for the countries that were listed in Table 6.1, we find that strong bicameralism is more likely to appear in federal democracies (as expected) but also that only half of the 12 federal democracies listed in that table have a strong bicameral legislature. Indeed, Table 6.2 summarizes the strength of bicameral legislatures based on their compositional distinctiveness and powers (in relation to the corresponding lower houses).<sup>1</sup> Bicameralism is strong in Australia, Argentina, Brazil, Germany, USA and Switzerland, but much weaker in Austria, Belgium, Canada, India, Russia and Spain (Swenden 2004, p. 39).

Table 6.2 also lists the 'regime type' of the political system in which the bicameral legislature is embedded. It is clear that all weak bicameral legislatures are nested in parliamentary federations. Conversely, with the exception of the Australian and German (and Swiss) bicameral legislatures, strong bicameralism is confined to presidential systems of government. Even the powers of the Australian and German second chambers are weaker in relation to their corresponding lower houses than that of the other second chambers listed among the group of strong bicameralism.

The association between parliamentarism and weak bicameralism follows from the mutual dependence between cabinet or 'government' and legislature that characterizes a parliamentary regime (Müller et al 2004, pp. 3–32). A prime minister and cabinet are politically accountable to any majority of members of parliament, with a risk of being outvoted by the latter through an ordinary or constructive vote of no confidence. By comparison, in a presidential system, the president and legislators are elected in separate elections and each of them serves fixed terms. The president cannot be removed from office, except by Impeachment; the legislature cannot normally be dissolved by the president (Lijphart 1992).

The choice between parliamentarism and presidentialism has important implications for the design and strength of bicameralism. In a presidential system, two distinctively composed but equally powerful legislative chambers do not raise a problem of accountability because the president should not be held responsible to the legislature in the way in which a parliamentary executive requires the support of a legislative majority. As a result, both houses of a presidential legislature can be equally powerful since there is no clear 'institutional' rationale for why the second chamber should be made inferior to the lower house in terms of its legislative or budgetary powers. In practice, presidential

Table 6.2 Bicameral strength in the most important federal democracies

Second Chamber/ Regime Type	Composition	Powers	Bicameral Strength	Significance from the Viewpoint of Subnational Representation
US Senate <i>Presidential</i>	Directly elected Equal state representation <i>Distinctiveness: Moderate</i>	Co-equal (but money bills introduced in lower house) Superior role in approval Treaties + executive or judicial nominations <i>Bicameral Symmetry</i>	High	Moderate
Brazilian Senate <i>Presidential</i>	Directly elected (by simple plurality) Equal state representation <i>Distinctiveness: High</i>	Co-equal + executive or judicial nominations <i>Bicameral Symmetry</i>	High	High
Argentinian Senate <i>Presidential</i>	Directly elected (in part by PR) Equal state representation <i>Distinctiveness: High</i>	Money bills introduced in lower house Co-equal, originating house of legislation takes final decision but requires (2/3 or absolute) majority to overturn opinion non-originating chamber + executive or judicial nominations <i>Bicameral Symmetry</i>	High	High
Swiss <i>Ständerat</i> <i>Hybrid</i>	Directly elected (by plurality vote) Equal state representation (except for half-cantons) <i>Distinctiveness: High</i>	Money bills introduced in lower house Bicameral disagreements require conference committee meeting and subsequent vote by each chamber <i>Bicameral Symmetry</i>	High	Moderate

Table 6.2 (continued)

Second Chamber/ Regime Type	Composition	Powers	Bicameral Strength	Significance from the Viewpoint of Subnational Representation
Australian Senate <i>Parliamentary</i>	Directly elected (by PR) Equal state representation (lower representation for territories) <i>Distinctiveness: High</i>	Money bills introduced in lower house, but appropriation bills can be vetoed by Senate Navette + possibility of joint dissolution to sort out bicameral disagreements <i>Moderate Bicameral Asymmetry</i>	High	Low-Moderate
German Bundesrat <i>Parliamentary</i>	Indirectly elected (regional executives) Weighted state representation <i>Distinctiveness: High</i>	No vote of confidence + suspensive veto against federal appropriation bills Absolute veto in approximately 55 per cent of legislation Concertation Committee to sort out Bicameral disagreements + subsequent vote by each chamber <i>Moderate Bicameral Asymmetry</i>	High	Moderate-High
Indian Rajya Sabha <i>Parliamentary</i>	Indirectly elected (regional legislatures) Weighted state representation <i>Distinctiveness High</i>	No votes of confidence in government No right to amend or introduce money bills (only pass on comments) Right to amend other bills, but disagreements are decided by majority vote in joint sitting	Moderately Strong	Moderate

Table 6.2 (continued)

Second Chamber/ Regime Type	Composition	Powers	Bicameral Strength	Significance from the Viewpoint of Subnational Representation
Canadian Senate <i>Parliamentary</i>	Appointed by Governor General (in practice Canadian Prime Minister) Representation by 'Region' <i>Distinctiveness High</i>	(in which more populous lower house dominates) <i>Bicameral Asymmetry</i> Money bills introduced in lower house, Senate can amend but not increase money bills sent up from lower house Veto right in other matters <i>Moderate Bicameral Asymmetry; however, powers largely unused due to legitimacy deficit</i>	'High' (de facto Low, due to constrained or almost unused powers)	Low
Russian Federation Council <i>Semil 'Super' Presidential</i>	Equal state representation, one delegated by regional executive, the other by subnational legislature <i>Distinctiveness: High (de facto, lower due to presidential grip on nominations)*</i>	No votes of confidence in government Veto right constrained to matters affecting state-regional relations + suspensive veto in other matters <i>Moderate Bicameral Asymmetry</i>	Moderately Strong	Moderate
Belgian Senate <i>Parliamentary</i>	40/71 directly elected simultaneous with lower house 21/71 indirectly elected from within regional (Community) parliaments 10 co-opted by directly and indirectly elected senators	No votes of confidence in government No votes on budget Veto right in constitutional matters, constitutional laws (requiring special majorities) and generally one third	Weak	Low

Table 6.2 (continued)

Second Chamber/ Regime Type	Composition	Powers	Bicameral Strength	Significance from the Viewpoint of Subnational Representation
Spanish Senate <i>Parliamentary</i>	(+ senators by right: sons/daughters of the ruling monarch) Mostly proportional subnational representation <i>Distinctiveness: Low</i> 208, directly elected simultaneous with lower house 49 appointed by and from within regional parliaments <i>Distinctiveness: Low</i>	of federal legislation Suspensive veto right in other matters <i>Moderate Bicameral Asymmetry</i>  No votes of confidence in government and statewide budget Veto right in constitutional matters, state of emergency or approving coercive measures against subnational government acting against Spanish national interest Suspensive veto right in other matters <i>High Bicameral Asymmetry</i>	Weak	Low
Austrian Bundesrat <i>Parliamentary</i>	Indirectly elected by regional legislatures Weighted subnational representation <i>Distinctiveness: Moderate</i>	No votes of confidence in government or budget Veto right on constitutional matters altering the distribution of competencies between the centre and the regions Suspensive veto right in other matters (can be overturned by lower	Weak	Low

Table 6.2 (continued)

Second Chamber/ Regime Type	Composition	Powers	Bicameral Strength	Significance from the Viewpoint of Subnational Representation
		house with simple majority)		
		<i>High Bicameral Asymmetry</i>		

Note: Unless electoral system is mentioned, lower house and second chamber are elected on the basis of similar electoral systems. \* Regional governors and chairs of regional assemblies lost their right to sit in the second chamber and were replaced by delegates (of the governor and regional legislatures). A decision by Putin in 2004 to appoint governors (as his representatives) further weakened the Federation Council by strengthening the grip of the President on that chamber’s composition (Gill 2007, pp. 7–8).

Table 6.3 *Bicameral strength and its relationship with parliamentarism/presidentialism (bicameral asymmetry in power is shaded)*

	Parliamentarism		Presidentialism	
	Lower House	Upper House	Lower House	Upper House
Political accountability (censure vote leading to government resignation)	YES	NO	NO	NO
Absolute veto power in executive maintenance (federal budget bills)	YES	NO	YES	YES
Powers in general lawmaking	YES	YES	YES	YES

second chambers can develop an important role as veto-players, but they also actively participate in policy setting (for instance, by initiating a large number of bills).

In contrast, since a parliamentary executive requires the support of a legislative majority, parliamentary governments are usually held accountable to the lower house alone. The latter is always directly elected and its composition more closely approximates the principle of ‘one person, one vote’. Voting down budget bills is synonymous to withholding confidence in government; therefore most parliamentary systems deprive their second chamber from the right to veto, possibly even amend appropriation bills (see Evans 1997, pp. 93–102; Howard and Saunders 1977, pp. 251–302 on the right of the Australian Senate to block appropriation bills, the use of which provoked a constitutional crisis in 1975). Since the chain of accountability runs between the parliamentary executive and the lower house, an important dimension of bicameral asymmetry appears that is found missing from presidential regimes (see shaded areas in Table 6.3). Therefore, parliamentary second chambers often only have a suspensive veto right; they may delay or amend government legislation, but they do not initiate a large bulk of federal legislation themselves. Where they have more legislative powers, they are often



composed in such a way that their political majority is likely to be congruent with that of the lower house (for exceptions see Section 6.3). In this sense, parliamentary second chambers are generally more reactive than active, also in considering the extent to which federal policies touch upon subnational interests.

## 6.3 FEDERALISM, SECOND CHAMBERS AND SUBNATIONAL REPRESENTATION

The previous section provided a brief overview of bicameral strength, based on compositional distinctiveness and powers. Yet, how strong should a bicameral legislature be in order to make a substantial contribution to subnational representation? Furthermore, do all strong bicameral legislatures necessarily play a significant role from the viewpoint of subnational representation?

### 6.3.1 Reflections on the Powers of the Second Chamber

First, irrespective of how a second chamber is composed, it will only have the ability to pursue such a role if it is sufficiently powerful. A second chamber without the ability to veto or delay federal decisions will only play a secondary role in subnational representation and other political institutions are likely to assume that role instead (see further below). Having said this, not all the powers of second chambers are equally relevant from the viewpoint of subnational representation. For instance, should a second chamber have the right to veto appropriation bills which finance administrative departments and programmes that are exclusively federal? Should it have the right to declare war or intervene in the appointment of ambassadors? Should it have the right to set up committees of inquiry to probe into federal expenditure programmes? Arguably, second chambers that have these rights (such as the US Senate) are testimony to the more ‘multi-faceted’ role that the framers of the constitution may have had in mind with bicameralism. Indeed, second chambers could provide a more ‘detached’ view on policy matters, helped by the higher age requirements of their members or especially the longer terms which they serve. Hence, the ambition to make the second chamber play a significant role as a ‘house of review’ could have overshadowed, in some cases even dominated, their assumed relevance from the viewpoint of subnational representation (for example, see Quick and Garran 1901 or Swift 1996 for an overview of the constitutional debates preceding the making of the Australian or US Senates, respectively).

On the other hand, one would expect the second chamber to have a right to introduce, amend or veto constitutional changes that alter the balance of powers between the federal and regional levels of government; to co-decide on the regional distribution of federal grants or to influence the rate of federal taxes if part of their revenue accrues to the regions. On the basis of the summary overview in Table 6.2, only the powers of the Austrian and perhaps also the Spanish second chambers fall short from this perspective. De facto, the Canadian Senate can be added to this group; its nominated character had deprived it of much legitimacy and therefore its considerable powers have remained largely unused (see Franks 1999 for a few recent exceptions). In general, the more a federation adopts the features of a co-operative or joint decision federation, the stronger

the required powers of the second chamber. The evolution of the powers of the German Bundesrat reflects the development of post-war German federalism from a co-operative to a 'joint decision-making federation'. When the members of the German parliamentary council debated the German 'Basic Law' in 1948, they assumed that the consent of the second chamber would be required for about a third of all federal bills. Yet, more than 50 years later, the Bundesrat's consent was needed for about 55–60 per cent of all federal bills. This relative increase in powers reflects the growing involvement of the federal government in concurrent and framework legislation. It also illustrates the growing relevance of shared taxes, joint decision-making tasks or the increasing financial support of the federal government in assisting the Länder whenever they are charged with implementing federal legislation (Sturm 2001). Hence, in part, the strengthening of the centre has been offset by increasing the involvement of the Bundesrat in federal matters. This makes the process of German 'centralization' qualitatively different from, say, a similar process in Austria (where a transfer of competencies from the Länder to the federation was not offset by a collective decision-right on those matters at the federal level). Conversely, the most recent reforms of German federalism have reduced the level of 'entanglement' between the federal and subnational levels by returning some legislative powers to the Länder, a development that is said to bring the veto-powers of Bundesrat closer to (if still above) its originally intended levels (Hrbek 2006).

### **6.3.2 Reflections on the Composition of the Second Chamber**

Yet even if second chambers have the capacity to decide on matters that are relevant from the viewpoint of subnational representation, its members may not necessarily keep such concerns in mind. Therefore, and second, the incentives that drive the members of the second chamber derive at least in part from the way in which the second chamber is composed.

Also, in this respect, not each of the compositional features that were mentioned in Table 6.2 is of equal significance from the perspective of subnational representation. For instance, US senatorial terms are thrice as long as terms of representatives. Consequently, representatives are almost continuously embroiled in a re-election campaign, whereas (small state) senators are less dependent on party influence and constituency concerns, at least during the first couple of years after their election. Or, to list another example, the US congressional literature suggests that the success of a candidate is associated more with, and measured against, 'the state of the nation', the larger the constituency in which they stand for election (Krasno 1994). With the exception of some of the smallest states that have twice or as many senators as representatives, lower house constituencies are sub-sets of senatorial constituencies. The latter typically coincide with the boundaries of a state. Therefore, senators are more likely to address 'national' concerns than representatives. Indeed, next to state governors or vice-presidents, senators are the most important position from which to launch a bid for the US presidency. This said, the ever more costly campaigns for the (re-)election of senators representing larges states have also gradually pushed forward the start of their election campaigns. Furthermore, while senators may think and act 'nationally', the procedural rules of the US Senate leave more room for advancing specific state concerns (for instance, filibustering or the occasional need for unanimous consent agreements to structure floor debate; Sinclair 1989). Chairs

of powerful committees (the choice of membership which may reflect specific state interests) could also wield their influence to extract state-specific interests (Peterson 1995).

Compared with the length of terms, two other compositional features are much more important as determinants of subnational representation. The first considers the extent to which the members of the second chamber possess strong incentives to lobby for subnational interests. This hinges in part on the geographic reach of the party which they represent, or in the case of nationwide parties, on their authority to act against the interests of the nationwide party. The second feature has been studied more extensively by legislative scholars, but loses much of its relevance if the incentives to ‘think and act’ subnationally are missing. It concerns the degree to which members of the smallest or over-represented units in the second chamber will use their disproportional influence in the chamber to advance specific territorial interests. I will discuss both elements in turn.

### **6.3.3 A Territorial Incentive Structure: Members of the Second Chamber, Party Seniority and Constituency Ties**

Most members of a second chamber run on a party ticket. Even Canadian senators owe their appointment first and foremost to having served the party which controls the Canadian government at the moment of their selection (Franks 1999). Therefore we must look ‘inside’ the parties to assess the extent to which members of a second chamber can advance subnational interests. Two aspects are relevant here: (1) the dependence of members from regional parties or subnational party machines for their (re)selection or promotion within the party while in office; (2) the capacity of members of the second chamber to stand up against majority opinions of the federal party (in the lower house or second chamber). This hinges on their seniority within the party as a whole.

With respect to the first of these two elements, the method for electing second chambers is a crucial variable. Directly elected second chambers do not necessarily generate the strongest subnational ties. True, where such elections are by plurality vote and take place in constituencies that are congruent with the units of the federation (as in the USA for instance), we find an incentive to cultivate a ‘personal’ and constituency specific vote. However, the direct election of the US Senate since 1913 (17th amendment) has reduced the dependence of senators from specific party concerns associated with their state. During the first half of the nineteenth century, US senators were not only elected by state legislatures but they were also subject to recall. Hence they could be forced to abide by specific state legislative instructions (Swift 1996, p. 32). The ‘recall’ requirement disappeared first, and gradually primaries came to replace selection by state legislatures. This method of selection freed senators from state party discipline, and, especially when their election coincides with that of the president allowed them to anticipate ‘presidential coattail effects’.

In comparison, despite their direct election, Brazilian senators have remained more dependent on their state party machines. The presidential coattail effect is much weaker in Brazil than in the USA. Brazilian senators are not pre-selected in open state primaries, but by a small group of state party leaders, depriving national party leaders of significant input (Samuels 2000, p. 5). Rather than surfing on ‘presidential coattails’, Brazilian senators line up behind gubernatorial candidates who have ‘the name recognition and organizational backing [clientelistic networks] that congressional candidates seek’ (ibid.,

p. 6). Furthermore, unlike the USA, Brazil lacks a two-party system since congressional elections by (open-list) PR generate a multi-party system instead. Therefore, congressional elections are typically won on multi-party candidate lists and congressional candidates must vie for the attention of subnational party leaders to obtain eligible positions on these lists. Career patterns of senators and governors in the USA more or less run on parallel tracks, but in Brazil, senators may have served as governors previously or aspire to a governorship after their senatorial terms. In sum, Brazilian senators are nested more strongly in state politics than their counterparts in the USA and their prime loyalty remains towards the state even after their election to the Senate (*ibid.*, pp. 16–17; Samuels and Mainwaring 2004, pp. 98–9).

The USA and Brazil are both presidential systems of government. Parties tend to be more disciplined and better organized in most parliamentary systems. In general, MPs in a parliamentary legislature have less scope to cultivate a personal vote, even where they are elected by first-past-the-post in single member electoral districts (Cain et al. 1987). True, some parliamentary parties may have a territorially concentrated support base (for instance, ethno-regionalist parties such as the Scottish National Party or the Bloc Québécois). Alternatively, national parties may have strong subnational party branches that play a key role in selecting candidates for second chamber elections as a result of which the latter can be expected to pay allegiance to subnational party interests. Arguably, that allegiance is strongest for second chambers that are indirectly elected by or/and from within regional parliaments or executives. For instance, this is the case for the German and Indian second chambers. The composition of these second chambers depends on the outcome of regional elections, and subnational party branches are more likely to select candidates or draft party manifestos for said elections. The allegiance to subnational policy levels will be lower among the group of directly elected parliamentary Senates. Normally, their election coincides with elections for the politically more significant lower chamber. Therefore, parties seeking to gain votes in both elections are under strong pressure to make Senate campaigns congruent with the themes that dominate the election of the lower house.

In general, members of parliamentary second chambers will be under stronger pressure than their counterparts in presidential systems to display cohesive voting behaviour. This is so because the battle between government and opposition in the federal lower house is likely to spill over into second chamber politics. As Sawyer once put it, to the extent that the same parties are represented in both chambers of a parliamentary bicameral legislature, ‘the politics of federalism [in the second chamber] may have been abandoned for the politics of keeping a particular party [or parties] in office [government]’ (Sawyer 1969, p. 42). Conversely, members of a parliamentary second chamber who represent federal opposition parties may abandon the politics of federalism for the politics of ‘frustrating’ or ‘holding to account’ a particular party or party coalition in federal government. In this fight, the federal government holds two important advantages.

First, it possesses a legitimacy bonus, since it can invoke the legislative support of a directly elected legislative majority in the (more proportionally composed and directly elected) lower house. The federal government’s ‘electoral mandate’ forces parliamentary second chambers to act cautiously, even if they were to invoke their role as vehicles of subnational representation. Second, the federal parliamentary executive is likely to have critical resource advantages: strong administrative support from ministerial cabinets or

ministries that members of the legislature without a post in government lack. Therefore, the role of the second chamber will be confined primarily to formulate policy preferences in response to proposed government policy, irrespective of whether these proposals relate to a recalibration of federal-regional relations in the state. In this sense, parliamentary second chambers are more reactive compared with their presidential counterparts.

The latter point is important because it explains the ‘extra-ordinary’ position of the German Bundesrat among the group of parliamentary second chambers. The requirement of regional block voting, and especially its composition of regional executive members strengthens the capacity of the second chamber in subnational representation. Regional executive leaders are senior figures within their respective party organizations and they have some authority to speak up against the preferences of the major party protagonists in the federal executive and lower house. In fact, members of the Bundesrat frequently assume important positions in the federal party organizations (especially the Parteivorstand or party executive). Furthermore, as regional executive leaders, the members of the Bundesrat have the administrative support that most of their colleagues in the other parliamentary second chambers can only dream of. This enables them to influence federal policy-making earlier and more profoundly than their counterparts in other parliamentary second chambers. Finally, the composition of the German Bundesrat confirms the dominant pattern of intergovernmental relations in parliamentary federations: intergovernmental relations as inter-executive driven relations (Smiley and Watts 1985).

Of course, most members of the Bundesrat also pay loyalty to the national interests of the party family to which they belong, especially when they have set their eyes on a role in federal government or combine their function as subnational (Land) executive leaders with that of federal opposition leaders. Furthermore, the members of the Bundesrat frequently convene in *de facto* party meetings, sometimes in the presence of the Chancellor or the opposition leaders in the lower house (Leonardy 2002). In light thereof, the Bundesrat is frequently criticized for ‘playing federal party politics’, especially when the party political composition of the second chamber is incongruent to that of the federal executive and the second chamber is seen as a major brake on planned federal government policy (Fromme 1981; Lehbruch 1998; Jeffery 1999; Scharpf 1995). Although an in-depth analysis to prove the validity of these accusations falls beyond the scope of this chapter, one should distinguish between two types of ‘obstructionism’ (for a summary of both arguments, see Swenden 2006, pp. 213–19).

A first type is clearly linked to national party political strategies. It arises when a federal government faces a party politically hostile second chamber and accuses the Bundesrat of preventing it from implementing the policy proposals (‘the policy mandate’) on which it was elected. Alternatively, the federal government can play the ‘blame game’ and use party political incongruence to cover up intra-party disagreements or a fallout with its federal coalition partner (Scharpf 1994).

A second type of ‘obstructionism’ arises when the Bundesrat pursues its role as an articulator of subnational interests. This is the type of behaviour that federal theory expects from a second chamber.<sup>2</sup> Bicameral disagreement that is linked to different territorial interests within as well as between parties in federal government or opposition has increased in the past 20 years, especially on fiscal issues (Gunlicks 2002). Partly this reflects the growing territorial socio-economic heterogeneity of Germany following

unification. The dividing lines in the Bundesrat can pit Land governments that are controlled by the same political party/parties against each other.

It is interesting to contrast the role of the German Bundesrat in subnational representation with that of other parliamentary second chambers (even the indirectly elected ones). For instance, with some exceptions, Australian senators generally defer to the wishes of their party colleagues in the lower house because the more senior party figures (Prime Minister, Deputy Prime Minister, Leader of the Opposition, the Deputy leader of the shadow cabinet) reside there (Jaensch 1986, 1994). These party leaders can promote obedient senators to the frontbench, and enforce party discipline through internal party rules (especially in the case of the Australian Labor Party).

#### **6.3.4 Second Chambers and the Over-representation of the Smallest Units**

Arguably one of the most studied aspects of federal second chambers is the extent to which they over-represent the smallest subunits in the state (Samuels and Snyder 2001; Stepan 2001).<sup>3</sup> Such over-representation could turn the second chamber into a body which disproportionately advances the interests of small states. For instance, on the basis of how many members of the second chamber are needed to make valid decisions (quorum of attendance) for ordinary legislation or for constitutional amendments, one can calculate the minimum number of senators that can approve legislation or block constitutional change. In Australia, the minimum quorum of attendance is one third of all senators (hence 26 senators). Therefore, in theory, Senate legislation can be approved by a small group of 14 senators comprising just each of the 12 Tasmanian senators and both senators from the Northern Territory. Jointly, they represent a mere 3.57 per cent of the Australian population. Similarly, in the German Bundesrat, the delegations of the ten smallest Länder, representing just 28.7 per cent of the population are sufficiently strong to halt federal bills that require the consent of the Bundesrat (Swenden 2004, pp. 132–4).

Yet, the consequences of ‘equal or weighted’ as opposed to ‘proportional’ subnational representation should be interpreted in light of the fact that voting is often by party and not by region. As mentioned above, in parliamentary systems this is more often norm than exception. Hence, not all senators from the same sub-units represent similar parties; for instance, the votes of the 12 Tasmanian senators are split between Labor, the Liberals and possibly some independents. Furthermore, the ten smallest German regions (comprising, for instance, affluent Hamburg and relatively poor Mecklenburg-Vorpommern) do not necessarily share the same interests and thus may not cast identical votes in the Bundesrat. Although these observations put ‘the problem’ of over-representation into perspective, when assessing its implications for subnational representation we should take the following four observations into account.

First, qualifying the point that was raised above, even if parties are cohesive and nationwide, the effect of over-representing the smallest units in the second chamber cannot be ignored completely. This is best documented for some of the presidential second chambers. For instance, the provision of equal state representation in the US Senate, combined with the importance of seniority in the membership or chair of relevant senatorial committees has given small state senators—especially when occupying important committee positions – the leverage to ‘bring home’ distributive programmes that

disproportionately benefit the interests of their state constituents (Baker 1995; Peterson 1995, pp. 140, 145–6; Lee and Oppenheimer 1998). The effect of equal subnational Senate representation has also been noted in the policy outputs of the Brazilian, Argentinian and Swiss second chambers (Vatter 2004; Diaz-Cayeros 2006, p. 225; Gordin 2010). Gordin has demonstrated that senators from over-represented Argentinian provinces have been allowed to incur higher deficits or more easily encountered the president's goodwill to bail out such deficits, especially when sharing the presidential party label (Gordin 2010). In Switzerland, the small cantons tend to be more rural and conservative; therefore their over-representation in the Council of States has provided a buffer against the progressive welfare policies that are propagated by the urban (and Social-Democratic) cantons (Obinger et al. 2005, pp. 263–304).

Second, federations develop over time. Therefore, mechanisms that once seemed to protect territorial minority interests may lose that quality with the demise or arrival of new cleavages. For instance, in Switzerland, the Catholics were the most salient minority when the Swiss 'confederation' was born. Today, the Catholic-Protestant divide has lost most of its salience. Arguably the over-representation of the Catholic-conservative cantons in the second chamber was warranted, especially since several cantons sought secession from the Swiss confederation during the Sonderbund War (Vatter 2004, p. 7). However, the second chamber cannot be said to protect linguistic interests very well, even if language has overtaken religion as the most important cleavage. The over-representation of the smallest cantons does not benefit the French- or Italian-speaking Swiss minority populations who live concentrated in more densely populated, and therefore under-represented cantons.

Third, the over-representation of the smallest units may work to the benefit of minorities but only when these are territorially concentrated and make up a (political) majority in the territories in which they are found. For instance, the 'Southern Democrats' who controlled the over-represented Southern US states used their seniority in the Senate to halt affirmative action programmes that would stand to benefit black citizens from these states. This was so despite the higher representation of blacks in these states (discrimination was meant to protect cheap black labour as a source of economic competitiveness; Pierson 1995). Similarly, the dominance of rural and bourgeois parties in the Swiss second chamber is said to have exacerbated the under-representation of women there (Vatter 2005, p. 208). In Australia, the provision of equal state representation has not served Aboriginals well since the opposition to pro-Aboriginal policies has generally been stronger in Western Australia and Queensland, two states that were over-represented in the Senate, at least until the mid-twentieth century.

Finally, the consequences of over-representing the smallest units in the second chamber are more frequently overlooked for parliamentary federations since representation is more by party than by region. A notable exception is the German Bundesrat due to the constitutional obligation to cast a uniform regional block vote there. Yet, even if representation is more by party, over-representing the smallest units can still generate significant consequences in two important ways. First, it can affect the party political balance between both chambers. For instance, Australian governments have been a few seats short of a majority in the Senate for most of the time post-1949. Although Senate elections by Proportional Representation (compared with lower house elections by the alternative vote, a majoritarian electoral system) are the main cause for this lack

of Senate majority, equal state representation has played a role as well. For instance, between July 1996 and July 1999, the Australian government (Liberal-National) was two votes short of a Senate majority. In this period the government frequently relied on the support of two independent senators, one of whom represented the smallest (island) state of Tasmania. Had the Senate been composed on the basis of proportional subnational representation, Tasmania would not have been entitled to 12, but only two senators. In that case, the independent Tasmanian senator would not have been elected and the Liberal and Labor parties would have been able to benefit from their more concentrated following in some of the large and currently under-represented states. Second, where parliamentary second chambers are directly elected (as in Australia), federal governments can draw from the contingent of party senators representing the smallest units in order to build a cabinet that incorporates MPs from all the units of the federation. In Australia, there is at least an expectation that the government comprises MPs from the smallest states.

#### 6.4 ALTERNATIVE CHANNELS OF SUBNATIONAL REPRESENTATION

While all examples of strong bicameralism are situated in federal states, not all federal states have strong bicameral legislatures. Furthermore, the above analysis illustrated that several federal second chambers fall short in their role of subnational representation. If second chambers fail to represent subnational interests in federal decision-making, what are the alternatives? Kenneth Wheare once argued that while the method of safeguarding regional interests via a federal second chamber is advisable, ‘federal government does not necessarily work badly without it’ (Wheare 1963, p. 90).

Second chambers are only one method of joining up politics and policies across different levels. In parliamentary federations, where second chambers tend to be weakest, inter-governmental relations often take the form of inter-executive relations, confirming their characterization as ‘executive’ federations (Watts 1999). At the apex, executive summits bring together the federal prime minister or ministers from the federal or subnational governments or the regional premiers alone. Examples of such meetings are the Premiers Conferences in Canada, the Council of Australian Governments in Australia or the Conference of Education and Culture Ministers in Germany (*Kultusministerkonferenz*). Hence, such inter-executive meetings even developed in Germany, notwithstanding the key role of the Bundesrat.

Executive summitry meetings are of course prepared and paralleled by gatherings that bring together civil servants from various (levels of) government(s). Examples are the *Landesreferenten* in Austria, the close to a thousand discussion and working groups of administrative experts from the federal and Land levels in Germany, or the expert committees drawing Swiss cantonal representatives into the preparatory stage of federal lawmaking (Wälti 1996, pp. 107–37; Kramer 2005, p. 132). However, not all parliamentary states with a relatively weak second chamber can take recourse to institutionalized and formalized ‘intergovernmental’ alternatives of the type found in Canada, Austria or Australia (Bolleyer 2006a, 2006b).

In Spain, for instance, inter-executive coordination mechanisms or sectoral



conferences that bring together civil servants or ministers from the various autonomous communities are not always attended by executive representatives from all the regions and such conferences may lack the power to issue binding decisions (Grau i Creus 2000). Furthermore the historic communities have frequently preferred a strategy of bilateralism, seeking recognition as special regions (or rather nations) within the state. In this sense, strengthening the Spanish Senate may not be an attractive alternative, for it would mean that these sub-state nations may have to give up some of these bilateral ties with the centre in exchange for a Senate that would act as the collective defender of subnational interests (Juberías 1999; Roller 2002). Senate reform has also featured on the agenda of Canadian and Belgian constitutional reformers (Vanhee 2003; Smith 2007; Verhofstadt 2008), but as in Spain these reforms have stalled. A federal second chamber that would be more effective in regional representation could challenge the role of its current members (who may have to seek refuge elsewhere) or undermine the authority of the federal government. In a plurinational federation like Canada, Quebec may ask for a right to veto Senate decisions, much like what the historic communities aspire to in the Spanish context. Furthermore, Senate reform is often part of a wider constitutional agenda. Therefore, its success frequently depends on concrete achievements in other domains (such as electoral reform, or a constitutional reordering of competencies).

As federal states continue to (re)distribute authority vertically and horizontally, the role of second chambers in subnational representation will remain at the heart of the debate on institutional engineering in federal states. In light of the growing importance of subnational authority across the world (Hooghe, et al. 2008), subnational authorities elsewhere may try to 'break' their way into or increase their voice at the national policy level. They may also use the second chamber as a vehicle to increase their leverage in European Union or international affairs by seeking to affect the position of the national executive. The role of second chambers in subnational representation is not only an issue of relevance for federal states, but also for the unitary or decentralized states that have strengthened the role of subnational authorities (regional or local government) in recent decades. For instance, in France the Senate has been interpreted as a chamber that represents local and agrarian interests, due to its link with local government and the over-representation of senators from small, agrarian communities (Loughlin 2007). A closer study of multi-level governance in Scandinavia can show insight into how intergovernmental coordination takes place without the presence of a second chamber.

This chapter has demonstrated that second chambers in federal states are hugely diverse in terms of composition, power and the way in which their members relate to the overall party system. Jointly, these factors determine the capacity of second chambers for representing subnational interests in federal decision-making. That capacity varies significantly from federation to federation, but where it is weak, alternative structures and channels of multi-level coordination may have developed. As a result, second chambers should neither be seen as a necessary nor as a sufficient condition for the proper functioning of multi-level governance. They can play an important role in this regard, but it depends.

## NOTES

1. Since the powers and composition of these upper houses have already been discussed extensively in the comparative literature I summarize their main features here without going into further detail (for general comparative overviews see, for instance, Tsebelis and Money 1997; Lijphart 1999; Patterson and Mughan 1999; Riescher et al. 2000, Russell 2000; Baldwin and Shell 2001; Llanos and Nolte 2003; Swenden 2004; Luther et al. 2006; Uhr 2006; Watts 2007).
2. For instance, when the German Christian-Democrats (CDU-CSU) possessed comfortable majorities in the lower house and Bundesrat (from 1982 until 1987), the then Chancellor Helmut Kohl (CDU) successfully kept as many issues of bicameral disagreement as possible out of the 'bicameral concertation committee'. Instead, he preferred to resolve them in internal party meetings with his CDU-CSU controlled regional governments (Lehmbruch 1998, pp. 160–61, Klatt 1999). Occasionally compromise meant backtracking on proposed reforms in the health care, postal or communications sectors. Sometimes compromise could only be achieved by 'buying' the support of one or several CDU regions, for instance, by offering them disproportionate receipts of equalization payments (some of these practices were later declared unconstitutional by the Constitutional Court; Renzsch 1999, pp. 180–92).
3. In recent years, the empirical political science literature has increasingly 'problemized' the over-representation ('malapportionment') of small units in a federal second chamber (Samuels and Snyder 2001; Stepan 2001; Gordin 2010). Such a viewpoint contrasts with the rationale of more traditional accounts of federalism which have argued that over-representation protects small units against majority rule and strengthens their loyalty vis-à-vis the federation (Elazar 1987; Burgess, 2006).

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## 7 Multi-level governance, decentralization and fiscal federalism

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An important part of any discussion of multi-level governance is the fiscal relationship among the different governmental actors. To explain a given policy even if it is not strictly ‘fiscal’ in nature, one wants to know who receives money and who pays for any particular policy as well as the level of government that makes the decision and administers it. The main literature that considers these relationships focuses on ‘fiscal federalism.’ As I will explain in more detail below, one element of this literature is simply a description of the division of fiscal responsibilities. Education spending may be primarily the domain of the states, as is the case in Spain since 2002, while water provision may be the domain of localities. Still other goods that governments provide may come from several levels of government; one only has to think of federal, state and local police and the many American movies that have been produced that highlight the tension between (and among) law enforcement agencies. Similarly, on the revenue side, certain taxes may be restricted to one level of government or another, or there may be arrangements where specific taxes are shared. This exercise fits directly into discussions about the power different levels of government have over each other as well as the interconnectedness of the different levels when it comes to fiscal matters. Fiscal federalism more generally is mostly relevant for Type I multi-level governance, that is, for governance that extends across policy areas, that is relatively stable and that often has constitutional roots (see the Introduction in this volume).

While these examples illustrate the importance of paying attention to how fiscal relations work across different levels of government, the classic fiscal federalist texts take the discussion one step further – they are broadly prescriptive, that is, they suggest the optimal mix of expenditure and taxation powers at different levels of government. Moreover, they argue for a clear differentiation of expenditure and taxation powers across jurisdictions (for example, Oates 1972). In the context of this handbook, the literature suggests that the interlocking and shared powers that multi-level governance describes lead to bad fiscal outcomes. Multi-level governance (at least in fiscal affairs) should be avoided.

Given that the first insight about the use of fiscal federalism is fairly obvious and also descriptive in any case, this chapter focuses on the theoretically more interesting prescriptive elements of the literature. It begins in Section 7.1 with a brief overview of theories of ‘fiscal federalism.’ It then links this discussion with the empirical observation of a pronounced move towards fiscal decentralization over the past 20 years in Section 7.2. It focuses in particular on the negative consequences of shared competences on both the tax and spending sides of the budget. To focus the analysis, this section compares fiscal ‘decentralization’ in two parts of the world, Europe and Latin America. While the multi-level governance literature has focused mostly on American and European examples,

one finding this chapter provides is that democratization meant greater interconnectedness in fiscal matters in Latin America. One could, in fact, describe the nature of the game since democratization in Latin America as one where the central government tries to deconstruct multi-level governance. The final section suggests some open questions. While the traditional fiscal federalist literature has described and largely advocated more decentralization, recent works question the logic of the core argument.

## 7.1 THEORY

Before connecting the different arguments, some definitions are in order. Simple ‘decentralization’ is not the same thing as ‘fiscal federalism.’ While a careful discussion of the differences appears in Rodden (2006, chapter 2) and readers are encouraged to consult it, I begin with a few illustrations to explain the differences. In Denmark, most public money, comprising roughly 60 per cent of all government spending, is allocated at the sub-national level. This corresponds to ‘fiscal decentralization.’ Yet Danish mayors and the like have little control over either how the funds are spent or how they are raised; the central government provides clear instructions on both counts. A contrast would be Switzerland. Only approximately one-third of the public sector is at the national level as a percent of GDP, and the cantons have wide autonomy on both the expenditure and revenue side of the budget. Moreover, there are clear political structures that define the relationship among the different jurisdictions of government and their responsibilities. The Swiss system is both decentralized and federalist.

To move on to ‘fiscal federalism,’ on the other hand, the term traditionally has two uses in the literature. The first is simply a description of the responsibilities and powers of different levels of government in a given polity. In this case, one is often developing some sort of metric on a scale that moves from decentralization to centralization (for example, Diaz-Cayeros 2006). Under this descriptive rubric, there are another two issues. The first is the relevant locus of power; who makes the decision on how much to spend and on how much to tax?

Examples from the USA and Germany that concern the implications of fiscal federalism for education policy indicate how complex these matters may be. In early spring 2009, both countries passed economic stimulus packages that contained funding explicitly for education. In the American case, state and local governments have most competences on education. The Obama Administration, however, wanted to increase education spending at all levels of government. The final legislation therefore specified in the central government’s stimulus package about \$54 billion in spending under the so-called ‘State Fiscal Stabilization Fund,’ but it made those transfers conditional – state governments would have to restore any cuts they made to education in the immediate period prior to the passage of the stimulus package and maintain at least that level of spending for three consecutive years. Moreover, the legislation also specified that 81.8 per cent of the money would go directly to local school districts, while the remaining amount could be spent at the discretion of the governor (see National Education Association 2009). In this way, the package cut out directly the role of state legislatures in one of the biggest expansions of education spending any level of government has had. In Germany, the amount of money was somewhat smaller, or about 10 billion euros, but the idea was the

same, namely to give localities money they could spend on education projects. Unlike in the American case, however, the distribution of the money was trickier. The reason was that the German Basic Law forbids the central governments from spending any money in areas that are not in its competence, and education is not a competence of the federal government. In the initial months after the passage of the stimulus package, localities could not spend the money they had technically been given as lawyers dealt with the implications of the Basic Law for Germany's form of fiscal federalism (*Der Spiegel* 2009). In both cases, the pre-existing fiscal rules and institutions (or lack of them) structured changes in the multi-level governance of education.

These examples also indicate the extent to which competences can be shared, and this is a general consideration when it comes to describing the relevant locus of power in a particular fiscal system. To what extent do different levels of government have autonomy to raise specific taxes and to spend money in specific policy areas? In which cases are tax revenues shared and expenditure obligations divided across one or more jurisdictions (Braun 2003)?

The second issue that fiscal federalism literature is concerned with is who bears responsibility when things go wrong. This, in turn, follows from what are the implications of shared competences, and it leads to the more prescriptive work on fiscal federalism, which comes from a long tradition in economics that is centered around the work of Oates (1972, 1999). His focus is on the responsibilities that should be located at different levels of government. He contends that macro-economic policy as well as some policies that redistribute income to the poor should be located at the central, or national, government level. The reasoning is not one of efficiency but of capacity – countries generally have one currency across different regions, and only the central government can set policies that affect the value of money. The level of decentralization of other policies depends upon how much lower levels of government differ from one another. If populations want different levels of publicly provided goods, then governments should have powers to provide different levels. This is not only welfare-enhancing, but it is also better from a democratic theory perspective (for example, Inman and Rubinfeld 1997). This argument has been at the root of calls for greater decentralization especially in the developing world where the government systems have traditionally been centralized, and this centralization is considered a reason why their governments have failed to improve general welfare especially for the poor (Martinez-Vazquez 2007).

As Treisman (2007) documents well, international organizations like the International Monetary Fund, the Inter-American Development Bank and the World Bank have used these arguments about fiscal federalism to advocate fiscal decentralization. They have provided extensive technical as well as financial support to countries that want to decentralize.

Yet, even among proponents of decentralization like Oates, there is a clear qualifier to the theoretical push for more decentralization, namely that actions taken by one government may have adverse effects on neighboring governments. Such 'negative externalities' are the main reason for more centralization even if sub-national preferences are heterogeneous. Take, for example, a situation where the one state in a given country runs chronic deficits. If it goes bankrupt, the result may be lower credit ratings and a loss of confidence in the remaining regions. Under such a circumstance, it would be less costly for the other regions, or for the national government, to bail out the region in

trouble. Knowing this, the region will have an incentive to overspend in the first place. This situation is the classic moral hazard problem, and it arises precisely from the shared competence that the multi-level governance literature highlights.

For this reason, the literature discusses the possibility of creating 'hard budget constraints' to resolve the moral hazard problem. Such constraints either restrict or forbid regions from accumulating debt in the first place. Rather than create the type of interlocking jurisdictions one finds under multi-level governance, these arrangements are meant to set clear boundaries and often hierarchies of power over fiscal matters. In the UK, for example, local governments must receive permission from the Treasury before they borrow. These restrictions are meant to assure that lower levels of government do not have the tools to hurt others (and themselves).<sup>1</sup> An alternative is for the relevant government unit to pledge credibly that it will not bail out the troubled state. In this case, hard budget constraints are unnecessary.

Whether such a pledge is credible depends upon the ability of states to bail out themselves. Eichengreen and von Hagen (1996) find that when regions have their own tax base hard budget constraints that restrict or ban outright debt at the regional level are not necessary. The national government's pledge not to bail out a given state is credible because the regions have their own resources to pay for any fiscal mess they create for themselves. Note again the importance of the move away from interlocking jurisdictions that characterize multi-level governance.

There are other reasons why it is desirable for lower levels of government to have their own tax sources. When governments get their money from a common 'pot' that the central government provides, a so-called 'common pool resource problem' develops where states consider the additional tax burden of their decisions only on their constituency and not on the population as a whole. Because governments get the full benefit of each additional unit of spending but pay only part of the cost, they are prone to spend a lot more than in the situation where they fully weigh the negative consequences of additional taxes. This means that when they raise their own money through own taxes governments have an incentive to weigh directly the relative costs of spending programs, and their taxpayers bear the costs of any additional spending (see the Introduction to this volume; Olson 1969). Note that if sub-national governments raise most of their own revenue this means in practice that central government transfers are small. There is empirical evidence that decentralized states where sub-national governments rely mostly on government transfers usually have sub-national governments that have higher deficits than in countries where states have significant autonomy over revenue sources (for example, Rodden 2006, Ebel and Yilmaz 2002, Rodden and Wibbels 2002).

Returning to the question of when pledges not to bail out lower level government are credible, Wibbels (2003), in his study of the USA in the 1840s, argues that it is necessary for the sub-national governments themselves to see it in their best interests that the national government not bail out one of them. At the time, several American states got into serious fiscal trouble. It was the time of state spending for big infrastructure projects, such as for canals and railroads. Nine states defaulted while another four partially defaulted. They demanded federal bailouts. A majority of states, however, did not have similar debts, and they blocked any federal action in the US Congress.

Largely as a result of this clear separation of responsibility across different jurisdictions, most state governments then placed fiscal restrictions on themselves. Today, all



American states but Vermont have some sort of balanced budget requirement, albeit with some variation in the stringency of the requirement in practice. The concern of populations was that their governments default. This episode illustrates that hard budget constraints do not have to be imposed from above as is commonly assumed. If regional governments have their own sources of revenue, it may very well be in the best interests of governments to restrain themselves.

To say that bailouts are unlikely is not the same thing as to say that they are banned however. There is an additional side of the story that is perfectly consistent with Wibbels's (2003) argument if one examines fiscal federalism in the USA over the last four decades, and that indicates that the break with 'shared' competence on fiscal matters is not complete. There have been three periods where most states found themselves in fiscal difficulty rather than just a minority and where the federal government bailed out the states. The first was in the early 1970s when the first oil crisis led to a deterioration of public finances almost everywhere. The federal response was the General Revenue Sharing and Antirecession fiscal Acts. The second situation was the Jobs and Growth Tax Relief Reconciliation Act of 2003. Most states had difficulties balancing their budgets, and political support for payouts to the states at the federal level was assured. The design of the transfers, however, is revealing. Every state received a cash infusion from the national government based on a modified per capita basis that gave the smallest states somewhat more per person than the largest states. Given that the US Congress either allocates the same numbers of seats per state (Senate) or that there is a slight bias towards the small states when population is taken into consideration (House), the final decision on how to allocate the money fits well with the underlying structures, and with Wibbels's argument that bailouts will come when a passing majority is in favor of them. The third bailout became law in spring 2009 as part of the Obama Administration's stimulus package.

The description about bailouts concerns situations where states coordinate to get help from the national government, but (fiscal) competition is generally considered one of the consequences of fiscal federalism. Tiebout (1956), for example, suggests that people may 'vote with their feet' and move to regions where government-provided goods are close to their ideal preferences. This model assumes, of course, that labor is indeed mobile so that it can move.<sup>2</sup> Rather than a convergence of policy, one expects a divergence. This theoretical result contrasts with arguments about a 'race-to-the-bottom' on taxes as states compete for capital. The most egregious examples in the literature are the hundreds of millions of dollars American states have spent in an attempt to lure mostly foreign auto companies, but the idea is to allow a sub-national government autonomy to set policy in its jurisdiction without interference from other levels of government.

While the discussion so far has been about bailouts that may arise from externalities due to the behavior of individual states, there is another qualifier to the functional approach to fiscal federalism from Musgrave and Oates (Musgrave 1959; Oates 1972, 1999) They assume that government is benevolent when it designs policies. If one relaxes this assumption, one then needs to consider whether certain ways to structure inter-governmental relations increase or decrease levels of corruption. It is especially important that matters of good governance and accountability be included.

Some authors return to arguments about the effects of competition among lower levels of government that can limit corruption. If local officials demand a big payoff from

the population, the population can simply move to jurisdictions where politicians are not corrupt. This form of 'competitive federalism' leads to more economic growth and explains why 'federal' countries from China to the USA grow faster (Weingast 1995). In a similar vein, Kappelera and Vällilä (2008) find that fiscal decentralization boosts economically productive public investment, and in particular infrastructure. Their argument is that greater competition for firms leads sub-national governments to make more productive investments in an attempt to attract firms on the expenditure side. As Rose-Ackerman (1999) points out, however, the effects of factor mobility can cut both ways. Non-corrupt law enforcement may have trouble catching crooks across fluid borders. It is in these circumstances that we expect to see more shared competence.

In fact, a recent book in particular raises questions about the whole literature. Treisman (2007) is a veritable tour de force in its consideration of different arguments for and against decentralization as well as in its deconstruction, and repudiation, of almost all of them. While he does consider some of the (mainly fiscal) arguments against decentralization, his main target is the intellectual justification for decentralization. In a carefully crafted book that puts in formal theoretical language the insights of authors from Madison to John Stuart Mill, he argues that there is no reason why centralized states cannot provide the same benefits from centralization that decentralization is supposed to offer. On the argument that decentralization leads to more accountable politicians, for example, he provides an alternative explanation that is much more relevant, namely the level of political competition. One would expect central government politicians who win highly competitive elections to be more responsive to population demands than local politicians who routinely win non-competitive elections. On the fiscal arguments against decentralization, where the main worry is the one mentioned above about a moral hazard problem, he suggests that we need to know more about the exact powers of the local government, their ability to coordinate and the time horizons of national governments before we can say anything about the consequences of fiscal decentralization.

Treisman's book provides several challenges to the literature on fiscal federalism and on decentralization. First, one should be careful with the number of moving parts in any analysis. Treisman shows that most arguments are incomplete. They simply assume that a given variable is a result of decentralization (for example, increased competition) or they ignore the possibility that the same policy can be implemented in a more centralized setting, and it is the policy, rather than the underlying political system, that matters. Future work on the topic needs to be more careful in its modeling of the underlying issue and it needs to be sure to take account of all relevant variables in a given situation. The second message is a strong policy one, namely that decentralization may not be the panacea to a range of ills from a lack of 'people power' to inefficient spending. In fact, decentralization may worsen pre-existing problems.

## 7.2 FISCAL FEDERAL EXPERIENCES IN LATIN AMERICA AND IN EUROPE

One reason why the theoretical debates have intensified is that there has been greater decentralization, and the form the decentralization has taken has meant there are more shared competences and (hence) more multi-level governance. This section briefly

*Table 7.1 Fiscal restrictions in Europe and Latin America*

Region	Balanced Budget		Central Government Limit		Internal Stability Pact		None of the Restrictions	
	1991/96	2004	1991/96	2004	1991/96	2004	1991/96	2004
EU-15	8	7	5	11	1	5	6	2
LA-19	3	3	9	16			8	0

*Note:* Figures are for 1991 for the EU-15 and 1996 for the LA-19; both sets of countries have data for 2004. Table based on data presented in Daughters and Harper (2007), p. 249 and Hallerberg et al. (2009), 70.p. The EU-15 are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the UK. The LA-19 are: Argentina, Bahamas, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, Suriname, and Trinidad and Tobago.

reviews the development of ‘fiscal federalism’ in Europe and Latin America over the past 20 years. While there has been some shift of power as well as resources to lower levels of government, there are also more restrictions on how sub-national governments can use those powers than in the past, which can be seen as an attempt to limit the worst effects of multi-level governance.

In Europe, there have been what appear to be contradictory movements. Taking the EU-15 as the base, which includes most West European countries, one observes some fiscal decentralization within countries. Devolution in the UK has led to regional parliaments in Northern Ireland, Scotland and Wales. The fiscal terms of the devolution vary, with Scotland receiving the right to make minor adjustments to taxation as well as the right to take the decision to diverge from national practices on spending in the areas of education and health. Similarly, in Italy since 1997, regional governments have had some limited power to set taxes, while since the Constitutional reform in 2001 the regions have had equal legal standing with the central government (see Hallerberg and Stolfi 2008). Spain has a system where there seems to be almost continual movement towards more decentralization. The central government negotiates with regional governments the terms of their relationship once every three years or so. Similar to Scotland in the UK, in 2002 the regions received the right to set education and health policy, and, in another similarly to the UK, some regions also received limited tax powers. Belgium made the biggest changes of all countries in 1993 on the expenditure side when most major spending areas were moved to the sub-national level (most notable exceptions were in defense and social security).

Yet, as responsibilities have moved downward, there has been a corresponding tightening of central government restrictions on local governments. Hallerberg et al (2009) compare the restrictions in place in 1991, 2000 and 2004 at the sub-national level, and their table 3.6 is reproduced here (Table 7.1). It is clear that there has been a general increase in restrictions on lower levels of government. In 1991, approximately half of the sample had either balanced budget requirements or ‘golden rules’ that restricted borrowing to investment purposes, a third had central governments that could restrict sub-national borrowing and one of the 15, Denmark, had an agreement on borrowing that the levels of government negotiated among themselves. By 2000, however, three

countries added the ability of the central government to restrict borrowing while another three added negotiated internal stability pacts. Such pacts are really ‘domestic stability pacts,’ which have an analogy to the Stability and Growth Pact at the European Union level.

While it is notable that different levels of government do negotiate such agreements, their enforcement in practice has varied. In Austria, there is an agreement that the municipalities must balance their budgets as a group over the medium term, while regions as a group must have a surplus of 0.75 percent of GDP. The pact allows some transfers of surplus/deficit rights across municipalities and regions. The pact also includes financial sanctions on sub-national governments, although there are escape clauses for economic downturns. Similarly, in Belgium representatives from the regions, the central government and the central bank negotiate budget balance and expenditure growth targets for the different levels of government in its High Council of Finance. Upon a recommendation of the Supervisory Council and in coordination with the regions, the central government can limit regional borrowing for two years if the regions do not respect their targets. In Germany, a Financial Planning Council coordinates an agreement on budget balances at the different levels of government. There are no punishments if a level of government does not stick to its targets.

Indeed, as of 2004, only two of the 15 countries did not have some sort of restriction in place, namely Finland and, if one considers that the agreements of the Financial Planning Council are not binding, also Germany. In Finland the lower levels of governments are comparatively less important than in other parts of continent – the percentage of local government revenues of total government revenues, for example, is fairly low, at about 23 percent. Even so, there have been efforts to streamline the way that the central government awards grants to localities, and localities for their part have received more own-source tax revenue (Ministry of Finance of Finland 2001). The German case is potentially more troubling given that the country is a federation. A new fiscal rule is set to appear in the German constitution, the so-called ‘debt brake,’ which will set formal limits on deficit levels at the central government level in 2016 and at the Land level beginning in 2020. A ‘Stability Council’ will provide assessments on whether the Länder are abiding by the law.

To return to the general framework for the EU-15, if one looks at the timing of the changes, one may be tempted to conclude that the fiscal requirements associated with Economic and Monetary Union would explain the restrictions on lower levels of government. Countries that wanted to adopt the euro were expected to have budget balances higher than –3 percent of GDP and gross debt levels no larger than 60 percent. What is important for the purposes of this chapter is that the deficit and debt levels were in general government terms, not just central government. The –3 percent budget balance rule has remained important after one joins the European Union. While the rules under the Stability and Growth Pact have some important loopholes, which mean in practice that states ignore them during economic downturns, the basic principle is that the Economic and Financial Council (ECOFIN) of the European Union can decide that a country has an ‘excessive deficit,’ which in turn triggers an ‘excessive deficit procedure.’ These procedures from the European Union level may have put pressure on governments to reduce debt and deficits at all levels of government.

While the story about the link between Economic and Monetary Union is plausible, it

is also probably too simple. Three countries chose to remain outside the eurozone, and all three had restrictions in place on sub-national governments. Moreover, two of the three tightened its rules in this period. Evidence from other parts of Europe is also revealing – Switzerland is not a member state of the European Union, but similar developments can be found there. Between 1994 and 2002, eight cantons imposed so-called ‘debt brakes’ on themselves that led to somewhat lower expenditures and somewhat higher revenues, or much lower deficits, than existed before (Kirchgässner 2005).

Indeed, evidence from Latin America suggests that both decentralization as well as efforts to rein in sub-national governments were a worldwide phenomenon at this time. Two countries, Argentina and Brazil, have federalist roots that go back to the nineteenth century, but Latin America would generally be considered on average more centralized than Europe. There were, however, two waves of decentralization. The first occurred in the early 1980s and included constitutional reforms, targeted fiscal transfers, and delegation of some taxation and expenditure powers (Wiesner 2003, p 10). These changes were associated with democratization, and they were mostly political, such as the creation of mayor offices and the like, rather than strictly fiscal. The second wave began in the 1990s, and it has taken different forms. In Chile, the revenues and expenditures have remained mostly at the national level, but there have been administrative reforms, such as the creation of ‘regional governments’ and ‘regional councils’ in 1993 (*ibid.*, p. 19). On the other hand, Brazil has moved towards a true federal state.

Indeed, a common pattern is that democratization meant that sub-national governments received some share of expenditure responsibilities and tax revenues. The exact form this all took, however, varied – in Argentina, for example, two of the biggest revenue generators, the income and value-added tax, are shared between the central government and the provinces (Bonvecchi 2009), while in Mexico the new spending responsibilities receive financing mostly through central government transfers (Magar et al. 2009). More generally, there has been a fiscal shift to the sub-national level, with 13 percent of expenditure at the local level in 1985 in Latin American countries but 19 percent in 2004, which is closer to the 29 percent at the sub-national level in OECD countries in the same year. These averages hide variation, however, with Argentina at near 50 percent of expenditures at the sub-national level at one end and Panama at around 2 percent at the sub-national level at the other (Daughters and Harper 2007, pp. 214, 224). Moreover, the mismatch between expenditures and revenues that Rodden (2006) and others identified is especially prominent in countries like Argentina where transfers from the center to the provinces are large. The lack of fiscal discipline at the local level has led two observers of Argentine politics, in fact, to title a paper ‘The dark side of federalism’ (Saiegh and Tommasi 2000).

Like in the EU-15 countries, however, there has been a drive for the national governments to impose restrictions on the governments below them. Table 7.1 provides information for 19 Latin American countries for two points in time, 1996 and 2004, which come from Daughters and Harper (2007). Balanced budget requirements are less common in this set of countries, with only the Bahamas, Chile and Suriname requiring them at the local level at both time points. The main change is a strengthening of the center to restrict the ability of governments below them to borrow, with nine countries having such restrictions in place in 1996 and 16 in 2004. This meant that no country lacked one of these institutions restrictions by 2004.

Yet there are some lessons to learn about the effectiveness of such restrictions. The most exemplary probably are found in Brazil after the introduction of its Fiscal Responsibility Law in 2000. It was applicable at all levels of government, and it set *ex ante* and *ex post* controls on borrows and lenders. It also generated new stakeholders interested in good fiscal outcomes, such as the Federal Audit Court. Indeed, as Alston et al. (2009) persuasively suggest, the law was successful because the most important actors in the policy-making process had incentives to introduce and to maintain it. For the states, the law gave the executive enforcement mechanisms to address the common pool resource problem all of the states faced. Moreover, at the time, most governors were in their second terms of office and could not run again, so they were more open to reforms. The law also strengthened the hand of the president, which assured his support. Yet the history of such fiscal responsibility laws in general has not been as hopeful – several other countries ranging from Argentina to Venezuela also introduced them, yet none honored the terms of their own agreements.

There is also a story about attempts of central governments to move away from the shared competences that characterize multi-level governance that is worth telling. In Argentina, crises provide opportunities for renegotiation of the terms of the fiscal relationship (or Type I multi-level governance, MLG-1). The center has agreed to bail out provinces in trouble, but only if the provinces do not oppose the center's expansion of taxes like export duties where only the center gets the revenue (Bonvecchi 2009). Similarly, the center bailed out troubled provincial banks in Brazil during its own financial crisis in exchange for either the closure of those banks or their privatization (Melo et al. 2010), which effectively moved matters of fiscal regulation from a shared competence to one where the central government could call the shots.

### 7.3 STATE OF THE LITERATURE TODAY: RENEWED DOUBTS ABOUT DECENTRALIZATION AND FUTURE CHALLENGES

This chapter has reviewed the state of the literature on fiscal federalism and its implications for multi-level governance. Key components of multi-level governance include shared competences and inter-locking jurisdictions. The fiscal federalism literature generally warns of the negative consequences that result from such institutional arrangements. When arrangements are shared, it is not clear who should pay for any financial messes that result, and this encourages lower levels of government to spend more than if they had to bear the entire cost of their decisions themselves. Similarly, if the money for expenditures comes from a shared pot, governments also have reason to spend more. The fiscal 'reforms' that one observes in both Europe and Latin America can be interpreted as attempts to move away from multi-level governance.

Several challenges to the literature remain. While there are clear supporters of the benefits of decentralization, as more countries have decentralized, doubts about the utility of such decentralization have increased. Rodden's (2006) careful study of federalism indicates that the accompanying institutional set-up is important. Sub-national governments that simply receive large transfers from the national government do not internalize the costs of their decisions. Treisman (2007) suggests that much of the modeling work

has been incomplete and perhaps even sloppy, and he calls for more nuanced consideration of the different factors that belong in any consideration of whether a country should decentralize or not.

A question much of this work begs is why countries decentralize in the first place. There are several arguments that are now in circulation. Some authors focus on the nature of the game between a national executive and legislature (for example, Willis et al. 1999), while others emphasize the territorial component (Falleti 2005). Treisman (2007) would suggest that one should integrate these insights into a more complete model before one tests their applicability.

## NOTES

1. Such restrictions do not prevent sub-national governments from making bad decisions with money they have on-hand, however, such as placing their money in risky bank accounts. Several council and city governments lost significant amounts of money in off-shore Icelandic banks during the financial crisis in 2008 and 2009.
2. Rogowski (2000) shows that the model holds even if labor is immobile so long as capital is mobile.

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## 8 Multi-level party competition in federal and regional states

*Charlie Jeffery*

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Over the last 30 or so years democracies across the developed world have witnessed a decentralist turn. Processes of federalization, regionalization<sup>1</sup> and devolution in hitherto centralized states have accumulated, while long-established federal states have experienced intensive debates about the scope for additional decentralization of their federal systems. This decentralist turn is documented in the new index of regional authority produced by Marks et al. (2008). Their index – covering 42 European Union (EU), Organization for Economic Cooperation and Development (OECD) and other states – shows that regional authority was broadly stable from 1950–70, but has grown steadily since. Of those 42 states, 29 have become more regionalized, and only two (marginally) less regionalized. The biggest drivers of the growth of regional authority have been the proliferation of elected institutions at the regional level, and the accumulation of the functions of government held by those institutions.

Over a similar period, and in an interconnected process, the number of ‘ethnoregionalist’ or ‘non-statewide’ parties competing for elected office in Europe has proliferated. A growing number of parties compete for office in only part of the territory of the state concerned, typically seeking to establish or increase the level of, and to control, institutions of self-government in that territory. Lane et al. (1991) counted 45 non-statewide parties (NSWPs) in Western Europe at the turn of the 1990s; Emanuele Massetti estimates there are now 93 in Western Europe which have sufficient organizational infrastructure to contest elections on a regular basis, of which around 30 are significant players in regional party systems. In addition, a new contingent of NSWPs is now also emerging in central and Eastern Europe.<sup>2</sup> There appear to be no systematic data on the prevalence of NSWPs outside Europe.

These data on regional authority and NSWPs show that party competition in federal and regional states is not just about national parliaments. There are now more regional parliaments to win office in, winning office in those regional parliaments is now a bigger prize as the range of their functions has grown and growing numbers of non-statewide parties now compete for office in regional settings alongside parties which have a statewide profile. This conjunction of changed circumstances has opened up a significant new research agenda. It raises questions about:

- The decisions voters make in regional as compared with national elections, in particular whether they make decisions for the same reasons about particular parties in different electoral processes.
- The drivers behind the growth of NSWPs, once dismissable as ‘quaint and irritating anachronisms’ (Rokkan and Urwin 1982, p. 1), but now in many places the pivotal parties in regional party systems.

- The competitive challenges that NSWPs pose for statewide parties – and vice versa – in regional settings.
- The ways in which party competition at regional and statewide levels are, or are not, linked with or constitutive of one another.

This chapter explores how each of these questions has been addressed in scholarly work over the last decade or so. It begins by discussing a number of methodological constraints on the development of that work, in particular the often unreflected choice of the ‘nation-state’ as the primary unit of analysis in mainstream political science. By arguing for a move ‘beyond the nation-state’ the chapter reinforces the wider claim in this handbook, and in multi-level governance scholarship more generally, that a single-level focus is inadequate for an understanding of contemporary governance. It also throws light on how two of the central traditions of political science analysis – institutionalism and political sociology – have been applied to multi-level party competition in ways which, by and large, ignore one another rather than joining forces to build a more subtle, synthetic account. These concerns underlie the manifesto set out in the conclusion for a more ambitious programme of research better attuned to the complexity of politics in multi-level democracies.

## 8.1 OPENING UP THE RESEARCH AGENDA: BEYOND THE ‘NATION-STATE’

Though multi-level party competition has become a growth area in political analysis, three significant methodological problems have conspired to constrain its impact. The first concerns the residual weight of understandings of the ‘nationalization’ of politics. Post-war social science has canonized the ‘nation-state’, submitting often unwittingly to a ‘methodological nationalism’,<sup>3</sup> a set of assumptions that establish the nation-state as a ‘natural’ unit of analysis for social science. Those assumptions have come under increasing challenge by political scientists exploring new forms of transnationalized political process (Grande 2006; Egeberg 2008; Stone 2008), especially but not only in the field of European integration. Where political science has yet to shake off the grip of methodological nationalism is in the field of territorial politics within the state. Michael Keating (1998, p. ix) has argued that ‘territorial effects have been a constant presence in European politics, but that too often social scientists have simply not looked for them, or defined them out of existence where they conflicted with successive modernization paradigms’. These ‘modernization paradigms’ have a number of different forms, but a common story: over centuries an intertwined process of state formation and national integration culminated in the mass-democratic, national welfare states that were consolidated after World War II (Marshall 1950 [1992] Tilly 1975; Rokkan 1999; Zürn and Leibfried 2005). That common story depicts the integration of the mass population into a shared national, statewide political life inter alia through processes of cultural homogenization and linguistic standardization and the nationalization of political participation through electoral competition for office in national parliaments.

There is little doubt that these were powerful forces of nation-state integration, and that these forces achieved their fullest reach in the first decades after World War II.

However it also seems clear that nation-state integration was always incomplete, and that the reach of integration achieved after World War II has since ebbed. States did not achieve cultural homogeneity, and single, statewide patterns of political participation. The decentred social mobilization expressed by non-statewide political parties and the institutional decentralization of democracy captured by Marks, Hooghe and Schakel provide obvious empirical demonstration. That these limits are not more fully recognized in scholarship on party competition reflects the weight of the nation-state paradigm. Scholarship on parties and elections continues to project forward national modernization paradigms in a broadly Rokkanian tradition, but largely stripped of Rokkan's concern with the 'periphery'.

If the methodological nationalism of work focused within the state acts as an exogenous, structural obstacle to a greater impact of work on the regional dimension of party competition, others are self-inflicted. A second obstacle is a disconnection between scholarly debates in the USA and those in (Western) Europe. Separate institutional forums have emerged for work on regional party competition in the federalism/regionalism research groups of the American Political Science Association in the USA and the European Consortium of Political Research and some national political science associations in Europe. Successful journals with overlapping remits covering the field of multi-level party competition exist in the USA (*Publius. The Journal of Federalism*) and in Europe (*Regional and Federal Studies*). Yet there is relatively little overlap in memberships of research groups, or cross-fertilization of research agendas. These distinct institutional geographies have fostered divergent intellectual traditions. Much US scholarship on multi-level party competition continues to trace a lineage to an institutionalist tradition in federal studies as marked out in classic contributions by Wheare (1946), Riker (1964), Friedrich (1968) Watts (1999) and others, now modernized with the adoption of 'new' institutionalist approaches (Erk 2008, pp. 5–6). Yet that tradition has had little resonance in a (Western) Europe which had just three federal states for most of the post-war period (Austria, Germany and Switzerland). Instead, European research has built a stronger focus on regional social mobilization, including work on the political movements of stateless nationhood in Europe (here connecting to work on Canada – cf. Keating 1996; McEwen 2006; Henderson 2007) and more broadly on the demands and movements for the recognition of regional interests which continue to transform the constitutional structures of both federal and regionalized states in Europe.

This continental divide between institutional and sociological perspectives echoes an earlier debate – which was especially potent in Canada – about the causal relationships between territorial social cleavage and institutional change, broadly between the position set out by W.S. Livingston (1952) that territorial social diversity produces federal forms of government, and that of Alan Cairns (1977, p. 716) that political parties and interest groups mobilize in response to the 'governmental structure in which they exist'. The continental divide that currently exists between US institutionalist perspectives and European sociological ones reproduces a version of the positions in that debate, yet shows little prospect of reconciling them, or even bringing them into more structured dialogue with one another. By talking past each other in this way US and European scholars impede the development of a more compelling and overarching theoretical account of new dynamics of regional party competition and their relation – and challenge – to the nation-state paradigm. The effect is to limit the impact of their work.

That effect is compounded by a related point and a third obstacle to greater impact: the proliferation (especially in European scholarship) of small-scale, often single case studies of regional party competition (although often bundled as collections, for example, De Winter and Türsan 1998; Hough and Jeffery 2006a; Swenden and Maddens 2009a). With few exceptions, for example, the work of Chhibber and Kollman (2004), Downs (1998), Keating (2001), and on a smaller scale Deschouwer (2003), Swenden and Maddens (2009b) and Thorlakson (2007), scholars have not moved towards establishing the conceptual foundations or datasets for more ambitious theoretical contributions or comparative analyses.

The net effect of these various obstacles to the development of the field is that what follows is an account of an only partially worked through research agenda whose resonance with wider political science debates is still more at the stage of potential than realization.

## 8.2 THE REGIONAL VOTER AND THE RELATIONSHIP OF REGIONAL AND NATIONAL ELECTIONS

The regional voter was long an elusive phenomenon. Prompted by the apparently renewed vigour of peripheral identities from the end of the 1960s, a range of authors sought evidence of their impact on statewide voting behaviour (Rose and Urwin 1975; Urwin 1982; Rokkan and Urwin 1983). But none of them found it: 'electorally, contemporary peripheral mobilisation has not been very successful' (Rokkan and Urwin 1983, p. 165). Daniele Caramani appeared to add a final word in his magisterial *The Nationalization of Politics* in 2004: 'Even though there has been a strong trend to institutional decentralization . . . the period since World War II has witnessed a fundamental stability of the territorial configurations of the vote in Europe' (Caramani 2004, p. 291). This conclusion is entirely valid on its own terms, in a book focused on elections to national parliaments. Indeed, others who have looked for evidence of de-nationalization in statewide elections have confirmed Caramani's finding of territorial stability of voting behaviour (Deschouwer 2009a). Yet Caramani's conclusion also overlooks the possibility that elections to regional parliaments might be, or have become, an arena in which voting behaviour diverges from the 'nationalized' patterns of statewide elections.

Such divergences may not be replicated in elections to national parliaments, yet can still have vital significance for national politics, for example, in impacting on the range of coalition opportunities available at the national level (Downs 1998, p. 146), introducing new veto points in intergovernmental relations that limit what national governments can do (Lehmbruch 1976, 1998), or at a more fundamental level in challenging the decision-making scope of national parliaments. The election of a pro-independence government in Scotland in 2007 has, for example, prompted debate about a range of schemes which would transfer powers from the UK to the Scottish Parliament (Jeffery 2009). Against this background, interest in the relation of regional to national elections has grown significantly over the last decade. In most cases the starting point has been to explore whether regional elections are what Reif and Schmitt (1980) called 'second order' elections. Reif and Schmitt coined this terminology in their analysis of voting behaviour in

European Parliament (EP) elections. Voters did not vote in EP elections on the basis of judgements about latest developments in European integration, but rather about 'the political situation of the first-order arena [their national parliament] at the moment when the second-order election is being held' (Reif 1985, p. 8). EP election results were functions of national politics; they offered scope for voters to express short-term frustrations about national politics – in particular by not turning out, voting against the incumbent parties in national government and voting for fringe or protest parties – because there was less 'at stake' in EP elections than in national parliament elections. Voters could then return to their 'normal' voting behaviour at the next national election, when their decisions really mattered.

The adoption of this framework of analysis for the relationship of regional to national elections – as indeed Reif and Schmitt (1980, p. 8) had recommended – is widespread (cf. Hough and Jeffery 2006a). But it has been adopted as a convenient, off the shelf choice in the absence of bespoke approaches, and brings with it particular consequences. In particular it imports from the study of EP elections the assumption that other forms of politics are subordinate to national politics. Most of the findings of work on regional elections as second order elections confirm that subordination. Reporting on contributions to an edited collection on sub-state elections in Austria, Belgium, Canada, Germany, Italy, Spain and the UK, Jeffery and Hough (2006, p. 252) conclude: 'The general finding, then, is that most sub-state elections do indeed appear to be second order, subordinate to voters' considerations of state-level politics.'

There may be a sense of self-fulfilling prophecy at play here. Research findings may be path-dependent on research questions. If other starting points are taken which treat regional elections on their own terms, rather than as functions of national elections, a different or at least more nuanced picture might emerge. Two such starting points appear possible, the first institutional and American in origin, the second sociological and European. The institutional approach has a hidden link to Reif and Schmitt. Their work drew on ideas in US scholarship about the relationship of presidential elections to other kinds of election held in the presidential mid-term (mainly Senate and House elections, but also gubernatorial and state legislative elections). The broad finding in that scholarship is that 'at every midterm, the electorate turns against the presidential party' simply 'for being the party in power' (Erikson 1988, p. 1028). While this finding is unambiguous – 'an almost invariable historical regularity' (ibid., p. 1011) – for Senate and House elections, there is a more contested picture in the relationship of presidential to state gubernatorial and legislative elections (or, in European terms, regional elections in the USA).

State elections have risen up the scholarly agenda as the political weight and policy portfolios of the states have grown over the last three decades or so. Some analysis views state, and in particular gubernatorial elections as (in European terminology) second order, serving as mid-term referendums on the record of the incumbent US president (Simon et al. 1991), especially on the state of the national economy (for example, Simon 1989). Carsey and Wright (1998, p. 1002) conclude that 'presidential approval clearly intrudes [in gubernatorial elections] in a major way'. This analysis of second-orderness has been challenged by other accounts which find that governors are held accountable for their state-level record, in particular the state economy: 'voters in these elections express support or dissent for the performance of the incumbent based upon how well

the economy is doing' (Atkeson and Partin 1995, p. 99; cf. Leyden and Borrelli 1995; Ebeid and Rodden 2006).

There are a number of variations on this argument. Robert Stein (1990) has argued that US voters differentiate their voting in state as compared to federal elections according to the functional responsibilities that are at stake at each level of government. Cutler's (2008) recent work on Ontarian elections in Canada shows that 'valence' judgements on parties' issue profiles on, and competence to deal with, provincial-level issues shape provincial election outcomes.<sup>4</sup> The common denominator is a focus on institutional structure; federal systems make possible a 'split-level democratic citizenship' (*ibid.*, p. 502) in which important matters are at stake in both statewide and regional elections, and voters (at the very least have the potential to) make different, and unconnected voting decisions for different types of election.

There have as yet been few attempts to deploy these institutional approaches to European regional elections, though some examples are beginning to emerge in UK scholarship (though with inconsistent findings): Curtice's (2006) exploration of whether in the 2003 Scottish Parliament election voters made decisions intended to hold the Scottish government to account for its record over the previous four years (not really); and Johns et al.'s (2007) examination of whether valence evaluations of government and opposition in Scotland determined the 2007 Scottish election outcome (they did). Rather more attention in European scholarship has been given to the extent to which distinctive territorial identities and/or voter conceptions of territorial interest may differentiate the voting behaviour of key voter groups in regional elections from that in national elections.

This is an interpretation favoured by Richard Wyn Jones and Roger Scully in their (still tentative) approach to 'multi-level voting' (MLV), as applied mainly to Wales in the UK, and focused on the pattern since devolution in 1999 for Welsh (and Scottish) nationalist parties to do better in devolved than UK elections (Trystan et al. 2003; Scully et al. 2004; Wyn Jones and Scully 2006): 'the complex nature of identities in nonstate nations such as Scotland and Wales . . . provides, in elections to devolved institutions, an alternative national focus within which many voters may locate their electoral choices' (Wyn Jones and Scully 2006, p. 130). Paterson et al. (2001, p. 44) develop a similar analysis, though focused on territorial interest rather than identity (though of course those who define interests territorially may do so because of the identity they claim): 'voters revealed that what they are looking for in a Scottish election are parties that are willing to use the devolved institutions to promote Scotland's interests'. Hough and Jeffery (2006b, p. 137) point to equivalent patterns in post-communist Eastern Germany, as do Pallares and Keating (2003, p. 250) in Spain, who see patterns of 'dual voting' in Spain as a voter response to 'a vision of statewide parties based on ideological criteria and one of the non-statewide party based on regional interests'.

In sum, there is a growing body of evidence that in regions with distinctive territorial identities voters use regional elections to articulate a sense of distinctive political community, whether defined culturally as identity, instrumentally as interest, or both. This Euro-sociological approach challenges that of second order elections; it points to circumstances in which regional voting behaviour is uncoupled from, rather than a variant of, voting behaviour in national elections. So in a different way do the more institutional approaches used in North America and now beginning to emerge in Europe. One of the

problems in moving to a more general evaluation of the explanatory power of these challenges to the conventional, nationalized interpretation of regional elections is that their key indicators in aggregate-level electoral data – shifts in support away from incumbent statewide parties to NSWPs in regional as compared to national elections – are the same as those predicted by the second order model. The only systematic way to unpack that aggregate-level trend is to carry out more individual-level surveys of voter behaviour designed simultaneously to test competing second order, sociological and institutional approaches. This is partly a question of persuading research funders to support more work on regional elections in more places, but also one of ingenuity in interrogating what by now are already rich datasets on regional elections and regional public attitudes in Germany, Spain and the UK.<sup>5</sup>

### 8.3 POLITICAL PARTIES: COMPETITIVE CHALLENGES IN MULTI-LEVEL POLITICS

There are two types of political party that are active in regional-level settings: statewide parties which compete for office across all or almost all of the state territory, and non-statewide parties which have a region-specific rationale, though generally compete in both regional and statewide elections in their region. Growing attention has been given in the last decade or so to NSWPs, though again they are viewed in different ways in North American and European scholarship. The discussion first focuses on these differences before moving on to explore the competitive dynamics between NSWPs and statewide parties.

#### 8.3.1 Where do Non-Statewide Parties Come From?

The growing number of NSWPs has prompted a large number of case studies of particular parties, but rather fewer attempts at classification and explanation. One exception has been the work led by Lieven de Winter and his collaborators – all based in Europe – on what they initially called ‘ethnoregionalist’ (de Winter and Türsan 1998) and later ‘autonomist’ parties (Lynch, et al. 2006). This work has a sociological foundation, linked back to the work of Rokkan and his collaborators on the social cleavage between centre and periphery (Lipset and Rokkan 1967; Rokkan 1999). It focuses on ethnoregionalism as ‘ethnic entrepreneurship’ (Türsan 1998, p. 6) designed to articulate, mobilize and defend the collective identity of a territorially defined social group within (and sometimes crossing the border of) a state. The central objective of ethnoregionalist parties is to establish or strengthen some kind of ‘self-government’ within or beyond the state concerned (de Winter 1998, p. 241).

De Winter (1998, pp. 211–12) measured the success of ethnoregionalist parties in terms of vote share and seats in national parliament elections on the basis that ‘the main policy objective of ethnoregionalist parties is the reorganisation of the national power structure towards an increase in the degree of self-government, and for this reorganisation only legislative bodies at the national level are competent’. This justification – challenged by Miodownik and Cartrite (2006, p. 54) as a ‘logic more appropriate to state-wide politics’ – appears flawed in a number of ways. First (and the main concern of Miodownik and

Cartrite) is that it defines out of significance parties which do not make it into national parliaments, but which may still be significant players in regional parliaments. Second, not all – and more likely, not many – constitutional reforms introducing or strengthening regional self-government have been driven by ethnoregionalist party presence in national parliaments, but rather the vigour of pro-autonomy sentiment in the region itself. And third, institutions of self-government are often introduced for reasons other than ethnoregionalist pressures – for example, to provide new means of implementing national or EU policies or to promote ‘endogenous’ regional economic development (cf. Jeffery 2008, pp. 546–50) – yet once established can provide new platforms for regional political ‘entrepreneurship’.

The latter is a point well made by Pallares et al. (1997) in their analysis of NSWPs in Spain. Some of those parties match de Winter and colleagues’ definition of ethnoregionalism, and their strength and legitimacy was instrumental in establishing a regionalized democracy in Spain. But other NSWPs have since emerged in almost every Spanish region, including those where there is no realistic claim to a distinctive social identity, and have become advocates in some cases of further regionalization. These parties emerged not to defend social identities but in response to the ‘new political opportunity structure’ (ibid., p. 168) of the regionalised state. Spain, in other words, has NSWPs with both sociological roots in territorial cleavage and institutional roots in the opportunity structures of the Spanish state (indeed this is why Pallares et al. (1997, p. 139) adopted the awkward but more inclusive term ‘non-statewide party’).

This institutionalist perspective is echoed elsewhere, with especially notable contributions in North American scholarship. Dawn Brancati’s (2006) 37-country study (with cases from all continents except Africa) demonstrates that decentralized institutional structures more readily explain the prevalence of NSWPs than territorial social cleavage. And Chhibber and Kollmann (2004, p. 20) have developed an ambitious theory of party system formation in their longitudinal study of Canada, India, the UK and the USA which suggests that party systems form on a spectrum from ‘centralized’ (that is, uniform and statewide) to ‘provincialized’ (that is, with regional differentiation) depending on ‘which level of government controls resources that voters care about’. So ‘as authority devolves to lower levels of government, state-based, province-based or even region-based political parties can gain increasing votes at the expense of national parties’ (ibid., pp. 222–3). Echoing the institutionalist strand of work on regional elections, what matters in explaining the growth of NSWPs is the importance of what regional political institutions are empowered to do, because that is what matters for voters.

### **8.3.2 The Dynamics of Regional Party Competition**

Whatever the origins of NSWPs, their presence impacts on the dynamics of party competition in the regions concerned. One of the more fruitful themes in recent research has been the exploration of the strategic opportunities and dilemmas that face both NSWPs and the statewide parties that compete with them in the NSWP regions. Research has moved beyond an understanding of NSWPs as single-issue parties focused solely on the pursuit of institutions of self-government that might better give voice to and protect distinctive regional identities. The self-government project may well be the defining and predominant feature of NSWPs in the absence of self-government. But once institutions



of self-government have been established – as is now increasingly the case – other strategic calculations become significant, not least the fact that few NSWPs have won a parliamentary majority (or achieved sufficient strength to become a leading player in regional coalition governments) on a platform of ‘pure’ regionalism. The logic of office-seeking requires NSWPs to open out to wider constituencies of voters (Newman 1997; Tronconi 2006).

That logic requires NSWPs to compete also on the terrain conventionally contested by statewide parties. They have a number of choices in doing so, as has been shown in attempts to classify NSWPs on ‘secondary’ (de Winter 1998, pp. 208–11) ideological criteria, including:

- classic left-right positioning on the respective roles of market and state (where NSWPs compete directly against social democratic and conservative/liberal parties)
- post-materialism (where NSWPs compete with green parties)
- anti-modernism (where NSWPs compete with the authoritarian right on issues like immigration or Euroscepticism).

NSWPs’ responses to these strategic choices may in principle help them open up a wider constituency. But they may also bring new dilemmas. First, they may threaten the internal cohesion of the NSWP, either through a perceived dilution of the party’s commitment to the regionalist cause, or through a perceived dilution of the ideological position grafted onto its regionalism at some earlier stage in the attempt now to make the breakthrough into government (Elias 2009). In this sense NSWPs face an internal party dilemma which bears resemblance to the ‘law’ of deradicalization and institutionalization within a once contested political system that Robert Michels (1915) identified in early twentieth-century socialist parties: the more that office is sought, and the more the party professionalizes itself in the pursuit of office, the more it develops a stake in the current system and the more its transformative vigour is dimmed. One risk in these circumstances is that other NSWPs, ‘truer’ to the original cause of mobilizing collective identity to win self-government, will emerge. The complex histories of division, recombination and further division of regionalist parties in Corsica (Olivesi 1998) and Sardinia (Hepburn 2009) exemplify that risk.

Another risk – which leads into the second strategic dilemma faced by NSWPs – is that pragmatization and moderation in pursuit of government office may blur the distinctions between NSWPs and SWPs in the region concerned. Saul Newman (1997, p. 56) makes the incisive point that NSWPs are frequently ‘more ideological followers than . . . leaders’, whose ‘socio-economic agendas resemble . . . the ideological position of the regionally dominant party when they arise’. The ideological positioning of NSWPs is in other words – as Emanuele Massetti (2009) puts it – a ‘deeply contextual process’; in a Scottish political environment long dominated by the UK Labour Party the Scottish National Party, for example, was unlikely to gain much traction with a right wing economic agenda; Flemish regionalism, equally, was never likely to have a left-leaning agenda. NSWPs ‘do not challenge the status quo as much as reflect it in a new way’ (Newman 1997, p. 56). But as they engage with others’ ideological agendas, they logically face the challenge of maintaining their own distinctive identity.

That challenge may, third, be exacerbated by a reverse dynamic: when statewide parties move onto NSWPs turf by stressing regionalist agendas, either through regionally tailored variations of the statewide party programme, and/or by allowing regional branches of the statewide party greater organizational autonomy in competing in the region. Examples include the socialists in Catalonia, who are formally autonomous of the Spanish Socialist Party (Hopkin 2003, p. 233), and, to a lesser degree, the Labour Party in the UK which has gradually allowed its Welsh and Scottish branches more organizational and programmatic leeway in competing with Plaid Cymru and the Scottish National Party (Laffin et al. 2007). In neither case have the statewide parties yet had clear or sustained success in facing down the NSWPs challenge. Elsewhere they have, for example, in Sardinia, where the persistent weakness of Sardinian regionalism reflects the success of successive statewide parties ‘at playing the Sardinian card’ (Hepburn 2009), or in Belgium, where the statewide parties dissolved themselves into regional-scale parties, and subsequently eclipsed the Flemish, Walloon and Brussels regionalists who had earlier led the argument for the regionalization of the Belgian state (Deschouwer 2009b). Of course, statewide parties that play the regional card too emphatically also run the danger of eroding their appeal in other parts of the state and undermining their statewide credentials (Chandler 1987, p. 152).

The patterns of interaction between NSWPs and statewide parties in regional contexts are, by definition, diverse. They produce distinctive patterns of party competition in any regions in which NSWPs attain significant levels of support, with regional branches of statewide parties drawn into different kinds of strategic calculation that apply in statewide elections. But even in states, or parts of states, which lack significant NSWPs there is evidence that regional branches of statewide parties also detach themselves, to varying degrees, from the logic which drives the party at statewide level. This is most obviously the case in Anglophone Canada, where statewide party labels are used, but have significantly different meanings, across the various provinces (Carty and Wolinetz 2006). But it is also the case even in more centralized and politically uniform federations like Germany and Austria. Detterbeck and Jeffery (2009, p. 84) show in the German case that ‘decision-making within the parties [the main statewide parties, the Christian Democratic Union and the Social Democratic Party] has become more decentralized and fine-tuned to specific Land circumstances’. Fallend (2004) makes a similar analysis in the Austrian case, with regional branches of the two main statewide parties likewise bringing different strategic calculations to bear when they compete in regional as opposed to national elections. There are echoes here of the analysis of Chhibber and Kollman (2004): parties organize themselves according to the institutional logics of political systems. If important decision-making powers are organized at the regional level as well as at the national level, statewide parties will adjust their organizational structures accordingly.

## 8.4 MULTI-LEVEL PARTY COMPETITION

Statewide parties can, in other words, be just as important as NSWPs in shaping the content and trajectories of regional party competition. They are important in another respect: they form the major point of linkage between the different arenas of regional party competition in a state, and the overarching arena of statewide party competition.

Because they are, by definition, everywhere, they are central to understanding the multi-level dynamics of party competition (Swenden and Maddens 2009b).

Contributions which explore the linkages between the parties that are engaged, simultaneously, in regional and statewide party competition (or reveal the absence of such links) are relatively rare. They fall into three categories: work on coalition formation, on congruence across levels of government and on analytical frameworks for understanding multi-level politics. The seminal contribution on coalition formation was by Downs (1998), who looked systematically at 263 cases of regional coalition formation (and its relation to statewide party competition), in Belgium, France and Germany. Downs presented a multi-faceted challenge to the presumption that regional politics is a subordinate function of national politics. He showed, *inter alia*, that regional coalitions often did not replicate the party alliances that might have appeared 'logical' from a statewide perspective (*ibid.*, p. 146), that regional preferences often overrode 'national circumstances and pressures' (p. 217) and that coalition innovations at the regional level helped open up opportunities for new kinds of alliance at the statewide level (p. 231). Regional-level parties, in other words, exercised significant and unexpected autonomy and some of their regional-level choices had the effect of recalibrating the logic of statewide coalition formation. In that respect at least, political choices at the statewide level were contingent on prior choices at the regional level.

Downs (1998, p. 273) also had a wider point: that the expectations of coalition theory – much of it based in a formal modelling tradition, and focused almost exclusively on coalitions in national parliaments – did not necessarily hold at the regional level. This is a point taken up more recently by Stefuriuc (2009). Focusing on regional government formation in Spain, she confirms some aspects of formal coalition theory: coalitions tended to be of minimal winning size, with limited ideological range and to control the median legislator. But she also emphasizes the assumptions in coalition theory that parties are unitary (that is, nationalized) actors are both generally implausible, but also, logically, untenable in multi-level states. She also finds that parties can hold multiple goals simultaneously – for example, seeking government office at one level, while trying to exert influence by bargaining from a position outside government at another – depending on the incentives available to them at different levels.

The different choices available to the same party at different levels of government provide a link to work on the 'congruence' of party systems at regional and statewide levels. The concept of congruence has been used in two different ways. The first has been to map patterns of government and opposition at regional and statewide levels, and in particular – picking up on Downs (1998) – to identify where the composition of regional governments diverges from (or is incongruent with) that of statewide government (for example, Jeffery 1999; Deschouwer 2009c). The second usage of 'congruence' to capture the multi-level characteristics of party competition is one developed by Lori Thorlakson (2007, p. 70) who devises measures of decentralization which illuminate 'whether political arenas at the state [regional] level are cognitively and competitively independent of the federal political arena' (as reflected in aggregate electoral data). These decentralization measures cover resource-raising and expenditure autonomy and the scope of decision-making powers. The finding – in an analysis with similarities to that of Chhibber and Kollman – is that institutional decentralization, and not territorial social diversity, explains incongruence best: 'the institutional allocation of power

in a federation influences the strategies of parties and voters, creating the potential for distinct politics to develop at the state [regional] level' (Thorlakson 2007, p. 89).

Thorlakson's restatement of the North American institutionalist position that has been a recurrent theme in this chapter, though based on impressive research, does not resolve much. Against it can be weighed equally trenchant restatements of a European sociological position that insists that social structure is primary, and is the basis of collective territorial mobilization from which the institutional structures of government – whether more or less decentralized – follow (for example, Erk 2008). What has been missing are analytical frameworks which have the intellectual ambition to recognize that both institutions and society matter, that both may be primary at the same time.

Deschouwer's (2003) conceptual reflection on political parties in multi-level systems offers a potential starting point for this kind of analytical framework. Taking the party itself as the unit of analysis, Deschouwer (2003, pp. 216–19) first sets out parameters for understanding at which level of government the 'core' of each party is to be found. The core will not necessarily be at the statewide level, and may vary from party to party, and is likely also to be structured by the systemic features of the state concerned, including both institutional variables (intergovernmental coordination, scope of regional autonomy, asymmetry of institutional structure and electoral rules) and social variables of homogeneity/heterogeneity (*ibid.*, pp. 220–3). Parties make choices about how they compete with each other, at and across different levels of government, through the interaction of these party and systemic variables: 'the way in which a party is positioned' and 'the way in which the system itself offers or limits opportunities for action' (*ibid.*, p. 219).

## 8.5 FUTURE AGENDAS

The value of Deschouwer's contribution lies, in particular, in his call for researchers to be prepared to shift what he calls the 'point of reference' (*ibid.*, pp. 217). Depending on the party (and the location of its 'core'), or the election, or the process of government formation, the point of reference, against which one can best understand the choices and opportunities open to the party, will vary. The analysis of multi-level politics requires multiple points of reference simultaneously.

And depending on the point of reference, the weight of institutional and sociological variables will vary. An ethnoregionalist party in a region with a strongly defined territorial identity and powerful and asymmetrical institutions of regional government will have different choices than a statewide party in a socially homogeneous and institutionally symmetrical federation. Importantly even statewide parties in socially homogeneous and institutionally symmetrical federations adapt their goals and strategies depending on the electoral arena. Even parties in such federations provide evidence that party competition is not shaped solely by the logic of competing for office in national parliaments. A fundamental point follows: perhaps more clearly than anything else this chapter has shown – amid the vast diversity of institutional form and social structure in contemporary democracies, and the open range of choices these create for voters and parties – that the national is not 'natural'. It has shown a compelling need for a systematic de-nationalization of the approaches traditionally used in the study of elections and parties.

It has also shown that territorially defined identities and/or interests combine with institutional opportunity structures to shape the way voters vote, and parties compete, in different ways in regional as compared to statewide settings. The de-nationalization of approach has to be both institutional and sociological, open to each, from different 'points of reference', being independent and dependent variables. The insistence of many of the authors cited in this chapter on either an institutional or a sociological independent variable (often combined with some kind of wholesale dismissal of the other) seems contrived, dogmatic and crudely reductionist. We would be better served by a recognition of the complexity of political societies, and of the multi-faceted research programme needed to capture that complexity.

That programme needs better data and better teamwork. Marks et al. (2008) have laid down a challenge on the data side with their dataset on regional authority, which was drawn together from secondary sources, without major external funding (but rather a lot of painstaking work). There exist vast amounts of attitudinal data in North America, Europe and elsewhere from election studies and public attitudes surveys which tell us much about how individuals and regional societies negotiate multi-level politics in specific places; these now require imaginative reanalysis and comparative analysis to help build generalizations and to isolate the respective impacts of institutional, sociological and other variables. Similarly we know much about parties and party competition in specific places; we need to scale up the ambition and build datasets which allow more systematic analysis across time and space. The adaptation of the Comparative Manifestos Project methodology for multi-level campaign analysis by research teams in Belgium (cf. Pogorelis et al. 2005; Libbrecht et al. 2009) and Germany (cf. Bräuninger and Debus 2008; Debus 2008a, 2008b; Däubler and Debus 2009) opens up that kind of possibility.

The call for better teamwork is about the transatlantic divide that has been a repeated theme in this chapter. It is difficult to challenge methodological nationalism when efforts are divided by a 'methodological continentalism', with North American institutionalists developing large quantitative studies and European political sociologists deep in contextual nuance and small case studies each talking past each other. Enormous opportunities for cross-fertilization are being lost. The professional associations and leading journals on either side of the Atlantic have a role to play here, and with it an outstanding opportunity to confront and de-bunk one of the most pervasive, yet perhaps most misleading assumptions in post-war social science: that the nation-state and its institutions are the natural unit of analysis for social scientists.

## NOTES

1. 'Region' is a problematic term, used simultaneously to describe supranational groupings of states and units of government within states. Within states the term is contested, especially when applied to stateless nations. However, most comparative research on sub-state government does use the terminology of 'region', and this contribution reflects this common usage.
2. I am grateful to Emanuele Massetti for these figures. They are drawn from his doctoral thesis awarded in 2009 by Sussex University, UK, on 'Regionalist Parties' strategy adaptation in changing political environments: a comparative study of the Northern League, Plaid Cymru, the Scottish National Party and the South Tyrol People's Party'.
3. The term was coined by Martins (1974, p. 276). Jeffery and Wincott (2010) discuss more fully the debate on, and critique of, methodological nationalism, and its implications for the study of regional politics.

4. Although others find classic second order effects also in Canadian provincial elections (Erikson and Filippov 2001).
5. In Germany regional election studies are available online at <http://zacat.gesis.org/webview/index.jsp> (accessed 3 June 2009). In Spain there are systematic analyses of regional public attitudes available at [http://www.cis.es/cis/openncm/EN/1\\_encuestas/estudios/listaTematico.jsp?tema=121&todos=si](http://www.cis.es/cis/openncm/EN/1_encuestas/estudios/listaTematico.jsp?tema=121&todos=si) (accessed 3 June 2009). In the UK regional election surveys and attitudes data are available at <http://www.esds.ac.uk/> (accessed 3 June 2009).

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## 9 Multi-level governance and organized interests

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### 9.1 INTRODUCTION

Organized interests are an integral part of modern policy making. Private actors, corporate and collective, not only lobby for their interests but have also taken on much bigger roles as experts, administrators and facilitators of public goods, as well as private regulators. The shift of the debate from ‘government’ to ‘governance’ was partly induced by the increasing importance of private actors in policy making. Organized interests are therefore located at and have gained access to all levels of governance regimes. This, however, has not diminished the role of the state in governance. As Theda Skocpol points out in the opening chapter of the edited volume ‘Bringing the state back in’, political theory in the 1970s was heavily dominated by approaches which prioritized socio-economic forces to explain politics at the expense of the autonomy and capacity of states and their agencies (Skocpol 1985). This has led to a resurgence of academic interest in state activities and the autonomy and capacity of the state to pursue its own agenda independent of socio-economic interests. The reorientation in the political science literature over the last three decades thus has less to do with a rebalancing of private versus public or society versus state but more with a shift of focus from structures and amorphous socio-economic (capitalist) interests to specific actors and processes.

The more recent political science approaches seek to reconcile and thereby redefine the relationship between society, business and the state by balancing autonomous state action and the pursuit of private interests. These approaches are embodied in governance literature. However, their theoretical and conceptual understanding of the role of organized interests as an expression of societal and economic influences on public policy making in multi-level governance (MLG) has remained confined to some very distinct areas. The different types of organized interests have been analysed in specific categories of literature on social movements, trade unions and employers’ associations (in the corporatism literature), as well as in literature on lobbying at the national and European level (Woll 2006; Coen 2007). However, a comprehensive theoretical approach towards the analysis of organized interests in MLG regimes is still lacking.

This chapter conceptualizes the role of organized interests in MLG from the perspective of the organizational properties of private actors. It argues that the capacity of private actors to engage in and contribute to MLG regimes – as denoted in the interaction between different levels – varies and is dependent on the type of interests and organizational structure. In other words, the role of organized interests in MLG regimes varies with the type of MLG as defined in the introductory chapter. The constitutionally defined type of MLG I, which is based on a clear division of power in a hierarchical setting, corresponds to highly institutionalized private actors, particularly to associations. In more fluid policy networks, the MLG II regime, organized interests tend to be less institutionalized and more fragmented.

Historically, organized interests have evolved in interaction with the polity they face. As the nation state had become the most important reference point for public policy, organized interests also concentrated their resources and their activities at the national level. This is also due to the fact that nation states and their regulatory powers present the most important foundation for organized interests by far. National governments give incentives and disincentives for collective organization, as well as structure the access points to policy-making procedures. They have remained the anchor point for organized interests, as lobby groups without a national base hardly exist and are mainly found in the context of European Union (EU) policy making. Recently, however, organized interests have become increasingly important in the context of new fluid MLG arrangements (MLG II) in which private actors are included in policy networks. This is because they act as a bridge between the different levels of governance and provide expertise for possible policy solutions.

## 9.2 ORGANIZED INTERESTS AND MULTI-LEVEL GOVERNANCE – A THEORETICAL APPROACH

Organized interests are representatives of various societal spheres – based on culture, social issues, citizenship rights, ethnic or religious communities or economic interests – with a clear dominance of socio-economic interests groups in policy making. Theoretically speaking, they are composites of individuals, firms or associations, and can be classified as collective actors in the policy-making arena. They can take different organizational forms, depending on the types of goals they are trying to achieve and their control over resources (see Table 9.1). As such, they are likely to deal differently with problems of MLG.

Fritz W. Scharpf (1997, p. 55) distinguishes between four types of collective actors:

1. Clubs are groups of actors who have individual goals but share resources. These are typically industry associations who form interest organizations in order to influence government regulations.
2. Associations consist of groups of actors who share both goals and resources. They are based on membership dues and have elaborate decision-making procedures in order to reflect the positions of the group as a whole.
3. Social movements are groups of actors who have shared goals but individual resources. Each participant contributes to the production of a common good without establishing an organizational structure.
4. Coalitions are individual actors who engage in temporary collective action when pursuing their own interests. They share neither purpose nor resources. They are usually lobby firms commissioned to pursue the interest of companies.

The different types of organized interests are associated with different types of organizational forms, decision-making procedures and therefore also embody different capacities for strategic action. Coalitions and movements can only act after reaching a broad consensus, if not unanimity, among their members, since no organizational structures enable leaders to rest their decisions on a majority vote. In contrast, in both clubs and

Table 9.1 A typology of organized interests

Actor	Purpose	Control over Resources	Stability	Organizational Structure	Access to Policy-making Process
Associations	Collective purpose	Collective control	Stable, permanent	Stable, corresponding to governance structure	Institutionalized
Clubs	Separate purpose	Collective control	Stable, permanent	Stable, corresponding to governance structure	Institutionalized
Social movements	Collective purpose	Separate control	Fluid, temporary	Flexible, corresponding to issue and involved actors/institutions	Informal
Coalition	Separate purpose	Separate control	Fluid, temporary	Flexible, corresponding to issue and involved actors/institutions	Informal

Source: Adapted from Scharpf (1997), own extension.

associations, leaders are more independent of their membership and able to take decisions which do not reflect all members. In some circumstances, leaders of associations can even decide in the interest of only a minority of their membership. Their room for maneuver is therefore greater and capacity for strategic action is more developed, as they can potentially move the focus of the organization as a whole from one level to the next.

However, and in contrast, organized interests that do not share resources and are therefore limited in terms of collective action are organized more fluidly, which makes them more flexible. Coalitions can be set up on an ad hoc basis and movements might emerge in opposition to political developments at any level for brief periods of time (that is, the Seattle anti-globalization movement). Durable commitments are replaced by fluid adjustments when policy issues move from one level to another one.

This approach does not distinguish per se between civil society and corporate interests, although there might be good reasons for doing so. Civil society organizations – non-governmental organizations but also welfare associations and self-help groups – often pursue goals that are not just in the interest of specific particularistic groups but represent the common good. They frequently take the form of social movements. Compared to corporate interests – generally in the form of clubs – and industry associations, civil society organizations do not only face collective action problems and scarce resources.

In addition, they play different roles in the context of democratic legitimacy. Democratic decision making depends on an active civil society in which alternative

solutions to societal problems are openly discussed. Civil society organizations and movements are a necessary component of these discourses – unlike the pursuit of corporate interests. While modern problem solving increasingly depends on the willingness of corporate actors to contribute resources, management skills and logistics to the process, the discourse element of democratic decision making is embodied in civil society organizations; not in corporate participation in public policy making.

In other words, organized interests are collective non-state actors participating in governance. Civil society organizations and corporate interest groups are the two main sub-groups of organized interests in governance settings. While both participate in democratic policy making, they occupy different roles and functions: civil society organizations participate in the development of policy alternatives and legitimate policy positions. Corporate actors contribute expertise, resources and managerial capacity, while pursuing individual corporate interests at the same time.

In the context of the distinction between MLG I and II (Hooghe and Marks 2003), different types of organized interests can be expected to coincide with different types of MLG. MLG I as the general-purpose governance arrangement with a limited number of non-overlapping jurisdictional boundaries at a limited number of levels (*ibid.*) is likely to be associated with more institutionalized types of organized interests, where collective actors share resources and are set up on a more permanent basis. It should feature more associations and clubs which can engage in credible commitments and therefore assume governance functions themselves. As an example, one can observe very stable interaction between organized interests and governments in the golden years of post-war development, since highly organized interests were included in policy making by taking over partial governing functions in the provision of public goods.<sup>2</sup>

The MLG II type describes a complex, fluid patchwork of innumerable, overlapping jurisdictions (*ibid.*). This governance structure is functionally limited to one policy area and thus not constitutionalized. It is likely to attract more flexible interest groups who are driven by ad hoc policy issues and who are therefore unlikely to share their resources. Organizational structures are weaker and internal decision-making processes underdeveloped. Thus, movements (such as anti-globalization) and coalitions (such as business round tables) are more likely to be found in an MLG II context than associations and clubs. This should not be mistaken as a more pluralist setting (in contrast to corporatist) but as an entirely different way of organizing governance capacity. MLG II is associated with a public policy response to new societal problems, for which there is no predefined level of problem solving. Environmental policy which is dealt with at all governance levels would be a good example for how different private actors have formed coalitions to influence governance on this specific policy issue.

The distinction between MLG I and II and the different roles of organized interests within it also allows a dynamic perspective on the evolution of governance regimes. As MLG systems have evolved from the regional level upwards and have been accompanied by a process of constitutionalization, we should expect to find more arrangements of MLG I at the national and subnational level, while MLG II is predominant at the European, world-regional and global level. Consequently, associations/clubs are predominantly established in stable governance settings locally, regionally and nationally and might find it harder to Europeanize and globalize. Coalitions and movements, while to be found at any level, might be more effective and prevalent at the supranational level.

They correspond more easily to the fluid nature of policy-specific MLG II regimes as coalitions, and movements also form around specific issues.

Focusing on the difference between 'formal ad hoc issue coalitions' and informal cooperation in 'loose networks', Mahoney (2007) also finds that the type of organized interests depends on the institutional structure, that is, the type of governance they interact with. Comparing coalition building in the USA and the EU, she finds that the political system is one of the main factors which influence whether interest groups form coalitions or act as single entities.

Another distinction between the different types of organized interests in the two MLG systems is how private actors gain access to the policy-making process and how they introduce their issue to government agendas. As various studies in comparative politics have shown, the policy-making process is determined by the institutions in which the process takes place. Institutions have been regarded from different angles in the analysis of policy processes: first, institutions can be seen as 'veto points' or 'veto players' in the policy-making process (Immergut 1992; Tsebelis 2002). From this view, they are seen as impeding change and blocking those issues that do not find a Pareto equilibrium within the institutional setting. From the agenda-setting perspective, however, institutions can also be seen as opportunity structures. Thus, institutions offer access points to the policy-making process to organized interests and facilitate change (Baumgartner et al. 2006).

Using this agenda-setting perspective, one can distinguish the role of organized interests in the different types of MLG by how they gain access to the policy-making process. Corporate actors such as associations and clubs are more dominant in an MLG I setting, where they have institutionalized/centralized access to the policy-making process through their involvement in advisory committees, social and economic councils, and in the administration of welfare state institutions. More fluid actors such as social movements and coalitions have fewer institutionalized access points to political institutions and mainly gain access to the particular policy issue by using 'voice strategies,' such as public opinion campaigns, media events, demonstrations and so on (Beyers 2004, pp. 216–17).

### 9.3 ORGANIZED INTERESTS AND NATIONAL/ SUBNATIONAL POLICY MAKING

National governance regimes are in themselves MLG systems, since they are based on the interplay of national, regional and local policy-making structures. However, these national governance regimes tend to follow the classification of an MLG I. While co-decision-making rights between various levels do exist, they are clearly defined and constitutionalized. In national governance systems, the decision-making power and jurisdiction of each level of governance are usually legally set.

In addition to territorial levels of governance (federalism), there are also functional levels of governance which are based on co-decision-making rights by private and quasi-public actors (quangos). Here, the levels are not hierarchical but divided by policy fields or issue areas. They range from consultation and lobbying to the delegation of public authority to private actors, as in the administration of social security systems.

*Table 9.2 Examples of functional and territorial representation*

	Political Authority	Functional Representation of Organized Interests
National	Federal parliament	Economic and social councils, advisory committees, administration of national welfare institutions
Regional	State parliament	Regional councils, functional representation in regional authorities and supervisory boards of public agencies such as universities, chambers, media organizations; regional welfare institutions
Local	Local councils	Functional representation on governing boards of schools, hospitals and other local institutions

The combination of both territorial and functional layers of representation results in a complex matrix of decision making (Table 9.2).

Moreover, the interaction between organized interests and the state has taken profoundly different forms in different countries, as the neo-corporatist literature has emphasized. In advanced industrialized countries, the starkest contrast can be observed between pluralist systems, in which organized interests can lobby governments but do not have public authority, and corporatist systems, in which highly centralized organized interests have been charged with functions that reach much beyond the status of lobby. They not only sit on supervisory boards of public or quasi-public agencies but also self-administer welfare functions whose budgets are underwritten by the state.

The neo-corporatist literature argues that the relations between governments and producer groups in countries with highly centralized trade unions and employers' associations are based on a political exchange. Trade unions, representing employees' interests, are capable of mobilization and can prevent governments' policy goals by opposing them in the political process. In a political exchange with the government, however, the trade unions waive their mobilization capability in order to achieve and maintain their own policy goals and in return receive legal and political protection for their members in labor law, as well as benefits for their own organizations within the political system (Pizzorno 1978; Streeck 1984; Molina and Rhodes 2002). Moreover, they communicate the governments' policy goals (for example, low wage increases) to their members and thereby legitimize them.

The exchange moderates the trade unions' policy interests (from radical wage demands to labor law) and ensures their continued institutional power by way of an increase in tasks performed by them in the implementation of public policy (for instance, in labor market and social policy). As an effect, immediate policy interests (for example, higher wages) are translated into long-term policy interests (for example, protection against dismissal) and into the pursuit of power interests in the form of trade unions' institutional participation in political decisions (on advisory boards and in tripartite institutions).

As a consequence, the main representatives of economic interests – trade unions and employers – in many continental European countries are represented on national economic policy councils. These were set up in the interwar years or after 1945 to provide for regular meetings and discussions between labor, business and the government. The Netherlands, for example, set up a tripartite Social and Economic Council after the

war and similar bodies exist in Belgium and Austria. Some of these have, usually narrowly circumscribed, constitutional rights to advise the government or the parliament on matters of economic policy, or to comment on current legislation. Moreover, trade unions, usually together with employers and sometimes also with the government, sit on the boards of a variety of quasi-public or parafiscal agencies administering labor market policy or social insurance programs. In part, such agencies were created at a time when national states incorporated in their compulsory social insurance programs the friendly societies and mutual aid funds founded for their members by unions and small business associations in the nineteenth century. Bipartite and tripartite bodies of this kind emerged in particular in the so-called Bismarck countries, where social insurance was funded through contributions by workers and employers rather than by general taxes. The parafiscal agencies collecting and administering such contributions provided for representation of those paying them.

While in federalism the different governance levels are generally constitutionally defined, the coordination between different levels of neo-corporatist decision making is organized in part by the relatively high organizational structures of the private actors and in part through the national party system. Committee seats are generally delegated to organizations according to their representativeness. Highly representative organizations such as centralized trade union bodies tend to have seats at all levels of decision making. The delegates from these organizations are in turn representative for the economic interest they are meant to represent, such as labor, small and large business, religious groups, farmers, culture and the handicraft sector. These organizations therefore adjust their own organizational structure to the polity in which they operate. In other words, in federal systems, organized interests tend to reflect different levels of territorial governance in their own organizational structures. Regional structures are generally drawn in line with federal states. Electoral procedures and boards of organized interests also reflect territorial governance levels.<sup>3</sup>

While the interaction of state-society relations is affected by Europeanization and internationalization, some argue that the patterns of internationalization follow domestic rules. For instance, Jan Beyers argues:

One can hypothesize that especially well-embedded domestic interest associations are better prepared as well as inclined to Europeanize their political strategies. This would suggest that well-elaborated and institutionalized relations between state actors and interest associations carry over to the European level. As a result, Europe seems to reinforce existing patterns of domestic interest representation. (Beyers 2002, pp. 592–3)

In addition to formal participation in state councils or quasi-public agencies, even in MLG I governance regimes, informal inclusion of private actors in sectoral, regional and international policy networks seems to have become increasingly important in recent years. These new forms of governance below, within and above the national state depend on bringing together all concerned parties to collect expertise, provide for mutual information on policy preferences and increase as much as possible the legitimacy of jointly devised policies. Rather than conflict, policy networks emphasize cooperation in the pursuit of common objectives and the improvement of collective infrastructures that cultivate joint comparative advantage. Although policy networks have no constitution and there are no formal rights to inclusion, care is taken in most cases to ensure that private



actors participate to gain the general support of their members and to tap their expertise with respect to economic development, culture and general societal support (Marin and Mayntz 1991; Benner et al. 2004).

This combination of an institutionalized inclusion of organized interests in the policy-making process, on the one hand, and a looser cooperation of interest coalitions, on the other hand, is particularly eminent in the EU.

## 9.4 ORGANIZED INTERESTS AND EU INTEGRATION

The EU is a paradigmatic case for MLG, as it has been described as a ‘system of continuous negotiation among nested governments at several territorial tiers – supranational, national, regional and local’ (Marks 1993, p. 392). It combines both of the MLG types, a constitutionally defined division of responsibility, and more fluid policy networks on specific issues. Grande (1996) describes the EU as neither a hierarchically organized ‘super-state’ dominated by a supranational ‘super-bureaucracy’ nor as an international ‘regime’ in which national actors and interests dominate. Moreover, the EU is in a state of flux, with many procedures and issues of legitimacy unsettled. Thus, we find a variety of different types of organized interests at the European level which use different access points to influence European policy makers.

In this context, the study of organized interests in the process of EU integration is highly developed; often more highly than the role of organized interests in national policy making.<sup>4</sup> The reason for the high level of attention to organized interests is manifold: first, Europeanization of many policy issues has opened up new avenues for private actors in policy making. In contrast to national systems of governance, where access to policy making has evolved over long periods of time, Europeanization has proceeded fast and is still developing, so that private actors still need to find their roles and access points in European policy making. Second, in the context of debates on the democratic deficit of EU institutions and growing opposition against Europeanization, organized interests have been employed by the Commission and the Council of Ministers to reassure voters about the EU’s social agenda (Greenwood 2007; Saurugger 2007). And third, the increasing regulatory functions of the EU in the process of market making are of great interest for many producer groups who seek access to decision-making procedures (Bouwen and McCown 2007; Broscheid and Coen 2007).

Given the wealth of studies on organized interests in the EU and the role of Europeanization as an arrangement of MLG, this literature can serve as a more general pool of information on the role of organized interests in the European MLG system. There are several strands of literature to distinguish.

The first focuses on the dynamic process of Europeanization as a movement from the national to the European level. Rainer Eising and Beate Kohler-Koch refer to the ‘*Beharrungsthese*’ (obstancy thesis), where a negative correlation is found between the extent to which a group is integrated in domestic policy networks, and the extent of its integration in Europeanized networks (Eising and Kohler-Koch 2005, p. 46; see also Cram 2001; Eising 2004). In the same vein, Cram argues that the domestic evolution, structure and resources of interest groups influence how they can act at the European level. In return, the degree of their success in influencing European policy making

gives them either more or less leverage on the domestic playing field (Cram 2001, pp. 610–12)

The second strand of literature discusses the interaction and steering of organized interests by state actors. Focusing on informational lobbying of the Commission, Broscheid and Coen explain the Commission's need for interest input, especially in complicated regulatory policy areas or to sense member state and community level preferences. As such, the reward the Commission 'pays' for this privileged information is none other than access to policy making through invitations to workshops, consultations and forums, therefore creating a structure of insider lobbying sub-systems surrounding the Commission (Broscheid and Coen 2007, pp. 348–50). The Commission may also provide return informational rewards to lobby insiders, including policy developments, contacts and contracts (*ibid.*, p. 352). Lastly, Broscheid and Coen 'observe that the greatest level of lobbying activity clusters around the regulatory policy domains of the Commission' and 'that the greatest number of fora occurs in the redistributive domain' (*ibid.*, p. 361). Mahoney (2004) also gives a good account of how EU institutions influence interest group activity: first, by direct interest group subsidy; second, by manipulation of the establishment and composition of formal arenas of political debate; and third, by the system-wide expansion of competencies and selective development of chosen policy areas. She states:

One of the most visible methods governments employ to guide activity is government contracts. By deciding what projects are to be funded and who will be responsible for bringing the projects to fruition, institutions guide policy debates and wield considerable control over interest activity. However, the demand-side techniques available to government are not limited to government contracts. Demand-side forces are at play in any governmental activity that draws interests to various areas of policy-making. Thus, the establishment of an agency or program, budgetary allocations to certain policy areas, the expansion of regulatory control and the formation of consultative committees or forums, the distribution of seats on those bodies, as well as direct subsidy of interest groups, all fall into the realm of government activity that influences the behavior of actors in the interest group community. (Mahoney 2004, p. 444)

Third, the distribution of access to the decision-making process is analysed. Authors have studied the different access points organized interests find in European institutions and which interest groups benefit the most from these structures. One common distinction between the different types of interests that has been used repeatedly in the literature on access points in the EU (Beyers 2004; Coen 2007; Eising 2007) is the differentiation between 'specific interests' and 'diffuse interests.' Diffuse interests have been defined as those interests that lack a well-delineated and concentrated constituency; they defend interests that are linked to broad and general segments of society and their members generally support the issues concerned beyond their private needs. They mainly influence policy making through public information and protest politics (for example, round table discussions, press conferences, demonstrations, public opinion campaigns) (Beyers 2004, p. 216). 'Diffuse interests' can be compared to what we described as civil society groups (social movements and coalitions). Associations and clubs (corporate interests), on the other hand, can be counted as the type of actors that have been defined as 'specific interests' in the EU integration literature. The literature defines 'specific interests' as having 'a clear-cut stake in the production process and defend[ing] the interests of

well-circumscribed and concentrated constituencies' (ibid.). Unlike diffuse interests, they mainly support issues directly related to their members' economic, professional, social and commercial interests and influence the policy-making process by providing expert information in institutionalized settings, such as parliamentary expert hearings and expert committees (ibid., pp. 216–17).

The variety of EU institutional structures offers various access points at different levels in the policy-making process that can be targeted by the different types of interests to a varying degree. Several authors have found that while some institutions provide more access to diffuse interests, others interact more with specific interests (Beyers 2004; Eising 2007; Smith 2008).

The most important actors and institutions that offer organized interests access to European policy making are 'the national ministries and government departments within each member state, the Council of Ministers, various Directorates General of the European Commission and their Cabinets, numerous committees and sub-committees, the national parliaments, the European Parliaments' (Grande 1996, p. 322) and the European Court of Justice.<sup>5</sup> This multi-level arrangement of different institutions with constitutionalized shared powers shows elements of a general-purpose MLG I system, but also reflects elements of the more flexible policy-specific MLG II arrangement. The policy-making process can differ greatly according to the various policy issues due to the policy-oriented structure of the Council and the numerous committees that are formed on a flexible policy-specific basis.

As Mahoney (2004) points out: 'an important point of access to the policy-making process is membership of one of the Commission's formal Consultative Committees'. In these committees, organized interests can influence the policy-making process at an early drafting stage, since the Commission refers to these committees 'for expertise and broad interest input, making considerable effort to engage non-governmental interests in the policymaking process' (Mahoney 2004, p. 448). Eising adds: 'Enjoying a monopoly over policy initiation and monitoring compliance with Community law in the member states, the European Commission is considered to be the most important point of contact for interest groups in the [European Union]' (Eising 2007, p. 387). Coen (2007) points out that access to the Commission is very much biased towards business and professional organizations (that is, specific interests), which in 2003 represented 76 percent of EU interest groups compared to 20 percent of public interests (ibid., p. 335). Coen then typifies the regulatory/agency style of Brussels policy making as dominated by: 'elite trust-based relationships between insider interest groups and EU officials', therefore heightening the Commission's legitimacy. These trust-based relationships are formed by information exchanges, consultations and conciliatory actions, as well as by individual interest group strategies aimed at remaining in the inner circle. Eising also notes that the European Commission is the institution that is most important for the initial stages of policy formation. With the immense number of different issues and policies that are conceptualized, it is only possible for those actors to influence initial policy proposals that have direct access to the Commission and are called by the relevant committee for expert information (Eising 2007, pp. 397–8). Different studies have shown that this is rather more possible for specific interests than for diffuse interests (Beyers 2004; Bouwen 2004; Coen 2007).

Another point of access for organized interests is the European Parliament, which

is more dominated by domestic and party actors than the Commission and thus offers access points to different types of interest groups than the European Commission (Bouwen 2004). Eising explains:

In general, the EP [European Parliament] is considered to represent supranational interests in the EU policy-making process. But being elected by national voters, its members are said to be more amenable to national interests than the European Commission and also more open to diffuse interests, including those representing the environment, consumers, or large groups such as the unemployed and pensioners. Some analysts regard the links forged between interest groups and MEPs [members of the European Parliament] as 'coalitions of the weak'. (Eising 2007, p. 388)

Beyers (2004) also finds this difference between diffuse interests and specific interests. He observes 'that diffuse interests gain more access to the EP than to the EC; this situation is, on average, reversed for specific interests' (*ibid.*, p. 234).

The examples of the European Commission and the European Parliament show how organized interests play various roles in the two different types of MLG that are combined in the European governance system. While there are institutionalized policy processes and constitutionalized decision-making rules, the numerous institutions are determined by different policy issues, with European structures still developing and thus offering new access points for organized interests. In respect to organized interests' access, Beyers comes to the conclusion that the EU offers access points for both specific interests, such as associations and clubs, and for diffuse civil society groups. 'Although the institutional supply of access favours specific interests, the European Union contains important institutional opportunities for diffuse interests that aim to expand the scope of political conflict or signal policy concerns by using public political strategies' (*ibid.*, p. 211). Thus, the 'EU's mixed institutional setting, with its multiple access points, contributes to such a diversified supply of access' (*ibid.*, p. 218).

Referring to the different strategies used by organized interests in the EU, Coen adds:

The level of access expected and provided can vary markedly for private and public interests across sectors, directorates and policy areas. With such political uncertainty and assuming the political resources to play a multi-level and institutional game, it is logical and responsible to develop a mix of political channels to influence policy. (Coen 2007, p. 339)

This mix of interest access channels and governance types is characteristic for MLG and organized interest relations in the EU.

## 9.5 ORGANIZED INTERESTS AND GLOBAL PUBLIC POLICY

Globalization, or the expansion of all types of social and political actions beyond national boundaries, has caused governments to increasingly turn to international institutions, such as the World Trade Organization (WTO), the United Nations (UN) or the International Labour Organization (ILO). Thus, organized interests trying to influence national or regional policies also need to increasingly focus their attention on global institutions and policy regimes (Smith and Wiest 2005, p. 621). This development of a

global MLG system requires new strategies and more expert information for interest groups acting in the global policy arena, but also opens new access points and opportunity structures to them. International organized interests not only play an important role in constructing different international regimes, as is discussed by Jan Aart Scholte in Chapter 25 of this volume, but they also play an increasing role in enforcing internationally generated policies and treaties adopted by states (Smith 1995; Keck and Sikkink 1998).

Global MLG is dominated by policy-specific regimes or policy networks, thus we mainly find MLG II structures in global public policy making. While the system of the UN could be considered an MLG I structure, it is not a 'world government,' as UN Secretary-General Kofi Annan recognized in his report to the Millennium Summit in 2000 (Held and McGrew 2007, p. 1). Rather, the global system of governance embraces various institutional structures such as states, international organizations, transnational networks and public and private agencies interacting in all areas of public policy. Held and McGrew describe 'global politics' today as follows:

Global politics today . . . is anchored not just in traditional geopolitical concerns but also in a large diversity of economic, social, and ecological questions. Pollution, drugs, human rights, and terrorism are among an increasing number of transnational policy issues which cut across territorial jurisdictions and existing political alignments, and which require international cooperation for their effective resolution. (Held and McGrew 2007, p. 6)

While government action is focused around these and other policy issues, organized interest groups at the international level also coordinate their actions with a focus on specific policy issues. Thus, we find numerous social movements, coalitions and policy networks that try to influence global governance by acting upon national policy making and monitoring/enforcing the implementation of and compliance with international agreements. Woods finds:

They [civil society groups] bring principles and values to the attention of policy-makers and firms. They also play a role in monitoring global governance, analyzing and reporting on issues as diverse as the Chemical Weapons Treaty, negotiations on global climate change, world trade, and the actions of the IMF and World Bank. (Woods 2007, p. 27)

One global policy area in which organized interests have played an important role in negotiating and monitoring rules and norms across national borders is the policy issue of international labor conventions. New actors and new ways of a global governance of labor law have evolved with the increasing internationalization of industrial relations and the growing role of multinational corporations (Hassel 2008, p. 232). Moving away from ILO conventions and thus from a state-based regulatory regime, the involvement of private (firms) and public (NGOs) non-state actors has led to an (initial) international convergence of global labor standards. This emerging regime of global labor governance is highly influenced by private actors such as businesses, NGOs and trade unions that form coalitions in order to convince internationally active firms to voluntarily comply with a core of acceptable behavioral norms (*ibid.*, pp. 232–3).

## 9.6 CONCLUSION

The notion of organized interests in an MLG setting is still a theoretically underdeveloped field. I have suggested in this chapter that it makes theoretical sense to distinguish between MLG I and II with regard to the types of private actors and their involvement. It is assumed that we tend to find stable, institutionalized actors such as associations and clubs in MLG I settings, while issue-specific, but more fluid, temporary social movements and coalitions dominate policy making in MLG II settings. As governance forms develop beyond the nation state, the role of private actors and their interaction with state actors in policy making will further evolve. Federalism and forms of MLG I will not be able to guide us in the understanding of new forms of governance and MLG II.

Globalization and regional integration have led to the emergence of new MLG regimes, such as the EU, for example, and several global policy regimes such as in labor, trade or climate change. Organized interests have not only played an important role in the creation/emergence of many of these regimes, they have also found new strategies to influence policy makers at the different levels of governance. Organized interests in the two different types of MLG influence policy making according to the institutional structure, much in the same way that interest groups have traditionally tried to gain access to the policy-making process by using the access points provided by the institutional structure of the political system. Overall, there is still a wide field to be researched in order to conceptualize and understand the interaction of private and public actors in MLG settings.

## NOTES

1. I would like to thank the editors of the handbook for their patience and Nora Gatewood and Anna van Santen for their outstanding research assistance.
2. Another example is C. Mahoney's (2007) paper, which discusses the higher number of formal coalitions in the USA as compared to the EU.
3. Also see Skocpol et al. (2000).
4. For extensive literature reviews, see Woll (2006) and Coen (2007).
5. More generally 'access' can be defined as 'the frequency of contact between interest organizations and EU institutions. These contacts range from informal bilateral meetings with EU officials and politicians to institutionalized committee proceedings' (Eising 2007, p. 386). Another way of gaining access to the policy-making process, which is often used by civil society groups, movements and coalitions, is an indirect influence through public opinion formation and the media.

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# 10 Multi-level governance in Germany and Switzerland

*Dietmar Braun*

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## 10.1 INTRODUCTION

Multi-level governance is not a brand-new topic for federal states. Many policy fields in federal countries were and are subject not only to one authority level of territorial powers but to the influence of both the federal government and member states and, occasionally, also of local governments. Discussions that are now taking place under the label of multi-level governance are therefore familiar to experts of federalism. What the discussion on multi-level governance adds, however, is the relevance of additional authority levels interfering with the ‘three-layered’ structure of federal states, that is, the international, and in Europe, the supranational level.<sup>1</sup> These levels increase the complexity of territorial governance. Discussions on multi-level governance have also contributed to a renewed attention for the level of the local government (cities and communities), which have remained in the shadow of attention for the relationship between the federal and member state level until recently.

Multi-level governance has therefore enlarged the discussion about the territorial distribution of powers in federal states but at the same time it has narrowed scientific attention to coordination problems among territorial levels. The focus is on policy fields that are not attributed to only one territorial level but in which at least two or more territorial levels have an influence on decision-making (Benz 2004). Such policy fields can typically not be dealt with by using a hierarchical governance mode. If several actors have the ‘right to decide’ (Braun 2000), ways and means must be found to arrive at decisions by strategies of ‘mutual understanding’, ‘bargaining’, or ‘problem-solving’ (Scharpf 1997). Coordination between territorial powers becomes the perennial challenge in such concurrent policy fields, in which more than one territorial authority decides and acts.

There are different origins of concurrency in federal states: In the ‘administrative’ type of federalism (Hueglin and Fenna 2006), which has introduced a ‘functional division of powers’ between decision-making powers, on the one hand, and implementation powers, on the other, co-decision-making comes either from constitutionally guaranteed rights of member states to veto federal decisions in some matters or from their ‘right to act’, that is to decide on how to implement federal decisions. Concurrency can also exist in the Anglo-Saxon countries with a ‘legislative’ type of federalism (ibid.) in matters where both the federal government and member states (or communities) have the right to decide and act in a certain policy field. And in both types of federal countries we find a large number of policy fields where the federal government has by virtue of financial grants acquired the possibility to influence both decision-making and implementation of member states in policy areas that are according to the constitution under authority of lower governments. The integration of the European Union (EU) into the multi-level

governance game leads to similar types of concurrency in a number of policy fields: there are fields with a 'functional division of powers' that also include dual powers with overlapping competencies. With the inclusion of the EU some policy fields may become four-layered in their need for coordination.

Switzerland and Germany have been chosen as the topic for this chapter because, as federal states, they represent the complexity of multi-level governance much better than unitary states do. It is in federal states that we can best demonstrate the working of such political orders. In addition, these countries were chosen because they have some features in common that distinguish them, for example, from the USA and Canada (see the subsequent chapter), that is, being examples of the continental, 'administrative' type of federalism, while representing at the same time opposite poles within this type. This chapter endeavours to highlight these similarities and differences in organizing the federation in order to see in what way this contributes to different ways of dealing with multi-level governance.

The emphasis in this chapter is on how both the similarities and the differences between these two countries influence the coordination between the federal and the member state level and the inclusion of the EU within national multi-level governance. Section 10.2 explains why Germany and Switzerland are, despite their commonalities, opposite poles within the 'administrative' type of federalism and what this means. We assume that the structural set-up of both countries explains the multi-level coordination practices (Section 10.3). Section 10.4 aims to understand how the EU is integrated into multi-level governance of both countries. Section 10.5 concludes the discussion.

## 10.2 EXPLAINING THE DIFFERENT GOVERNANCE PATHS FOLLOWED BY SWITZERLAND AND GERMANY

Both Germany and Switzerland have built their federal system in many ways on a functional division of powers in concurrent areas between the 'right to decide' of the federal level and the 'right to act' of the member state and community level. The federal government in both countries has weak administrative powers that in general do not allow the implementation of federal laws on the lower government level. This creates the functional interdependence between the three domestic territorial levels: local governments and member states rely in many matters on national decisions and money while the federal government depends on local governments and member states to execute federal acts. This does not mean that both countries deal with such interdependence in the same way but the basic structure of functional distribution is the same. The difference with 'legislative' federalism is that 'program coordination happens before the legislative dice has been cast', while in legislative federalism it is after programmes have been decided upon on both levels (Hueglin and Fenna 2006, p. 62). Such a federal structure promotes 'integration' and forces territorial actors to concert their actions. The notion of 'cooperative federalism' is often used to characterize the emerging 'joint decision-making' and 'interlocking politics' (see below and Börzel and Hosli 2003).

Despite this commonality between both countries, the practices of organizing cooperation are quite different. Paraphrasing Clifford Geertz (1968), one can say that, though both countries follow the logic of 'administrative federalism', they 'bow in

different directions': Germany follows a 'unitary' rationale with centralizing tendencies in the distribution of legislative authority while Switzerland follows a 'non-centralized' organization (Linder 2005) or a 'real decentralized federation' (Lane 2001, p. 17), which values the self-determination of member states highly (Hänni 2000).

While the historical foundations that were laid in the middle of the nineteenth century and the historical paths that were followed since then do play an important role in explaining differences between both countries (Lehmbruch 1993, 2002; Linder 1994, 2005; Neidhart 2002a), it is the different role of 'place' as a political category and the importance of 'size' in Switzerland that explain, to a significant extent, why Swiss and German federalism follow different paths in dealing with multi-level governance.

Though the German territory was historically strongly fragmented with regard to political power, it still considered itself as a nation with a common language and history despite religious cleavages. Until today, the identities of Germans are neither based on their communities nor on their member states, which are in part artefacts of war settlements. If we find such identities, they are likely linked to the different regions in Germany (Mayntz 1989). Regions, however, have no political status and cannot be mobilized in the political struggle. 'Place', as an analytical category that grasps at the territorial anchorage of identities of individuals and their political mobilization potential, is therefore not a 'political category' that explains politics and policy-making in Germany. Territory, however, plays a role in politics, but this role is determined by its superposition by party politics: member states are important for the political power of parties as they multiply politically powerful positions. In addition, political power in member states gives the right to legislate in the Bundesrat, the important second chamber on the federal level. This often leads to a confrontation between parties in the federal government and opposition parties that have strongholds in some of the Länder. So, if one speaks about territorial identity in member states, it is the question of a 'Social-democratic governed country' versus a 'Christian-democratic governed country' that seems to matter. Linking territory to party politics has another effect that strengthens the unitary tendencies in Germany: As the party system in Germany is very well 'integrated' and 'centralized' (Grande 2002), these unitary and harmonizing tendencies are also felt in day-to-day politics at the member state level.

Switzerland, in contrast, has a multi-national character and this influences policy-making in all areas. The binding of individuals to communities, cantons and linguistic regions (in that order) are the main identity-building tools for Swiss citizens. This explains the strong drive for maintaining the autonomy of lower governments, even in the smallest community. The difference from Germany in this respect is probably best exemplified by the proven impossibility of reorganizing the size and structure of communities. In Switzerland, neither the cantons nor the federal government have the authority to do so, and it is very seldom the case that a number of communities would agree to a fusion (Ladner and Steiner 2003). This is completely different in Germany, where several structural reforms of the territory of communities have taken place to overcome problems of negative externalities or to ameliorate administrative efficiency. This difference is explained by the different political status that is given to the lowest level of government: it is a 'place' of identity building in Switzerland but not in Germany. As a consequence, the community level has a more autonomous, though certainly not independent role in the multi-level governance of Switzerland, while the influence of communities in concurrent

policy areas is clearly restricted in Germany. The strong role of 'place' in Switzerland also explains why communities and cantons keep a large degree of tax autonomy, while it seems almost logical that German communities have almost no taxing powers and that German Länder profit from tax-sharing but have no leeway in developing their own tax policies.

The organization of the party system also corresponds to this structure: the federal level of parties in Switzerland is relatively weak in international comparison. Party politics is defined at the different levels of member states and federal level party policy-making federalizes the different tendencies in member states.

Another underlying factor of importance for the different paths the two federations follow is size.

The size of member states (and more so of communities) in Switzerland is particularly small. Such small territories are in constant danger of creating negative spill-over effects. Additionally, the small cantons lack administrative, political and economic resources to deal with important and expensive problems such as infrastructure or health care. Because of the small size and geographical conditions (two-thirds of the surface in Switzerland is mountainous), asymmetries in economic resources between cantons can be substantial. In combination with tax competition between cantons, it is harder to solve asymmetries by, for example, raising taxes: questions of 'social justice', solidarity and financial equalization have always played an important role in Switzerland. This has never led to the same demands for equal or equitable living conditions as in Germany, but it is clear that Swiss federalism is also built on and could not survive without a good dose of 'fraternity'. This has contributed to a stronger role of the federal government as it was generally recognized that it should be the federal level that takes care of the equilibration of economic forces between cantons. Only recently has horizontal equalization between cantons been introduced.

Size, in summary, has been a motor for cooperation in multi-level governance in Switzerland. In contrast, it never had such a role in Germany. Problems of negative externalities were not the driving force behind German 'cooperative federalism' and one also finds less pressure for the Länder to develop horizontal coordination.

Territorial levels are therefore interdependent in both countries, but Switzerland resembles more a multi-layered structure of relatively autonomous territorial levels that have come together to solve a number of collective action problems, while Germany's multi-level governance structure is guided from the top to the bottom.

These underlying features – historical origins and paths, 'place' and 'size' – explain to a large extent the differences in coordination practices in multi-level governance between Switzerland and Germany.

### 10.3 MODES OF MULTI-LEVEL GOVERNANCE

The preceding paragraphs have demonstrated why and how Germany and Switzerland follow different paths in 'administrative federalism'. How does this affect multi-level governance, that is, the way these countries organize coordination in concurrent policy fields? Or in other words, how do they organize multi-level governance?

Generally, one can say that Germany has opted for a strong and formalized

integration of member states in policy formulation, although member states enjoy a few discretions during implementation, and Switzerland has opted for a weaker and more pragmatic integration of member states in policy formulation, allowing them to retain a strong autonomy during the implementation phase. We find, therefore, two quite distinct models of multi-level governance, despite their common choice for a functional division of powers.

### 10.3.1 Germany

Multi-level governance in Germany is built on the participation of member state governments in policy formulation and decision-making on the federal level. This feature has a long tradition in Germany. After the World War II cooperation was re-established by two tendencies: first, by the decision to restore the 'Council' model of bicameralism (Hueglin and Fenna 2006, p. 196), which makes member state governments participate in the second chamber of the federal parliament; and second, by the introduction of a large number of concurrent policy areas that were under authority of the Länder as long as the federal government did not claim these areas. In the course of time such a claim was made repeatedly, most of the time pointing to the principle of 'equal living conditions' – or, since 1993, 'equitable conditions' – that is stipulated in the *Grundgesetz*, the German constitution. As a result, few of the concurrent policy areas remained in the hands of the Länder. Concurrent areas are, however, subject to the consent of the Bundesrat with the result that, before 2006, when a certain disentanglement of tasks was introduced, more than 50 per cent of federal laws needed deliberation and compromises between federal and member state governments in order to be adopted. Few areas of self-determination were left in the hands of the Länder before 2006 and this has not fundamentally changed, even after areas such as education or public employment policies were transferred to the sole authority of the Länder.

Participation in federal decision-making therefore presents self-determination as the main principle of organization of multi-level governance in Germany. Many federal laws were and are in fact 'joint laws' of territorial powers which makes further discretion at the level of implementation unnecessary and is a fundamental distinction between Germany and Switzerland. An *ex post* veto power does not fit into the logic of participation.

The Bundesrat is without any doubt the central institution where cooperation takes place, but it is not the only institution. The right to grant investment subsidies and the 'joint tasks' that are defined in the *Grundgesetz* (such as regional and agricultural structural policy or the protection of coastal areas) as well as a number of planning councils (for example, in education, which has recently been abolished; in science, monetary and economic policy) have all led to an entanglement of territorial interests in a large number of policy areas in which policy formulation is a matter of finding an encompassing consensus among all participants. Above all, the joint tasks have contributed to the discussion about the so-called 'joint decision trap' (Scharpf 1976, 1988), which seems to lead to a diminished capacity of adopting the necessary structural reforms that would be needed in order to overcome certain problems in these areas. The joint decision trap has become a negative image for strongly formalized decision-making procedures in entangled policy areas and the difficulties to overcome the manifold veto-powers in such a system are significant.

One should point to the fact that the difficulties to overcome different interests in these concurrent areas is not just a matter of bringing territorial interests in line. It is the party struggle that, above all, must be taken into account if one wants to understand the immobility that seems to prevail in these areas. As member state governments are represented by their administration in committees, and as government positions in the Länder are often a resource of federal opposition parties, one cannot prevent party politics from entering into the arena of territorial multi-level governance.

This does not mean that the Länder have no discretion at all when implementing federal law. First, the federal government has occasionally left room to interpret policies at the Länder level by using so-called 'framework laws'. These laws are now abandoned, however, in order to reduce the number of concurrent areas. Second, differences in implementation between the Länder exist to a certain degree, most notably in social policy, a concurrent policy area, where the Länder can develop their own policies by, for example, fine-tuning the general principles of social policy laws, or by complementing national programmes in the treatment of special problems or in areas that have not been taken care of by the federal government (Schmid 2002; see also Münch 1997). Discretion exists in the German context of multi-level governance but if and only if the federal government has not explicitly enacted a law itself. Once it has, the unitary undercurrent of multi-level governance in Germany demands that the Länder respect the federal laws and implement them appropriately.

A more restrictive interpretation of the 'equitable living condition' clause in the *Grundgesetz* by the Federal Tribunal and some changes in the attribution of authority by the federal reform adopted in 2006 have both strengthened the position of the Länder but have not really led to a fundamental change of practices in multi-level governance. It is true that one finds some separation of authority in concurrent areas – the Bund and the Länder obtained the right of deciding alone in more areas, but the transfer of powers to the Länder remained weak and could not contribute to a significant strengthening of the autonomy of the Länder (Scharpf 2006a, 2006b). To further disentangle areas, framework laws were, as already indicated, abolished and the Länder obtained the right to adopt their own laws that can deviate from federal law in those areas where they lost their veto-power at the federal level in the wake of the disentanglement of tasks (Reutter 2006). But even this new and substantial prerogative was immediately attenuated because the federal government has the possibility, though only in 'exceptional circumstances' which are not defined in the law, to intervene and impose federal regulations. This again needs a settlement in federal parliament and this means with the member state governments in the Bundesrat. As a result it is participation that remains the default strategy in German multi-level governance.

### **10.3.2 Switzerland**

The fabric of Swiss multi-level governance corresponds to the underlying culture of 'place': emphasis is not on the participation of cantonal governments at the federal level, though it exists and has even been used more often during the last 15 years (Vatter 2007a, 2007b), but on the discretion of cantonal governments to apply federal laws.

The number of concurrent areas in which the federal level has main responsibilities is more restricted in Switzerland than in Germany. But even in those cases where the

federal government and parliament enact laws, one finds in general a rather cautious use of prerogatives by the federal government. Most laws are laws that leave considerable 'ambiguity' and room for interpretation for member states and create, therefore, the opportunity to maintain a maximum of self-determination (Wälti 1996; Neidhart 2002b).

This explains why policy formulation at the federal level is not the centre of Swiss multi-level governance and why territorial questions are less politicized at this level. The main veto-power of cantonal governments is not at the federal level and does not need to be. Cantons are of course heard in pre-parliamentary procedures but this is a rather weak form of 'voice' and does not include veto-powers. Cantonal governments have no veto-power in parliament either. The representatives of cantons in the second chamber, the Council of States, are elected by the people in the canton. Switzerland follows the 'Senate' model of the USA but not the 'Council' model of Germany (Hueglin and Fenna 2006). Voting in the Council of States seems to be based, as is voting in the National Council, on party cleavages rather than territorial cleavages (see, for more detail Braun 2003). The Council of States can therefore not be seen as the representation of cantonal interests in general and certainly not of cantonal governments in particular. This does not mean that cantonal interests would not influence federal decisions. They are ubiquitous in the voice of cantonal factions of parties and by way of the representatives themselves who are firmly anchored in the cantons and communities they come from. Moreover, the federal government is held by the constitution to take cantonal interests into account when developing new laws. But all this does not come down to an explicit veto-power of cantonal interests in federal law-making.

As a result, one can contend that cantonal interests in Switzerland are protected outside federal decision-making in three ways.

First, by direct democracy, which gives cantons the possibility to launch their own initiatives or to mobilize against federal laws with the help of the 'double majority' that is needed for constitutional change. The 'double majority' restricts the federal level by involving the population in smaller and rural cantons, which are over-represented in the referendum (Vatter 2007a) – nonetheless, this does not guarantee veto-power to cantonal governments. They have, however, an important influence on the mobilization of voters within their cantons.

Second, Switzerland has mechanisms for discussing federal law projects before they enter the federal parliamentary arena. These mechanisms are usually more implicit, more subtle and taken out of the visible political struggle. The various meeting places of the federal administration and cantons remain informal and often take place within the 'conferences' of cantonal ministers. These conferences are institutional bodies that serve in principle as discussion forums that allow cantons to coordinate action. Cantons are heard on several occasions before laws that affect the interests of cantons are put on the federal agenda, but there is no formal 'joint decision-making' process (Knoepfel 2002b). What is more, the discussions between cantons and the federal administration are, in contrast to Germany, dissociated from direct party influence and therefore less politicized. This is to be explained by the fact that cantonal governments are not, like the federal government, coalition governments as we know them in other parliamentary democracies. Cantonal governments are, like the federal government, composed of individually elected party representatives. The government is therefore not built on the logic

of party coalition or coalition agreements and governments are usually oversized coalitions. This requires permanent consensus and compromise, building on different policy matters. A minister who is representing a canton within one of these 'conferences' (that exist for different policy areas) does not therefore represent their party but the cantonal government, and they must defend the propositions before their colleagues as a member of the government in the canton but not as a member of party x or y. This makes a difference for the political game during the discussions. Though one would go too far in saying that party interests do not matter, they certainly are second in those territorial arenas where federal laws affecting cantonal interests are discussed. Dealing with these matters is therefore less complex in Switzerland than in Germany and multi-level governance is built more on informal and pragmatic relations than on the formal and politicized relations as in Germany.

Finally, the main veto-power of cantonal governments is due to the large discretion granted during the implementation process. Swiss cantons have considerable autonomy in implementing federal laws (Wälti 1996). If this discretion did not exist, it would be very likely that cantons would make more use of their prerogative of using the cantonal referendum than they have in the past. Several studies confirm that we do find considerable differences in the application of federal laws between cantons (Linder and Vatter 2001; Knoepfel 2002a; Balthasar 2003; Braun 2003), to be explained by different cultures (Battaglini and Giraud 2003), a state interventionist tradition (Balthasar 2003) or by the degree of consent or refusal of federal laws within cantons (Linder and Vatter 2001; Linder 2007). A precise implementation of a federal law is almost never found (Kriesi 1998, p. 82). Discretion varies, however, according to policy areas. In a few areas, for example, civil protection, the federal government has more power to influence the implementation of cantons than in other areas because cantons, lacking information or administrative resources, depend on the instructions of the federal government in order to implement policies (*ibid.*, p. 63). The federal government may also stipulate minimal requirements the cantons have to fulfil, making deviance more difficult. Finally, cantons always have to take into account that too large a deviance from federal norms may have considerable political costs because it may result in open confrontation with the federal government and even with fellow cantons that have followed the general outlines of the federal law. Implementation powers are therefore relative, but they exist and are frequently used in the Swiss context, which contributes to the continuing heterogeneity in political structure and practices in Swiss multi-level governance.

The recent federal reform in Switzerland, adopted in 2004 and, after two subsequent implementation laws in 2006 and 2007, in vigour since January 2008, has not changed this overall picture. On the contrary, Switzerland has in principle further strengthened the position of cantons.

By way of this reform, there was a comprehensive disentanglement of policy areas mostly because responsibilities were blurred and the use of expenditures seems to have been inefficient. Four categories of tasks were retained: the policy areas under sole authority of cantons (for example, special schools, homes for the elderly), which have been increased; areas under sole responsibility of the federal government (for example, invalidity insurance, defence, highway construction); areas which fall under the regime of horizontal coordination (for example, universities, waste and used water regimes) and the remaining concurrent areas (for example, health insurance, regional traffic,



environmental protection) that are now organized by way of a new governance regime (Frey 2006). In order to overcome the diffuse and ad hoc processes of bargaining in these areas and the resulting inefficiencies, the roles of both the federal government and the member states are defined according to the logic of new public management procedures: the federal government defines the general strategies in discussion with the cantons, and the cantons obtain a clearly defined contract with obligations and rights to execute policies in these areas. Additionally, control procedures are introduced (see also Braun 2008). What is important here is that the cantons, from now on, obtain global budgets from the federal government in these areas instead of subsidies directed to special programmes and occasions. They have the right to define their own ways to organize the implementation of the contracts.

The new governance structure does not therefore violate the existing 'balance of power': the cantons maintain their implementing powers. At the same time they also obtain more clearly regulated rights to participate in the set-up of strategies in these areas, something which has remained rather implicit. The power of the federal government to use 'conditional grants' as a means to influence the politics of the cantons has been clearly restricted by this regulation.

Both systems have therefore attempted to reform existing practices of cooperation and implementation and both systems have followed existing paths: Germany has weakened to some extent the dominating unitary logic but autonomy and implementation powers of the Länder have remained weak. Switzerland has modernized its multi-level governance structures without weakening the discretion of member states in the implementation process. The main difference between the logic of participation in Germany and the logic of 'place' in Switzerland continues to exist.

What has been changed by the rise of the EU as the 'fourth' level of multi-level governance?

## 10.4 THE 'FOURTH LEVEL' OF MULTI-LEVEL GOVERNANCE: THE EUROPEAN UNION

The difference between Switzerland and Germany with regard to the influence of the international level on multi-level governance is evident: Germany is a member of the EU, Switzerland is not. One would therefore expect significant differences concerning the role the EU plays in multi-level governance of the two countries. Is this the case?

### 10.4.1 Switzerland

In fact, one cannot discard the EU from discussions on policy-making in Switzerland. The country is not a member of the EU but, being in the heart of Europe, it cannot act as if it were solitary. Strong economic links bind Switzerland to the EU. After the refusal of the population to accept the new agreements between the European Economic Community (EEC) and the EU in 1992, which discarded any further demands for an adhesion to the EU, the policy of the federal government was to create special relationships between the EU and Switzerland in the form of 'bilateral treaties' that linked Switzerland in many areas to the EU (for example, the free movement of persons, heavy transport traffic, air

traffic, the trade of agrarian products, research funding, immigration policy). Because of the conclusion of such treaties, Switzerland had to accept the main working principles of the EU. Also in areas in which Switzerland has not concluded such treaties, it often cannot neglect EU legislation or policies.

So, it is not astonishing that Switzerland has adopted a standard procedure in legislation to control whether new legislation is 'Euro-compatible' and that a number of EU laws (EUROLEX) that were formulated for the EEC Treaty were implemented in Switzerland immediately after the failed referendum in 1992 (Kux and Sverdrup 2000). By way of this 'unilateral adaptation' Switzerland has made 85 per cent of its legislation on matters that concern the 'market' 'Euro-compatible' (ibid.). This also holds in other areas, for example, concerning technical norms or in monetary policies (ibid., p. 252). 'In many respects, Switzerland is adapting to European integration as a member state would' (ibid.).

Switzerland has one structural difference, though, in comparison to member countries – the EU administration cannot directly interfere in domestic politics as it can in Germany. Switzerland is not obliged to follow all the additional regulations, comitology work, implementation regulations and so on, and the EU does not become a 'fourth' actor within policy-making at the domestic level (ibid., p. 254).

In contrast, in the areas that are part of bilateral treaties, Switzerland is obliged to adapt its legislation to EU legislation, and if the EU adopts new laws or principles after a bilateral treaty has been concluded, Switzerland cannot simply deny these new laws and principles. If domestic laws are in conflict with EU regulations, the EU expects an adaptation. In such a case, Switzerland cannot be punished for violation of the EU law, like other member states that fall under the jurisdiction of the European Court, but the EU could decide to dissolve existing treaties or to not extend these treaties.

In summary, it is clear that Switzerland is constrained in its autonomy to act in those areas that are regulated by a bilateral treaty with the EU. Kux and Sverdrup therefore state that the 'EU has a strong policy impact . . . where it receives considerable domestic attention and structures domestic decision-making' (ibid., p. 254). Switzerland has a limited leeway 'as to when and how to respond to the changing EU environment' (ibid., p. 261). But the influence of the EU is an exogenous one: it works like a regulatory structure, once the treaties have been concluded, without making the EU an active part as an actor inside domestic relations of multi-level governance.

What does all this mean for domestic policy-making?

First of all, Switzerland has proven that it is capable, despite strong internal veto-mechanisms (direct democracy) to adapt to the international environment in general and to the EU in particular. Political struggle about the terms of conditions of acceptance of treaties are of course taking place, but a number of studies demonstrate that Switzerland has found quite flexible mechanisms of internal decision-making procedures to build a consensus on most matters (Fischer et al. 2002; Fischer 2003; Mach et al. 2003). International pressure has even helped from time to time to overcome the veto-power of actors and find solutions, for example, in the agrarian sector, where it had not been possible before.

Second, the increasing number of international treaties has at first, like in all federal countries, had the effect of strengthening the federal level (Rhinow 2006), simply because foreign policy matters, including the conclusion of international treaties, are

under the authority of the federal government. This has led to reactions of member states in all federal states and invariably to a stronger integration of member states in foreign policy-making. Switzerland is no exception. The cantons started to demand a stronger voice in the conclusion of international treaties from the beginning of the 1990s. The creation of the 'Conference of Cantonal Governments' was one institutional response to the feeling that cantons were more and more confronted with a 'fait accompli', given the 'monistic' interpretation of law in Switzerland which obliges all political levels to adopt international law once treaties have been concluded, and given their role as the 'implementing agencies' of international laws and regulations. The federal government concluded contracts and the cantons had to comply. This, of course, was against the spirit of 'subsidiarity' and self-determination in the Swiss federation and finally led to a change of the constitution in 1999. Since then the federal government is obliged to inform the cantons on all matters which are of interest for them (Article 43) and it must take the competencies of cantons into account when concluding contracts (Article 54). Even more important (Article 55): cantons can participate in the formulation of treaties if their effects concern them. There are no precise and formalized regulations of how this should take place, but it is obvious that since then cantonal representatives have been present during the discussions of treaties and that there is a vivid exchange of policy positions among the federal government and cantonal administrations.

Third, cantons have not only obtained more 'voice' in the formulation of treaties and contracts but have also maintained most of their implementation powers. In principle, international treaties do not change the general division of labour among territorial units and existing implementation practices. Cantons must, of course, apply international law and the federal government is obliged to control that it is done, but except for 'self-executing treaties' (Hänni 2000, pp. 298–310), which stipulate in detail the measures and law adaptations to be taken, implementation follows the same lines as in the case of federal laws and cantons have the same discretion. This also means that the federal government can, as in other matters, try to prescribe minimum standards and more precise regulations and it can even take charge of implementation (*ibid.*, p. 306). But in general, the federal government applies the same rules of 'subsidiarity' as in the case of federal law and remains very reluctant to use such powers. In addition, cantons have found other ways that are used more and more to circumvent a stronger intervention of the federal government in matters linked to the implementation of international treaties, that is, horizontal coordination. Cantons are trying to define rules of implementation themselves in the form of 'concordats'. In this way, the general obligation of applying international law in an equal way is fulfilled while 'self-determination' of cantons remains respected.

In summary, the 'fourth level' in multi-level governance has not fundamentally changed the existing governance rules and practices in Switzerland. We find a stronger *ex ante* integration of cantons during the negotiation of treaties to balance the authority of the federal government in this matter. But the 'implementation game' remains the same, except perhaps for the increased use of horizontal coordination, which has also been stimulated by the recent federal reform.

#### **10.4.2 Germany**

The EU is omnipresent in German politics (Sturm and Pehle 2001). As the loss of national and hence regional competences has been more important in Germany than in Switzerland, the struggle of having a voice in decision-making and even to decide or co-decide on international treaties and EU policies has been of particular intensity since the 1980s (*ibid.*; Hüttmann 2005). Formally, the Länder have achieved several modifications to defend their interests, for example, there are now members of the Länder in the ministers' councils in the EU with a right to vote in certain matters that touch particularly upon their competencies; the Länder participate in the Council of Regions; and the Länder have established new committees in the Bundesrat in order to deal with European questions and to build a common position of the Länder. As it has turned out, however, this has often been very difficult. Because of heterogeneous interests and failing consensus, the Länder have often used individual strategies to influence European politics (Sturm and Pehle 2001, p. 97). This has given the richer and larger Länder a more advantageous position because it needs resources and visibility to influence decisions in the EU (Börzel 2002, p. 374). But even in this case the influence has failed and there is a consensus among scientific observers that the Länder have lost competencies, despite these different opportunities to influence the decision-making process in EU policies matters.

This does not mean that the Länder are not powerful anymore in multi-level governance. First, one finds a stronger role of member states and their regions in developing transnational cooperation (Schultze and Zinterer 2002; Hesse and Ellwein 2004, p. 113). This has boosted in some ways the autonomy and development of the member states that now have more leeway in developing regional policies (Wachendorfer-Schmidt 2003, pp. 166–7). And it has contributed to a more self-conscious role of the Länder in the many bargaining arenas of cooperative federalism.

Second, it is interesting to note (Börzel 2002, p. 375) that one often finds implicit resistance of the Länder to bear the implementation costs imposed on them by EU law and regulations. If the Länder fail to implement these laws and regulations, the EU addresses itself to the federal government, which is the guarantor of the fulfilment of obligations stemming from EU law. This creates a strong pressure on the federal government to adopt more detailed legislation and force the Länder to implement it. But at the same time it also leads to more intensified negotiations and coordination between the federal government and member states.

In fact, one can state that cooperative federalism in Germany has been intensified because of the EU (*ibid.*, p. 381) and that it has also changed its character (Wachendorfer-Schmidt 2003; Eppler 2005): Cooperative federalism is more often used because EU interventions and EU law forces German territorial actors to harmonize their policies. At the same time, these actors use cooperative federalism not just to negotiate and solve domestic problems but also to deal with EU regulations and to find common ways to defend their own competences and interests in the best way or to maximize resources coming from the EU. The previous mix of territorial and party interests, which has often led to immobility, is now complemented by common interests of Germany vis-à-vis the EU. As a consequence, bargaining and compromise building has become more complex but not necessarily more immobilizing as common interests

of actors vis-à-vis the EU may help to overcome some of the implicit territorial and party interests that remain virulent in the bargaining arenas of cooperative federalism (Wachendorfer-Schmidt 2003).

The inclusion of the EU into multi-level governance in Germany has therefore led to more self-conscious member states in Germany, which were not able to avoid a further loss of competencies due to the expansion of EU domains, and which try to use arenas of cooperative federalism in a more intensive way in order to maintain their prerogatives and their influence. But in general, this has not changed the basic structure of multi-level governance in Germany, which remains built on 'participatory federalism'. In comparison to Switzerland, the EU has, however, become an endogenous factor in German multi-level governance as the EU is a 'fourth actor', integrated within the arenas of cooperative federalism.

## 10.5 CONCLUSIONS

Germany and Switzerland were chosen as examples of a specific type of federal state, that is, a type that is built on the functional division of powers. It was demonstrated throughout this chapter that the two countries have filled in multi-level governance in quite different ways. Germany's federalism is based on a desire for a unitary development with a strong sense for equality among the various territorial units. The unity of law precedes implementation. Switzerland's federalism respects the multi-national character of its country and recognizes the strong urge for autonomy on the level of lower governments. The stronger discretion in implementation in Switzerland is explained by the constitutive role of communes and cantons as places of identity for Swiss citizens.

This means that all law-making, programme development and so on in Germany, which is part of concurrent policy areas, needs a settlement at the federal level, that is, on a rather formalized and, because of the strong influence of a centralized party system, also highly politicized level. Immobility due to failing agreements ('joint decision trap') has become a trademark of German multi-level governance. The inclusion of the EU into multi-level governance has changed the dynamics of these arenas only slightly because there is reason for domestic territorial and party actors to find a common position against the EU on many occasions. Recent reforms of federalism were limited and did not change the functioning of multi-level governance in Germany.

Multi-level governance in Switzerland means a focus on the implementation arena that functions rather informally. Only very seldom and only recently – in higher education policy, for example – do we find a similar formalized procedure of cooperation as in Germany. In general, relationships in multi-level governance of Switzerland are characterized by a high degree of pragmatism. Recent reforms have, under the influence of new public management, added a more formal contract structure without violating the strong discretion of the cantons in the implementation of federal laws and regulations. Next to contract structures, the Swiss have strengthened horizontal coordination, something which is rarely found in the German context. Horizontal coordination is another means to avoid imposition from above, that is, from the federal government.

The EU has not changed the basic working of multi-level governance in Switzerland. Implementation procedures have remained the same. However, one does notice a

stronger integration of cantonal representatives in policy formulation during negotiation processes with the EU or other international bodies.

In summary, ‘administrative federalism’, or the functional division of territorial powers, forces both countries to coordinate territorial levels but, as stated in the beginning, in doing so, Germany and Switzerland bow in different directions: the former to the centre and the latter to the level of lower governments. Neither recent reforms of federalism nor the integration of the ‘fourth level’ of the EU has changed the different ways that Germany and Switzerland organize multi-level governance.

## NOTE

1. There is another level that will not be discussed in this chapter, that is, the level of ‘functional, overlapping and competing jurisdictions’ (Frey and Eichenberger 1999; Hooghe and Marks 2001). It is supposed to organize the cooperation of (territorial) actors in a number of functional areas, such as, for example, health care or infrastructure matters.

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# 11 Multi-level governance in Canadian and American intergovernmental relations

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## 11.1 INTRODUCTION

How can the concept of multi-level governance (MLG) contribute to the comparative analysis of internal intergovernmental relations in Canada and the USA? In an earlier paper,<sup>2</sup> we argued that the concepts of federalism and MLG share some major characteristics and also manifest some major differences. In that paper we applied this comparison of federalism and MLG to the European Union (EU) in order to evaluate these shared and different characteristics. Most European federal and MLG theorists have tended to view the two concepts as complementary rather than contradictory, and to consider the boundaries between them to be increasingly blurred. Therefore when the EU is defined and analysed as a form of MLG, it is generally placed somewhere on a broad 'federal' continuum between confederations and federations (Stein and Turkewitsch 2008, pp. 17, 20, citing Burgess 2000).

In this chapter we extend this comparison and application of the concepts of federalism and MLG to the patterns of internal intergovernmental relations of two 'mature federations,' Canada and the USA. We view the former as representative of 'parliamentary-cabinet' regimes and the latter as typical of 'presidential-congressional' regimes. We argue that the traditional intergovernmental concepts and frameworks drawn from theories of federalism continue to serve as useful devices for a systematic comparative analysis of internal intergovernmental relations in the two countries representing two different federal regime types described by Watts as 'parliamentary federations' (for example, Canada, Australia, India, Germany, Austria) and 'presidential federations' (for example, the USA, Brazil, Argentina, Mexico, Venezuela) (Watts 2008, pp. 118–19, 136–7). This is in sharp contrast with the more unique (that is, less susceptible to comparative analysis) hybrid confederal/federal system of intergovernmental relations that now operates in the EU. A major reason for this is that these two North American systems continue to manifest all of the major features of federal and intergovernmental relations governance described in classical theories of federalism of the Anglo-American tradition (Stein and Turkewitsch 2008, p. 5). These include a written constitution defining two distinct and autonomous levels of government and a division of powers between them; two legislative bodies at the national level, one of which is designed to represent the constituent units at the regional level (at least in part), and one of which is designed to represent the national population as a whole according to some principle of representation by population; a court of last resort expected to serve as a final arbiter of legal and political conflicts between the two levels of government; autonomous fiscal (revenue collecting) and financial (spending) systems operating at each level of governance, enabling their governments to function without relying on the beneficence of the other level

of government; and an independent role and veto capacity for both levels in all formal constitutional amendments affecting federalism and intergovernmental relations.

However, since World War II, increasingly intertwined cooperative forms of federalism associated with the welfare state rather than separate, parallel and relatively independent intergovernmental decision-making processes have emerged and evolved. In the last two decades, particularly as a result of significant technological and communications innovations, there has also been a marked trend toward a much more closely integrated and globalized world. As a result, there have been manifestations of new autonomous units of governance at both the supranational and local levels of these North American federal systems. There have also been increasing instances of close patterns of cooperation and partnership by private sector and voluntary third sector organizations with governmental and quasi-governmental structures in Canada and the USA in the framing and implementation of public policy decisions. As a result, some very new and undefined features of intergovernmental decision-making have evolved in these polities that call for refinement and greater complexity in our analyses of their current patterns of internal intergovernmental relations. The EU, unlike Canada and the USA, generally reflects features of an overlapping/interlocking and cooperative type of federalism more closely identified with the continental European tradition of federalism (Stein and Turkewitsch 2008, pp. 7–8). Nevertheless, the post-World War II integrative intergovernmental experiences in Europe, and new descriptive and analytical concepts reflecting different forms of MLG associated with these experiences, can still provide us with some valuable insights and guideposts in our contemporary Canadian-American internal intergovernmental comparisons.

Our chapter is subdivided into the following sections: Section 11.2 on traditional and changing concepts and frameworks used to study intergovernmental relations in Canada, Section 11.3 on traditional and changing concepts and frameworks in the analysis of intergovernmental relations in the USA, Section 11.4 on How the concept of MLG adds to studies of internal intergovernmental relations in Canada and the USA and Section 11.5 with analysis and conclusions.

## 11.2 TRADITIONAL CONCEPTS AND FRAMEWORKS USED TO STUDY INTERGOVERNMENTAL RELATIONS IN CANADA

### 11.2.1 Executive Federal Intergovernmental Policy-Making Processes and Patterns

In parliamentary-cabinet regimes, particularly those modeled on the British Westminster-style system, political power tends to be concentrated at the executive level of a fused executive-legislative political decision-making system (Lijphart 1984, chapter 1). In federal-type parliamentary-cabinet regimes, generally designated ‘parliamentary federations,’ this pattern of concentration of power in the top echelons of the executive is duplicated at both the central and regional levels of government. It has been aptly labeled ‘executive federalism’ (Smiley 1987; Watts 2008, p. 96) As a result most intergovernmental policy-making in parliamentary federations tends to be dominated by a relatively small contingent of ministers or elected executives who head ministries of the same

general or functionally specific policy areas. They are frequently assisted in intergovernmental policy-making by top officials within their respective departments, along with a handful of 'generalist' and strategically oriented intergovernmental political appointees. The style of such intergovernmental policy-making discussions and negotiations is often one of bargaining or negotiation rather than joint discussion of shared planning goals; and it has been aptly compared with that of competitive-style diplomacy at the international level. The term 'federal-provincial diplomacy' was first applied to Canadian intergovernmental relations by Richard Simeon in his seminal book of that title (Simeon 1972); it has since been used to describe the pattern of federal-regional negotiations in other parliamentary federations such as Australia and Germany (Watts 1989). Among other features associated with this bargaining style of decision-making is a tendency to confine such intergovernmental sessions to small groups of top political decision-makers in that policy sector behind closed doors, to refrain from keeping detailed records of such meetings, and to avoid submitting the decisions of these bargaining sessions to elected and popularly representative assemblies for their scrutiny and final approval. This pattern of diplomacy in 'executive federalism' has been both lauded for its policy-making speed and efficiency and condemned for its anti-democratic orientation (Cameron and Simeon 2000).

The rules for this intergovernmental decision-making system in parliamentary federal systems are usually undefined, and there are no explicit provisions or detailed descriptions of its existence, status or procedures of operation in any written constitution or government document. The entire system has evolved over a lengthy period of time, primarily as a result of informal and ad hoc political structural changes (Watts 2008, p. 118). In Canada these developments paralleled the evolving historical pattern of intergovernmental relations. This was initially, in the half century after Confederation, one of intermittent and irregular communications and consultations among different, separate and watertight compartments of government (Veilleux 1971; Stevenson 1993). Beginning shortly after World War I, and especially after World War II when major welfare state reforms were implemented, intergovernmental interactions began to assume a more formal and regularized pattern, and to be increasingly accepted as an integral part of the administrative and political culture (Smiley 1987).

In summary, the dominant pattern of intergovernmental relations policy-making in Canada by the 1980s was one of closed negotiations among a relatively small number of both elected and appointed executives and officials, all governmental actors. They met regularly in informal adaptive networks of intergovernmental policy-making which were in the earlier stages relatively centralized power structures, but later much more balanced or even decentralized, depending on the policy sphere and matter that was being addressed. Most of these meetings involved efforts to bridge the reality of overlapping policy concerns by the two levels of government in virtually every policy sector in Canada, despite a formal division of powers and of policy jurisdiction defined in the Canadian constitution. These intergovernmental meetings dealt primarily with functionally specific matters; however, frequent and regular federal-provincial first ministers conferences and annual premiers' conferences were also held. The latter proliferated particularly after 1960 in Canada, and were concerned for the most part with more general-purpose issues such as constitutional and fiscal federal reform (*ibid.*). All of these intergovernmental activities were confined to public spaces within rather than outside the

governmental sphere. The principal strength of these executive federal intergovernmental structures, as noted above, lies in their capacity to provide effective linkages between the policy-making apparatuses of the two major levels of government in those expanding areas where both are required or expected to participate. They are also capable of generating policy decisions in an expeditious and efficient manner, given the small numbers of participants in them and the absence of decision-making hurdles or opponents that they face. On the other hand, just as calls for greater public and civil society participation in governance structures and decisions have become increasingly louder and more vocal in this era of democratic reform, so have the criticisms directed against these executive federal actors for what is considered to be their expanding reliance on undemocratic and unaccountable intergovernmental policy-making structures and procedures (Cameron and Simeon 2002).

### **Some recent intergovernmental relations forms and practices in Canada**

In recent years these manifestations of executive federal policy-making patterns in Canada have started to change, and some new and radically different forms of intergovernmental relations have begun to emerge in this and other parliamentary federal systems. An important impetus for such changes came with the strong public criticism that was directed at the highly elitist Meech Lake intergovernmental constitutional reform processes that were embraced in Canada in 1987. In this instance, major decisions regarding altered federal and provincial government policy-making spheres and procedures were left entirely to first ministers and a handful of appointed political aides. In the legislative ratification process that followed these first ministers' meetings, there was very little genuine debate about the merits and shortcomings of the constitutional proposals. This was largely due to the fact that at both the federal government level and in most provinces at that time, the first minister and cabinet exercised control of their legislatures through their governing party majorities. In the subsequent constitutional reform discussions over the Charlottetown Accord proposals from 1990 to 1992, there was, in stark contrast, much wider non-governmental, interest group and societal participation at all phases of the process (Stein 1997).

#### **11.2.2 Fiscal Policy**

The criticism directed at the lack of non-governmental and societal involvement in federal-provincial policy-making in Canada was vocalized in other policy sectors besides that of constitutional reform. In the sphere of fiscal reform, similar objections were leveled at the elitist and restricted federal-provincial policy-making structures that produced several federal-provincial fiscal agreements. As a result there have been a number of important initiatives in the sphere of fiscal federalism since that time: most notably, that of the newly constituted Council of the Federation, consisting of provincial and territorial first ministers, in 2003. It established broader extra-governmental consultative mechanisms for its inquiry into the issue of 'vertical fiscal imbalances,' such as 'independent panels,' comprised of academics, business and public sector specialists, and private sector policy 'think tanks' and research networks. They were viewed as part of a 'citizen's dialogue' (Simmons 2008, p. 365).

Similarly, the Martin-led federal government in March 2005 appointed a panel of five

experts on federal-provincial Equalization and Territorial Formula Financing. It likewise adopted consultative practices with non-governmental groups and individuals such as round table discussions made up of academics, business and public sector officials and other interested individuals (*ibid.*). There have also been bilateral rather than multilateral intergovernmental negotiations on fiscal matters in the last few years, particularly during the Martin Liberal Government of 2004–06. But no consensus has emerged as to whether intergovernmental multilateral negotiations, bilateral bargaining or consultative structures that involve non-governmental experts or representative citizens yield the best results, and which criteria should apply in evaluating them.

### **11.2.3 Health Policy**

The same is true in the health policy sector. In this sphere the federal government under Trudeau unilaterally withdrew in 1977 from the 50-50 cost-sharing arrangements that had operated in health care under the universal state-funded Medicare Act since 1966. In return the provinces were accorded the benefits of block funding in which their governments were expected to accept and observe in practice more detailed conditions and requirements defined under this Act if they wished to receive health care financial assistance. In 1984 the federal government imposed five general conditions on the provinces in its Health Care Act. This action led to a number of unresolved conflicts and threatened unilateral actions by the federal government and one or a number of provincial governments over various health care policy issues. Most notable were the serious charges of under-funding of health care leveled at the federal government by the provinces. As a result, the federal government under Prime Minister Chrétien appointed a Royal Commission of Inquiry into Health Care Reform under the chairmanship of former Saskatchewan Premier Roy Romanow in 2002, shortly after the Canadian Senate had established its own Committee on Health Care matters under a prominent Liberal Senator, Michael Kirby. Their recommendations resulted in turn in the negotiation of a \$41 billion transfer payment to the provinces in health care assistance over ten years by Prime Minister Martin in 2004 (Maioni 2008). While this action provided temporary relief and met some important short-term grievances of the provinces in this policy area, it did not alleviate any of the longer-term substantive and intergovernmental process problems in the health care sector. Nor did it resolve the issue of public sector versus private group or individual participation in policy-making structures in this sector.

### **11.2.4 Environmental Policy**

Finally in the environmental policy area, there have also been ongoing intergovernmental conflicts that paralleled and reflected changing patterns of Canadian environmental policy since the late 1960s. There were successive phases of strong and weak federal government commitment and concern about environmental policy regulation and legislation during this period, often corresponding with peaks and troughs in evolving 'waves' of public interest in environmental policy. During the peak periods, the federal government promoted closer consultations between the two levels of government in environmental policy matters, including an intergovernmental Canadian Council of Ministers of the Environment (CCME) in the early 1970s and the Canada-Wide Accord

on Environmental Harmonization in 1998. These trends toward greater environmental policy consultation had both positive and negative consequences. On the positive side they fostered unanimous or consensus decision-making. On the negative side they promoted devolution of environmental policy responsibility to provincial governments, adoption of neo-liberal principles of deficit and expenditure reductions, and a federal-provincial 'race to the bottom' that reflected 'lowest common denominator standards' in policy negotiations (Winfield 2002, pp. 133–4).

These recent developments in environmental policy also point to a growing need for intergovernmental authorities to open themselves to decision-making processes at the international level. It is a good example of a policy sector which requires broader and more inclusive conceptual tools in the study of intergovernmental relations such as those identified with theories of MLG.

In the two other policy sectors in Canada briefly examined here, and in many other policy areas as well, it is clear that the scope of intergovernmental policy-making has been transformed and made broader and more inclusive in its decision-making structures. We have noted previously the increased efforts on the part of both levels of government to include non-governmental actors in intergovernmental policy-making, especially after 2002 when the 'fiscal imbalance' debate occurred between the two levels of government. But we may also observe that this greater openness to non-governmental actors in the fiscal policy sector did not manifest itself more generally in other intergovernmental policy matters, particularly when some consensus between the two levels of government already existed (Simmons 2008, p. 373).

In summary, in recent patterns of Canadian intergovernmental relations the horizontal expansion of intergovernmental relations to include non-governmental actors from the private and non-profit third sector has not developed to any marked degree. Canadian governmental representatives seem less inclined to welcome this horizontal expansion in intergovernmental policy into the non-governmental sphere than are their American counterparts. Therefore MLG reforms, at least in this sense, seem likely to be resisted in Canada.

### 11.3 TRADITIONAL AND CHANGING CONCEPTS AND FRAMEWORKS IN THE ANALYSIS OF INTERGOVERNMENTAL RELATIONS IN THE USA

Intergovernmental relations in the USA have evolved through several distinct phases, which in many respects parallel those in Canada. The first phase from 1789 to 1930 was that of 'dual federalism' (Wright 1978), and resembled the 'watertight compartments' stage in the development of Canadian federalism. During this phase, the national and constituent unit (state or provincial) governments operated in a relatively autonomous manner. The next phase from 1930 to 1960 was one of 'cooperative federalism' (Colby 2002, p. 146; Wright 1978) in which the two levels of government tended increasingly to overlap in intergovernmental policy areas, and to assume joint responsibility in these matters. Due to their much greater fiscal capacity, the federal governments in both countries took the lead in these common areas of policy action. After that phase, however, the pattern of intergovernmental relations in the two countries began to diverge markedly.

In Canada, from 1960 on the provinces gradually assumed a more equal and competitive stance vis-à-vis the federal government, and intermittently negotiated successfully for the transfer to them of jurisdictional authority as well as tax points and shared cost payments or block grants. The pattern of relations between the two levels of government among elected ministers, partisan appointees and career officials also became markedly less cooperative and much more conflictual. The concept of ‘executive federalism’ (or ‘federal-provincial diplomacy’ according to Simeon 1972) was readily accepted by most academics and public servants in Canada as an appropriate descriptive term for this new pattern of intergovernmental relations. In the USA, however, during the same period, the federal government became increasingly dominant in intergovernmental policy-making, occasionally even reducing the financial and policy-making status of state governments to that of a subordinate authority or mendicant.

However beginning with the Reagan administration in 1980, the rhetoric, if not the reality, of intergovernmental relations in the USA began to assume a more decentralist guise, under the label of the ‘New Federalism.’ This pattern was supposed to be commensurate with the anti-statist and conservative orientation of that administration, but it mostly involved the federal government divesting itself of programs that it viewed as financially wasteful. Power and authority during the 1980s did not devolve very much from the national to the state level. In the subsequent two decades the national government devoted fewer resources to the management of intergovernmental affairs, although a similar pattern of centralized intergovernmental relations was maintained. In fact, after the events of September 11, 2001, the national government assumed considerably larger policy-making authority in relation to the states in what it characterized as a new policy area of homeland security. However, although it undoubtedly is the dominant view, scholars do not unanimously agree that recent developments in American intergovernmental relations are increasingly centralized and Washington-centered (see, for example, the work of Elazar 1984; Nathan 1996). In fact, the issue may be understood largely as one of varying patterns of centralization and decentralization in different policy areas.

### **11.3.1 Traditional Concepts and Models of Federalism and Intergovernmental Relations**

Wright (1978) outlines three models of intergovernmental relations, which depict different types of authority relationships between levels of government: separated authority (autonomy); dominant or inclusive authority (hierarchy); and equal or overlapping authority (bargaining). First, in the separated authority model (which has also been referred to as dual-federalism), sharp boundaries separate the federal government from the state governments. Local governments are dependent on the states. With respect to federal-state power relationships, this model implies that the two levels are independent and autonomous (*ibid.*, pp. 20–23). This model parallels that of dual federalism. Most federalism scholars agree that the separated authority model is obsolete (Elazar 1962; Grodzins 1960 [2007]; Wright 1978).

Second is the inclusive authority model, which Wright represents as a series of concentric circles diminishing in size from federal to state to local. The area of each circle corresponds to the proportion of power that is held by each level of government (federal, state and local) in relation to the other levels. The federal government is seen as the most

powerful actor in this model. The inclusive authority model implies dependency relationships, in which states and local governments are subordinate to the federal government (Wright 1978, p. 23–4). In our opinion, this model is too simplistic to describe the complexities of American intergovernmental relations.

The third model that Wright presents is the overlapping authority model. He argues that this model is the most representative of intergovernmental relations in practice. The model is pictured as three overlapping circles, each representing one of the three levels of government, as in a Venn diagram (*ibid.*, p. 20). The overlapping authority model suggests that each of the three levels of government has an exclusive area of authority, but there is a large area in which all three levels of government are involved in the development of policies. Cooperation and competition, interdependence and bargaining-exchange relationships among levels are the key attributes that characterize intergovernmental relations in this model (*ibid.*, pp. 28–9). In our view, there is much to commend in this considerably more nuanced and more realistic and applicable model. We agree with Wright that intergovernmental relations are characterized by overlapping authority, and we find this model to be the most open to insights also fostered by the concept of MLG.

### **11.3.2 Intergovernmental Relations in Fiscal Policy, Health Policy and Environmental Policy**

#### **Fiscal policy**

In the area of fiscal policy, a key issue concerns intergovernmental transfers. In terms of allocation of expenditure powers, the use of the federal general spending power has been widespread, although the constitution does not explicitly identify such a power (Watts 2008, pp. 100–101). In the USA, intergovernmental transfers are more commonly known as grants, grants-in-aid, federal aid or state aid. The rough equivalents in the Canadian system are transfer payments, including block transfers such as the Canada Health Transfer. The main outcome is that different types of grants tend to produce different types of intergovernmental relationships. Over the years, the use of grants has resulted in increased federal influence over state and local governments and this has had significant political consequences. On the one hand, grants tend to promote intergovernmental bargaining; on the other hand, they incite state governments to maneuver for advantage and resources. In this sense, they have encouraged conflict, as well as cooperation (O'Toole 2007, pp. 11–12).

There are important differences between Canada and the USA in terms of the specificity of the requirements for conditional grants. Those in the USA are usually very specific, while those in Canada are general and 'virtually unconditional' (Watts 2008, p. 106). Furthermore, unlike Canada, the USA does not have a formal system of equalization transfers, although some redistribution occurs through federal grants-in-aid. With its comparatively large interstate fiscal disparities, this implies that the USA has a 'greater tolerance for horizontal imbalances' than does Canada (*ibid.*, p. 112). In Canada, the provinces tend to view these grants as entitlements, whereas the American states see their role in such fiscal policy negotiations as subordinate actors without entitlements. Poorer states are locked in a vicious circle: with fewer grants they have less resources to lobby for such entitlements.



**Health policy**

In the area of health policy, the constitutional relationships between federal and state governments are 'ambiguous' (Colby 2002, p. 143). In Canada, a similar constitutional ambiguity exists. There are few specific references to health policy in the constitution. Thus, there is a contrast between centralization, which is implied in the economic and residual powers of the federal government, and the decentralized system that now exists in practice, in which health insurance and the provision of health care fall under provincial jurisdiction (Banting and Corbett 2002, pp. 14–15; Maioni 2002, p. 173).

American intergovernmental relations in health policy are primarily based on a grant-in-aid system. States have the choice of whether or not to participate in individual grant programs. States that accept grants often have a great deal of flexibility over their administration, resulting in substantial variation across states. The use of waivers to the federal policies can provide for a degree of leeway for the states. However, this flexibility has a high cost, and can result in conflict. Such conflicts arise over different views of intergovernmental relations and the role of the public sector, the conditions for receiving the grant and the overall cost of the program (Colby 2002, p. 143). Intergovernmental conflicts tend to be mediated at the federal level, primarily in the courts and in Congress<sup>3</sup> (Banting and Corbett 2002, p. 14).

In health policy, intergovernmental relationships differ by area and even within programs. The federal government and the states each deliver different aspects of public health programs, which include both highly centralized and highly decentralized programs (*ibid.*, p. 13). For example, Medicare, the largest public health program, is purely federal, and has few intergovernmental aspects. On the other hand, Medicaid is jointly funded by the federal government and the states, and, in terms of policy design, administration and outcome, operates in a decentralized manner. While the federal government determines the standards for eligibility and coverage, each state is responsible for designing and administering its own Medicaid program. The State Child Health Insurance Program, a joint federal-state program, is more decentralized than Medicaid in the sense that states have more flexibility in establishing the criteria for eligibility and benefits. Thus, state programs vary considerably in many respects Banting and Corbett 2002, p. 14; (Colby 2002, pp. 149–52).

Recent administrations have devolved more decision-making to the states and granted them more flexibility in grant programs (Colby 2002, p. 159). This parallels the Canadian move towards block funding. The Reagan administration attempted to decentralize health care programs with the creation of more block grant programs and by reducing regulations. The Clinton administration continued this trend, allowing for waivers of federal requirements in the Medicaid program in order to provide even greater flexibility (*ibid.*).

**Environmental policy**

There is a substantial body of federal environmental legislation, which is often of particular concern to state and local governments. In terms of the division of powers, the constitution does not specifically delegate power for environmental policy to the federal government and thus it was historically considered to be a reserve power of the states. In the twentieth century, Congress gradually derived power from several constitutional provisions, in particular the commerce, spending and treaty clauses. The spending clause

enables the federal government to attach mandates (regulatory conditions) to its grants-in-aid to state governments and is thus an important source of its power over issues of environmental protection (Kincaid 1996, p. 82). The federal government did not devolve environmental powers to the states; rather it subsumed state powers over environmental issues and imposed federal regulations. It allowed state primacy only if their regulations were equivalent to or higher than federal standards. This was based on the premise that state environmental protection standards were not sufficiently strict (*ibid.*, p. 84). In contrast, in Canada, the constitutional division of powers with respect to environmental regulation historically gave primacy to the provinces. The federal government's power to impose environmental regulations was restricted by judicial interpretations of the constitution and it was not able to assert authority in environmental policy. Thus in Canada, as compared to the USA, environmental policy is characterized by a higher level of overlapping jurisdictions (Morton 1996, pp. 37, 41).

The 'New Federalism' implied a greater role for state and local governments. In terms of environmental policy, it had two primary objectives: to decentralize and 'de-fund' federal environmental protection. The Reagan and George H.W. Bush administrations subjected the states to large budget cuts of environmental programs. This was a source of conflict particularly as many states were unable to replace the federal funds with their own funds (Lester 1995, pp. 41, 53). Indeed, a frequent area of intergovernmental disagreement is the mandated compliance by state and local governments with federal regulations, often without the financial support to help meet such standards. Furthermore, environmental regulations have high compliance costs and varying standards that create challenges for intergovernmental coordination. Adding to these issues are the federal courts, which, on hearing cases filed by environmental organizations, often compel state compliance with federal mandates (Kincaid 1996, pp. 79–81).

A further important development in the 1980s and 1990s was modernization of the states' institutional and administrative capacities. Many states made significant changes in the legislative, executive and judicial branches, including strengthening the role of the governor and increasing revenue through tax diversification. However, not all states adopted such reforms, and thus some of them were not as capable of assuming their new environmental responsibilities (Lester 1995, pp. 41, 53).

Changes in intergovernmental relations and other recent developments have meant that states have increasingly assumed a more active role in environmental policy, particularly with respect to environmental protection and climate change.<sup>4</sup> The federal government refrained from ratifying the 1997 Kyoto Protocol; and instead, the George W. Bush administration asked industry to voluntarily reduce emissions. Many states have started to act independently of the federal government in terms of developing and enforcing environmental protection standards, and have developed a variety of environmental initiatives. All states meet or exceed federal environmental standards in at least some areas, and many states have imposed their own, stricter regulations where federal standards are lacking or non-existent. This has resulted in increased interstate variation in environmental policy (Gerston 2007, pp. 146–7).

The character of intergovernmental relations and the extent of conflict differ across these three policy areas. According to Gormley (2006), such variation is the result of both 'the level of federal aid and the number of federal mandates,' which affect the relationship between the federal government and the states (*ibid.*, p. 523). Comparatively, health

policy is characterized by a higher amount of federal funding and a moderate number of mandates, while environmental policy is characterized by many mandates and low funding (*ibid.*, p. 529). Waivers are more common in health policy than in environmental policy. It is comparatively easy for state governments to get waivers of federal health statutes. In contrast, the federal government has prohibited waivers of its environmental regulations, possibly because the option might have led to an overload of requests for such measures. Although the states are restricted from seeking waivers of federal environmental laws, they have continued to lobby for increased flexibility in implementation (*ibid.*, pp. 535–6). There is a parallel here with the Canadian Environmental Harmonization Accord, particularly with respect to the trend it encouraged towards the devolution of environmental policy responsibility to provincial governments. As a result of these key differences, Gormley (2006, p. 523) finds that intergovernmental conflict tends to be higher in environmental policy and lower in health policy. In terms of conflict resolution, the federal courts have tended to side with federal government's position vis-à-vis the states on issues of environmental protection. However, the courts have tended to be less supportive of the federal government on health policy issues (*ibid.*). This may be because of the generally more decentralized nature of health care, despite variations across programs, in contrast to the more centralized nature of environmental policy, at least in the legal and constitutional sense.

#### 11.4 HOW THE CONCEPT OF MLG ADDS TO STUDIES OF INTERNAL INTERGOVERNMENTAL RELATIONS IN CANADA AND THE USA

As we noted in Section 11.2, in Canada during most of the post-World War II period, and particularly since the 1960s, the trend in intergovernmental relations has been increasingly that of 'federal-provincial diplomacy' or 'executive federalism' (Simeon 1972). However, the pattern of executive federalism has started to change in recent years, largely as a result of the increasing trend to globalization and the growing inclusion of new governmental and non-governmental structures and institutions in decision-making at all levels of governance, including the transnational and local levels. Meekison et al. (2004a, 2004b) acknowledge that many of Canada's policy achievements have been managed through the institutions of executive federalism, and these structures are likely to continue to offer an effective method of managing the federation. But they also admit that executive federalism has a well-known set of deficiencies, including lack of political accountability to either elected legislatures or the broader mass of citizens operating in civil society structures, and fostering of excessive levels of intergovernmental conflict. Despite these shortcomings, they observe that 'executive federalism has continued to expand and deepen, in conjunction with new policy needs and demands, and has become more institutionalized' (*ibid.*, p. 4).

Among the most important managers of executive federalism and intergovernmental relations, according to these intergovernmental relations experts, are what are described as the 'peak institutions,' the First Ministers Conferences and the Annual Premiers' Conference (recast since 2003 as a bureaucratically staffed and funded Council of the Federation). There are also more recent regionally based 'peak' intergovernmental

institutions, such as the annual Western Premiers Conference and the semi-annual Council of Maritime Premiers. But these institutions are generally undeveloped, still weakly institutionalized and unable to bear the increasing load of federal-provincial intergovernmental relations in an era of expanding globalization and urbanization. As a result, since intergovernmental cooperation has begun to be transformed in the 1990s and the first decade of the new millennium into closer intergovernmental collaboration, they conclude that the analytical framework most frequently used in the discussion of federal-provincial relations in Canada (that is, executive federalism) must be broadened and made more encompassing. In their view, it has become necessary with these intergovernmental changes to develop new institutions to support this closer form of collaboration. They argue explicitly that 'the sort of multi-centered collaboration that is now being contemplated, and that could involve federal, provincial, municipal, Aboriginal, and foreign governments, as well as transnational institutions, will be much more complex and increasingly more political than earlier federal-provincial interactions' (ibid., p. 23).

We strongly endorse these views. We also agree with the observation of Meekison and colleagues that 'while there is evidence that the transnational multi-level institutions are emerging, the challenge of multi-level governance is only just beginning to be addressed' (ibid., p. 24.) We also concur with their view that 'intergovernmental collaboration is not a panacea, especially due to the high transaction costs of joint action. . . . Collaborative federalism and its concomitant development of multi-level governance arrangements [in Canada]. . . remains a work in progress' (ibid.).

In a concurrent comparative study of the impact of global and regional integration on federal systems that involved several of the same editors, a somewhat more nuanced view of this worldwide trend to globalization and closer intergovernmental collaboration is offered. In it, the co-editors argue that '[as] a result of global or regional integration, issues that were once within the domain of federal or constituent units may increasingly be subject to private forms of international governance.' They also note that:

a range of plausible arguments can be proffered about the likely effects of global and regional integration. Some suggest that national governments may be privileged. Others believe that constituent units are becoming stronger. Still others make the case that all orders of government may be ceding effective authority to other actors – be they international organizations, non-governmental organizations (NGOs), or the private sector – as government becomes more networked. [But] the world of governance is rarely tidy, and our [initial] assumption was that all of these impacts may be happening to one degree or other. (Lazar et al. 2003, pp. 4–5)

In the USA, new demographic, technological and social challenges have emerged in the last two decades that call for transformation and reform of the nationally centered but increasingly downgraded or ignored intergovernmental management system. Costs of Medicare and Medicaid and other programs at all levels of the intergovernmental system are increasing. These programs are becoming much more integrated and intertwined, the interest groups influencing decisions on them are proliferating and the stakes in them are relentlessly magnifying. At the same time, there has been a gradual weakening of institutional capacity for intergovernmental monitoring (Conlan and Posner 2008, p. 4). Recent developments in the evolution of intergovernmental relations have left some academic specialists in this area unhappy with the traditional concepts and models of American federalism that have been applied to the study of intergovernmental relations

in the USA (that is, Conlan and Posner 2008). Nathan (2008) calls for a more positive and less legalistic analysis of the current role of the American states than those provided by Wheare (1946) or Macmahon (1955). He speculates that a 'new, new federalism' may now be emerging in which federalism is being rediscovered by liberals who are proponents of state activism in policy sectors such as health reform, environmental initiatives and regulatory matters. Conlan (2008, pp. 26–39) also calls for reanalysis of the evolution of and the current nature of American federalism.

## 11.5 ANALYSIS AND CONCLUSIONS

What might an MLG framework to describe contemporary intergovernmental relations in Canada and/or the USA look like? How might we modify the European MLG concept to fit the North American context? We must note that there is no single unified 'theory' of MLG, even in the context of the EU. Thus, we discuss how certain key aspects of MLG might be infused with the concepts and models currently used to study intergovernmental relations in Canada and the USA.

Like MLG, the study of intergovernmental relations in Canada and the USA has focused more on the use of descriptive models (for example, those of Wright 1978) than on the development of predictive models of interaction. Certain models of intergovernmental relations are conceptually closer to MLG than others. In particular, early models of intergovernmental relations, such as dual federalism, which manifest fewer similarities with the newer MLG concept, are generally agreed to be outdated. More recent approaches to intergovernmental relations in the USA and Canada share with MLG a shift from more hierarchical models to models emphasizing the more shared or cooperative aspects of decision-making.

Newer models and concepts of intergovernmental relations can and, we argue, should draw on aspects of MLG. For example, among the conceptual tools that MLG can bring to the study of intergovernmental relations is a broader focus on the horizontal and vertical governmental and non-governmental policy-making structures operating at different levels and across different sectors of the intergovernmental process. Further insights provided by MLG in focusing on the cooperative aspects of intergovernmental relations include incorporating the role of private actors in decision-making and bringing decision-making more out in the open. In some respects, more recent works on intergovernmental relations in Canada and the USA have already started to incorporate some of these aspects.

Newer definitions of intergovernmental relations are closer to that of MLG, focusing on 'networks' and 'webs' of interaction. For example, Stephens and Wikstrom (2007, p. 46) define intergovernmental relations as an 'intricate web of the myriad relationships that exist between, among and within governments and interest groups that lobby in the intergovernmental arena.' Their definition shares some of the fluidity of the MLG concept and at the same time the authors prefer to move beyond what they see as the 'rigidity' of federalism, which they view as an 'excessively structural and legalistic concept' (*ibid.*).

Increased focus on the local level of government is one area where intergovernmental relations can draw from MLG. For example, in some of the policy areas we discussed,

the role of metropolitan areas is increasingly crucial in both countries to a degree, and especially in the USA. In that country in recent years there has been an increased policy-making role played by cities in the case of environmental regulation. The fiscal crisis of the 'dependent cities' (Kantor 1995) suggests a need for greater financial independence in local government within the American federal system, and this is also true in Canada (Young and Leuprecht 2004). In this sense, MLG might provide a template for governmental and policy action as well as a descriptive model of how this policy interaction might take place.

There are other aspects of intergovernmental relations in Canada and the USA in which the concept of MLG is less applicable. For example, the most obvious disjuncture is the limited number of levels in Canada and the USA compared to the EU, the 'birth-place' of the concept of MLG. This is particularly true because there is no genuinely autonomous supranational governmental level for these countries. Thus in our three policy areas we found that there was little or no supranational government involvement. This was largely the case even in negotiations over the Kyoto Agreement and Protocol in environmental policy.

The concepts of MLG and federalism are not necessarily contradictory. The two concepts are complementary, and the lines between the two concepts are increasingly blurred (Stein and Turkewitsch 2008, p. 15). Following this line of reasoning, we might also argue that in many respects, the ideas that flow from scholars working with the concept of MLG in the European context are complementary and consistent with many of the newer models and descriptions of intergovernmental relations in Canada and the USA.

Recent trends have called for the development of new concepts to supplement or replace earlier, narrower concepts that had been previously used to analyse Canadian and American intergovernmental relations. For example, the 'dual federalism' or 'separated authority' model (Wright 1978) has been characterized as obsolete today by leading scholars of federalism, such as Grodzins, Elazar and Wright, and has largely disappeared from American literature on federalism. There therefore appears to be a growing consensus among federalism scholars that the applicability of traditional intergovernmental relations models needs to be reconsidered.

This is precisely where the concept of MLG is becoming increasingly relevant. There has been both a pattern of rapid innovation and evolution and one of sharp criticism directed at this new, evolving concept. But there has also been a gradual process of refinement in its definition and application, which can be usefully integrated into future theoretical analyses and conceptual contributions in the study of intergovernmental relations in Canada and the USA. For example, we would propose that only the Type I definition of MLG by Hooghe and Marks (2003), confined to five vertically interrelated levels of government, be adopted in these studies. We would also incorporate some of the modifications and extensions of this definition of MLG proposed by Jachtenfuchs (1995), Marks et al. (1996), Scharpf (1997) and Peters and Pierre (2001),<sup>5</sup> although we agree with Bache and Flinders (2004a, 2004b) that there is no single definition of MLG that is currently broadly accepted by the academic community. In other words, we feel that no one definition should have priority in the comparative study of intergovernmental relations in Canada and the USA.

Closer attention should be paid in North America to determining how the continental European tradition of federalism has managed to shape patterns of intergovernmental

relationships among countries on that continent. We believe that past European federal theorists have promoted closely intertwined and interlocking intergovernmental relationships, and this has had both positive and negative consequences. The politically cooperative and joint forms of intergovernmental relations are often attributable to the interlocking pattern of central-regional intergovernmental relations and executive-administrative policy-making and implementation in the EU itself or in some federal countries of continental Europe, such as Germany. The cooperative nature of their governmental interaction may also help to foster greater innovation in public policy-making. It may encourage some governments involved in regular intergovernmental relations to exercise greater restraint in their competitive struggles with others in that relationship. On the other hand, a pattern of intense competition and a ‘race to the bottom’ in policy negotiation has also manifested itself frequently in German and European intergovernmental relations, in what Scharpf has appropriately labeled ‘the joint decision trap’<sup>6</sup> (Scharpf 1988). In this situation, the need to achieve a unanimous or near-unanimous decision has encouraged lengthy intergovernmental bargaining designed to find ‘lowest common denominator’ solutions. Finding some balance between these benefits and shortcomings might be the best model or template for more effective intergovernmental action in Canada and the USA.

## NOTES

1. An earlier expanded version of this chapter was presented at the annual conference of IPSA Research Committee 28 on Comparative Federalism and Federation in Berlin, Germany, 3 October 2008, under the title, ‘The concepts of federalism and multi-level governance evaluated: a comparative analysis of Canadian and American intergovernmental relations’.
2. Michael B. Stein and Lisa Turkewitsch (2008).
3. For a more detailed discussion of intergovernmental conflict and mediation in the USA in the areas of health policy, education policy and environmental policy, see Gormley (2006, pp. 523–54).
4. For a comprehensive examination of the emergence and development of American states’ climate change policies and the implications for intergovernmental relations, see Rabe (2004).
5. As we noted in our earlier paper (Stein and Turkewitsch 2008), the definition of the concept of MLG has broadened and subsumed new dimensions since its initial formulation in the context of the EU. Marks (1993) originally described MLG as ‘a system of continuous negotiation among nested governments at several levels – supranational, national, regional and local – as a result of a broad process of institutional creation and decisional reallocation that has pulled some previously centralized functions of the state up to the supranational level and some down to the local/regional level’ (ibid., p. 392). Peters and Pierre subsequently noted that ‘although we tend to think of these institutional levels as vertically ordered, institutional relationships do not have to operate through intermediary levels, but can take place directly between, say, transnational and regional levels, thus bypassing the state level’ (Peters and Pierre 2001, p. 132). For further discussion of various definitions of the concept of MLG, see Stein and Turkewitsch (2008, pp. 8–9).
6. ‘The joint decision trap’ is a potentially stagnating condition that operates in conjunction with the unanimity voting requirement at the subnational or nation-state levels of a system of ‘joint-decision federalism,’ such as Germany. It arises from the tendency of some conservative lower level units in such systems to veto reform-oriented legislation introduced by other more progressive units in order to preserve the political status quo (Scharpf 1988).

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# PART III

## THE EU AS A MULTI-LEVEL SYSTEM



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## 12 The institutional framework of the European Union

*Markus Jachtenfuchs*

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### 12.1 WHAT IS SPECIAL ABOUT GOVERNANCE IN THE EUROPEAN UNION?

Using the concept of ‘governance’ as an analytical category allows for the possibility that collectively binding decisions can be taken by institutions other than the state. However, this entails a number of problems which the state typically does not have. In the first place, the state possesses the monopoly of the legitimate use of force (Weber 1978, pp. 54–6; Poggi 1990). Collectively binding decisions must not only be adopted but need to be implemented, often against the resistance of strong actors. The monopoly of the legitimate use of force is potentially a formidable resource for increasing the chances of collectively binding decisions to be put into practice. It is an instrument of power understood as the ability of one actor to enforce his will upon another against the latter’s resistance. During the development of the modern state, the monopoly of force has differentiated into an external branch, institutionalized in the military, and an internal branch, institutionalized in the police.

Usually, the highest level of government in federal states possesses exclusive control over the military and at least partial control over the police or an independent police force. In the European Union (EU), the highest level of government has neither a military force independent of the member states for projecting power to the outside world nor an independent police force which could in the strict sense ‘enforce’ decisions upon non-complying member states, firms, organizations or individuals (Kelemen and Nicolaïdis 2007). The impressive build-up of the EU’s military capability is not identical with the emergence of a genuine European army as it was envisaged by the European Defence Community which failed in 1954. Instead, it consists of the pooling of military forces which are in the last resort controlled by the member states coupled with the creation of a market for defence industries (Jones 2007). EUROPOL is not the equivalent of a European FBI (Occhipinti 2003) but an organization primarily for collecting and sharing information. Thus, the EU level cannot rely on the legitimate threat of the use of physical force for putting its decisions into practice.

The EU level lacks not only the monopoly of the legitimate use of force, it also lacks the monopoly of taxation. Fiscal sociology in the tradition of Schumpeter (1991) has argued that looking at the financial resources of a state could reveal important insights about its structure and power. This is indeed true: while the EU, compared to other international organizations, has an impressive budget of more than 120 billion euros, this is just about 1 per cent of the EU’s GDP. In comparison, the federal budget in Germany alone amounted to about 250 billion euros in 2007, which corresponds roughly

to ten percent of the GDP. In summary, the EU budget is too small to have a major macroeconomic impact.

Even more important than the size of the budget is the structure of the EU's revenues. Although the EU prides itself of having a system of 'own resources' whereas normal international organizations like the United Nations (UN) are dependent on member state contributions, it does not have anything similar to an independent tax base. Import duties and agricultural levies which are structurally close to such a tax make up only 15 per cent of the EU budget and are collected by the member states who decide upon the fee they take as a compensation for resource collection. Despite its name, the so-called 'VAT based resource' is not a tax or even a share of value added tax which 'belongs' somehow to the EU. Instead, it is a direct transfer from national budgets calculated on the basis of a fictitious VAT tax base and including all budget rebates several member states obtained in intergovernmental negotiations. The gross national income (GNI) based resource, introduced in 1988, now constitutes the largest single source of the EU's income. It completely breaks with the fiction of an own resource and consists of a direct transfer from national budgets, calculated with reference to the gross national income. The VAT-based and the GNI resource together account for about 85 per cent of the EU's income. Governance in the EU lacks not only the monopoly of the legitimate use of physical force, it also lacks a strong and independent fiscal basis (Laffan 1997; Genschel 2002). This has important consequences for the shape and functioning of the multi-level Euro-polity.

## 12.2 A TERRITORIAL POLITY WITH VARIABLE GEOMETRY

Thus, the European multi-level system differs in important aspects from federal states. It does, however, also differ substantially from typical international forms of multi-level governance because the latter are usually confined to specific policy areas. States participate in a number of functionally specific regimes which are only partially overlapping. In the terminology of Hooghe and Marks, international multi-level systems are usually Type II systems (Hooghe and Marks 2003) whereas the EU is very close to a Type I system.

Most importantly, the EU has a clearly defined territory in which decisions taken by EU bodies are collectively binding. This territory is the sum of the territories of its member states. In this territory, nature protection provisions, banking regulations or product standards are equally binding. These rules are adopted by a single set of institutions which covers all policy issues alike. In the standard version of the law-making process, the Commission submits a legislative proposal on which the Council and the European Parliament jointly decide. Complaints can be addressed to the European Court of Justice (Stone Sweet 2004; Hix 2005).

Underneath this uniform structure of territory and institutions, the EU shows a much higher degree of internal differentiation than most federal states. It has important functional subsystems with a different territorial scope and a different set of institutions and decision-making rules (for an early treatment of the EU's subsystems, see de Schoutheete 1990). The most well known of these subsystems is the Eurozone. The EU neither has a common currency for everyone nor has it maintained the individual currencies of all

its member states. Instead, a strong group has adopted a common currency (the euro) which is governed by common institutions such as the European Central Bank or the Eurogroup in the Council while the other member states maintain their own currencies and central banks (Enderlein 2006; Eichengreen 2007; Hallerberg 2007).

The second important subsystem of the EU is the Schengen system of those states which have agreed to abolish border controls among themselves (Anderson and Apap 2002). The Schengen system now covers 13 EU member states. Ten more member states are not yet full members. The UK and Ireland have decided not to join, whereas Norway and Iceland – non-EU members – are part of it. Switzerland, another non-EU member, has become a full member of the Schengen system as well. As a result, some citizens from a non-member state of the EU can move freely in large parts of the EU whereas the citizens of some EU member states have to go through a border check when entering that zone.

Apart from this territorial differentiation, there is also a differentiation of decision-making bodies in the EU according to functional areas. The most explicit acknowledgement of this differentiation were the three ‘pillars’ introduced by the Maastricht Treaty in 1993. While the sharp distinction between the internal market rules (the ‘Community pillar’), foreign policy and justice and home affairs (the second and third pillars) was slowly eroded in subsequent Treaty reforms, some important elements of it still survive in the Lisbon Treaty. The Commission does not have the monopoly of legislative initiative in all areas, the European Parliament is only consulted or simply informed about important issues, and the European Court of Justice cannot adjudicate disputes under all provisions of the Lisbon Treaty.

The European system of multi-level governance is thus close to Hooghe and Marks’ Type I but with important elements of Type II. Some important policies such as the common currency or the free movement of people are not applied to its entire territory (but in the latter case even extend beyond it), and while there is largely a uniform institutional system, there are important exceptions to this uniformity.

### 12.3 A PARTICULAR CONFIGURATION OF LEGISLATIVE, EXECUTIVE AND JUDICIARY POWERS

The standard textbook knowledge about the institutional set-up of modern democracies states that there is and should be a separation of legislative, executive and judiciary powers. The EU deviates in important ways from this rule (see Hix 2005, chapters 2 and 3 for a detailed overview; Majone 2005). A few points are particularly relevant in this respect.

First, the European Commission has not only the right but the monopoly of legislative initiative in many areas of policy making. The guiding idea behind this very peculiar construction at the time of its creation in the 1950s was to strengthen the orientation of legislative proposals towards a common European interest as opposed to particular national interests. For this reason, the founders of the then European Communities created an institution which was responsible for the European common good and largely independent from national governments as well as from voters. The European Commission is in essence a technocratic institution detached from societal pressures. Although member

states can exercise pressure on the Commission, for example, by threatening not to adopt a legislative proposal which the Commission deems necessary or by rejecting funding for specific policies in the budgetary process, its formal monopoly of legislative initiative makes it a very powerful institution. Only in new policy fields, most notably in justice and home affairs, member states also have the right to make formal decision proposals (for example, Article 76 of the Treaty on the Functioning of the European Union). Unlike governmental ministries which are normally differentiated along functional lines, the Commission is a single organization responsible for all EU policies. Its internal differentiation into issue-specific 'directorates generals' is less pronounced than the differentiation among governmental ministries, and the political level of Commissioners is still responsible as a collegiate body for all Commission activities alike. There is no equivalent to a ministerial responsibility for a single policy issue and ministry (Cini 1996; Hooghe 2001; Nugent 2006, chapter 9).

But the Commission is not only a law-maker, it is also responsible for the execution of EU policies. It monitors the application of EU laws in the member states and even directly administers a substantial share of certain policies such as agriculture, regional assistance, research and development funding or competition rules.

Second, the Council is also a hybrid institution mixing the legislative and the executive (Hayes-Renshaw and Wallace 2006). It has a multi-tiered hierarchical structure, ranging from civil servants, ambassadors and ministers to heads of state and of government. All of them are members of their national executives but on the EU level act as law-makers debating, modifying and adopting Commission proposals. In the EU's multi-level system, the Council represents the territorial interests of constituent units (Sbragia 1993). Unlike the US Senate, however, it is not a parliamentary chamber with elected representatives for this very purpose. Instead, it is closer to the German Bundesrat which consists of appointed representatives of the Länder governments. As a consequence, the Council not only represents the substantive interests of the member states but also the institutional self-interests of the member state governments (Scharpf 1988). Unlike both the US Senate and the German Bundesrat, the EU Council is not a single body but meets in different compositions according to functional tasks (for example, the ministers of the environment or the ministers of the interior).

Third, the European Parliament (EP) is a directly elected supranational parliamentary body (Corbett et al. 2007). Having started as a purely consultative assembly consisting of representatives of national parliaments in the 1950s, it is perhaps the institution which has gained most in terms of influence in the last decades. This has, however, not led to the development of a parliamentary system of government. Even in the Lisbon Treaty, some particularities still persist. In some policy areas, most notably in the field of police cooperation, the EP is still merely consulted during the legislative process but does not have the right to veto proposals or make authoritative suggestions for amendments. As a general rule, the EP also does not have the right to suggest legislation but remains confined to act upon proposals submitted by the Commission or, in some cases, by a group of member states. Nevertheless, the EP has started to adopt 'legislative resolutions' which are meant to be legislative proposals and which Commission or Council cannot easily ignore because the EP has the formal right to veto proposals which are important for them. But this informal practice is not the same as a formal right of initiating legislation. It also does not have full budgetary rights (and not power to tax) but its grip on

the EU's budget is limited on certain types of ('non-compulsory') expenditures (Laffan and Lindner 2005). And most importantly, the EP does not in any way elect or support a European government. The composition of the Council as the chamber representing territorial interests is in any case determined by the outcome of national elections. The composition of the Commission is determined by a common agreement among the Council members. As an informal practice, the EP has acquired the right to interrogate incoming Commissioners before they take up office. There is a common understanding that a person who is rejected in such a hearing will not be appointed by the Council. As in the case of the right of legislative initiative, the EP has extended its powers beyond what was originally fixed in the treaties. Although the relationship between EP, Commission and Council increasingly resembles a system of checks and balances, the crucial difference to, for example, the US system is that there is no executive with a direct popular mandate (Hix et al. 2007).

#### 12.4 A STRONG COURT AND CONTINUOUS CONSTITUTIONAL DEBATE

In the configuration of powers outlined in the previous section, the European Court of Justice (ECJ) plays a particularly important role. Like the EP, its importance has grown enormously since the founding of the European Economic Community. But while the EP has acquired much of its influence by explicit decisions of the member states, such as the decision to have direct elections to the EP or the extensions of the EP's role in the legislative process, the ECJ has largely empowered itself without explicit consensus of the member states and sometimes against their explicit will and resistance (Weiler 1999; Alter 2001; Stone Sweet 2004).

The standard theory explaining the EU polity-making process argues that the member states control the EU's institutional development. Steps for further institutionalization are agreed upon in major intergovernmental bargains in which the 'supranational' actors such as the Commission, the EP or the ECJ have at best a minimal influence (Moravcsik 1998). However, this theory is at odds with explaining the growth of ECJ powers. At a purely descriptive level, the ECJ has managed to introduce two principles into the EU which in the standard interpretation have transformed a set of intergovernmental treaties into a supranational constitution (despite the fact that the term 'constitution' is not mentioned in the treaties and even the compromise formula 'Constitutional Treaty' had to be removed after failed referenda in France and in the Netherlands). These principles are the doctrines of 'direct effect' and of 'supremacy'. The first stipulates that EU primary law (mainly the treaties) and some types of secondary law (mainly the so-called 'directives') under certain conditions do not need implementing legislation in order to grant individual rights. The second stipulates that in case of conflict, European law is superior to national law, and even to national constitutional law. Both doctrines have been developed and further refined during the years (Weiler 1991, 1999).

There has been massive resistance from elected politicians and from high national courts, most notably from the German *Bundesverfassungsgericht*, against this radical reshaping of the EU's legal order (Rasmussen 1986; MacCormick 1995). After all, however, the legal transformation of the EU and the emergence of the ECJ as the EU's



constitutional court has been accepted (Alter 2001). Rather than directly challenging the independence of the judiciary, member states have tried to avoid the extension of centralist constitutional doctrine in new areas, for example, by explicitly stating that the newly introduced ‘framework decisions’ were not directly applicable (Article 34, 2 (b) of the Treaty on European Union). But it is clear that the ECJ has had and still has a strong role in shaping the structure of the Euro-polity and the relationship between its levels. In the case of framework decisions, a recent judgement of the ECJ seems to suggest their direct effect in specific circumstances against the explicit wording of the Treaty (ECJ case C-105/03, ‘Pupino’, 16 June 2005). More generally, a strong role of the judiciary in adjudicating conflicts between levels of government seems a characteristic pattern of federal or multi-level systems with independent levels of government and no general predefined priority of one level over the other (Lenaerts 1990).

While controversies over the extent of the powers of different levels of government seem typical for multi-level systems, the salience of the constitutional issue seems to be particularly high in the EU. Decisions about the architecture of the EU’s multi-level system are not only taken on intergovernmental conferences and by the ECJ but also during day-to-day politics. The EP’s attempt to propose new legislation, although it does not formally have the right to do so or to have an inaugural vote on individual Commissioners, are part of this pattern. The same is true for the debates on the correct legal base (that is, treaty Article) for a legislative proposal where the Commission tends to prefer provisions allowing for a majority decision whereas the member states tend to favour provisions with unanimity. This constitutional dimension is also present when new regulatory agencies (for example, on telecommunications) are being planned or set up. It is also the background of the debate on the so-called ‘comitology’, that is, the committees consisting of representatives of both the Commission and the member states (but no representatives from the EP) set up to administer and supervise often highly specific policies. The ongoing constitutional struggle among EU institutions about the distribution of power between the European and the national level (represented by the Commission and the Council, respectively) emerges in a number of seemingly technical issues discussed in these committees. It forms the background of fights about the conditions under which the member states can block a Commission decision, about whether they can just postpone or really stop the decision and about whether a simple or a qualified majority was necessary for that purpose (see Joerges and Vos 1999 for an overview on comitology).

## 12.5 DIVISION OF TASKS: A STRONG MARKET WITH A WEAK STATE

While Euro-federalists had expected the creation of strong political institutions after what they perceived as the demise of the nation state in World War II, history took a different course. Nation states did not cede their monopoly of force or their monopoly of taxation and remained the decisive actors in the political reconstruction of Western Europe. They began functionally limited attempts of economic cooperation among themselves in order to moderate adverse effects of economic interdependence and to realize gains from cooperation in order to stabilize themselves as political units (Milward 1992; Haas 2004).

The creation of a transnational market remained by far the most important goal among member states (Fligstein and Stone Sweet 2002; Majone 2005). Market-making took place in the first pillar of the EU which was characterized by a monopoly of initiative of the Commission, increasingly widespread use of majority voting in the Council and a strong jurisprudence of the ECJ against anything that could even remotely be perceived as a barrier to the four fundamental freedoms of the EU: the free movement of goods, services, capital and people.

As a result, market-making and market regulation is now strongly institutionalized in the EU. It is indeed so strong that some authors even regard it as an 'economic constitution' (Streit and Mussler 1995) or as a 'regulatory state' (Majone 1996; Lodge 2008). After the symbolic completion of the project to create an internal market by 1992, the EU member states have jointly agreed on a common currency and on a central bank with a very high degree of independence from political influence. While the EU has been very strong in the field of market-making or 'negative integration', that is, in the removal of barriers to the four freedoms, it has been notoriously weak in 'market-breaking' or 'positive integration', that is, in the adoption of rules which actively shape the European market and even change its functioning. The most notable exception here is the absence of large-scale distributive policies (Scharpf 1999; Leibfried 2005). Those redistributive policies which are strong on the EU level (such as agriculture, regional development aid or research funding) are limited to small segments of the population. A redistributive welfare state which explicitly aims not only to make citizens less dependent on market income but also to create political loyalty in return does not exist at the EU level but is limited to the member states. These welfare systems are extremely complex and differ strongly across countries. There is neither a consensus on which type of welfare state one should have at the EU level nor the income to finance such a European welfare state because the EU does not have the power to tax.

Foreign, security and defence policies are notoriously weak on the EU level and largely carried out by member states. The emerging division of labour since the end of the Cold War leaves territorial defence clearly with the member states, their armies and their monopoly of force, coordinated through the North Atlantic Treaty Organization (NATO) and the European pillar of NATO. Progress in this field is remarkable but there is no sign of a European territorial defence force or a European military service (Smith 2004; Carlsnaes 2007). The Lisbon Treaty will create the foundations for a European diplomatic service under the direction of a European Foreign Minister (which is not allowed to bear that name) but existing alongside with the national foreign ministries which are usually much better staffed and funded. Only in the field of humanitarian intervention and crisis reaction forces, the EU is slowly developing its own military capability. But even the latter still consists of soldiers from national armies. The EU is thus fundamentally different from federal states where the highest level of government usually has exclusive control over the army and over the foreign service.

The field of policing and judicial cooperation was practically non-existent well into the 1990s. However, the initiative to create an internal market until 1992 included the goal of an area without internal borders – borders between the EU member states were supposed to physically disappear. As a consequence, the EU agreed on the creation of an 'Area of Freedom, Security and Justice', a companion project to the internal market in the field of internal security (Lavenex 2007). For more than a decade now, this has

been an area of intensive legislative and institution-building activity. Initially, issues of asylum, migration, policing or criminal justice were perceived by the EU member states to be vital national concerns. In order to protect their sovereignty, they created an institutional set-up different from the market-related Community pillar, with different legal instruments (framework decisions, conventions and so on), with a reduced ECJ and EP involvement and without the Commission monopoly of legislative initiative. The Lisbon Treaty does not completely abolish these differences but drastically reduces them (Ladenburger 2008). What is emerging in this field, however, is not a European monopoly of force or an equivalent to a supranational ‘economic constitution’ but rather a new form of embedding the member states’ monopoly of force into a dense institutional structure which has policy-making authority in the issues at stake but leaves sovereignty to the member states (see Herschinger et al., Chapter 31 in this volume).

## 12.6 CONCLUSION: UNITY AND DIVERSITY IN THE EURO-POLITY

The EU is a very special multi-level system. On the one hand, it resembles a federal state. It has a clearly defined territory and population, a set of central institutions including a directly elected parliament and a very strong court, an almost comprehensive range of competencies, a common currency and a constitution. On the other hand, the EU has no army, no police, no taxes and no welfare state but remains restricted to market regulation and the coordination of internal security. During the last decades, the original EU of six Western European democracies (France, Germany, Italy and the Benelux countries) has experienced a dramatic geographical expansion towards the West (the UK and Ireland), the South (Greece, Spain, Portugal, Cyprus and Malta), the North (Denmark, Finland and Sweden) and the East (Poland, Hungary, the Czech Republic, Slovakia, Bulgaria, Romania, Slovenia, Lithuania, Latvia and Estonia as well as Austria). Membership of some smaller Balkan countries and of some quite large ones (Belarus, Ukraine and most notably Turkey) seems realistic within one or two decades.

While it was still impossible to speak all languages of the cosy EU-6 (Dutch, French, German and Italian), the EU-27 has more than 20 official languages, three alphabets (Latin, Greek, Cyrillic), a huge variety of state traditions including post-communist transition countries and highly different levels of economic development. At the same time, its central purpose consists in the complete abolition of borders between those different entities. Globalization, understood as the increase of transborder interactions, is thus not an external factor which hits the EU but an endogenous political project. The European multi-level polity is therefore characterized by very high levels of economic and political interdependence coupled with a very high degree of economic and political heterogeneity.

Integrating heterogeneous subunits into a larger whole is the essence of federal states. The EU is faced with the same task under the conditions of high heterogeneity and high interdependence. It does not have a strong centre with enough resources to subsidize the less developed units and with enough power to enforce its decisions against dissenting subunits. Instead, its subunits are sovereign states with the authority to use force, to tax and with usually high levels of popular legitimacy. Reconciling unity with

diversity in the past has almost exclusively meant strengthening unity. The European Commission saw the defence of the European common good against particular national interests as its main task. The ECJ has based numerous rulings on the declaration in the preamble of the founding treaties to create 'an ever closer union among the peoples of Europe' and with this justification ruled against a huge number of particular national regulations or standards. Concerns about an increasing encroachment upon essential national prerogatives and the idea that uniform policies might not be optimal for heterogeneous states have found their expression in long political debates about 'subsidiarity' (Bermann 1994) or in numerous variants of 'flexible integration' (Stubb 1996) but without much impact. Respecting national diversity has usually been regarded as a threat to a weakly established and constantly threatened unity. Only few authors have argued that preserving national autonomy might be as important as creating more unity (Scharpf 1994).

But like any multi-level system, the EU has to constantly find and revise a balance between unity and diversity. As it has a relatively weak centre, it cannot enforce unity upon potentially dissenting subunits in the strict sense. But the increasing use of qualified majority voting which is widely perceived to be an essential tool for maintaining the decision-making capacity in an ever-enlarging Union will also put more and more member states in a minority position. The EU narrows down the political options available for member states in many areas but does not possess an independent political legitimation for doing so. Self-limitation and the accommodation of legitimate national diversity in the Union are the great institutional challenges for multi-level governance in the EU.

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## 13 The European Union as a loosely coupled multi-level system

*Arthur Benz*

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### 13.1 INTRODUCTION

The characterization of the European Union (EU) as a multi-level system of governance resulted from controversies about the nature of this political system emerging from European integration. In the wake of the treaty reforms during the 1990s, the EU has progressed beyond a confederation of states towards a particular kind of multi-level system. The Union fulfills a great deal of state functions, but to date it has not evolved into a new supranational state. Whereas a state has legislative power and the power to implement its laws in its jurisdiction, most policies of the EU can only be made by joint or coordinated decisions of European and national institutions. Therefore, the EU deviates from the usual structures of a federal state. Whenever it is designated as a multi-level political system *sui generis*, two particular traits are emphasized: one is its hybrid character resulting from the combination of federal-like structures in the areas of 'supranational' policy-making and confederal structures in arenas of intergovernmental cooperation. On the other hand, the term multi-level governance indicates the interlocking between the European, the national and the subnational levels.

This second aspect led Fritz W. Scharpf to transfer the concept of joint decision-making from theories on German federalism to European politics (Scharpf 1988). Later, when the regions arrived on the European scene and the interplay between levels became more complex through the invention of new modes of coordination, the term multi-level governance took hold (Marks et al. 1996; Benz 2000; Hooghe and Marks 2001). This concept now has come to characterize the interdependence among European, national, and subnational policy-making as a general feature of the political system of the EU.

This shift in terms has had ambivalent consequences. Without doubt, the concept of multi-level governance is better suited to describe the complex structure of European policy-making than the term joint decision-making, in particular as it covers relations between both territorially and functionally defined units. This holds especially true if not only the European legislation through joined actions of the Council, the European Parliament and the Commission is taken into account but also the preparation of decisions in negotiations between public and private actors from all levels as well as the implementation of European policies. In contrast to terms like federal or confederal, the notion of governance refers to the fact that more often than not private actors are involved in policy-making. Moreover, by applying the analytical concept of multi-level governance, we can better comprehend the real variety of governance than by referring to concepts like 'condominio,' 'consortio' (Schmitter 1996), the 'fusion of levels' (Wessels 1997) or 'network governance' (Kohler-Koch and Eising 1999).

Nonetheless, all concepts used to understand the multi-level system of the EU have

their flaws. Either they comprehend the interplay of policies and governments between levels in a rather vague manner or they cover only particular aspects of European governance. Starting from a critical evaluation of the concepts of multi-level governance and joint decision-making, I propose a more detailed description of the EU as a loosely coupled multi-level system. It can be taken as a basis for differentiated theoretical reasoning and empirical research on governance in the EU.

### 13.2 CONCEPTS OF EU MULTI-LEVEL GOVERNANCE – A CRITICAL REVIEW

In European studies, the multi-level governance concept received widespread attention by publications of Liesbet Hooghe and Gary Marks (in particular Hooghe and Marks 2001). In their research on European regional policy and on the mobilization of subnational actors in EU policy-making, they found that the increasing transfer of competences to the European level coincided with a shift of powers from the national to the subnational level. Considering the interplay of these two processes, the authors concluded that European integration is neither a continuous process nor an established political structure but an always contested issue (*ibid.*, p. 28). Accordingly, regionalization had not just established another level of government but instead had created ‘a system of continuous negotiations among nested governments at several territorial tiers’ (Marks 1993, p. 392). Moreover, the authors revealed that instead of governments operating in their territorially demarcated jurisdiction, ‘variable combinations of governments on multiple layers of authority—European, national, and subnational—form policy networks for collaboration’ (Hooghe 1996, p. 18).

In contrast to integration theories, this approach does not regard member states as principal actors in European politics. Attention is centered on the multiple actors representing regional governments, national governments and parliaments, the European Commission, the European Parliament and private interest groups. Hooghe and Marks describe patterns of interaction among these actors as networks and negotiations. It goes without saying that such an analytical perspective is better suited to comprehend the complexity of European politics than functionalist, intergovernmentalist or even institutionalist approaches predominating research until the late 1990s. It elucidates the dynamics of interdependent processes of policy-making and the flexibility of structures, in which national and European actors participate more as political entrepreneurs than as holders of particular competences.

Hooghe and Marks provided a framework for analysis but actually did not elaborate a theory that explains how multi-level governance works. Although they rightly emphasized the dynamics and flexibility of the European political structure, they did not clearly carve out the mechanisms which might explain these dynamics and the outcomes of policy-making. Moreover, they did not address the question why and how such a complicated political system works or under which conditions policy-making fails. When they suggested to distinguish types of multi-level governance organized on a territorial or functional basis, they made a remarkable step towards integrating the EU in a comparative research framework. Still, the question remains whether such structures allow for effective and legitimate policy-making. From a theoretical point of view, one should



expect multi-level governance to be burdened with the institutional complexity, the great number of veto players and continuous power struggles between actors involved. These factors have been considered in a second strand of reasoning on multi-level governance which has been nourished by theorizing on German federalism.

A first important contribution to this theory was Fritz W. Scharpf's thought-provoking article on the joint decision trap (Scharpf 1988). In order to explain the stalemate of European integration in the 1970s and early 1980s, Scharpf compared the institutional setting of European policy-making with German cooperative federalism, which in those days revealed similar problems. In both cases, legislative institutions constituted multilateral negotiation systems which compelled actors to come to an agreement. If decisions in such settings concern redistributive issues, policy-making is doomed to fail. Despite these problems, Scharpf did not expect the institutional structures of joint decision-making to be reformed. Even if governments cooperating in multi-level governance might be frustrated with political stalemate they are trapped in an institutional status quo since any change implies a redistribution of powers on which an agreement is unlikely.

This negative portrayal of European governance was not only questioned by the dynamics of integration after 1989, but also contested by empirical research and in theoretical discourses. Studies on regional policy, and among them Hooghe's and Mark's works, showed that EU multi-level governance differs in several respects from the structures and processes in German federalism. For instance, the greater number of actors at the national and subnational level makes simultaneous negotiations impossible and leads to a sequential process of policy-making in multi- and bilateral relations (Marks 1993; Hooghe 1996a; Benz and Eberlein 1999). Moreover, the Commission – as an independent agenda setter and administration – can moderate distributive conflicts. Finally, the influence of party competition on negotiations among governments, which causes stalemate in German federalism, is reduced in the European context. Therefore, in contrast to the German type of joint decision-making, the EU has been labeled as a loosely coupled multi-level system (Benz 2000). It allows – as Adrienne Héritier (1999) showed in case studies on EU policy-making – actors to find ways to escape imminent situations of deadlock by exploiting the flexibilities of complex institutional settings and inter-institutional processes. This explains the astonishing effectiveness of multi-level policy-making in the EU and the continuous changes in patterns of governance (Wallace 2001; Benz 2008).

The notion of a loosely coupled structure points to the principal reason why the EU works in the way described by Hooghe and Marks. Moreover, it yields a framework which allows for a more differentiated analysis of multi-level governance in the EU. A comparative perspective can help to clarify the particular features of such a political system.

### 13.3 LOOSELY COUPLED STRUCTURES OF MULTI-LEVEL GOVERNANCE

In EU multi-level governance, like in every inter-organizational setting, actors interact across the boundaries of their jurisdiction. This situation confronts actors with serious

role conflicts. At the same time they are subject to multiple constraints of different institutional structures. However, in the EU arenas of policy-making are usually connected in a way that rules and decisions in one arena do not determine those in another. They merely set a context for boundary spanning policies. These patterns of governance resulted from an evolutionary institutional development triggered by major steps of European integration which have been paralleled by adjustments at the national, regional and local levels. While institutions like the Commission, the Council, the European Parliament or committees have been set up by institutional reforms, governance across levels hardly ever emerged from institutional design, but rather evolved from collective action of policy-makers responding to practical needs or engaging in power struggles. As a consequence, multi-level policy-making rarely follows clear decision rules or commitments to procedures. Representatives from different institutions linked in multi-level governance, be they governments or intra-governmental actors, coordinate their decisions primarily by communication and exchange of information rather than by formal commitments, resource dependencies or control. When binding decisions have to be taken, they are based on intense negotiations in which each participant takes into account the institutional constraints and expectations others are subject to. And if external actors can intervene by applying veto-power, the prevalence of communication allows and induces them to use this power in a strategic way to avoid the joint decision trap (Benz 2009, pp. 166–9).

A comparative perspective helps to clarify this particular pattern of loose coupling in EU multi-level governance (McKay 2001). On the one hand, the EU does not constitute a political system resembling a dual or competitive federalism as it exists in the USA. It goes without saying that the Common Market has reinforced competition between national or regional economies. However, in order to avoid negative impacts of this competition, the EU extended its engagement in quite a lot of policy areas by regulating or coordinating policies of competing member states. With the extension of Europeanized policies, a number of different modes of governance have been invented ranging from hierarchical regulation to ‘soft’ coordination by networks or the Open Method of Coordination. Hence it would be wrong to regard the EU as a multi-level system separating powers. Governance connects levels and their institutions in various ways.

On the other hand, multi-level governance in the EU differs in several respects from a strictly coupled federal system as it exists, for example, in the Federal Republic of Germany. While intergovernmental relations in Germany require negotiations including all governments due to constitutional rules, policies of European, national or subnational institutions are more often than not coordinated in informal negotiations among altering participants or by mutual adjustment instead of applying compulsory multilateral negotiations. And while in Germany governments of the Federation and the *Länder* have to consider the effects of their joint decisions on party competition and are strongly influenced by party politics (Lehmbruch 2000), actors in European policy-making have much more leeway to deal with the constraints set in national, subnational or European arenas in a rather flexible way.

The pattern of loose coupling in the EU multi-level systems can be observed in three dimensions which require coordination: in the relations between the European, the national and the subnational levels (vertical intergovernmental dimension); in the relations between decentralized governments, that is, the member states or subnational

authorities (horizontal intergovernmental dimension); and in the relations between executives engaged in multi-level governance and their parliaments, interest groups or their constituencies (intra-governmental dimension). I will consider these in turn, although it is their interplay which actually determines European politics and policies.

### 13.4 VARIETIES OF VERTICAL INTERGOVERNMENTAL COORDINATION

Only for some years, research on multi-level governance has considered the diversity of modes of coordination between levels. While Scharpf in his earlier works (Scharpf 1988) focused on negotiation, Hooghe and Marks (2001) and others (for example, Kohler-Koch and Eising 1999) emphasized the network character of governance. Meanwhile, reacting to results from a number of policy studies, Scharpf has differentiated his theory (Scharpf 1997, 2001, 2006) which now covers hierarchical direction, intergovernmental negotiations, joint decision-making and mutual adjustment as modes of governance that are relevant in the EU. As empirical research has shown, modes of governance vary from policy to policy (Eising and Lenschow 2007; Tömmel and Verdun 2008), and the interplay between European, national and subnational actors differs accordingly. But regardless of the mode applied, an in-depth analysis reveals that coordination usually allows all actors involved at the different levels to adjust their policies in a more or less flexible way.

This even applies in cases where the EU has the power to regulate and governs by law. In order to implement the Common Market project, the Commission can compel member state governments to abstain from policies favoring firms or sectors of the national economy. Regulative powers have also been essential to abolish tariff barriers and to implement a joint currency and monetary policy. In these policy areas, the EU acted right in accordance with the concept of liberal state theories, that is, by applying regulative power of the center against competing lower-level governments (Eberlein and Grande 2003). Regarding policy instruments, this approach has led to a predominance of law and has supported the prominent role of the European Court of Justice (Stone Sweet 2004) as well as independent regulatory agencies (Majone 1999). European regulation constitutes a hierarchical order of multi-level governance, since the legislative and executive acts have to be implemented by member states or, if passed in the form of directives, are to be transposed by national parliaments into law.

Hierarchical direction as a mode of multi-level governance should be understood as asymmetric interaction between principals and agents in a vertically differentiated structure, rather than as governing by command and control. In EU regulation the well-known problems of information asymmetries and conflicts of interests between levels constraining the power of the center in any hierarchical setting increase due to veto-powers of member state governments in the multi-level process of legislation, the weak powers of European institutions to enforce the implementation of their policies and the influence of powerful private interests. These factors have caused adjustments of governance in at least three respects. First, regulative programs are usually specified in negotiations between experts from national and European administrations and from private firms or associations ('Comitology' committees). Second, outside this institutional framework

transnational networks of national regulatory authorities determined to support implementation have emerged (Eberlein and Grande 2003, pp. 433–8). Third, the program to introduce a general Common Market launched in the 1980s revealed as an extremely complex task of deregulation. Faced with this challenge, the hierarchical mode of governance came to its limits and the EU induced processes of mutual adjustment in regulatory competition among member states. While hierarchy remained in the shadow of real politics, economic competition should motivate governments to voluntarily harmonize their regulation. These are only the most prominent cases of hierarchical governance revealing that the EU is far from applying its regulating powers in a strict way.

Usually, despite being able to use its regulating power in a hierarchical structure, EU institutions resort to negotiations with national or subnational governments to solve conflicts. In many cases these processes include actors from the private sector who continuously cooperate with the Commission or national governments in networks. Emphasizing these patterns of policy-making, some scholars have characterized governance in the EU as ‘network governance’ (Kohler-Koch and Eising 1999, pp. 5–6; Schout and Jordan 2005). This concept should not only underscore the fact that the Commission regularly formulates initiatives after negotiating with national, regional or private actors. It should also draw attention to the multitude of working groups contributing to the implementation of law and to well-established partnerships between the Commission and associations of private interest groups. If relations among these actors persist over a longer time span, they constitute networks, that is, stable patterns of interactions between independent actors linked by mutual trust and interested in a joint solution of problems (Kappelhoff 2000, pp. 25–9). In other cases, which we find in committees of the Council and the Commission, institutionalized systems of negotiation link actors from different levels.

Networks support the coordination of independent actors’ policies without the intervention of an external authority and without formal decision rules. They generate trust among actors, common understanding of situations and problems, shared information and accepted guidelines for behavior. When individual decisions are coordinated by negotiated agreements, networks prevent actors from strategically using their bargaining power and from making tactical moves causing uncertainty and conflicts and increasing the probability of negotiation failure. On the other hand, networks committing participants to joint action only include core groups, whereas actors at the periphery are only loosely integrated. Agreements and policy outcomes produced by actors in the core network can be opposed by peripheral actors. In EU multi-level governance, opposition usually comes from excluded subnational or by-passed national executives, parliaments or civil society associations. In this role, they serve as a counterforce against the conservative tendencies of collective action in core networks and prevent networks from turning into a tightly coupled pattern of cooperation.

Finally, in policies where the EU has no formal power to regulate, the governance mode of mutual adjustment prevails. This means that intergovernmental coordination is achieved by strategic action and reaction of governments without direct communication. As mentioned above, mutual recognition of national regulations is one alternative (Schmidt 2008). While the EU Council decides on minimal standards, the member states are motivated to recognize rules of other states as equivalent to their own law when the admission of goods and services to national markets is under dispute. Much more

flexibility of intergovernmental relations results from the Open Method of Coordination. It has been invented as a means to achieve greater convergence of member states' policies necessary to turn Europe into 'the most competitive and dynamic knowledge-based economy in the world capable of sustainable growth with more and better jobs and greater social cohesion' (European Council 2000, p. 2, point 5). Considering the diversity of relevant instruments, the complexity of the matter and the fact that implementation of this objective requires innovative activities of national or subnational governments, the European Council introduced this mode of governance which is in line with the principle of subsidiarity. The member state governments or their regions and local governments are motivated to coordinate their activities according to guidelines without the Council or the Commission trying to get powers to regulate and without binding agreements in joint decisions (Hodson and Maher 2001; Radaelli 2003; Zeitlin et al. 2005). Instead, policy convergence should be achieved either by exchange of experience and transfer of practices or via competition induced by blaming and shaming in comparative evaluations.

Thus coordination between levels of European governance is required by an intense sharing of powers. But rather than applying strictly binding rules of coordination in a hierarchical setting or in compulsory negotiations systems, policy-making in the EU aims at a rather flexible combination of cooperation, competition and control. These mechanisms emerged in multi-level structures which leave actors sufficient discretionary power to react to constraining effects of intra-governmental policy-making or horizontal intergovernmental relations.

### 13.5 HORIZONTAL INTERGOVERNMENTAL COORDINATION

In the horizontal dimension, multi-level systems can again vary between uncoupled or tightly coupled structures. The first type exists in a pure competitive federal system where governments of the constituent states do not cooperate and where interdependencies are dealt with by mutual adjustment of policies. The second type is represented by a federal system with intense multilateral relations through negotiations or fiscal transfers. In reality, no federal system resembles the first type. Canada came near to it until the end of the last century, since governments of provinces frequently negotiated with the federal government, but only occasionally among themselves. Fiscal equalization is still organized by the central government and the Canadian Senate constitutes no forum for inter-provincial communication. Again, German federalism stands for the second, tightly coupled type, given the long tradition of inter-*Länder* relations entrenched in institutions or treaties, and given fiscal equalization based on federal grants and transfer payments between the *Länder*. The EU reveals at least three features in its horizontal dimension which make it a loosely coupled system.

First, the European treaties accept the institutional autonomy of the member states and of their subnational governments. The existing diversity of lower level governments makes multilateral relations between national and subnational governments more difficult than they are anyway due to different cultures and languages. Horizontal relations have emerged between particular groups of the member state governments, their

parliaments, or their regions and local governments. However, they are based on loosely linked networks rather than on institutions or procedures set out in treaties.

Second, negotiations between member state governments are not as intense as in German federalism, but the Council of Ministers and its permanent or ad hoc committees provide an institutional setting for continuous communication. With the EU lacking a real government, one could argue that intergovernmental relations are much more horizontal than vertical. The Council as a multilateral negotiation system might create strong ties among member state governments. However, there are two important mechanisms allowing for considerable flexibility: one is the procedure of enhanced cooperation set out in the Treaties, the other the practice of opting out. The first allows a group of states to implement a joint policy within the framework of the European institutions in the case that not all member state governments come to an agreement. By opting out, an individual member state can avoid participating in a European policy, an opportunity used by some states in the Schengen Agreement and the Economic and Monetary Union (EMU). In both ways the constraining effects of joint decision-making are reduced and both help governments to overcome situations of deadlock.

Third, in economic terms, the Common Market fosters competitions between member states and its regions. Nevertheless, competition is moderated by regulatory policies as well as, although within a limited financial framework, by redistributive regional policy. Payments to regions in need are granted by European funds which are financed by contributions of the member states. However, only the framework of transfers to regions is set by joint decision-making in the Council, with the European Parliament having a veto right. Grants to regions are allocated on the basis of bilaterally coordinated programs of the Commission and responsible authorities of the member states.

### 13.6 LINKING INTER- AND INTRA-GOVERNMENTAL POLICY-MAKING

The most serious difficulties of governance in multi-level systems are caused by tight coupling of intergovernmental relations and intra-governmental decision-making. If, for example, heads of governments or ministers depend on an explicit approval of a majority in parliament when participating in European policy-making, their hands are strictly tied in multi-level negotiations. If the executive is relatively independent from the will of a parliament, but subject to strong pressure of interest groups in its jurisdiction, the result is the same. To put it more generally, if intra-governmental decision-making includes strong veto-players compelling the actors in multi-level governance to act in accordance with a clearly defined mandate, coordination of policies might fail due to imposed bargaining behavior, networks do not emerge due to enduring mistrust and competition for best practices is undermined by competition for power and resources.

In every multi-level system, actors are in one way or another confronted by these problems which they have to cope with through strategic action (Benz 2009, pp. 166–92). However, their leeway for strategic responses is much greater if inter- and intra-governmental structures are loosely coupled. This is the case in the EU due to the particular pattern of intra-governmental politics and the way it is linked to inter-level coordination.

At the European level, the functional division of power between institutions and the inter-institutional relations generate loose coupling. In most policies, the European Commission holds the right to initiate policies negotiated in the Council of Ministers and the European Parliament. When applying this right, the Commission uses its informal contacts with national administrations and interest groups (Peters 1994). However, it can define the agenda for European policy-making without being subject to effective parliamentary control or control of the Council. Private interest groups participate in these networks, but they are represented by experts, who have a vital interest in finding solutions for problems. In this context, actors tend to negotiate in the arguing rather than in the bargaining style. Moreover, the Commission is inclined to adopt policies of member states that have been proved as effective rather than to react to pressure from national governments (Héritier 1997).

After the agenda of the EU has been defined, issues are dealt with in a different system of negotiations in the Council of Ministers and the European Parliament. In both institutions bargaining strategies prevail since actors are accountable to national parliaments or political parties, respectively. However, in both respects, linkages of Council negotiations are weak. According to empirical studies, members of the European Parliament feel attached to their country or to political parties, but they also regard themselves as representatives of European public interests (Thomassen and Schmitt 1999). These multiple orientations favor deliberation instead of confrontation and they increase the probability of positive decisions with the required majority. In any case negotiations are not determined by fixed coalitions and the institutional setting provides conditions facilitating compromises with the Council.

The same holds true for the Council. In fact, its members are responsible to their national parliaments which define their positions on issues at stake in more or less intense party competition. It is possible that this induces the Council members to stick to national positions with their hands becoming strictly tied. However, the more national parliaments have achieved influence in European affairs, the more their members have become aware of the pitfalls caused by multi-level governance. As a rule, they have found ways to strategically cope with the traps inherent in parliamentary control of European decision-making (Benz 2004; Auel and Benz 2007): all national parliaments have established committees for European affairs enabling them to react to policy proposals of the EU before positions are determined. In several member states, MPs intensely communicate with their Council representative in order to coordinate positions and adjust them when necessary. Moreover, they have developed transnational contacts to the Commission, to the European Parliament and to other national parliaments in order to attain information on potential compromises (Neunreither 2005). Powers to impose sanctions on the minister representing the member state in the Council are used as a last resort, while national parliaments have turned into communicative arenas linking European and national politics.

In the context of this loosely coupled structure, a particular negotiation culture has emerged in the Council (Eising 2000, pp. 230–44). On the one hand, negotiations take place in a differentiated committee structure that extends all the way from working groups of lower level administrations to official representatives. In this structure disputed issues are dealt with incrementally, through partial agreements which are fixed and no longer discussed in the further negotiation process. On the other hand, rules of fairness

concerning both proceedings and results are emphasized. These rules prevent negotiations from being blocked by distributive conflicts among actors following national interest and self-interested interaction orientations. This is the reason why strategies to minimize conflicts, in particular compromises at the lowest common denominator, which Fritz W. Scharpf (1988) identified in intergovernmental cooperation in the German federal system, are less likely in European multi-level governance.

It should not be ignored that the loose way of linking multi-level governance and intra-level decision-making in democratic institutions implies the risk of an uncoupling of the latter. If this is the case, the multi-level system of the EU suffers from a deficit of democratic accountability. When considering this aspect, a number of dilemmas come into view: the Commission is hardly accountable for its policy proposal, even if *de facto* (and under the Lisbon Treaty *de jure*) the European Parliament can force its resignation. But this autonomy allows the Commission to articulate problems in contact with experts and interest groups and bring them on the agenda, which is one of the reasons why the EU is rather effective. The members of the European Parliament are accountable to their constituencies. As long as voters primarily respond to national rather than European policies when electing the European Parliament, and thus ignore the real issues at stake, we have to concede that accountability is problematic (LeDuc 2007). But again, from a pragmatic point of view, this deficit appears in a way compensated by the effectiveness of negotiations and deliberations in the Parliament provided that its members cannot ignore the will of citizens they represent. The individual members of the Council are accountable to their national parliament and have to keep them informed, as it is endorsed by protocols on the role of national parliaments and the Treaty of Lisbon. However, the inclusion of national parliaments differs between member states (Raunio 2005). If they are excluded from participating in multi-level governance in communicative relations like those mentioned above, they are reduced to guardians of national interests. In that case the executive may independently determine European policies, but a national government facing elections may also feel compelled to continue national party competition on European issues and fight for its particular national bargaining position even if this obstructs decisions. Thus, uncoupling of national democratic politics and EU governance would result in problems similar to those that arise if European governance is tightly coupled to national party competition. Both patterns have negative impacts on the effectiveness of European policies and on the accountability of the Council members.

### 13.7 IMPLICATIONS OF LOOSE COUPLING – PERSPECTIVES FOR A THEORY OF MULTI-LEVEL GOVERNANCE

As summarized in Table 13.1, patterns of multi-level governance can be distinguished according to the linkages between intergovernmental and intra-governmental arenas of policy-making. The type of coupling depends on institutional rules, the governance modes applied in the different arenas and strategies of policy-making of actors involved. Political systems resembling the model of dual or executive federalism tend to separate these arenas, thus causing considerable problems of managing interdependent tasks and of democratic legitimacy. The German federal system comes close to a tightly coupled multi-level system, which reduces capacities for reform and is doomed by joint



Table 13.1 *Types of multi-level governance*

	uncoupled	tightly coupled	loosely coupled
<i>vertical intergovernmental</i>	mutual adjustment in dual federalism	joint decision-making	negotiation in the shadow of hierarchy, networks, mutual adjustment by benchmarking, Open Method of Coordination (OMC)
<i>horizontal intergovernmental</i>	autonomy (no coordination between jurisdictions), institutional competition	institutional homogeneity, multilateral negotiation	institutional diversity, voluntary negotiations (opt out; enhanced cooperation), limited fiscal relations
<i>intra-governmental</i>	executive dominance	binding mandates of parliaments	negotiated mandates between parliaments and government

decision traps. EU multi-level governance can be characterized as loosely coupled. My assumption is that this type provides favorable conditions for effective and legitimate governance compared to other types. This does not mean that governance in the EU is without flaws. There is no doubt that democratic deficits exist and that not all policies end with effective decisions, not the least since modes of governance vary between policies. Still, loose coupling is a rather abstract concept that characterizes general features of a multi-level system. To advance the theory, we need to take into account varieties of mechanisms of coordination in different policy areas. The concept only explains why, by and large, the EU works at all and usually solves problems in a way that is acceptable for citizens. But further research is required to identify types of multi-level governance and to test hypotheses explaining their effects.

Moreover, the risks inherent in this flexible system should not be ignored either. Even if a loosely coupled multi-level system proves more effective and democratic than other types, the issue of stability and dynamics has to be taken into account. The linkages between levels and arenas constitute a rather precarious balance of power between many corporate actors involved. Hardly stabilized by institutional rules, governance depends to a considerable extent on strategic interactions among the participants. In fact this is the reason for the flexibility described by Hooghe and Marks (2001). Freedom to apply their strategies allows actors to find escape routes in situations of deadlock. But this also gives them the opportunity to modify the balance of power to their advantage. They can engage in coalitions in one arena and at the same time cut or weaken their ties to other arenas. Such developments can end in the well-known situation of politics predominated by executives, by party political cleavages or, what is more likely in the EU, by cleavages among nation states or regions. On the other hand, as long as the institutional framework of the multi-level polity supports loose coupling between levels, territories and arenas, such situations should be temporary and can be revised by countervailing strategies by other actors.

While these are issues for further theoretical and empirical research, the concept of

coupling of arenas has practical implications, too. If the underlying assumptions implied in this concept are correct, institutional policies are rather problematic, if they, by ignoring the prerequisites of multi-level governance, aim at separating powers between levels and at unconstrained autonomy of lower-level jurisdictions or if they address democratic deficits by stipulating binding mandates for representatives in multi-level governance. Such institutional designs change the systems either towards tight coupling or destroy existing coordination mechanisms. If institutions are altered in this way, the consequences cannot be revised. For this reason it is essential that intelligent reforms are based on an insight into the logics of multi-level governance.

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## 14 Party politics in the European Union

*Simon Hix*

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### 14.1 INTRODUCTION

Politics in the European Union (EU) is party politics. Elected officials at the national as well as European levels invariably owe their positions and their future political careers to the political party to which they belong. National government ministers, Commissioners, national members of parliament (MPs) and Members of the European Parliament (MEPs) have reached the top of politics in Europe because they have managed to rise within the ranks of their political parties. As a result, political parties play a far more central role in political life at all levels of government in Europe than in some other multi-level systems, such as the USA. So, to understand how the EU works, one needs to understand how parties work in Europe's multi-level political system (Hix and Lord 1997).

On the one hand, a multi-level polity, such as the EU, is a challenging environment for political parties. The allocation of power to different levels of government in a multi-level polity can lead to tensions inside parties. For example, office holders at different levels of government from the same party can have different policy objectives. Also, in a multi-level system of government there are usually multiple electoral arenas – at the central level and in each of the lower units, and each electoral arena will invariably have a different set of voters, with heterogeneous policy preferences. As a result, candidates for election from the same party will have incentives to take up different policy positions in each arena, to tailor their message for their potential voters in their particular election. This, then, is likely to lead to internal policy conflicts inside parties, as candidates and leaders at different levels of government and across different territorial units advocate different policy positions.

On the other hand, rather than seeing parties as being undermined by multi-level polities, Riker (1975) argued that the organization of power in federal systems is in fact endogenous to the incentives and the organizational structures of parties. For example, if the main political office that party leaders want to win is government office at the higher level of government, parties will have an incentive to centralization candidate selection to achieve this goal. In turn, if party leaders at the centre then control the selection of candidates standing in elections at all levels of government and in all arenas, they can prevent candidates taking up different policy positions in different arenas, and so enforce party cohesion. And, over time, if the main political parties are then highly centralized, this will lead to the gradual centralization of policy competences in a polity, irrespective of the constitutional arrangements defining how powers are allocated between the higher and lower levels of government.

So, which way round does the relationship between parties and multi-level governance work in the EU? Does the EU undermine parties? Or, do the incentives and organizational structure of parties determine the current balance of power between the member

states and the EU? To answer these questions I shall first look at the incentives for party leaders and candidates in the EU's multi-level system of governance, before turning to how these incentives shape the operation of party politics in the two main democratic arenas in EU politics: in European Parliament elections, and in the behaviour of the MEPs.

## 14.2 PARTIES' GOALS IN EUROPE'S UPSIDE-DOWN POLITY

Political parties have two main goals: political office and public policy. If parties aim to be elected to or to stay in government, they have an incentive to change their policies to maximize their chances of electoral success (for example, Downs 1957). To get elected, parties need to make policy promises to their voters, and then deliver on these promises once in government. If they fail to act upon their policy promises, or change their policy positions dramatically once elected, parties are likely to be punished by the voters. Hence, although it might seem that parties' 'office' and 'policy' incentives are sometimes in conflict, in practice they go hand in hand: to win executive office parties need to promise and deliver on policies (Laver and Schofield 1990). So, what are the office and policy incentives for parties in the EU's multi-level governance system?

If one considers the prestige and policy-making power of the executive and legislative offices at the national and EU levels, for most politicians in Europe the hierarchy of offices is something like this:

1. National prime minister
2. Commission president
3. National cabinet minister
4. Commissioner
5. Member of a national parliament
6. Member of the European Parliament

In other words, executive offices are more desirable than legislative offices, as executive offices at both the national level and the European level give politicians a very strong agenda-setting power. However, when any two similar offices are compared, the office at the national level is more highly desirable, as the extent and salience of the policies that can be influenced are greater at the national level and the European level.

This can be explained by the balance of policy-making power between the national and European levels. A wide range of policies have been delegated to the European level, in particular covering the regulation of the production, distribution and exchange of goods, services, capital and labour in the single market. Nevertheless, the bulk of public expenditure remains at the national level, such as social security spending, education spending, health care provision, pensions, housing and transport. While public expenditure in most EU member states constitutes more than 40 per cent of GDP of the member state, the total EU budget constitutes only 1 per cent of total EU GDP. Also, national government office, particularly in the medium-sized and larger member states, allows politicians to play a significant role in international affairs, via foreign and defence policies, which are still predominantly conducted via intergovernmental regimes.

Hence, national political office offers politicians far greater opportunities to change society in the direction they desire than European political office. So, being a national prime minister is more desirable than being the European Commission President, except perhaps for some of the very smaller member states. Jacques Santer, Romano Prodi and Jose Barroso all became Commission Presidents after being national prime ministers. However, for Santer and Barroso these were positions at the end of their domestic political careers, and rather than seek a second term as Commission President, Prodi preferred to return to domestic politics as the Italian Prime Minister. Similarly, a senior ministerial position in a national cabinet is more desirable than a position as a Commissioner. Most Commissioners tend to be former cabinet ministers towards the end of their political careers. However, if the opportunity arises to return to national cabinet office, Commissioners are unlikely to remain in Brussels – for example, in 2009 Franco Frattini gave up one of the most important portfolios in the Commission (Justice and Home Affairs) to become the Italian Foreign Minister.

The choice between being a member of a national parliament and being an MEP is less clear-cut. In pure power terms, a politician is far more likely to be able to shape policy as an MEP than as a backbench member of a national parliament. This is because of the way the European Parliament works relative to national parliaments. Because the Commission does not command a majority in the European Parliament in the same way that national governments usually command a majority in their national parliaments, this means that the MEPs are far more independent politicians than national MPs. Neither the Commission nor national governments can force the MEPs to support legislation or to drop particular amendments to bills, whereas national governments are often able to force their MPs to support them or to withdraw amendments. As a result, whereas MEPs are able to force the Commission and the governments in the Council to accept approximately 50 per cent of their legislative amendments, backbench MPs are rarely (if ever) able to force a government to accept an amendment to a bill that the government does not support. In this sense, the life of an MEP is far more interesting than the life of a backbench national MP!

Nevertheless, if given the choice between being a national MP and being an MEP, many young opportunistic politicians choose the former rather than the latter. It is true that an increasing number of MEPs regard themselves as ‘Brussels careerists’, who intend to build their political careers inside the European Parliament rather than in domestic politics (Scarrow 1997). But, if a young politician would like to reach the highest levels of political power – of national government office, and perhaps eventually national prime minister – then they will choose to be a national MP rather than an MEP. For example, several highly prominent young MEPs – including Helle Thorning-Schmidt (of the Danish Social Democrats) and Nick Clegg (of the British Liberal Democrats) – have left the European Parliament in the past few years to become national MPs, and have gone on to become leaders of their parties.

In most multi-level polities, comparable offices at the higher level of government offer parties and politicians more policy powers, public recognition and career prestige than offices at the lower level of government. Being in the executive at a higher level of government may be more desirable than being in the legislative branch at a lower level of government. In general, though, executive (legislative) office at the higher level is preferable to executive (legislative) office at the lower level. In the USA, for example, politicians

would rather be the US President than a Governor of a state, or a member of the US Congress than a member of a state legislature. The EU, in contrast, is an upside-down polity, since offices at the lower level of government (at the national level) are more desirable for politicians and parties than comparable offices at the higher level of government (at the EU level).

This has significant implications for how parties work in the EU. In particular, the upside-down nature of the office hierarchy means that if a party faces conflicting incentives in its attempts to capture a comparable office at the EU level and the national level (for example, in the type of policies the party should advocate), the party positions that favour the capture of domestic office will invariably prevail. For example, in the European Parliament, most 'national delegations' of national political parties sit in one or other of the transnational political groups. So, most conservative and Christian democratic parties sit in the European People's Party-European Democrats group, centrist and liberal parties sit in the Alliance of Liberals and Democrats for Europe group, and social democrats sit in the group of the Party of European Socialists. Now, if the European party group to which a national party belongs takes a policy position which is significantly different from the position of the national party in the domestic arena, rather than the national party changing its domestic position to bring it into line with the European group position, the national party is likely to instruct its MEPs to vote against the position of the European group. This might undermine the cohesion of the political group in the European Parliament, and so limit the ability of the European party to achieve its policy goals. However, the national party will be willing to pay this price if it allows it to secure its main goal: of winning and maintaining national government office.

Nonetheless, national parties are not completely free to set out their policy positions in the domestic arena irrespective of what happens at the EU level. This is because the single market, the single currency and the flanking policies adopted by the EU to create and regulate the single market (such as social and environmental regulations and competition rules) constrain the policy choices that national parties can make in their pursuit of domestic government office. Parties on the left, for example, can no longer promise to protect national champions from competition (as this would breach EU competition rules), to run up deficits to fund major expansions in public spending (as this would breach the excessive deficits provisions of economic and monetary union) or to pursue restrictive regulatory policies in labour markets or services markets (as this would risk capital flight to other member states in the single market). Parties on the right, meanwhile, can no longer promise to remove social protections or costs for small businesses (as this would go against EU social regulations), to apply restrictive immigration policies (as this would go against the free movement of persons in the single market and EU asylum policies) or not to grant equal treatment in the workplace to ethnic minorities or homosexuals (as this would breach EU non-discrimination legislation).

As a result of these constraints, national parties have an incentive to try to influence EU policy outcomes in the direction they prefer: in a leftwards direction for most left-wing parties, and in a rightwards direction for most right-wing parties. Each individual national party has very little chance of being able to do this alone, even if the party is a major governing party from one of the larger member states. As a result, national parties have an incentive to organize with parties from other member states who share their basic policy preferences, to try to collectively influence the EU policy agenda. The policy

constraints set at the European level consequently help explain why national parties have organized together to form the political groups in the European Parliament, and have gradually delegated agenda-setting power to the leaderships of these legislative party organizations (Hix et al. 2007). This also explains the development of the ‘party leaders’ summits’ of the transnational party federations, which bring together the national party leaders of each European party family to discuss issues on the EU agenda, particularly before European Council meetings (Hix 1999).

This then relates back to Riker’s argument about how political parties can influence the degree of centralization of a multi-level system. In the EU system, it is the parties in government in the member states who have decided the basic ‘constitutional settlement’ in the EU. Regarding the balance of policy powers between the member states and the EU level, the settlement is essentially the following: policies to create and regulate a continental-scale market in Brussels; keeping most areas of taxation and spending at the national level; and coordination between national governments on policies that remain largely at the national level but have externalities on the other member states as a result of being part of a continental-scale market (that is, immigration and interior policies, macro-economic policies, and foreign and security policies) (see Donohue and Pollack 2001; Moravcsik 2001). This design is clearly in the interests of most parties in government, and as the recent rounds of EU treaty reforms have demonstrated, there is little appetite amongst national party leaderships to change this basic architecture in any dramatic way – either to pass major new areas of policy up to the European level, or to bring back any major area of EU policy back to the member states (although we may see that with the Common Agricultural Policy in the not-too-distant future). Clearly, then, national party leaderships in most member states in Europe see this design as the optimal policy balance from their own point of view. If there were incentives for parties to be more highly centralized at the European level, then there would be pressure from national party leaders to pass more areas of policy up to the European level.

Put another way, the ‘upside-down polity’ of the EU is a conscious design of national political parties, and national political parties have few incentives to change this design because they are the dominant political players in the EU polity.

This structure of office and policy incentives for political parties in the EU polity has significant implications for how various political processes work in the EU. To illustrate this point, in the next two sections I shall look at one of the main processes of connecting citizens’ preferences to EU policy outcomes: via the election of the European Parliament, and the subsequent behaviour of the MEPs.

### 14.3 EUROPEAN PARLIAMENT ELECTIONS AS SECOND-ORDER NATIONAL CONTESTS

Direct, European-wide, elections to the European Parliament were first held in 1979, and have been held every five years since, most recently in June 2004. When the governments first agreed to hold elections to the European Parliament, there was widespread optimism that these elections would transform party politics in Europe, by leading to the formation of genuine European-wide political parties, for example (Pridham and Pridham 1979).



Three transnational parties were formed in the build-up to the first elections, and several more have emerged since: the Party of European Socialists (formed in 1973), the European People's Party (formed in 1976), the European Liberal Democrat and Reform Party (formed in 1976), the European Free Alliance (of regionalist parties) (formed in 1981), the European Green Party (formed in 1993), the Alliance for Europe of the Nations (of nationalist-conservative parties) (formed in 2002) and the Party of the European Left (formed in 2004). These parties have adopted common manifestos in European Parliament election campaigns and have tried to coordinate European-wide election campaigns.

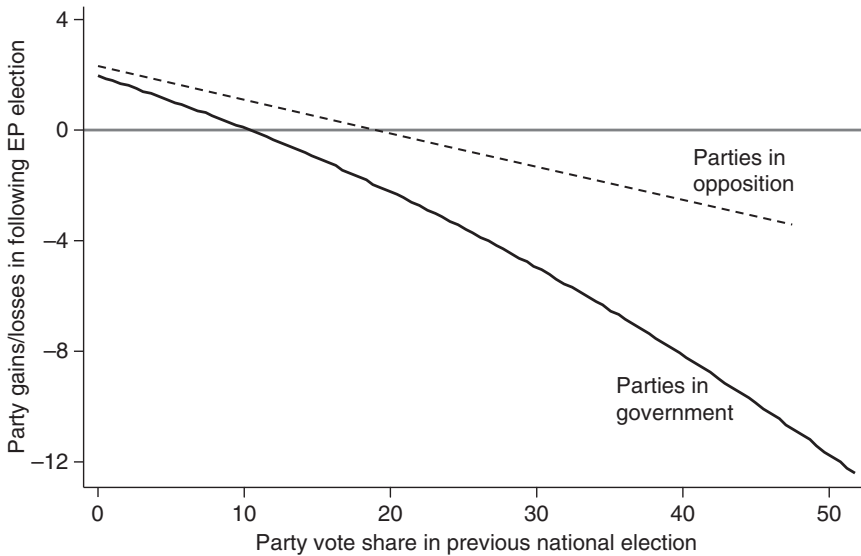
However, despite six rounds of European Parliament elections few citizens are aware of these transnational parties or vote in European Parliament elections on the policy positions of these parties, or on the basis of which of the transnational parties will become the largest group in the European Parliament, or on how the European Parliament groups of these parties voted in the previous five years or will vote in the next five years.

Because of the structure of incentives for national political parties in the upside-down EU polity, European Parliament elections are what are known as 'second-order national elections'. Karlheinz Reif and Hermann Schmitt first put forward this conception of European Parliament elections after observing the outcome of the 1979 elections (Reif and Schmitt 1980; Reif 1984). Their idea was that national government elections are the primary political contests throughout Europe. National parties, voters and the media consequently treat all other elections – European Parliament elections, regional and local elections, second chamber elections and elections to choose a ceremonial head of state – as secondary contests in the national election cycle. Despite a massive increase in the power of the European Parliament in the EU system since 1979, and despite growing media coverage and public awareness of the European Parliament, because national parties are still primarily concerned with winning and holding on to national political office, the European Parliament elections are still second-order national contests and unlikely to be anything different any time soon (van der Eijk and Franklin 1996; Reif 1997; Hix and Marsh 2007).

The second-order nature of European Parliament elections has two main effects. First, because there is less coverage of these elections in the media and there is less at stake politically, there is much lower turnout in these contests than in national elections. About 20 per cent fewer people vote in European Parliament elections than in national elections, and turnout in the 2004 European Parliament elections fell to below 50 per cent of eligible voters for the first time.

Second, European Parliament elections may be part of the national electoral cycle, but because these elections do not lead to the formation of a new national government, the people who do vote in European Parliament elections vote differently than if a national election were held. Some voters use European Parliament elections to express their dissatisfaction with the current policies or the leaders of the party or parties in government. This effect means that governing parties lose votes in European Parliament elections to opposition parties, especially if the elections are in the middle of a national election cycle, when governing parties are least popular.

Other voters use European Parliament elections to express their views about issues that concern them, such as the environment or immigration, and so vote for smaller parties who promote these issues rather than the larger parties. And some citizens vote



*Note:* From Hix (2008). These functions are simple bivariate quadratic regression models of the relationship between a party's vote share in the previous general election and whether the party gained or lost votes in an European Parliament (EP) election, pooled for all EP elections between 1979 and 2004 in all member states, and estimated separately for parties in government and parties in opposition at the time of the EP election.

*Figure 14.1 Party size and European Parliament election outcomes*

sincerely rather than strategically: for parties they are close to but do not normally vote for as they would not want to waste their vote. Either way, these patterns of behaviour mean that large parties, whether in government or opposition, lose votes in European Parliament elections to smaller parties.

Figure 14.1 shows how national parties performed on average in all European Parliament elections relative to the performance in the national elections immediately prior to the European contests, for all national parties in all member states in all European Parliament elections between 1979 and 2004 (Hix and Marsh 2007). Two main second-order effects are clearly visible. First, larger parties do much worse than smaller parties in these contests regardless of whether a party is in government or opposition. Second, governing parties lose more votes in European Parliament elections than opposition parties.

Citizens' attitudes towards the EU play some role in European Parliament elections. There is evidence, for example, that more strongly anti- or pro-European citizens are more motivated to vote in these elections than citizens with more indifferent attitudes towards Europe (Blondel et al. 1997). Also, anti-European parties win more votes in European Parliament elections than in national elections. However, almost all anti-European parties are small opposition parties. Because of the second-order effect, other small parties – such as extreme right parties, green parties, extreme left parties and regionalist parties – do well in European Parliament elections, regardless of their attitudes towards Europe. Hence, the main reason that anti-European parties do well in

European Parliament elections is that they are small opposition parties, and so provide a home for voters who would like to protest against the national governments or the larger opposition parties.

Treating European Parliament elections as largely irrelevant is not irrational for national parties. There is very little at stake at the European level for national parties in these contests. Sure, parties may win or lose a few MEPs. However, because representation in the European Parliament is highly proportional, the location of the median MEP will only shift slightly to the left or slightly to the right as a result of European Parliament elections. In addition, because of the many checks-and-balances in the EU legislative process, the make-up of the European Parliament resulting from European Parliament elections is unlikely to have a direct effect on the direction of the EU policy agenda. As a result, the potential European-level impact of European Parliament elections is far less important for most political parties than the potential national level impact, in terms of how these contests affect the prospects of national parties in the battle for national government office.

Because national political parties are primarily concerned with competing for national office, European Parliament elections are a highly ineffective way of connecting citizens' attitudes on European-level policy issues to policy outputs from the EU. Nothing will change until the European-level political stakes in European Parliament elections are significantly higher than they are now. The stakes would be higher for national parties if, for example, European Parliament elections were linked to the election of the Commission President, the EU budget negotiations and/or other major EU decisions with an apparent and direct impact on the policy agenda. National parties would still primarily be concerned with national elections. But, if European Parliament elections had a more direct impact on EU policy outcomes, national parties would have an incentive to delegate more powers to transnational parties to coordinate European-wide election campaigns.

#### 14.4 PARTIES IN THE EUROPEAN PARLIAMENT

In 1953, in the first year of the then Common Assembly of the European Coal and Steel Community (the precursor of the European Parliament), 72 of the 77 members of the assembly decided to sit in three political groupings (Christian democrats, socialists and liberals). This was a significant break from the norm of other international parliamentary assemblies, where members sit as national delegations. These first European political groups were rather loose organizations, with nominal leaders, small secretariats and some financial resources for administrative costs.

Over half a century later the political groups in the European Parliament are extremely powerful (Raunio 1997; Kreppel 2002 Hix et al. 2005, 2007). Each group has a president elected by the group's members, an executive committee which decides the key policy positions of the group, committee coordinators who are the spokespersons of the groups in the committees, party 'whips' who instruct the group members how to vote, and a large secretariat. The groups hold regular meetings, to discuss what positions to take on key issues and to decide internal group matters. The groups compete to control the chairs and vice-chairs of the committees and the other key positions inside the assembly (such as the President and Vice-Presidents of the Parliament). The groups determine which

Table 14.1 *Voting cohesion of the political groups in the European Parliament*

Political group (left to right)	1979–84	1984–89	1989–94	1994–99	1999–2004
Radical left (EUL/NGL)	0.817	0.804	0.753	0.756	0.831
Greens (G/EFA)	–	0.753	0.755	0.860	0.971
Socialists (PES)	0.754	0.781	0.770	0.831	0.931
Liberals (ELDR)	0.833	0.759	0.726	0.791	0.919
Christian democrats and conservatives (EPP-ED)	0.888	0.850	0.764	0.833	0.897
National-conservatives (UEN)	0.783	0.763	0.778	0.734	0.787
Average	0.815	0.785	0.758	0.801	0.889

*Note:* From Hix et al. (2007). The abbreviations refer to the names of the political groups in the 1999–2004 parliament, as follows: EUL/NGL = European United Left/Nordic Green Left, G/EFA = Greens/European Free Alliance, PES = Party of European Socialists, ELDR = European Liberal Democrat and Reform Party, EPP-ED = European People's Party-European Democrats, UEN = Union for a Europe of Nations.

MEP will be the 'rapporteur' (the person responsible for preparing the Parliament's amendments) on each piece of legislation. The groups control the allocation of speaking time inside the chamber. The groups pay for the assistants to the MEPs. And so on. In short, just like the 'parliamentary factions' in most national parliaments in Europe, the European political groups dominate the internal politics of the European Parliament.

One example of the influence of the political groups in the European Parliament is in the voting behaviour of the MEPs. There are three types of votes in the European Parliament: (1) 'show of hands' votes, where the chair of the session observes which side has won the vote; (2) 'electronic votes', where MEPs press the Yes, No or Abstain buttons on their desks and the overall result of the vote is recorded but how each MEP voted is not; and (3) 'roll-call votes', where the voting decision of each MEP is reported in the minutes. About one-third of votes are by roll-call, and there are now over 1000 roll-call votes each year.

The main political groups – the European People's Party-European Democrats (of Christian democratic and conservative parties), the Party of European Socialists (of social democratic and labour parties) and the Alliance of Liberals and Democrats for Europe (of liberal and centrist parties) – issue voting instructions to their MEPs in each plenary session. The members of the groups generally follow these instructions. Table 14.1 shows the 'cohesion scores' of the main political groups in all the roll-call votes in each of the first five directly elected European Parliaments (controlling for the size of the overall majority in each vote).<sup>1</sup> A party would score 1.000 if all its members voted the same way in every vote in a parliament and would score 0 if it was split down the middle in every vote. As a comparison, the Democrats and Republicans in the US Congress score about 0.800 while most parties in national parliaments in Europe score over 0.900.

These results suggest several things. First, the political groups have become increasingly cohesive over time, as the powers of the European Parliament have increased. Second, the political groups are now more cohesive than the parties in the US Congress and almost as cohesive as parties in national parliaments in Europe. Third, the more extreme groups, to the left of the socialists and to the right of the Christian democrats/

conservatives, are slightly less cohesive than the more centrist groups. Furthermore, while voting along party lines has increased, voting along national lines has decreased (Hix et al. 2005). Put another way, a Swedish conservative MEP is more likely to vote with an Italian or Estonian conservative MEP than with a Swedish liberal or social democrat MEP.

This may seem counter-intuitive, given the point above about the incentive for national parties to prioritize domestic matters or EU matters. National parties are also far more powerful than the European political groups (Kreppel and Tsebelis 1999; Hix 2002). National parties control the selection of candidates in European Parliament elections, and so have the power to remove an MEP who repeatedly votes against the positions of a national party. National party leaderships also influence the future career prospects of MEPs, both within and beyond the European Parliament. As a result, MEPs are beholden to their national parties to get elected and for their future career paths.

In contrast, the European political groups have few powers to force their MEPs to follow European group instructions, especially if a national party has asked its MEPs to vote a different way. The European political groups cannot prevent any of their members from being re-elected. Unlike parties in government at the national level, the European political groups do not control the legislative agenda (as legislation is initiated by the Commission and amended by the Council), and so cannot prevent a vote from taking place on an issue on which a group is divided (Cox and McCubbins 2005). The European political groups do not even have fully independent control of the allocation of committee chairs and rapporteurships, as these tend to be allocated to a particular national party inside a group, which then decides which of its MEPs is granted the office.

The intriguing question, then, is why are the European political groups so cohesive if national parties are far more powerful and sometimes have the incentive and the ability to force their MEPs to vote against their European groups? The answer lies in the fact that the European political groups have become powerful and cohesive organizations precisely because they have been allowed to do so by the national parties who form and drive them. Because the European Parliament now has a significant impact on the policy outcomes of the EU, and because national parties care about these outcomes (since they constrain their behaviour domestically), national parties have an incentive to organize with parties from other member states with similar policy preferences in an attempt to influence EU outcomes in their preferred direction. National parties could organize informal alliances issue by issue. However, this would be costly in terms of time and information, and national parties could not be sure that any informal agreements would hold in future votes. As a result, national parties have an incentive to delegate organizational and leadership powers to the European political groups, to share information, to allocate agenda-setting rights between the member parties and to set the broad guidelines of policies. The result is that national parties might be forced to vote against their policy preferences on some issues, but on average will vote according to their policy preferences in the knowledge that they are more likely to achieve these preferences as their colleagues in the group will be voting the same way.

The internal bargain between national parties inside each political group in the European Parliament is self-enforcing. Legislative policy-making involves repeated interactions. So, if a national party votes against the group on a key issue, they may gain in that particular vote but would risk losing influence inside the group in future votes.

Hence, national parties voluntarily choose to vote with their European political groups almost 90 per cent of the time.

## 14.5 CONCLUSION

Political parties are both shaped by and shape the EU's multi-level governance system. On the one hand, the particular balance of policy competences between the national and European levels (where most highly salient areas of public policy remain at the national level) forces national parties to be primarily concerned with winning and maintaining national government office rather than winning political office at the European level or compromising on national policy commitments in the interests of potential European-wide party goals. This explains, for example, why European Parliament elections have failed to develop as genuine European-wide electoral contests between transnational political parties and have remained midterm contests in the battle for national government office.

On the other hand, as the dominant actors in European politics, national party leaders have consciously designed the EU system (through the various treaty reforms) in such a way that their dominant position has not been undermined by the emergence of European-level elites independent from national party control. For example, national party leaders have increased the powers of the European Parliament in the knowledge that the main actors inside the European Parliament – the European political groups – are themselves agents of the national political parties who make up and control them.

But what of the future? The current architecture of the EU, and the dominant role of national political parties within it, seems relatively stable. However, given what we know about parties, one thing that could change the incentive structure in the EU's multi-level polity would be a genuine battle for political office at the European level: such as an open contest for the Commission President (Hix 2008). If there was a more open contest for the highest executive office at the European level, this could lead to the emergence of new transnational party organizations (perhaps out of the existing transnational parties or political groups in the European Parliament) as vehicles for the capture of the Commission President, who then appeal directly to voters over the heads of national political parties. This would challenge the dominance of national political parties, as it would probably lead to the formation of new and more independent European parties in the European Parliament and would add a European dimension to European Parliament elections. Not surprisingly, many national party leaders are trying to resist such a development.

## NOTE

1. These scores are the Hix et al. (2007) 'relative cohesion scores'.

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## 15 Multi-level governance and parliaments in the European Union

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### 15.1 INTRODUCTION

Twenty years ago, Robert Dahl argued that modern liberal democracies were undergoing a transformation, which will profoundly affect the institutions of 'traditional' elective, representative democracy (Dahl 1989, 1994). The thesis that the sheer growth of state interventionism and the internationalization of governance have increased the complexity of policy-making, requiring ever more specialized knowledge (Dahl 1989, pp. 335–8), has – in the meantime – found many followers. The present transformation of democracy will give rise to a system of 'quasi-guardianship,' a system of rule dominated by information-privileged experts (see, among others, Vibert 2007). While this scenario may sound overly dramatic, the access to and distribution of policy-relevant information is one of the key issues in scholarly debates about the role and impact of parliaments in the European Union's (EU) system of multi-level governance. Moravcsik has flagged this issue prominently arguing that international institutions and systems of international negotiations tend to produce a shift in the distribution of power among domestic actors and institutions which is likely to produce a redistribution of control not only over procedural resources (such as the authority to initiate or veto policy proposals) but also over cognitive resources (such as superior technical or politically relevant knowledge). He draws evidence from negotiations at EU intergovernmental conferences to demonstrate that EU member state executives have 'enhanced their institutional, informational and ideological control over EC policy to a point where they dominate domestic agendas' (Moravcsik 1994, p. 63) while domestic (parliamentary) opposition is sidelined. As a result, European integration threatens to strengthen 'domestic governments as they, and not backbench parliamentarians and people outside the executive branch, participate in decision-making in the various EU institutions . . . .The dominant position of domestic governments in both national and European politics . . . reduces the influence of parliaments at all stages of the decision-making process' (O'Brennan and Raunio 2007a, p. 4). The multi-level governance structure of the EU exacerbates this 'challenge' which parliamentary institutions face all across Europe. This chapter will discuss whether the interdependence of different levels of territorial or functional jurisdictions – as denoted by the attribute 'multi-level' – empowers structures of intergovernmental coordination at the expense of parliamentary institutions. Furthermore, the term 'governance' suggests that governmental actors operate in close collaboration with a range of non-public bodies ranging from interest associations to firms, which assume prominent positions in policy coordination and formulation. Whether and to what degree systems of multi-level governance threaten to bypass parliaments and policy-making structures based on formal decision-making rules will equally be subject to discussion in the ensuing sections.



This chapter is organized as follows: in Section 15.2 the focus will be directed towards national parliaments and ‘their’ response to the increasing internationalization of governance. In particular, it will be shown that European integration has had a profound impact on national parliaments across three different dimensions: their legislative activity, their internal institutional structure, and the behavioral responses and strategies of parliamentarians. Section 15.3 reverses the focus and demonstrates that the power of parliaments in EU policy-making have – in spite of allegations of ‘deparliamentarization’ – actually increased quite remarkably throughout the process of European integration: the European Parliament has been empowered in successive rounds of treaty reform and attempts to associate national parliaments more closely with EU decision-making have equally left a mark on the EU’s institutional make-up. In Section 15.4 the nexus between parliaments in EU policy-making and democratic legitimacy will be addressed. While the empowerment of domestic parliaments and the European Parliament promise to better link (inter)governmental decisions to the voters and thereby improve democratic representation and legitimacy (see Holzhaecker 2007, p. 143), the question needs to be raised whether this aspiration can be met under the realities of multi-level governance. The implications of multi-level governance for two central tenets of democratic legitimacy, accountability and political equality, will be scrutinized from the purview of parliamentary democracy.

## 15.2 THE IMPACT OF EUROPEAN INTEGRATION ON NATIONAL PARLIAMENTS

The literature on the Europeanization of parliamentary systems draws our attention to different dimensions of change (see Auel 2003; Auel and Benz 2005; Töller 2006; Goetz and Meyer-Sahling 2008). First, it is argued that European integration exercises a profound effect on the overall legislative activity of national parliaments. Second, European integration has led to a shift in the balance of power between parliaments and executive in the favor of the latter. Yet, studies also demonstrate that parliaments have ‘fought back’ by means of institutional reforms and adaptation. Third, an increasing number of studies explore how these changes in institutional opportunity structures affect the behavioral options of parliaments and their interaction with the executive (see the contributions in Auel and Benz 2005).

### 15.2.1 Legislative Activity

The transfer of competences to the European level implies that in an increasing number of policy sectors EU member states delegate decision-making competences upwards to the EU level thereby taking policy-making power away from domestic legislatures (see Börzel 2005, pp. 220–9 for an overview). What are the implications of EU-level task expansion for national parliaments? As far as EU secondary legislation is concerned, few national parliaments – the Danish Folketing being the ‘usual suspect’ – have the right and capacity to request commitments from their governments before a decision in the Council is taken. With regard to ‘constitutional issues’ – treaty reforms, enlargement and so on – national parliaments merely have a ‘take it or leave it’ option at ratification,

which they are highly unlikely to make use of (see O'Brennan and Raunio 2007a, p. 3). To provide just one example for the increase in restrictions on the scope of activity for domestic legislatures as a consequence of EU treaty provisions and secondary legislation (see, for example, von Beyme 1998; Töller 2004, 2006), a closer look at the German Bundestag is informative. Töller (2006, p. 7) shows for the Bundestag that the scope of restrictions, that is, the proportion of legislation with a European 'impulse' has doubled from 16.8 per cent in the 10th legislature (1983–87) to 34.6 per cent in the 15th legislature (2002–05). These results are challenged by König and Mäder (2008) who find that the 'European impulse' for domestic legislation in Germany is much weaker than is often suggested. Drawing from longitudinal data covering 30 years of German legislation, the authors find that roughly 25 percent of German legislation has been predetermined by EU legislative acts.

### **15.2.2 Institutional Changes**

While the extension of competencies to the EU level has resulted in restrictions on the legislative activity of domestic legislatures, 'national parliaments and the political parties within them have begun to realize their loss and have adapted their institutional structures to claw back some of that lost power' (Holzhacker 2007, p. 141). In particular, national parliaments have created new institutional structures to improve scrutiny and control of their governments' EU-related activities. O'Brennan and Raunio (2007a, pp. 8–16) indicate that national parliaments' adaptation to European integration has proceeded in different phases. From the early years since the mid-1970s, national parliaments have shown few signs of institutional or procedural adaptation. With the entry of Denmark and the UK into the Community (and EU-skeptical electorates), with the extension of sectoral integration through the adoption of the single market program and the concomitant adoption of qualified majority voting, national legislatures came to respond to these changes: between 1985 and 1990, numerous parliaments set up European Affairs Committees (for example, in Belgium, Greece, Italy, Luxembourg, the Netherlands) or strengthened existing ones (for example, in Germany). According to O'Brennan and Raunio (2007a, p. 11), the Maastricht Treaty marks the beginning of a third stage of adaptation. Coinciding with a further qualitative leap in sectoral and vertical integration, some national legislatures requested from their governments – upon ratification – a number of concessions regarding improved access to information as well as competencies in policy formulation.

Overall, national parliaments' motivation to implement institutional and procedural reforms as a response to the process of European integration can be linked to a set of different objectives (see Auel and Rittberger 2006, pp. 130–1). First, the reforms sketched above aimed to endow national parliaments with the right to obtain comprehensive information on European issues from their respective governments. Second, the reforms were designed to enhance parliamentary capacities to handle and process this information. All national parliaments have reformed their institutional 'infrastructure' by setting up one or more special European Affairs Committees and by implementing a scrutiny procedure for European documents and decisions. A third objective pointed at establishing participation rights vis-à-vis the government. This includes, for instance, the right to draft resolutions on European issues before a final agreement is reached ('scrutiny reserve').

### 15.2.3 Behavioral Adaptation and Strategic Interaction

The adoption of institutional reforms designed to achieve the above-mentioned objectives does not tell us much about the actual attainment of these objectives. These institutions can be conceived of as opportunity structures affecting the costs and benefits of alternative strategies, which national parliamentarians may employ to reach their individual goals. Hence, in order to assess whether and how formal participation rights affect parliamentary influence in European affairs, ‘one has to look beyond the formal institutions and take the strategies into account, which parliamentary actors develop to deal with the power or lack thereof’ (Auel and Benz 2005, p. 388; see Holzhaecker 2007 for an overview). This implies that research should focus on the relevant actors – parliamentarians in majority parties, opposition parties and the government –, their preferences, as well as the incentive structures and constraints that determine the structure of legislative–executive relationships (see Auel and Benz 2005; Goetz and Meyer-Sahling 2008 for an overview; Wonka and Rittberger 2009 for a research design).

## 15.3 EUROPEAN INTEGRATION AND THE PARLIAMENTARIZATION OF EUROPE

Proponents of the above-sketches ‘deparliamentarization’ thesis frequently overlook that throughout the process of European integration the powers of the European Parliament have been gradually extended, *inter alia* to counter the ‘deparliamentarization’ of domestic politics (see Rittberger 2005; Rittberger and Schimmelfennig 2006). This section draws attention to two developments that defy (or at least qualify) the ‘deparliamentarization’ thesis.

### 15.3.1 The Empowerment of the European Parliament

While national parliaments and parliamentarians adapt and transform their institutions and strategies to the challenges posed by European integration, the European Parliament has – at the same time – undergone a striking institutional transformation: with respect to Community legislation, the European Parliament’s legislative powers have been gradually extended at every intergovernmental conference (IGC) since the adoption of the Single European Act (Table 15.1). Until the entry into force of the Single European Act, the European Parliament merely had to be consulted in matters of secondary legislation. Since then, the so-called ‘cooperation procedure’ endowed the European Parliament for the first time with the formal right to propose amendments to legislation which – if supported by the Commission – were easier for the Council to accept than to reject (Tsebelis 1994). In subsequent treaty revisions, the legislative powers of the European Parliament have been gradually enhanced. The ‘co-decision procedure’ first introduced by the Maastricht Treaty and amended by the Amsterdam Treaty further enhances the power of the European Parliament *vis-à-vis* the Council (see Thomson et al. 2006). The ‘co-decision procedure’ is deemed to become the ‘ordinary legislative procedure’ under the new Lisbon Treaty and will thus become the dominant procedure for the adoption of secondary legislation in the EU, now that the Treaty is in force.

Table 15.1 *The European Parliament and EU legislative decision-making*

	Role of the European Parliament and legal base
EEC Treaty (1957)	Introduction of consultation procedure (Art. 137 EEC)
Single European Act (1986)	Introduction of 'cooperation' (Art. 189C EEC) and 'assent' procedures
Maastricht Treaty (1991)	Introduction of 'co-decision procedure' (Art. 189B ECT), extension of other procedures
Treaty of Amsterdam (1997)	Reform and extension of 'co-decision procedure' (Art. 251 ECT)
Treaty of Nice (2000)	Extension of 'co-decision' procedure (Art. 251 ECT)
Treaty of Lisbon (2007)	Extension of 'co-decision'; 'co-decision' declared to be 'ordinary legislative procedure' (Art. 294 TFEU)

How can these changes, which have resulted in a significant expansion of the European Parliament's legislative powers, be accounted for? Recent research on the empowerment of the European Parliament addresses two paths to empowerment: the first path to empowerment is through 'interstitial institutional change' (Farrell and Héritier 2007), which occurs in-between the grand bargains, viz. IGCs. This concept highlights the 'incompleteness' and 'ambiguities' of treaty rules. This literature takes at its point of departure principal-agent theory and argues that the 'incompleteness' of the treaty and information asymmetries between the principals (Council) and the agent (European Parliament) tend to produce contestation over existing treaty rules. The European Parliament is expected to take these ambiguities in the treaty as a lever in day-to-day politics in order to obtain an interpretation of treaty rules that enhance its competencies vis-à-vis other Community actors, such as the Council or the Commission (see Hix 2002; Héritier 2007). This group of researchers thus argues that institutional change is triggered by means of rule interpretation and bargaining over these rules among EU actors. At subsequent IGCs, member state governments are expected to formalize the hitherto informal rules that resulted from inter-institutional bargaining.

In contrast, the second path to empowerment points at changes of the formal rules which do not reflect mere formalizations of already operational informal rules, but a qualitative difference either in scope (a 'net-empowerment' compared to existing formal or informal rules) or function (a new category of powers has been added, for example, budgetary powers). In order to explain why member state governments enhance the Parliament's competences, the 'deparliamentarization' of national parliaments, that is, the reduction of their prerogatives, provides a crucial impetus. Recent research has demonstrated that it is precisely the expected or perceived undermining of domestic parliamentary prerogatives resulting from further integration that has fueled demands for expanding the powers of the European Parliament (see Rittberger 2005; Rittberger and Schimmelfennig 2007). The argument runs as follows: if a proposed or implemented step of EU integration is perceived to curb the competencies of national parliaments, the perceived 'democratic deficit' of European integration becomes particularly salient. This allows EU actors to exercise normative pressure on member states recalcitrant to redress this situation. In order for normative pressure to be effective in making

these recalcitrant governments comply with demands for extending the powers of the European Parliament, it is assumed that member states in the EU are embedded in a liberal democratic community environment (Schimmelfennig 2001). Members of a liberal democratic community environment share a common ethos which, if violated by any of its members, will trigger efforts of ‘abiding’ actors to bring the recalcitrant state in line with the community ethos through shaming and shunning. In a community, that is sharing a common ethos, that is characterized by a high-interaction density and no centralized rule-enforcement authority the pursuit of political goals is not only dependent on the bargaining power and preference constellation of the relevant actors, but on conformity with the community ethos. Actors may strategically use the community ethos to bolster the legitimacy of their own goals against arguments brought forward by their opponents (*ibid.*; see also Rittberger and Schimmelfennig 2006, pp. 1158–9). What does this argument imply for the expansion of the European Parliament’s powers? Even though augmenting the European Parliament’s legislative powers may not reflect the collective institutional interest or normative consensus of the member states, ‘their collective identity as democratic states and governments and as members of a liberal democratic community environment obliges them in principle to conform to basic norms of liberal democracy’ (Rittberger and Schimmelfennig 2006, p. 1159). The explanatory power of this approach has been demonstrated empirically with regard to the increase of the European Parliament’s legislative and budgetary powers, as well as with a view to hold the Commission to account (Lindner and Rittberger 2003; Rittberger 2005; Schimmelfennig et al. 2006). For example, the extension of sectoral integration and qualified majority voting as adopted by the Single European Act implied that the prerogatives of domestic parliaments were broadly perceived to be under stress, especially in those policy areas where legislative competencies were transferred to the European level. This step of EU integration was perceived to aggravate the marginalization of national parliaments in exercising control and influence over EU decision-making. As a result, some EU governments exercised normative pressure on reticent governments pushing for an expansion of the European Parliament’s legislative role: given that all member states are parliamentary democracies, the Parliament’s supporters argued that the loss of national parliaments’ legislative powers had to be compensated for by increasing the legislative powers of the European Parliament. In the case at hand, a minority of states succeeded in successfully exercising normative pressure on recalcitrant actors (Rittberger 2005, pp. 161–71).

### **15.3.2 Expanding the Role of National Parliaments in the EU Policy Process**

But not just the European Parliament can consider itself a beneficiary of previous IGCs, arguments about ‘deparliamentarization’ at the domestic level have also triggered discussions about enhancing the role of national parliaments in EU policy-making via EU treaty reform (see Raunio 2005, 2007; O’Brennan and Raunio 2007a; Rittberger 2007). Attempts by member state governments to associate national parliaments more closely with the EU policy process date back to the early 1990s. The Maastricht Treaty explicitly acknowledges the role of national parliaments in EU decision-making in two annexed declarations, one calling for improving the information received by national parliaments on legislative initiatives (Declaration No. 13) and the other encouraging

national parliaments to contribute to substantive policy issues (Declaration No. 14). The Amsterdam Treaty included a protocol on the 'Role of National Parliaments in the European Union,' which went on to specify some of the declaratory provisions of the Maastricht Treaty. The objective associated with these treaty changes was chiefly to improve the flow and availability of information on legislative initiatives which national parliaments could subsequently employ to improve the scrutiny process vis-à-vis their national governments. The question about how to involve national parliaments more closely in the EU policy process continued to occupy governments in subsequent IGCs. The European Convention and the ensuing IGC brought about the most substantial change concerning the role of national parliaments. National parliaments were entrusted with the right to trigger an 'early warning mechanism' to 'safeguard' the subsidiarity principle. This mechanism would be triggered if a specific proportion of national parliaments calls upon to the Commission to reconsider its draft legislation. During the Convention there was widespread agreement among the members about the general idea that national parliaments should not only be better informed about the legislative intentions of the EU, but that they should also be able to express their objections where legislative proposals were considered to run counter to the principle of subsidiarity. These provisions were taken up and included in the Treaty of Lisbon signed by the member state governments in December 2007. In summary, past (and intended) treaty changes have aimed at reducing the information asymmetries between national executives and national legislatures, thereby enabling national parliaments to more effectively scrutinize and influence their national governments in EU affairs. Furthermore, the introduction of subsidiarity control was considered to be a response to the often acclaimed 'legitimacy deficit' of European integration (Raunio 2007, p. 87). Even though most member states were willing to accept an extension of the role of national parliaments in the EU policy process in principle, translating this principle into concrete and acceptable proposals proved difficult. It was the discussion about the delineation of the EU's competences during the Convention process, which not only elevated subsidiarity to a guiding principle of institutional reform but, at the same time, offered an inroad for national parliaments. Even though subsidiarity and the role of national parliaments in EU policy-making had been on the member states' EU reform agendas since the early 1990s, no nexus had been established between the two until the Convention was convened. The Convention working group on subsidiarity was guided by the assumption that the application and monitoring of subsidiarity should and could be improved upon. In its final report, the group proposed to the Convention that national parliaments – arguably the actors suffering most from the transfer of policy-making prerogatives to the European level – should be given an important role in monitoring the compliance of legislative initiatives with the principle of subsidiarity. Similarly, the Convention working group on national parliaments 'reinforced the main findings of the subsidiarity working group by underlining that national parliaments should play a key role in monitoring the principle of subsidiarity' (Norman 2003, p. 98). This hospitable environment thus offered a 'window of opportunity,' which helped national parliaments to become more closely associated with the EU policy process.

How significant are these changes? Can we expect national parliaments to enhance their influence in the EU policy process as a result of the Treaty reform? The availability of information and new power resources does not automatically imply that national MPs

will make extensive use of them. There are plausible expectations that the electoral and career benefits to each individual MP of engaging more actively with EU affairs may not outweigh the costs associated with such activities (see Saalfeld 2003). Similarly, the subsidiarity control mechanism may not be as significant as many of its sponsors hope: 'if parliaments have few resources available . . . investing scarce resources in checking subsidiarity is probably not on top of the list for MPs' (Raunio 2007, p. 86) To effectively exercise subsidiarity not only requires of national MPs to scrutinize information about legislative initiatives but also to exchange information and coordinate positions with other national parliaments. Raunio thus concludes on a skeptical note, arguing that subsidiarity control 'is unlikely to have much significance. It may encourage the Commission to pay more attention justifying its proposals, and it may stimulate tighter control of governments by individual parliaments, but it is very probable that the mechanisms will be used only very seldom' (*ibid.*, p. 87).

## 15.4 PARLIAMENTS, MULTI-LEVEL GOVERNANCE AND DEMOCRATIC LEGITIMACY

National parliaments and the European Parliament have undergone profound institutional changes as a consequence of further integration. The previous section has aimed at exploring some of the key aspects and episodes of institutional transformation which engendered a process of institutional democratization from an empirical-analytical perspective. The intention of this section is to offer a brief evaluative sketch of these transformations from the vantage point of democratic theory. Multi-level governance is highly ambivalent concerning its potential to enhance the democratic quality of the EU (see Bache and Flinders 2004; Peters and Pierre 2004). The normative implications of multi-level governance for parliamentary democracy in the EU will be assessed with regard to two core principles of democratic rules: accountability and political equality (see Kohler-Koch and Rittberger 2007, pp. 7–9).

### 15.4.1 Accountability

Accountability is a crucial component of democratic rule 'as it helps citizens to control those holding public office' (Bovens 2007, p. 463). From the perspective of principal-agent theory, representative democracy consists of a chain of delegation from the people, 'who are the primary principals in a democracy . . . to popular representatives, who . . . have transferred the drafting and enforcement of laws and policy to the government' (*ibid.*). In this chain of delegation, accountability issues arise at each link of that chain, since 'each principal . . . seeks to monitor the execution of the delegated public tasks by calling the agent to account' (*ibid.*). What is at stake here is the question of whether or not existing accountability arrangements enable parliaments to effectively control the executive power in the EU's multi-level system. Multi-level governance is said to differ from the traditional model of governance in the liberal democratic state. In the liberal model of governing, governance is conceptualized as a hierarchical relationship among different (public) actors and (territorial) tiers 'in so far as communication, resources, steering and control normally moved up or down through all levels in the hierarchy'

(Peters and Pierre 2004, p. 76). Multi-level governance, in contrast, highlights public as well as private actors operating transnationally, across different levels of governance. In multi-level governance systems ‘actors, arenas, and institutions are not ordered hierarchically but have a more complex and contextually delineated relationship’ (ibid., p. 79; see also Marks et al. 1996). While the exercise of authority in hierarchical systems of governance provides ‘a reasonably clear institutional linkage between elected officials, public policies, and the electorate’ (Peters and Pierre 2006, p. 31), systems of multi-level governance lack clearly identifiable loci of authority and responsibility which are integral to a principal-agent view of accountability. Multi-level governance is often times praised for its focus on effectiveness and problem solving due to informal, flexible structures of interest coordination, its inclusive character and stakeholder orientation, yet it begs the question of how accountability in the sense of democratic control can be assured in such systems of governance. If we accept that democratic accountability refers to the idea that accountability is geared towards controlling and legitimizing ‘government actions by linking them effectively to the “democratic chain of delegation”’ (Bovens 2007, p. 465), multi-level governance puts stress on parliamentary institutions ‘to monitor and evaluate executive behavior and to induce executive actors to modify that behaviour in accordance with their preferences’ (ibid.). The selectivity of representation and the deficits of democratic accountability typical for network governance structures are thus aggravated by the multi-level character of governance in the EU: ‘the relations between actors . . . are weakly exposed to public scrutiny, and to the scrutiny of the legitimate, democratic, and representative bodies’ (Papadopoulos 2006, p. 13).

Given this rather bleak assessment, what are the prospects for accountability via parliamentary oversight and control in systems of multi-level or network governance? According to Anne-Marie Slaughter, the EU is exemplary for what she calls a ‘new world order’ (Slaughter 2004), a label referring to the proliferation of horizontal and vertical transgovernmental networks among national and supranational regulators, judges and legislators. Slaughter echoes the dominant view that parliaments and legislators are ‘lagging behind’ government officials, regulators as well as judges in informing and shaping boundary-spanning public policy (ibid., pp. 104–30). It is thus ever more important for mechanisms of legislative oversight to ensure that executive and administrative accountability are effectively in place. However, they are difficult to obtain. Take the case of ‘agency governance’ in the EU: the gradual increase of EU-level agencies in the past couple of decades has led to a proliferation of networks comprising national and supranational regulators from domestic and EU-level agencies taking on executive and regulatory tasks. While these agencies have developed a range of participatory practices – primarily destined at the ‘stakeholders’ of agency activities – public accountability through parliamentary oversight is rather underdeveloped (see Curtin 2005). Even though network governance may not provide a hospitable environment for parliamentary oversight, parliaments still have an important role to play. Christopher Lord advances a normative argument: even though policy networks may successfully ‘simulate’ the representative qualities of parliamentary politics, parliaments should, at the very least, be a ‘source of authorization and control’ (Lord 2007, p. 150). While parliamentary politics in the context of network governance can be considered normatively desirable from the purview of a democratic theorist, what are the worldly prospects for realizing parliamentary ‘authorization’ and ‘control’ of such networks? Curtin is



skeptical: 'I do query how parliamentary politics can get to grips with the very scattered nature of executive activity at the EU level'(Curtin 2007, p. 161). Curtin suggests that the 'imperfect status quo' should be accepted and, instead of clinging to the utopia of a fully 'parliamentarized' EU, 'principles of good governance [could be applied] right across the spectrum of executive activity as we find it' (ibid.) Slaughter discusses this challenge in a more positive tone. She proposes that national (and supranational) legislators akin to regulators and judges should coordinate their activities in legislative networks, thereby contributing to accountable governance by providing a 'counterweight' to networks of regulators and judges (see Slaughter 2004, p. 255). Citing examples from the World Bank and the World Trade Organization (WTO), Slaughter argues that parliamentary networks can play a crucial role in monitoring the activities of transgovernmental networks. This would help:

ensure that the direct representatives of peoples around the world communicated and coordinated with each other in the same ways and to the same degree as do their fellow government officials. It would help address the perceived problems of both global technocracy and distortion of national political processes, as well as adding another category of accountable government actors into the mix of entities participating in policy networks. (Slaughter 2004, p. 238)

#### **15.4.2 Political Equality**

Network governance is often celebrated for its inclusive qualities channeling a set of diverse interests into the political process. While multi-level governance carries the potential to be prejudiced towards 'access' of new interests and innovative ideas (Héritier 1999, p. 275), more ambitious expectations concerning 'participatory governance' and democratic upgrading have to be viewed skeptically (see Greven 2007) since the rules and practice of participation do not guarantee equality among actors. Lord claims aptly that '[a]ny person designated to speak for the diffuse and unorganized public interest in stakeholder networks or any rules requiring the stakeholder network to consider alternative interpretations of the diffuse public interest on the basis of equality . . . would not be designated "by" citizens but "for" them' (Lord 2007, p. 149). Peters and Pierre (2004) even call multi-level network governance metaphorically a 'Faustian Bargain' in which democratic values are traded for the accommodation of a broad range of interests and purported increases in policy-making effectiveness and efficiency. Scholars go so far as to claim that the 'informality' of multi-level governance structures entails a potential for political inequality. Inclusiveness does not automatically translate into 'equal opportunities' of actors involved in a decision-making process. While formal rules 'serve . . . the important role in safeguarding equality in terms of the capabilities of the actors' (Peters and Pierre 2004, p. 87) informality implies that it is up to the participating actors to define the relative power of the actors involved. Under such circumstances, it would not be overly surprising if multi-level governance is prejudiced towards the interests of executives at the expense of legislatures and sub-national actors: Peters and Pierre argue that in the EU, 'multi-level governance may in practice favor the interests of the nation-states as the dominant players, even though it is conceptualized as providing greater power to the structurally less powerful subnational actors' (ibid., p. 88).



The implications of multi-level governance for democratic accountability and political equality which have been laid out in the previous paragraphs demonstrate their full bearing in some of the more recent political developments at the EU level. One example, the ‘agencification’ of the EU, has already been briefly touched upon above (see Christensen and Læg Reid 2007 for a discussion of the tensions between accountability and agency autonomy). Informal intergovernmental policy coordination, which can be observed in the application of the Open Method of Coordination (OMC), provides another illustrative example (see O’ Brennan and Raunio 2007b). The OMC is an instrument of soft law, characterized by informal and primarily intergovernmental policy coordination. OMC is a benchmarking and monitoring tool providing ‘best-practices’ and guidelines for policy-making. It has been applied to a variety of different policy areas, ranging from social policy and employment to taxation and education. While it is too early to assess the impact of OMC on the achievement of policy objectives, its implications for parliamentary institutions appear more clear-cut. According to some commentators, OMC sidelines both national parliaments and the European Parliament while it has ‘strengthened the leadership role of the Council and the European Council . . . . The Commission has a central role to play through its role as the institution setting objectives and issuing guidelines and recommendations to national governments’ (ibid., p. 279). While national parliaments already have a hard time responding to the challenges posed by European integration and the ‘Community method,’ OMC adds evidence to the executive dominance thesis. For one, civil servants dominate the OMC process and national parliaments have shown little activity in scrutinizing OMC documents. Furthermore, since OMC documents have a status as non-legislative items, national parliaments have less information rights than under the traditional Community method (see ibid., p. 280). Yet, the key problem seems to be that national parliaments and opposition parties in particular refrain from close scrutiny of OMC documents or from using ‘shaming tactics’ vis-à-vis national governments, not just because they are ill-formed. Given ‘procedural ambiguity’ (ibid., p. 281) in the OMC process, such as the absence of set deadlines, it may be difficult for national parliamentarians to have these processes on their radar screens. As a consequence, ‘OMC and intergovernmental policy coordination . . . weakens the transparency of collective decision-making and . . . the accountability of the representatives’ (ibid.).

## 15.5 AVENUES FOR FUTURE RESEARCH

The literature on national parliaments in the context of EU multi-level governance has improved our understanding ‘of how national parliaments “process” European affairs, and what . . . the main difficulties facing national MPs in attempting to control the executive in EU issues [are]’ (ibid., p. 282). Studies of the ‘second generation’ have begun to scrutinize more closely how institutional changes affect the strategies and hence the behavior of parliamentarians in the context of EU policy-making: how do they employ the new institutional opportunity structures to influence EU-related policy issues? Since the evidence is scarce, more work needs to be done here. It is striking that, thus far, little attention has been paid to political parties as central actors in the political process. Some scholars have recently begun to assess how European integration has led to changes in

party organization at the domestic level (Poguntke et al. 2007), yet we know very little about how political parties respond to the challenges of European integration: if we conceive of political parties as collective actors, there are good theoretical reasons to assume that members of political parties in different positions – ‘ordinary’ MPs, members of ‘Europeanized’ committees, party leadership – display different inclinations to react to the challenges of European integration, and, more particularly, to seek to influence the EU decision-making process (see Wonka and Rittberger 2009). Empirical assessments of domestic political attempts at influencing EU decision-making can improve our understanding and evaluation of the ‘democratic deficit’ that results from the proclaimed ‘depoliticization’ of the Europeanization dimension in domestic party systems (Mair 2007). In this context, a number of pressing questions addressing the nexus between institutional and behavioral change and democratic theory suggest themselves since this chapter has only provided a brief sketch about how multi-level governance potentially impacts our traditional model of elective parliamentary democracy. On the conceptual plane, what institutional characteristics should systems of multi-level governance display so as to prevent a ‘Faustian Bargain’ in which democratic values, such as public accountability and political equality, are traded for (alleged) improvements in decision-making effectiveness and increased inclusiveness? Empirically, we possess only impressionistic evidence on how multi-level governance structures impact accountability and political equality: For instance, cross-sectoral comparisons of governance arrangements could provide insights into how alternative governance arrangements – such as OMC, transgovernmental cooperation in the Common Foreign and Security Policy (CFSP) or ‘ordinary’ supranational legislation following the ‘Community method’ – affect institutions and mechanisms designed to ensure political accountability.

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## 16 Regions and the European Union

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### 16.1 INTRODUCTION

Multi-level governance emerged within the context of European studies as an alternative approach to state-centric models of European integration (Hooghe and Marks 2001; Bache and Flinders 2004). Not surprisingly, the starting point for the concept was European Union (EU) structural policy, where in 1988 a reform of the structural funds had given the regions a real voice in EU policy-making for the first time (Marks 1993; Hooghe 1996). But has the EU really sidelined the nation states by mobilizing the regions? Are new relations between the supranational and subnational levels really the harbinger of the nation state's decline as political authority increasingly shifts upward to the EU (Börzel 2005) and downward to the subnational plane (Marks et al. 2008)? Or are the regions merely 'actors in an intergovernmental play' (Pollack 1995; Bache 1999), whose activities at European level reinforce rather than transform intrastate politics?

There is no doubt that the relationship between the EU and the (sub-state) regions of its members has been a bone of contention in political science debate. In this discussion, the 'region' has proven to be a somewhat vague concept that somehow encompasses the entire political space found below central state governments and above local authorities (Marks et al. 2008). In the absence of a consensual definition, 'region' is often used synonymously with 'subnational authorities', or the 'third' or 'intermediate' level of governance (Jeffery 1997). At a minimum, a region appears constituted by three features: (1) the existence of a public entity of clear territorial scope which is (2) situated between the local and the national level and which has (3) legislative and executive institutions capable of authoritative decision-making (*ibid.*, p. 15). According to this definition, the EU, with its currently 27 member states, has 419 subnational authorities or regions, ranging from the German Land of North Rhine-Westphalia with a population of 18 million to Hiiumaa, a *maakond* (county) of Estonia with about 10000 inhabitants.<sup>1</sup> Given the socioeconomic and institutional heterogeneity concealed behind such figures, it is hardly surprising that efforts to theorize patterns of relations between the EU and the national and regional levels of government have posed a significant challenge to scholars of the EU's system of multi-level governance.

After two decades of research, however, nobody has yet provided convincing empirical evidence of a comprehensive trend of subnational emancipation induced by the EU that challenges the overall dominance of the nation states (Keating 2008). Instead of a Europe of the regions, we seem to be witnessing the emergence of a Europe with some regions, where regional involvement varies across both member states and policy areas (Hooghe and Marks 2001).

The patterns of relations between the EU and national and subnational levels of government have been quite diverse and have therefore largely resisted attempts toward uniform theorization. European integration has neither purely strengthened the state,

as suggested by liberal intergovernmentalism (Moravcsik 1994, 1998), nor has the state been automatically weakened as expected by neo-functionalist approaches (Marks 1993; Sandholtz 1996). The multi-level governance literature acknowledges that European integration has not given rise to the emergence of a homogeneous regional level of governance in the EU. In fact, the powers of subnational governments vary immensely across the member states (Keating and Hooghe 1996; Marks et al. 1996; Jeffery 1997). It remains unclear, however, under which conditions European regions have been able to benefit from the upgrading of their role in the policy process, both at the domestic and the EU levels.

This chapter revisits the role of the regions in the EU system of multi-level governance. We argue that the patterns of intergovernmental relations between the EU, the central state and the regions are far too diverse to be explained by the theories of European integration that have dominated the debate on a 'Europe of the regions'. The concept of multi-level governance is better suited to accounting for the varieties of regional government found in the EU. However, this concept has no explanatory power to account for the variation we observe across time, policies and member states. In order to analyse the role of the regions in the EU, we will attempt to disentangle the policy and the polity dimensions of regional government in the EU and then provide an overview of how the relationships between the EU and the national and regional levels of government have evolved. Here, the policy dimension refers to policy content, for instance, the changing patterns of political interaction alongside the production of public policies aimed at developing regional capacities; the polity dimension, by contrast, conceptualizes changes in the institutional set-up of regional participation in national and supranational politics. The chapter concludes with some sceptical reflections on the idea of 'Europe with some regions' and the challenges this poses to research on governance.

## 16.2 THE POLICY DIMENSION

The Committee of the Regions claims that 'around two-thirds of EU legislation is implemented by local and regional authorities in Member States'.<sup>2</sup> The accuracy of this claim might well be called into question, but there is still little doubt that many EU policies have serious repercussions for regional and local levels of government (Hooghe and Marks 2001, pp. 90–91; Börzel 2002, pp. 153–71). It would go beyond the scope of this chapter to explore the role of the regions in the various policy areas affected by Europeanization and so we will limit ourselves to EU structural policy, which aims at reducing disparities between regions by developing their political and economic capabilities through the so-called structural funds.<sup>3</sup>

The Commission came up with the idea of a European regional policy in the late 1960s. At that time, all member states had some kind of national redistributive policy in place to help laggard regions catch up with economic growth and employment. These policies were largely inspired by economic modernization theories and by the concept of a 'territorial dimension' to the (then prospering) welfare state aiming at the alleviation of regional (economic) disparities (McCrone 1969; Tömmel 1997; Benz 2007). The European Regional Development Fund (ERDF) eventually became operative in 1975. It constituted the starting point for an 'active' Community regional policy.<sup>4</sup> In the initial

years, however, the ERDF did no more than refinance national structural projects out of the EU budget. There was no genuine European dimension to structural policy.

This situation changed dramatically in the 1980s. First, with the accession of Greece, Portugal and Spain, the heterogeneity of economic development within the Community increased, which put the issue of cohesion on the political agenda. Second, 'poor' and peripheral territories in Greece, southern Italy, Spain, Portugal and Ireland had little to gain from the internal market project. In order not to delay the completion of the Single European Market, the concerns of the cohesion countries that economic liberalization would make their peripheries lose out even further had to be 'bought off'. Third, EU state aid policy was becoming a real threat to existing state aid for economically deprived regions; thus, even the richer member states had an incentive to Europeanize structural policy (Leonardi 1995; Hooghe 1996).

The southern enlargements of the early 1980s resulted in the establishment of the Integrated Mediterranean Programmes, in other words, special funding schemes for southern peripheral territories (Bianchi 1992). The Commission used these programmes as a testing ground for new funding schemes and innovative modes to implement EU aid. The experience gained constituted the basis for the comprehensive overhaul of the European structural funds in 1988. The essential compromise between net payers and net receivers was that the significantly extended financial commitment of the Community in regional development was to be accompanied by a greater supervisory role on the part of the Commission and thus a greater supranational say in how the additional European resources were to be spent domestically. The reform principles included an 'integrated approach' (using social, regional and agricultural mechanisms in a coherent way), 'concentration' (on target zones), 'additionality' (EU funding was to supplement as opposed to replace national development aid), 'programming' (pluriannual programmes instead of one-off projects) and 'partnership'. Partnership provided the Commission with a powerful tool to open up bilateral relations between the national governments and their regions at the domestic level with the aim of turning structural policy into a process of multi-level cooperative policy-making (Heinelt and Smith 1996; Hooghe 1996; Ansell et al. 1997; Bache 1998; Bauer 2002). In fact, it promised nothing less than the transformation of vertical relationships via functional policy-making. Through the systematic involvement of the regions in the design, management and monitoring of economic development programmes, national governments would lose some of their political authority, while regional actors might shift their political loyalties toward the European centre. EU regional policy became the principal empirical testing ground at the policy level for neo-functional and intergovernmentalist approaches competing for the theoretical prerogative on explaining European integration.

However, a growing number of empirical studies began to forcefully demonstrate that the expectations for a 'Europe of the regions' had been premature. Partnership as the Commission's tool for transforming intrastate politics proved limited mainly for two reasons. On the one hand, regions vary significantly with regard to their institutional and political capacities to exploit the new political opportunity structure offered by EU structural policy. On the other hand, central governments have largely resisted the devolution of any real decision-making power to regional actors (Anderson 1990; Bache 1999). Subsequent reforms further toned down the transformative potential of partnership. The 1993 and 1999 revisions of European structural and cohesion policy extended



the partnership to the social partners, thus undermining the privileged role of regional and local authorities. More importantly, the 1998 reform ensured that partnership had to comply with the institutional set-up of the territorial relations in each member state (Hooghe and Marks 2001, p. 84). Finally, Eastern enlargement dealt another blow to the high hopes for a stronger role of the regions in the EU (Bauer 2004; Scherpereel 2007). The Commission had initially pushed the principle of partnership, linking structural funding as a means of pre-accession aid with demands for subnational capacity development. But with the date of accession fast approaching, the Commission finally dropped its standard request that structural funds had to be administered at regional level. When it became evident that the pre-accession funds had failed to build up sufficient institutional capacity at the regional level, the Commission turned away from its earlier attempts to empower the regions and instead encouraged central state management of structural funds in order to ensure higher financial absorption (Bailey and Proprius 2004; Hughes et al. 2004; Bauer and Kuppinger 2006).

While great expectations of Brussels were dashed in Sicily and in Central and Eastern European regions alike, it is probably exaggerated to describe partnership as having been 'blown completely out of proportion in the literature' and to deny it any 'centrifugal effect' whatsoever (Tsoukalis 1997, p. 208). Nevertheless, it has become clear that the empowering effect of EU structural policy is differential and largely depends on intrastate politics and existing national constellations (not least the particular situation in the respective region with respect to political, institutional and socioeconomic resources). Put bluntly, the new opportunities of structural policy-making were distributed among European regions and subnational authorities according to the Matthew principle – those who already had got more, while those who did not have remained empty-handed. To be fair, however, the regional level may still enjoy a greater say in structural policy today than 20 years ago (Marks et al. 2008), but it would be audacious to trace these changes exclusively back to the effects of European integration, let alone European structural policy (Keating 2008). Moreover, subnational influence varies within emerging patterns of multi-level governance, largely depending on, first, the stage in the policy cycle (formulation, decision-making, implementation) and, second, on the capacities of the respective regional actors (Marks 1996; Jeffery 2000; Hooghe and Marks 2001).<sup>5</sup>

Finally, it should be noted that upcoming change will perhaps not reduce the academic relevance of structural policy, but in practice this is precisely what is likely to happen. Due to Eastern enlargement, the challenges of a policy aiming at economic and social cohesion in the whole EU have become more daunting than ever before in the history of integration. However, the financial resources, though rising in absolute numbers, have been reduced relative to the actual problems. There is consensus that structural funding will have to be increasingly concentrated on the new member states of the Union. For the old member states, regional policy will thus lose significance. Moreover, the chances for developing its apparent or real political transformation potential in Central and Eastern Europe look bleak since, with the exception of Poland, the subnational authorities in these member states tend to be weak (Keating 2003; Pitschel and Bauer 2009). As a result, we may be likely to see two contradictory trends in EU regional policy – policy disengagement and attempts at renationalization in the West, and centralization in the East.

### 16.3 THE POLITY DIMENSION

The concept of multi-level governance was first developed to explain EU structural and cohesion policy, with which the Commission had directly sought to empower the regional level. Despite being a most likely case for the emergence of a 'Europe of the regions', the literature has found no evidence of territorial convergence. Structural policy has given rise to highly uneven patterns of subnational mobilization, which have hardly changed the distribution of power between the central state and the regions. Not surprisingly, therefore, the overall domestic impact of the EU system of multi-level governance on the territorial institutions of the member states has been equally limited and differential. The EU constitutes a comprehensive political opportunity structure that has provided the regions of the member states not only with additional resources, but also with some serious constraints. Moreover, the ability of the regions to make use of the opportunities and avoid the constraints, respectively, has been very much dependent on their political and organizational capabilities (Marks et al. 2008; Börzel 2002).

Next to the 1988 reform of structural policy, it was the Single European Act that led the regions to discover Europe (see Hooghe and Marks 2001, pp. 81 ff.). The completion of the Single European Market entailed a significant transfer of competencies from the national to the EU level, covering a whole range of policy areas that were vital to the interests of the regions. In particular, institutionally well-established regions such as the German *Länder* and the Belgian regions were dissatisfied with what they saw as limited options to participate in supranational policy-making compared to the loss of (co-)decision powers they suffered at the domestic level. While the regions had hardly any say in EU decision-making, they still had to pay for the implementation of many EU policies. In response to the 'uneven distribution of say and pay' in EU policy-making (Börzel 2002), the regions developed three different strategies: (1) gaining direct access and representation at the EU level and thus circumventing the central state, (2) intensifying domestic access to EU policy-making through cooperation with the central state, and (3) 'ring-fencing' regional competencies against the intervention of both the EU and the central state (Jeffery 2000; Börzel 2001; Hooghe and Marks 2001, chapter 5).

The endeavours to grant the regions direct and independent access to the EU level have entailed changes to the institutional architecture of the EU in the form of the Maastricht Treaty. First, Article 146 (today 203) allowed regional ministers to participate in the Council of Ministers in representation of their respective member states. While Article 146 can be considered a constitutional breakthrough for regional participation (Hooghe and Marks 2001, p. 83), in fact only the regions of federal states have been able to gain a seat at the negotiation table, and then only where their exclusive competencies are concerned. Moreover, they have to represent the member state as a whole rather than their particular regional interests. Second, the Maastricht Treaty created the Committee of the Regions (CoR). It must be consulted in the EU legislative process on any decision that is of regional or local concern (regional policy, the environment, education and transport). The CoR can also issue opinions on its own initiative on any other decision. It is clear by now that the CoR has disappointed any hopes that it might become a third chamber in the EU representing subnational territorial interests. As a consultative body, it lacks real political authority. Moreover, its membership is too diverse to allow for the formulation of common positions (Christiansen 1996; Farrows and McCarthy 1997). The prime

ministers of the German Länder not only have different concerns than the mayors of Greek municipalities, they can also use different, more powerful channels to introduce their interests into the EU policy process.

Next to obtaining constitutional representation, subnational governments have sought to establish independent offices in Brussels. Their number has been growing continuously over the last 20 years (8 in 1988; 54 in 1993; 160 in 2002; cf. Marks et al. 2002). The main task of these offices is to gather information and feed it into their subnational networks; they also try to influence policy-making by presenting regional views to the (appropriate) supranational actors. The offices vary significantly with regard to their legal status and their resources. Although they provide the regions with a vital avenue into EU policy-making, they tend to take the form and function of lobbying organizations rather than political representations. As such, they hardly present a threat to the gate-keeping position of the central state in EU policy-making.

Given the limits on direct access to the EU level, the regions have relied heavily on efforts to influence EU policy-making at the domestic level. Virtually all subnational entities with a minimum of executive or legislative power have managed to gain at least formal consultation rights (although sometimes only via representative associations) in the respective national-level procedures to formulate national positions on EU affairs. The regions in the federal member states (Germany, Belgium and Austria) have successfully fought for constitutional co-decision powers whenever issues are at stake that affect their sphere of competencies. Spain has been moving toward a form of regional participation at the domestic level that is strongly oriented in line with the German model. And the Italian government increasingly informs and consults the Italian regions on European issues of their concern (see Börzel 2002). Even for institutionally well-established regions, the national political systems appear to provide the most important channel for subnational influence in the EU system of multi-level governance.

Nonetheless, the attempts of the regions to gain access to EU policy-making both at the EU and the domestic level have been weakening in recent years. The debates in the European Convention and throughout the negotiations of the Treaty of Lisbon have shown that there is little support for formalizing a more comprehensive and qualitatively stronger subnational involvement (Lynch 2004; Bauer 2006). The Treaty of Lisbon does little more than provide some symbolic recognition of local and regional authorities as fundamental structures expressing national identity, a clearer definition of the principle of subsidiarity and the possibility for regional parliaments to participate in the 'early warning' system as a check-up on upcoming EU regulation. The loss of regional momentum may be due to a strategy shift among the more powerful regions, namely the German Länder, which have become increasingly disillusioned with the collective representation of the regions at the EU level, on the one hand, and have reached the limits of participation in EU policy-making at the domestic level, on the other. Thus, the German Länder have switched from 'letting us in' to 'leaving us alone' (Jeffery 2005). Indeed, within the Convention, the German Länder sought to ring-fence regional competencies by pushing for a clear delimitation of competencies (Jeffery 2007). Their attempts to have the Convention adopt a comprehensive 'subsidiarity list' which would limit the EU's legislative abilities failed miserably, however, not least because weaker regions had little interest in renationalizing cost-intensive policies given the weak spending capacities of their member states.

In summary, the widening and deepening of the EU may have rendered attempts to strengthen the regional level of government in the EU futile either by 'reining in' at the EU and domestic level or by 'rolling back' the EU's grip on domestic affairs (Jeffery and Yates 1993). Eastern enlargement has brought into the Union almost only (relatively small) states with centralized political systems, and thus in relative terms Eastern enlargement has clearly weakened the existing regional power base (Batt 2002; Brusis 2002). Today the EU is dominated by regions that are institutionally too weak and/or lack sufficient regional identity to push for a collective regional representation at the EU level. At the same time, a unanimous consent on the renationalization of EU competencies appears unlikely in an EU with 27 member states that have become ever more heterogeneous. The extension of qualified majority voting and the introduction of the double majority in the Council, respectively, undermine the co-decision powers of the regions in the formulation of national bargaining positions.

What essentially remain for regions that seek to extend or at least safeguard their influence on EU policy-making are lobbying activities at the EU level, particularly if they team up with other transnational actors, irrespective of their legal status. However, the capacity of regions to form issue-specific coalitions depends on their ability and willingness to invest organizational and political resources. As we have seen, these capabilities are increasingly varying as the regions of Europe become ever more heterogeneous.

#### 16.4 FAREWELL EUROPE OF THE REGIONS?

Despite some convergence with respect to regional participation at the EU and the domestic level, the regions of Europe have not been able to form an independent third level of government in the EU's system of multi-level governance. Even in structural policy, which explicitly aims at empowering the regions, subnational mobilization has been extremely diverse. The differential impact of European integration on the power of the regions poses some major challenges to students of multi-level governance. Little attempt has been made so far to systematically explain the different types of relationship that have emerged. Institutional capacities are certainly a strong predictor for the relative strength of regions to engage in EU politics (Hooghe and Marks 2001). However, the regions not only require sufficient capabilities to mobilize, they must also have a sufficient self-interest in using them to gain access to the EU policy process. And when they do, different regions may choose different strategies according to the resources that they objectively have at their disposal or according to their political predilections and priorities. The Spanish *Comunidades Autónomas*, for example, have competed with the central state as well as with each other for access to the EU. The German *Länder*, by contrast, have pursued a more cooperative approach in terms of horizontal coordination in EU affairs between themselves and (most of the time also) with the federal level. The strategy choices have given rise to distinct patterns of relations between the EU, the central state and the regional levels of government. While some point to the importance of path dependencies and institutional culture (Börzel 2002), others refer to the demand for regional political emancipation driven by bureaucratic politics (Bauer and Pitschel 2007) or the relationship between the executive and legislature within the regions (Bolleyer 2009).

Theoretical explanations for the differential patterns of multi-level governance in the EU are still lacking, and the effects of these patterns on the effectiveness and legitimacy of EU policy-making have been explored even less thoroughly. Regional co-decision rights in the formulation of national bargaining positions in EU affairs may provide some compensation for the transfer of regional competencies to the EU level. However, since these rights are exercised by regional governments, regional participation contributes to the EU-induced disempowerment of parliaments at the domestic level (see Schmidt 2006). Moreover, increasing regional participation exacerbates problems of insufficient accountability and transparency in EU policy-making. The extent to which such losses of input legitimacy (for example, the decreasing formal involvement of the representative institutions of a democratic system in decision-making) are compensated by greater effectiveness or output legitimacy (for example, the production of collective goods in the implementation of EU policies) is still an open question. Involving regional governments in EU policy-making has certainly been seen as a way to increase the problem-solving capacity of EU policies geared toward the regional level. However, additional expertise in policy formulation and greater acceptance in implementation may be bought off by more lengthy decision-making processes and policies that merely reflect the lowest common denominator.

Today, the prospects for a 'Europe of the regions' look dismal. Yet regions play an important role in the EU system of multi-level governance. What political science, however, has not yet come to terms with is the great variety entailed by the realities of an emerging 'Europe with some regions'. If the long-term aim is to develop a meaningful theory of multi-level governance that gives the regional level its due, then the following challenges should be addressed in the medium-term perspective. First, mapping the different actor constellations and modes of interaction that have emerged between the EU, the central state and the regions might provide a useful starting point (see Arthur Benz' chapter in this volume). Second, instead of invoking grand theories (that do not reflect the realities of regional politics in the EU), more attention needs to be paid to the middle-range mechanisms and scope conditions of regional participation in EU politics. Third, the whole debate about the 'Europe of the regions or with some regions' suffers from a 'policy deficit'. In essence, when it comes down to policy studies, regional political exchange with the supranational level is largely confined to EU structural policies. If we want to bring more substance to the debate, we need more analyses that investigate the differential impact of regional political choices on a larger portfolio of relevant policies. In other words, it is the differential salience of regional politics in the emerging multi-level system of governance that we need to address in order to get to the bottom of apparent policy trade-offs.

## NOTES

1. For these figures and more information on the heterogeneity of the subnational level, consult the web pages of the Committee of the Regions at <http://www.cor.europa.eu>, (access 24 February 2009).
2. Cf. <http://cor.europa.eu/pages/PressTemplate.aspx?view=detail&id=874e9c54-c261-4b06-b287-6fc6094b4a4c>, (access 24 February 2009).
3. The main structural funds, that is, the main funding instruments, are the European Regional Development Fund (ERDF), the European Social Fund (ESF), the European Agricultural Guidance and Guarantee

- Fund (EAGGF) and the Cohesion Fund. More instruments have recently been added, such as the European Grouping of Territorial Cooperation, the Solidarity Fund and the Instrument for Pre-Accession Assistance.
4. However, in retrospect it must be remembered that the 'European Communities' in the European Social Fund (ESF) – with particular tasks assigned to the European Coal and Steel Community (ECSC) – and in Provisions 92–94 of the Rome Treaty concerning state aids already had some leverage, albeit only indirect, to counter regional economic problems and to coordinate member states' responses to them (McCrone 1969, pp. 205 ff.; Armstrong 1978).
  5. It should probably be added that European structural policy also includes transregional elements. In particular, the instrument of Interreg provides funding for joint projects involving three and more regions. But these instruments are small in terms of budget and impact and lasting political effects are rarely reported (see Perkmann 2003).

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# PART IV

## MULTI-LEVEL GOVERNANCE AND COMPARATIVE REGIONALISM



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## 17 Multi-level governance and comparative regionalism

*Alberta Sbragia*

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The title of this chapter refers to some of the most debated concepts in the study of politics. ‘Multi-level’ is found in titles of books about cities as well as about the European Union (EU) while ‘governance’ for its part is used to refer to any number of relationships within nation-states, within the EU, and at the global level. Finally, comparative regionalism, in its turn, is also used in many different ways depending on whether the author is an economist or a political scientist, on the part of the world being analysed, and on whether the subject of the inquiry includes the EU (Sbragia 2008). Because each of these terms is very fashionable, they are used in many ways, in many different contexts, and in very different scholarly communities that rarely if ever communicate with one another.

The term ‘multi-level governance’ (MLG) is most commonly used in relation to the EU. Analysts can emphasize either ‘multi-level’ or ‘governance’ or both. Much of the EU literature focuses on the ‘multi-level’ aspect of MLG – the (often interdependent) relationship between Brussels, national capitals and (at times) subnational centers in the policy process. Such an approach differs from the more traditional ‘intergovernmental’ bargaining familiar to students of international relations. The multiple and complex connections among territorially defined levels of authority and among various policy and political arenas made the approach particularly attractive to EU scholars (Hooghe and Marks 2001).

The attraction of MLG to EU scholars was based on the fact that it seemed to capture the lack of ‘stateness’ that characterizes the EU. Member state governments were important, but the overall structure was non-governmental while still being authoritative. In essence, the approach allowed EU scholars to analyse a policy process that produced and implemented far-reaching regulations in a host of areas without benefiting from either a government or a state (Kohler-Koch and Eising 1999; Kohler-Koch and Rittberger 2006; Tommel and Verdun 2009).

However, a very large literature on ‘governance’ (*sans* a ‘multi-level’ modifier) has also emerged which again focuses on Europe – but on European states rather than the EU. That literature has been rooted in the study of comparative public administration and comparative bureaucracy. This state-focused version of governance has been characterized as emphasizing the process of ‘sustaining coordination and coherence among a wide variety of actors with different purposes and objectives such as political actors and institutions, corporate interests, civil society, and transnational organizations’ (Pierre 2000, pp. 3–4; see also Treib et al. 2007).

Governance in this context implies a retreat, if you will, of the hierarchical state. It focuses on non-governmental institutions, public-private partnerships, formal and informal policy networks, various forms of citizen participation and private governance (Pattberg 2005) as well as on negotiations among independent organizations whose

collective cooperation must be obtained in order to address various types of problems. It is often, although not exclusively, concerned with policy issues that might be viewed as ‘managerial’ or ‘technical’ rather than partisan or overtly political or ideological.

## 17.1 COMPARATIVE REGIONALISM

The term ‘comparative regionalism’ is also very broad and ill-defined. As used here, it refers to three cases of regionalism: the North American Free Trade Agreement (NAFTA), the Associations of Southeast Asian Nations (ASEAN) and the Common Market of the South (Mercosur/Mercosul). Each represents a different form of regionalism, and each represents a different level and form of regional authority. While each of these three regional groupings is engaged in regional policy activity rather than simply focusing on intra-regional dialogue or preventive diplomacy, such policy activity is very different from that in which the EU is engaged. ASEAN has carefully avoided any similarities to the EU, while Mercosur, in spite of copying its institutions from the EU and rhetorically viewing it as a ‘model,’ has very carefully sidestepped the kind of institution-building which would be required to move toward the kind of regional authority which the EU is able to exercise. NAFTA, for its part, is as authoritative as the EU at its most authoritative, but its scope is limited to that of a very expansive trade agreement and accompanied by an ironclad commitment to avoid institutionalization and institution-building.

However, a crucial distinction exists between NAFTA, on the one hand, and ASEAN and Mercosur, on the other. NAFTA members include Canada and the USA as well as Mexico whereas members of the other two regional organizations are all developing countries. NAFTA has been shaped and implemented according to the operating assumptions and practices of advanced industrial states whereas the evolution and implementation of both ASEAN and Mercosur have been shaped by the political and economic dynamics of developing economies.

The concept of MLG at the regional level is especially tricky when examined outside of the EU. Developed in the context of a highly organized regional organization with (by global standards) exceptionally institutionalized and wealthy democratic states, MLG is, perhaps not surprisingly, more broadly applicable to the NAFTA than it is to regional organizations in the developing world.

NAFTA, in which the USA plays a pivotal role, is far more institutionalized and expansive in its reach than regional organizations whose members are exclusively developing countries. Although, as we shall see, the dynamics of MLG in NAFTA are necessarily very different from those in the EU, we can at least think of ways of comparing NAFTA and the EU.

However, examining MLG in regionalism in the developing world presents more daunting challenges. The assumptions, which underlie MLG à la EU, are perhaps best illuminated by the experience of Southeast Asia. The ten states of Southeast Asia have over time constructed the ASEAN, the longest-lived significant regional organization in the developing world. At first glance, ASEAN might be viewed as similar to the EU. Yet its members differ from the EU’s members in crucial ways.

Meredith Weiss (2008, p. 147) argues, ‘states in the region boast what look like civil

societies but not always in the context of substantive democracy (and hence real autonomy of societal actors from the state, civil liberties, etc.) or democratization.’ Thus, what may seem to the uninitiated to be examples of various dimensions of MLG may in fact lack the democratic underpinnings which the EU literature takes as a given (Kuhonta 2008). In summary, ASEAN raises the question of whether MLG as conceptualized in EU studies can be said to exist in regional organizations that include non-democratic states.

Regional organizations in which all members are democratic states also, however, present challenges for the study of MLG. Mercosur is a case in point. Brazil, Argentina, Paraguay and Uruguay, the organization’s members at the time of writing, are all fairly well-institutionalized democracies. Civil society is organized and very active in Mercosur member states (Hochstetler 2008). Yet, the regional organization, designed to emulate the EU by creating a customs union, is still not even a free trade area. Further, its institutional structure is overshadowed by what has come to be known as ‘inter-presidentialism’ – a decision-making process dependent on the personal intervention of the member states’ presidents (Malamud 2003, p. 66). Finally, since MLG highlights the implementation of EU policies at the member state level, the fact that Argentina and Brazil are among the most decentralized states in the world (Martell 2007, p. 1595) raises still another set of questions about the inherent limits which Mercosur may face as a regional policy actor.

This chapter can only outline some of the key questions that arise when exploring MLG outside the EU. It must be noted that the type of scholarly research on developing countries themselves, which would be necessary to seriously evaluate any version of MLG in the developing world, is still much less developed than the literature on Europe (Haggard 2008; Kingstone and Power 2008; Kuhonta et al 2008). The work of scholars currently focused on national political systems within regional organizations in both Asia and Latin America will be critical in better evaluating the dynamics of regionalism and the possible evolution of governance in any form, MLG included.

## 17.2 THE AMBIGUITIES OF REGIONALISM AS A ‘MULTI-LEVEL’ CONSTRUCT

The contours of ‘regionalism’ are often ambiguous. For example, regionalism in Asia can refer to ASEAN, to ASEAN plus Three (APT), Asia Pacific Economic forum (APEC), ASEAN Regional Forum (ARF), the Chiang Mai Initiative (CMI) and the East Asia Summit (EAS). Memberships are often overlapping (the ten ASEAN members are members of all the organizations mentioned above), and the USA (APEC, ARF), the EU (ARF), and Australia and New Zealand (APEC, EAS, ARF) are involved in some of the regional groupings as well (Pempel 2008). Thus, regionalism in Asia does not have the relatively neat symmetry one finds in Europe.

A somewhat similar situation is found in South America. There Mercosur is the best known and most institutionalized regional organization. Brazil, Argentina, Paraguay and Uruguay are members while Venezuela is a candidate for membership but has not yet been approved by the Paraguayan Parliament. Venezuela is also the leader of the Bolivarian Alliance for the Americas (ALBA) which includes Bolivia and Ecuador as well as Caribbean states and Cuba. However, the Andean Community still exists while

the Union of South American Nations (UNASUR in Spanish), which brings together, for the first time, all South American states, is based on the Cusco Declaration of 2004.

The fluidity of regionalism in both Asia and South America, and the lack of institutionalization which such fluidity signals, is an important caution to scholars who conceptualize regionalism along the lines of the EU. The level of institutionalization in fact is very slight if compared to that of the EU. However, if compared with the long-standing lack of contact between governmental leaders within both Asia and South America, the creation of so many different regional fora indicates a growing willingness to engage in dialogue and at times collaborate in two areas of the world in which political leaders had very little contact with each other until relatively recently.

While (West) European leaders have historically been linked by bloodlines and, more recently, by membership in a whole host of regional institutions dating back to the Organization for European Economic Cooperation and the Council of Europe, political elites in the developing world have often had stronger links to former colonial powers than to their neighbors. In a similar vein, 'the colonial legacy . . . had a profound impact on the nature of public administration' in Southeast Asia (Haque 2007, p. 1299). At this point, regional leaders are engaged in the preliminary work required for the exercise of any kind of regional authority. There is no guarantee that any single regional grouping (with the possible exception of ASEAN) will be able to achieve the collective and exclusive exercise of regional public authority over a defined territorial space, however, given the fluidity and competition among different regional groups in the same geographic area.

### **17.2.1 MLG and Comparative Regionalism**

The term 'multi-level' does introduce the sense of policy being made at a regional center (with input from member states) and then being implemented at the national level. Some kind of hierarchy is foreshadowed even if, in the case of the EU, that hierarchy is more ambiguous than it is in a traditional state. Brussels is widely viewed as the political center of the EU, even though it is not a capital à la Berlin or Rome. The EU's organizational identity is based on the key institutions located in that city – the European Commission, the European Parliament and the Secretariat of the Council of Ministers. Although geographically located outside Brussels, the European Court of Justice (Luxembourg) and the European Central Bank (Frankfurt) are generally considered to form part of the 'Brussels' machinery of governance.

In contrast, other regional groupings, such as Mercosur and ASEAN, have not created a 'political center' like Brussels. While they do have secretariats, these are very small and are light years away from possessing the kind of institutional power collectively exercised by the EU's Brussels institutions. The locus of authority rests with the member state governments that deal with each other in an intergovernmental fashion. The concept of supranationality is completely absent as the members are obsessively concerned with protecting their sovereignty from intrusive neighbors. Neither has ASEAN nor Mercosur developed what Helen Wallace has termed 'intensive transgovernmentalism' (Wallace 2005, pp. 87–8). Whereas policy areas in the EU that have been insulated from supranationality are governed through intensive collaboration among national policy-makers, such intensive collaboration seems to be rare in other regional organizations. While regionalism has, as we shall argue, encouraged the development of

networks among national officials, such networks are far shallower than those found in the EU.

Finally, scholars of MLG rooted in the field of public administration have focused on network governance research as useful in understanding policy-making in advanced industrial states (Sorensen and Torfing 2005, 2007). The underlying premise of such research is that '*governing processes . . . are no longer fully controlled by the government, but subject to negotiations between a wide range of public, semi-public and private actors, whose interactions give rise to a relatively stable pattern of policy making . . . . It is this pluricentric model of coordination that in the literature is dubbed governance networks*' (ibid., 2007, pp. 3–4).

Such networks flourish in advanced industrial democratic states with strong administrative structures and organizations rooted in a well-developed civil society. It is not surprising, therefore, that they have emerged as important features of MLG in the EU (Kohler-Koch and Eising 1999; Borzel and Panke 2007). In a regional organization such as ASEAN in which some members are clearly not democracies and others still face the task of institutionalizing democratic rule, the kinds of governance networks found in Europe are not an option. Governance networks of that type require both democracy and a well-developed civil society.

### 17.3 FUNCTIONAL NETWORKS VERSUS PRESIDENTS

However, the creation of a regional organization can trigger the development of functional networks. While governance networks as defined in the relevant European literature bring together actors from different societal arenas, a more traditional network brings together actors from the same arena. At the regional level, such an exercise is crucial as actors operate within their own state and are unlikely to meet their counterparts from even neighboring states unless an explicit effort is made to bring them together. The development of functional networks, therefore, represents a key step in building a region-wide corps of officials who may eventually be open to coordinating their response to broadly similar problems.

ASEAN has been particularly active in building region-wide networks of public officials as well as expert analysts. Such efforts cross a spectrum of policy areas. The ASEAN Institute of International Studies (ISIS), for example, is a network of now nine institutes focused on policy-oriented scholarship with the Center for Strategic and International Studies (CSIS) in Jakarta acting as the secretariat for the network (Cesar de Prado 2007, p. 101). In functional areas, ASEAN brings together senior officials and experts in areas such as forestry and disaster management. At the ministerial level, environment ministers decided to deal with the environmental hazards caused by the haze produced by massive forest fires by creating a Regional Haze Action Plan to focus on cooperative measures to be carried out by ASEAN members' officials. Such networks are functionally specific and typically bring together government officials. Further, national governments bring officials from ASEAN members to conferences on issues such as improving the civil service so as to improve state capacity. Finally, the ASEAN Plus Three (APT) group – ASEAN plus China, Japan and South Korea – has also begun developing networks, particularly in the area of emerging infectious diseases.



While these types of networks would not seem very impressive to scholars of network governance in Europe, in the Asian context they represent an important (if preliminary) step toward regional cooperation. The focus on governmental/public sector officials allows sensitive issues pertaining to civil society – or its lack – to be avoided. Given the diversity of regime types in ASEAN – which include a monarchy, democracies, states with one-party communist rule and a brutal military dictatorship – a regional focus on government officials represents the common denominator across the regional grouping.

Of course, the creation of networks does not address ASEAN's lack of enforcement mechanisms. The lack of such mechanisms helps ensure that ASEAN, judged by EU standards, is an ineffective regional actor. Yet, given the lack of supranationality accompanied by the lack of legally enforceable binding commitments, the creation of networks is a necessary first step in moving toward greater regional cooperation in limited areas of common concern.

Mercosur, for its part, has set itself much higher aims than ASEAN with its commitment to form a customs union. Yet, it too has rejected supranationality and effective enforcement mechanisms. Decisions are made by national presidents rather than being produced through a more standard policy-making process. Further, Brazil and Argentina are clearly continually in the driver's seat. In fact, it is often difficult to distinguish Brazilian – Argentinian bilateral relations from those within Mercosur. Not surprisingly, Uruguay especially has continued to express very strong dissatisfaction with the way Mercosur functions and signed a bilateral investment treaty with the USA, which went into force in November 2006.

Although ASEAN is less formally institutionalized than Mercosur, networks within ASEAN play a more important role than they do in Mercosur. One reason for such a disparity between the two regional organizations has to do with the numbers and types of states belonging to each. ASEAN has five relatively large members – Indonesia, Thailand, Vietnam, Burma/Myanmar and the Philippines with a population of roughly 543 million and five small members (Brunei, Cambodia, Laos, Malaysia and Singapore) for a total population of roughly 580 million. Mercosur, for its part, has only four members, with Brazil being vastly larger than the other three members. Brazil, with a population of roughly 200 million is far larger than Argentina with 41 million, not to mention Uruguay with 3.5 million and Paraguay with 7 million.

While Indonesia (ASEAN's largest member) accounts for roughly 40 percent of ASEAN's population, Brazil accounts for 80 percent of Mercosur's population. Given Brazil's size and economic strength, Mercosur is an unbalanced regional organization as well as incorporating a small number of members. ASEAN, in contrast, is both more balanced and, with a larger number of members, more likely to find the development of networks useful for the gradual development of a regional policy-making environment.

## 17.4 NAFTA AND BEYOND

NAFTA, an expansive trade agreement between the USA, Canada and Mexico which came into effect in 1994, enjoys the greatest degree of regional institutionalization outside the EU. Given the legal and legislative systems operative in both the USA and

Canada and the commitment of successive Mexican governments to the agreement, it is not surprising that it has been implemented with relatively few problems. Deadlines have been largely met, although full access to US highways by Mexican trucks has been contested in both Congress and US courts.

The actual impact of NAFTA has been hotly debated in all three countries. Sidney Weintraub argues that neither Mexico nor the USA obtained the economic growth they expected from NAFTA whereas Canada did see a desired outcome in an 'upgrade in the value added' in its exports (Weintraub 2004, p. 14). Stephen Clarkson (Chapter 18 in this volume) argues that the agreement itself constrained Canada and Mexico far more tightly than the USA, while US critics of NAFTA view the agreement as having been instrumental in the out-sourcing of US jobs.

However, the free trade area created by NAFTA should not be equated with the economic space created by the EU's customs union or its single market. The EU as a customs union with a common external tariff, for example, does not impose rules of origin (ROO) upon its member states. In contrast, 'all trade under NAFTA is supported by an extensive system of ROO' and NAFTA's rules of origin are viewed as comparatively restrictive, even when compared with other US free trade agreements (Estevadeordal 2000; Garay and De Lombaerde 2006; Kunimoto and Sawchuck 2006, pp. 276, 284). NAFTA members maintain an independent trade policy in contrast with the EU's unitary policy.

NAFTA was carefully crafted so as to avoid the possibility that integration would move beyond the level agreed to in the original trade agreement. Institutional development à la EU was to be avoided. Nonetheless, NAFTA has led to what Mark Aspinwall (2009) has termed 'NAFTA-ization.' Although no policy-making institutions resembling those of the EU have been created or emerged, there is now a much denser network of relationships, contacts, and institutionalized consultation and cooperation than in the pre-NAFTA period. The contacts between US and Mexican officials in particular have developed and become regularized to an extent which is often overlooked (*ibid.*).

Most recently the Security and Prosperity Partnership (SPP) has led to 20 working groups that have been able to achieve consensus in a variety of technical areas, especially in the area of harmonization. NAFTA is no longer simply a self-executing trade agreement but is moving toward becoming a relatively well-institutionalized intergovernmental institution, which brings together relevant Canadian, Mexican and US bureaucratic officials and thereby 'builds trust, links technical experts across borders and depoliticizes the issues' (*ibid.*, p. 12). While NAFTA lacks supranationality and has not created an organizational identity, it has evolved into an institution in which officials meet, consult and decide in a variety of technical arenas.

SPP initiatives, however, have led to attacks by both liberals and conservatives. Some conservative groups view it as underpinning the so-called 'NAFTA Super Highway' which in turn is thought to be a key project in the eventual formation of a (feared) North American Community which would destroy US sovereignty. On the other hand, the conservative but established Heritage Foundation argues that sovereignty is protected: 'Actions taken by each of the partner countries occur within the realm of their own existing laws and thus pose no threat to sovereignty' (Markheim 2009, p. 2). For its part, Plan Mexico (Merida Initiative), signed into law in mid-2008, represents an SPP initiative in the area of regional security. Liberal critics argue, 'it fundamentally restructures the

U.S.-Mexican bi-national relationship, recasts economic and social problems as security issues, and militarizes Mexican society' (Carlsen 2008).

The SPP in turn led to the establishment of the North American Competitiveness Council (NACC) which in 2007 brought together 30 corporate Chief Executive Officers to provide a private sector perspective on issues related to competitiveness. The committee was criticized for excluding labor representatives as well as environmentalists. With the election of Barack Obama as President, it is unclear whether the NACC will continue to play a role in NAFTA's developing institutional make-up.

In summary, NAFTA has led to an unexpected level of interaction and institutionalization given the lack of contacts which had traditionally existed between the USA and Mexico, on the one hand, and Canada and Mexico, on the other, not to mention the complete lack of trilateral contacts in the pre-NAFTA period. Further, intergovernmentalism (and transgovernmentalism) within NAFTA has been accompanied by a type of 'multi-level' governance which had not existed in previous trade agreements negotiated between developed countries.

Although NAFTA 'incorporates several distinct dispute-settlement procedures' (Abbott 2000, p. 536), one of them – Chapter 11 – has given rise to a good deal of criticism by both non-governmental organizations and elected officials. In fact, Chapter 11 – the section of the agreement concerned with the protection of private investors – has triggered 'widespread accusations of illegitimate conduct by claimants, states parties, and arbitral tribunals' (Brower 2003, p. 40). It has mobilized both non-governmental organizations and a host of elected officials, especially in Canada and the USA, who view the implementation of Chapter 11 as undermining the ability of sovereign states to shape their own regulatory regimes in a wide variety of public policy areas.

Essentially, NAFTA's Chapter 11 gives investors (that is, large transnational corporations) from the USA, Canada and Mexico the right 'to seek settlement of investor-State disputes outside the State's domestic courts, or any domestic court for that matter, through alternative dispute resolution (ADR) mechanisms – specifically, but not exclusively arbitration' (Gal-Or 2005, p. 123). Rather than permitting only governments to bring cases to international arbitration, 'Chapter 11 permits all investors to launch claims unilaterally' (Capling and Nossal 2006, p. 155). No government's consent is required for investors to be heard by a tribunal. In fact, an investor can ask for a tribunal to hear a case even after, for example, a state court in the USA has ruled against it (Liptak 2004). Chapter 11 uniquely 'empower[s] private actors' compared to NAFTA's other dispute settlement procedures (Morales 1999, p. 48).

NAFTA's Chapter 11 granted private investors, rather than NAFTA governments, access to dispute settlement bodies, and thereby empowered investors vis-à-vis public authorities in a NAFTA member state other than their own. The three-member tribunals which hear the claims are not permanent institutions – one member is selected by the firm, one by the government against which the claim is being made and one by mutual consent. Tribunals cannot force the government in question to change the law being challenged, but they can award very large monetary damages. These tribunals, in fact, exemplify what Walter Mattli has termed 'private justice in a global economy' (Mattli 2001).

Chapter 11 came under public scrutiny when corporations began to use it to challenge both national and subnational regulations which they claimed reduced the value of their

foreign direct investment and thus were 'tantamount to' expropriation. Such regulations, however, were adopted to achieve public policy objectives unrelated in any way to foreign investment (Gagne and Morin 2006, p. 365). From all accounts, the possibility that corporations would use Chapter 11 to challenge, for example, state environmental regulations had not been foreseen at the time of NAFTA's passage through Congress (Liptak 2004).

Initially, US corporations utilized the provision against Mexico and Canada; Canadian firms subsequently began to bring cases against the USA and opposition to Chapter 11 began to build in both the USA and Canada. When Canadian corporations argued that US state regulations, for example, in the environmental arena had damaged their investment, associations representing US state and local elected officials began to mobilize against Chapter 11. The issue began to receive a good deal of attention in the USA from non-governmental organizations in particular (Capling and Nossal 2006, pp. 161–2). In Canada, criticism has also been loud in spite of the fact that in 2007 the Canadian government won a victory against United Parcel Service (UPS) which argued that Canada Post was competing unfairly because it had moved beyond simply delivering the mail and was undercutting UPS's prices (Chase 2007).

As of 1 January 2008, the Canadian Centre for Policy Alternatives reported that 18 claims had been lodged against Canada, 14 against the USA and 17 against Mexico. The USA had won the four decided cases brought against it, whereas both Canada and Mexico had had to pay damages (Sinclair 2008).

When one compares NAFTA to Mercosur and ASEAN, NAFTA stands out. It is based on a highly detailed 1000-page trade agreement that goes far beyond World Trade Organization (WTO) parameters, thereby being characterized as a 'WTO plus' agreement. Thus, the free trade area that it established, while not having an organizational identity, is highly institutionalized in that its parameters are governed by the provisions of a very detailed agreement which has been implemented to a significant degree. While the EU focuses on both 'market building' and 'market correction' (Sbragia 2000), NAFTA has very successfully concentrated on the first. Its success can be contrasted with the slow progress in 'market building' in both ASEAN and Mercosur (Heymann 2001; Bouzas et al. 2002; Sbragia 2002; Nesadurai 2003; Miranti and Hew 2004; Philipps 2004; Schelhase 2008).

While Mercosur (due to Brazil's role) has been successful as a block in stopping the US desired Free Trade Area of the Americas and the ten ASEAN members ratified an ASEAN Charter in late 2008, the two regional groupings are far less integrated than are the three NAFTA members. However, Mercosur and ASEAN are able to play an external role at times, whereas NAFTA does not. Both Mercosur and ASEAN have a legal personality whereas NAFTA does not. NAFTA has a powerful intra-regional influence, whereas Mercosur and ASEAN may well be more important extra-regionally than intra-regionally (Komori 2007).

## 17.5 CONCLUSION

When applied to the topic of comparative regionalism, the concept of MLG needs to be 'unpacked' so as to better understand the assumptions which are built into the term. Those

assumptions do not travel well in the developing world, and to travel at all, they need to be divorced from the concept of supranationality. Nicola Philipps, referring to the literature on the EU, concludes that it ‘has little comparative utility, especially those strands of it which concern themselves primarily with supranationalism’ (Phillips 2004, p. 38).

In fact, regional intergovernmental organizations need to be examined, not in contrast to the EU, but as institutional constructs which can, standing on their own, provide a type of governance which differs from that associated with ‘multi-level governance’ as developed in Europe. ASEAN, Mercosur and NAFTA, while not engaged in the kind of governance underlying the term as applied to Europe, nonetheless do play a role in their respective areas of the world. Further research on that role can use the MLG literature as a starting point but will need to recast it in light of the very different conditions found both in ASEAN and Mercosur member states as well as the unexpected power given by NAFTA to transnational corporations to challenge public sector regulation of private sector activity.

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## 18 Multi-modal governance in North America

*Stephen Clarkson*

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Ever since the European Community emerged on the world stage, observers have been watching other continents for signs of regional development. Indeed, it is now not unusual to read such statements as ‘in January 1994, North America formally entered the club of world regions, launching the project of an integrated economic space.’<sup>1</sup> Reflecting on the North America Free Trade Agreement’s (NAFTA) first decade, the American political scientist Robert Pastor affirmed in a similar spirit that ‘[f]or the first time, “North America” is more than just a geographical expression,’ with NAFTA being ‘merely the first draft of an economic constitution for North America.’<sup>2</sup> While it is intellectually tempting to join Pastor in visualizing North America as a world region, whose subsequent ‘drafts’ will approximate the sophisticated governance of the European Union (EU), this chapter’s subtext maintains that North America does not share a common DNA with Europe. Its main contention is that, as a recently constituted ‘world region,’ North America is not even a poster child for the multi-level governance, understood in our editors’ introductory words as a coherent set of nested policy regimes providing effective regulation with a satisfactory compliance rate (Smith 2000; Clarkson 2008).

While each of its three member states’ politics can be analysed in terms of the standard ‘levels’ of the Mexican, American and Canadian federations (each having federal, state/provincial and municipal governments), this chapter argues that the ‘governance’ taking place across the borders of North America can best be understood in at least four different modes.

1. North America has a disparate set of remarkably weak continental institutions whose function is mainly to settle governments’ and investors’ legal disputes arising out of NAFTA’s provisions.
2. Some economic sectors demonstrate significant transborder governance.
3. In other sectors trinational regulatory harmonization results less from continental than from global governance.
4. Since September 2001, traditional forms of intergovernmental relations have predominated in matters of military defense and border security.

The elaboration of these four themes will show how North America’s governance’s trendline is moving away from – not converging with – the hegemony off-setting, solidarity boosting model that energized transnational regionalism in Europe.



## 18.1 MODE 1: FORMAL TRILATERAL INSTITUTIONALIZATION

If North America qualifies for consideration as a world region, this is thanks to two economic agreements, the first forged bilaterally between the USA and its northern neighbor as the Canada-United States Free Trade Agreement (CUFTA, which entered into force 1 January 1989), and the second, which came into effect exactly five years later when CUFTA's provisions were deepened and extended to include Mexico within NAFTA (Leycegui and de Castro, 2000).

The continent acquired a more substantial international image when NAFTA was born, but when compared with the EU's substantial institutions, North America's turned out to be largely hollow (Clarkson et al. 2005). It had no legal personality, so – unlike the European Commission – could not negotiate international agreements. With no executive, legislative or administrative bodies of note, only its judicial mechanisms could claim any substance. Even as instruments of conflict resolution, NAFTA's dispute-settlement mechanisms proved less effective than those of the World Trade Organization (WTO). On issues where powerful US lobbies wielded political clout, the 'level' of government that decided the outcome of disputes was Washington which has repeatedly defied judgments favoring Canada and Mexico by both NAFTA and WTO arbitral panels.

NAFTA's institutional vacuum does not mean that its norms, rules and rights are inconsequential. On the contrary, these three components of what became part of what can be understood as each signator's external constitution<sup>3</sup> severely disciplined the practices of the two peripheral states, if not those of the center. For instance:

- The extension of the national treatment norm beyond governing goods (as under the General Agreement on Tariffs and Trade (GATT) to include foreign investment required a wholesale abandonment of Canada's industrial strategy policies that had previously bolstered domestic corporations' capacity to help them compete with foreign – mainly American – companies. Applying national treatment to investment also nailed shut the coffin of Mexico's import substitution industrialization model, which had delivered an annual growth rate of 6 percent from World War II to the early 1980s.
- Dozens of new rules prohibited Canada, for example, from imposing on the petroleum it was exporting to the USA a higher price than that prevailing in its domestic market or from reducing oil exports to preserve diminishing energy reserves. For its part, Mexico agreed to open up its banking sector to foreign ownership.
- Important new rights were granted foreign investors who could now directly sue North American host governments from the municipal to the federal levels for regulations they deemed tantamount to expropriating their corporations.

Although these norms, rules and rights were consequential, NAFTA's legislative and executive institutions had little substance. To be sure, NAFTA boasts an executive body, the North American Free Trade Commission, but this commission has no staff, no address and no budget. Despite the substantial responsibilities for managing NAFTA's implementation conferred on it by the Agreement, this trade commission consists solely

of sporadic meetings by the three countries' trade minister, secretary or representative who have turned out to be loath to make major decisions.

As for a legislative capacity to add to or amend NAFTA's new norms, rules or rights – a necessary feature of any multilateral body that hopes to retain its relevance as conditions evolve – this 'world region' has none. Changes in NAFTA's normative structure require trilateral intergovernmental negotiations by the three states' federal executives.

Nor does NAFTA have much in the way of an administrative arm. Buried in each of the three governments' trade departments, there is a small office responsible for documenting NAFTA-related business. NAFTA's remaining bureaucratic sinew consists of some 30 committees and working groups mandated by the Agreement's various chapters. These trilateral groupings, which are, in theory, staffed by middle-level civil servants from each federal government, barely exist in practice.<sup>4</sup>

NAFTA's only institutional features with any strength are judicial (Vega and Winham 2002). But of the half dozen different dispute settlement mechanisms, two have remained dormant (those relating to energy and financial institutions) and two are ineffectual (those of the Environmental and Labour Cooperation Commissions). The Agreement's chief conflict resolution processes are specified in Chapters 20, 19 and 11. Disputes between the parties over the interpretation and implementation of NAFTA's provisions were to be resolved by panels established under Chapter 20's clauses, but the panel rulings merely take the form of recommendations submitted to the NAFTA trade commission – that is, the three trade ministers – who, in turn, can only offer suggestions to their governments about how to proceed. When, for instance, after long delays caused by Washington's deliberate obstructionism, a NAFTA panel ruled that the US government had failed to honor its obligation to allow Mexican truckers access to its market, Washington was not obligated to change its ways and still persists in its non-compliance.

Putatively binding rulings are made by panels established under Chapter 19, which substitute for domestic legal appeals of the anti-dumping or countervailing duty determinations made by individual states' trade-administrative tribunals. While useful in the majority of cases, the US government's refusal to comply with these rulings in such high-profile cases as the long-drawn-out softwood lumber dispute with Canada underlines the point that NAFTA's institutions enjoy strikingly little clout when it comes to containing the unilateral propensities of the region's hegemon.<sup>5</sup>

The single arbitral function with definite muscle is the investor-state dispute process established in Chapter 11, which allows NAFTA corporations to initiate an arbitration process governed by World Bank rules in order to challenge the validity of a domestic measure they claim has expropriated their assets. Because these rulings have effect in the defendant jurisdiction, they have been the cause of much dismay among nationalists who protest the derogation of domestic judicial sovereignty and among environmentalists who believe the threat of such actions prevents the national regulation of corporate polluters. But because the number of Chapter 11 cases remains small and their effects limited, their overall institutional significance should be considered only moderate.

In short, the transborder governance established by NAFTA's institutions is considerably less than observers had cause to expect when listening either to proponents or opponents of what President Ronald Reagan had called North America's economic constitution. Compared to Norway, which must – with exceptions for the farming, fishing and petroleum sectors – implement European Commission directives even though it is

not a member of the EU, NAFTA's institutional superstructure is flimsy, and its impact on the two peripheral states is low.

## 18.2 MODE 2: TRANSBORDER CORPORATE GOVERNANCE IN SECTORS WHERE GEOGRAPHY MATTERS

Even if North America is less institutionally imposing than the original fanfare over NAFTA led many to hope or fear, the continent may have a greater political-economic reality in other, more commercial respects (Globerman and Walker 1993; Fry and Bybee 2002; Hufbauer and Schott 2005; Weir 2005; Shamsie and Grinspun 2007). Transborder governance can develop when clashes of economic interests need to be resolved or when transnational corporate demands need to be addressed. In such sectors as agriculture and steel where geographical proximity matters, powerful US transnational corporations have generated elements of a continental political economy. In the wheat and corn markets, for example, food processing transnationals have largely overcome domestic farm producers' resistance to imports – whether of Canadian wheat to the USA or of US corn to Mexico.

This section will consider three instructive cases: steel, automobiles and textiles. The steel industry experienced unintended consequences from the Agreement, and if NAFTA produced any winners, these were surely the US auto and textile sectors, which had managed to obtain rules-of-origin protection – at least for a time – from their Asian and European competitors.

### 18.2.1 Sectoral Continentalization: Steel

In spite of the fact that, as traditional heavy industry, steel provides the backbone of the old manufacturing economy, it did not do well under NAFTA. Since the Agreement failed to eliminate or even reduce the protectionist anti-dumping and countervailing duty actions with which the US steel industry had long been harassing imports from Canada, Canadian steel companies invested heavily in the US market. Their American subsidiaries became active as members of such US industry associations as the American Iron and Steel Institute and proceeded to lobby – along with the US steelworkers' union, which had fortuitously been run for a decade by Canadian presidents – to exempt Canada (and also Mexico) from the Bush administration's safeguard duties on foreign steel imports. This collaborative action suggested that, in the steel sector, a single, if informal, governance space was developing in which Canadian, and later Mexican, firms partially Americanized themselves within the US economy, rather than create a continent-wide industry containing nationally competitive elements. Symptomatic of this trilateralism was the creation of an instrument of trilateral governance, the North American Steel Trade Committee (NASTC). The NASTC involves the three governments with their respective industry associations in order to develop common North American policy positions at the Organization for Economic Cooperation and Development (OECD) and the WTO.

The Canadian industry was much better positioned to participate in the US economy than was its Mexican counterpart, which – having flourished under import substitution

industrialization following World War II – was seriously weakened by the lifting of government protection in the 1980s. But the acquisition in 2006 of all six of Canada's largest domestically owned steel corporations by Brazilian, Indian and American conglomerates suggests that NASTC's apparently continental regulatory consolidation is being trumped by the steel industry's corporate globalization. Even under global ownership, however, the sector remains a predominantly regional production system.

### **18.2.2 Automobiles**

As the culmination of many years of US automotive transnational corporations (TNCs)' lobbying, NAFTA was thought to have set up a fully integrated system of production for those manufacturers – principally the Detroit Three – that could meet its protectionist rules-of-origin requirements. However, the trilateral working groups created to negotiate continental safety and emissions standards proved incapable of producing the regulatory harmonization necessary for a fully integrated continental production system.

Meanwhile, global competition undermined the American auto assemblers' oligopolistic dominance in the continent. Transcontinental corporate consolidation through mergers and equity linkages, which had created six automotive groups accounting for 80 percent of world production, was developing a regime of accumulation which was truly global, generating pressures to create a globally harmonized system of regulation for the automotive industry. At the same time, continuing foreign auto and auto-parts investment in both Ontario (which boasts an excellent transportation infrastructure and the lower costs for employers of a public medical system) and Mexico (which offers well-trained labor power at one-fourteenth of US wages) reduced the disparity between the two peripheries' car economies. This continental industrial space had become more integrated internally at the same time as it had become more integrated globally when the 2008 global economic growth occurred. The dominant role played by Washington and the major funding contributed by Ottawa to the bailout of Chrysler and General Motors showed how vulnerable was market liberalization to state regulatory recapture.

### **18.2.3 Textiles**

NAFTA's rules of origin also appeared to succeed in connecting the three countries' disparate textile and apparel industries in a common North American production system, in which the interests of US firms combined more intimately with burgeoning Mexican firms than they did with shrinking Canadian companies. The asymmetries in this trilateral matrimony grew as the NAFTA-generated continental market governance collapsed in the face of two exogenous adversities – the expiry of the Multi-Fibre Agreement (which had allowed industrialized countries to impose draconian quantitative limitations on apparel imports from developing countries) and China's emergence as the dominant supplier flooding the North American market.

Continental production in a severely shaken textile and apparel industry still revolves around an American hub, with US industry responding unilaterally to its challenges, a battered Mexican industry retreating to the informal economy while supporting Washington's endeavors and a hollowed out Canadian sector sitting on the sidelines.

Continental governance in this sector amounts to little more than NAFTA's ageing rules of origin made increasingly irrelevant by Washington's bilateral agreements with other trading partners. Far from being a privileged member of a regional regime, Mexico found itself discriminated against in the United States' Central America Free Trade Agreement.

### 18.3 MODE 3: TRINATIONAL POLICY HARMONIZATION WITHIN GLOBAL CORPORATE GOVERNANCE

Although some North American industries showed distinct 'world region' characteristics, different signs of trinational policy harmonization may have nothing to do with regional governance in other economic sectors where geography is of minor import.

#### 18.3.1 Intellectual Property Rights for Pharmaceuticals

Changes to intellectual property rights (IPRs) for pharmaceuticals in North America were driven not by the IPRs defined in NAFTA's Chapter 17 but by the WTO's almost identical Trade-Related Aspects of Intellectual Property Rights (TRIPs) agreement which represented the triumph of US Big Pharma and its European and Japanese pharmaceutical counterparts in achieving a new global legal regime for this sector.

Even if the IPRs in NAFTA's Chapter 17 are virtually identical to those in the WTO's TRIPs agreement, the fact that Washington used the WTO's dispute settlement body – rather than NAFTA's – as its legal venue for pressing Canada to make concessions to US branded drug companies suggests that weak continental judicial governance has been trumped by the stronger alternative established at the global level. If European Big Pharma has used the WTO's dispute settlement process to force Canada and Mexico to provide longer protection periods for proprietary drugs than they had been willing to concede, this suggests North America is not a regulatory region on the global stage.

#### 18.3.2 Financial Services

Banking offers a confused picture, because North America turns out – surprisingly – not to be a natural zone for continental banking. Some Canadian banks have operated for decades throughout the hemisphere and, to a lesser extent, globally, while all of them had branches in the US market well before trade liberalization. For their part, US banks had also set up shop in Canada long before free trade. Notwithstanding their geographical proximity, it was not American but British banks that predominated among foreign-owned financial services in Canada whose retail banking system remains primarily in domestic hands.

With a much less robust set of banks, nationalized in 1982 following one of the country's periodic currency crises, Mexico found itself at the receiving end of transnationalized banking. NAFTA had required it to open specified portions of its re-privatized banks to foreign ownership according to a defined schedule, but, in the shock of the 1995 peso crisis, the IMF, World Bank and US Treasury used their financial bailout to force Mexico to drop its restrictions immediately. After a feeding frenzy of foreign banks

acquiring domestic partners, Mexicans found that all but one of their banks had fallen under foreign ownership, with Spanish capital taking a larger share than American. The financial services sector in North America's three economies has thus become more global rather than continentally restructured, NAFTA notwithstanding.

Although harmonization of the three banking sectors' regulatory systems has occurred within North America, this is not a result of any transborder governance created by NAFTA. Rather, this apparent continentalization actually reflects the three countries' discrete participation in global governance. If banking regulations in the USA, Mexico and Canada were becoming more similar before the global meltdown of 2008, this was because the three central banks participated in the monthly meetings of the Bank of International Settlements in Basel whose multilaterally negotiated norms were applied at home. Instead of banking regulations showing that North America had become a 'world region,' they indicated that the three countries of North America were simply separate players in a global mode of regulation. When this global system of accumulation experienced its worst crisis in living memory, 'North America' played no part in its rescue. No trilateral summit convened to work out a North American position prior to the 2009 meetings of the G20 or G8. As with most other capitals in the world, Ottawa and Mexico City simply waited to see what Washington would do.

## 18.4 MODE 4: INTERGOVERNMENTAL SECURITY AND DEFENSE RELATIONS

In matters of national defense since September 11, 2001, North American governance has reverted to earlier modes of government-to-government relations in which the continental hegemon pushes its neighboring governments to bend to its will, in this case guarantee the security of the American homeland against terrorism (Golob 2002). Provoked by the terrorist attack on New York and Washington, the paradigm shift by the US government instantly affected the dynamic driving North American governance. The economic integration fostered by NAFTA had been lowering the government-made economic barriers along the USA's two territorial borders, allowing the marketplace freer rein to increase human and economic flows across the continent. Throughout the 1990s, growth in cross-border traffic in goods and people generated increased attention to border governance issues. Concerned about the efficiency of their continent-wide production systems, business coalitions lobbied their governments to make the increased investments in transportation and security technology needed to create a near-borderless continent. President Clinton had signed agreements with Ottawa in the mid-1990s to improve border security management, but his administration did not take significant steps in this direction. September 11 generated an urgent political will in Washington to strengthen North America's border-security systems and its military defense.

### 18.4.1 Security

Washington's sudden move to a security paradigm was dramatized for North Americans on September 11 by the immediate blockade of its borders. This unilateral action

demonstrated that once Washington declared its national security to be at stake it would simply reassert its control over the policy space it had previously vacated in the name of trade liberalization. Its subsequent demands that Canada and Mexico do what it felt was necessary to securitize their exports confirmed how much North American governance was driven by Washington's government.

In the post-September 11 handling of US border security, traditional binational relations reasserted themselves over unilateralism, Uncle Sam dealing separately with each periphery. These intergovernmental negotiations were supplemented on the Canadian side by an unusually active business coalition involvement in the design of new security systems. This new intensity of hierarchical governance impinged on the traditional, government-to-government hierarchy. During this first phase of the US domestic war on terror, a detailed 30-point US-Canada Smart Border agreement was signed in Ottawa in December 2001. By March 2002, Washington had negotiated a parallel 22-point Smart Border agreement with Mexico City. Subsequently, Canada and Mexico's bilateral collaboration added a third relationship to intergovernmental security relations within North America. This reactivated regionalism was unusual. On the one hand, it reinforced Washington's dominance by incorporating Canada and Mexico in an extended zone of US-led continental security-policy making. At the same time, the new trilateralism reduced the power asymmetry between the hegemon and the periphery because US security became dependent on the Mexican and Canadian governments fulfilling their anti-terrorism policy commitments.

#### **18.4.2 Defense**

In contrast with homeland security trilateralism, an absence of three-way dialogue characterized each country's reversion to its Cold War behavior as it engaged with the military dimension of the US security shift. Responding to US Northern Command – the Pentagon's reorganization of its command structure for North American defense – Ottawa reorganized its own armed forces into a Canada Command, participated in a binational military planning group and agreed to extend bilateral military integration under the North American Aerospace Defense command from its air force to include its navy.

Just as Canada reverted to its Cold War junior partnership with the Pentagon upon the declaration of the new anti-terrorist war, Mexico reverted to its Cold War estrangement. Far from ingratiating itself with Washington by sending troops to Afghanistan (as did Canada), Mexico withheld even moral support and reaffirmed its long tradition of non-intervention beyond its frontiers. Although the Mexican fleet was comfortable cooperating with the US Navy on security exercises in the Gulf of Mexico, the Mexican military would not collaborate with the US Army beyond the kind of disaster relief it supplied in the wake of Hurricane Katrina's destruction of New Orleans in 2005. While sending a Mexican military observer to bilateral US-Canadian meetings at the North American Aerospace Defense Command was seen to be a major step forward, the ominous significance attributed to this gesture by Mexican nationalists underlined the enormous discrepancy that persisted between the two bilateral relationships in North America's defense circles.

## 18.5 MODE 1 REVISITED: THE SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA

Following the argument so far, the reader will have seen that, as a 'world region,' the North America created by NAFTA does not add up to much in institutional terms. While the continental steel industry provided one example of continental transborder governance, other domains such as IPRs and financial services showed that what appeared to be continental regulatory harmonization was actually the result of the three countries participating in global governance. A fourth North American reality, which has become particularly evident since Washington declared its global war on terrorism, can be seen in the US-driven intergovernmental effort to build a new continental security perimeter while raising trade-inhibiting barriers along the USA's northern and southern land borders.

While the first years following September 11 showed North America to be a more unilateral, US-defined political space, the proclamation of a Security and Prosperity Partnership for North America (SPP) by the three governments' leaders following their March 2005 meeting in Waco, Texas, appeared to herald a shift towards a more trilateral continent. Nationalist critics in the three countries feared SPP was a maneuver through which the executives in Canada and Mexico were advancing their agenda stealthily to integrate their political systems with each other. Corporate leaders in the three countries, who aspire to operate in a borderless North America, criticized SPP as a mere wish list of low-profile bureaucratic initiatives whose implementation would do nothing to engage with the major challenges facing the continent including a common currency, a customs union or a fully integrated energy market.

As seen by the Mexican presidency, SPP presented an opportunity to resolve many irritating problems in the bilateral economic relationship and so move NAFTA incrementally towards Mexico's grander vision of an EU-type regional governance. The new strategy involved a trade-off. First, Mexico would comply fully with US demands on security matters. Once it gained access to the US policy loop, it would negotiate the regulatory corollaries that applied to trade. If SPP negotiations could produce certification standards governing Mexican foodstuffs, such Mexican products as avocados would no longer be vulnerable to border stoppages arbitrarily declared by the US Food and Drug Administration. This negotiated regime would then give Mexico's agricultural exporters some competitive advantage in responding to US farm lobby demands over their rivals in Latin America, Asia and even Europe.

While the bulk of SPP's proposed measures dealt with either the US-Canada or the US-Mexico relationship, the informal telephone and email communications among the bureaucrats who had cobbled them together suggested that some significant trilateral space was being created in the process. Although the security side of SPP extended Washington's dominance in the continent beyond any point it had previously achieved, the prosperity issues seemed to offer some counter-asymmetrical power for the periphery. 'Regulatory harmonization' might conjure up images of Mexico and Canada simply having to adopt US standards, but the complexities and differences between each country's multi-level governmental system implied that this nightmare was unlikely to be achieved by American bullying. Instead, issues would have to be worked out pragmatically with Washington accepting its incapacity simply to impose its norms on the



periphery. In some cases, the American officials would still be giving their Mexican counterparts the familiar ‘do it our way or your product will not cross our border’ message. In others, a practical problem would have to be worked out by all parties having to resolve their problems cooperatively.

As for whether the SPP could lead ineluctably to the implementation of a common market, vehement opposition from civil society combined with passionate resistance within the US government to creating continental institutions makes this scenario unlikely. Even though the three countries’ executives were engaging the upper-middle ranks of their bureaucracies, they pay virtually no attention to each other’s interests when negotiating new trade agreements with other countries. They have shown little sign – apart from the single and short-lived trilateralism of the steel sector – of moving towards a common position on international economic policy.

## 18.6 CONCLUSION: CONFLICTING GOVERNANCE TRENDS

As one among a number of world regions, North America is an enigma displaying many diverse realities. Understanding its transborder governance requires identifying which centers of decision making in the continent are dominant and how they relate to each other. It also calls for analysing the specific governance mode that energizes individual economic sectors or drives specific policy regimes (Abu-Laban et al. 2008). This conclusion will extrapolate from the four modes involving North America’s inter-state relations and its marketplace in 2010 in order to reflect on the relevance of the multi-level governance paradigm which has inspired this volume.

1. NAFTA created a formal governance mode, but its institutions were too weak to construct mechanisms that would generate a self-sustaining dynamic at the continental level. Nor could NAFTA’s institutions offset the power of the dominant member while boosting that of the smaller ones, as they do in Europe, where it is all but impossible to account for developments within the member states without reference to EU-level processes and policies. In contrast, NAFTA’s rule changes obliged Canada and Mexico to conform to American objectives, while the USA refused to accept disciplines limiting its trade protection legislation or restricting its autonomy to subsidize producers.
2. NAFTA’s norms favored the transnational operations of large corporations, most of which are American, and its investor-state dispute settlement panels favored the strong (transnational investors) over the weak (Weintraub et al. 2004). The application to North America of the neoconservative paradigm successfully constrained the two peripheral governments, on the one hand, and liberated corporations, on the other. As a result, private actors’ involvement in policy areas increased, but mainly through issue networks in which TNCs played large but spontaneous and so unpredictable roles.

Having failed to gain exemptions from US trade protectionist processes, the two peripheries’ industries converged on the center. Complex rules of origin caused large structural adjustments in the textile and apparel industries while not protecting either them or the auto sector from the impact of changes in global governance

(end of Multi-Fibre Agreement), the global balance of power (China) or corporate restructuring.

In all the sectors where geographical proximity mattered, North America became a space in which US hegemonic control increased. Although the movement of global investment brought large American, Mexican and Canadian steel plants under foreign control, steel provides a rare example of an economic sector experiencing multi-level governance with the three domestic industries, their national lobby organizations, and the three federal governments all learning to cooperate in hemispheric and global negotiations.

3. Multi-level transborder governance for the pharmaceutical industry is different from what we would expect if North America were a genuinely continental space. Global governance (TRIPs) prevailed over NAFTA's putative continental governance. New IPRs expanded US pharmaceutical TNCs' dominance in the two peripheral economies. At the same time, the transformation of Mexico's property rights regime decreased its discrepancy with that of Canada and so reduced the imbalance between the US-Canada and the US-Mexico relationships (Cameron and Wise 2004).

Because banking norms are negotiated in an international forum where US power is offset by that of Europe and Asia, US control over the North American periphery in financial services actually diminished. Similarly, because banking regulations are tending to harmonize, the regulatory discrepancy between Canadian and Mexican banking has declined. This regulatory shift reveals that transnational governance in North America's banking space is less continental than it is global, even though its regulatory imbalance and power asymmetries have diminished.

4. Anti-terrorist border security driven by US pressure on its neighbors generated an intergovernmental policy mode in which the hegemon ended up depending on the periphery's collaboration. In this process, the power asymmetry between the continental center and its periphery was simultaneously intensified and mitigated. Dealing with US security concerns involved continuous negotiation on specific policy issues, the bilateral US-Mexico Merida Initiative of 2007 providing a perhaps historic precedent in which Washington has recognized how much of its societal security depends on Mexico bringing its outlaw drug cartels under control, while Mexico City recognized it could not achieve domestic security without massive US financial and technological assistance.

That the 2001 US-Canada border agreement provided Washington with a template for its arrangement with Mexico also suggested that this process diminished the difference that had once distinguished Ottawa's relationship with the US government from Mexico City's. Although narco-traffic and immigration pressures were far more intense along its southern than its northern border, Congress pushed the Executive to adopt common policies on biometric identity cards for all persons crossing US borders. For its part, the George W. Bush administration's support for universal technological solutions to the passage of low-risk merchandise across its border and through its ports of entry and the Barrack Obama administration's insistence that the two borders be treated equally further reduced the disparity between the two countries' responses to Washington.

The new dynamics of security also helped nourish the continent's third dyadic relationship that had developed between Mexico and Canada ever since Ottawa had

joined the US–Mexico negotiations leading to NAFTA. The continent’s third bilateral was given a major boost during the anxious months before President George W. Bush’s declaration of war against Iraq, when Prime Minister Jean Chrétien developed an oppositional axis with President Vicente Fox in an effort to block the impending invasion by generating a countervailing coalition of the unwilling at the United Nations.

The 2005 SPP of North America renewed the three federal governments’ desire to reconcile the US demand for maximum border security with the periphery’s need for minimum border-trade restrictions. Supplementing the SPP with an annual leaders’ summit moved forward the process of institution-building but did not herald North America embarking on any grander institutional project.

Under the Obama administration, governance changes are certain for North America in at least three other areas. The huge informal cross-border labor market, in which Canada and Mexico respectively constitute the largest suppliers of trained and unskilled laborers to the USA, is crying out for overt regulation. The gigantic illegal cross-border narcotics traffic – and the supply of high-powered weapons by US manufacturers to the Mexican and Canadian drug cartels – will have to be addressed lest Mexico collapses as a failed state. A cap and trade system to contain the environmental catastrophe of climate warming would best function if the three countries adopt a common system. Canada and Mexico are very much part of the problem in these three fields, but it appears that domestic US politics will once again determine the parameters for their solution (Harrison 2007).

In terms of multi-level governance, we can see that North America is not destined to develop along the lines of the European model in which asymmetries diminish and solidarities emerge (Randall et al. 1992; Pastor 2001; Huelsemeyer 2004; Studer and Wise 2007). To be sure, there may be many transborder networks such as Mexico’s vast system of US consulates – the largest of any country in the world – which try to mobilize documented or undocumented Mexican-Americans behind its tricolor flag. Sub-central entities such as Mexican states and Canadian provinces enter climate change policy regimes with their counterpart American states. Diverse political arenas interconnect spasmodically in systems involving continuous interactions. But these forms of transnational governance do not constitute a multi-level governance defined by the editors as effective regulation with satisfactory compliance rates in which each level enjoys its own autonomy, identity and understanding of the common good. Like multi-level governance, however, no one has the last word in North America where power centers continually reconstitute themselves in these four changing modes.

## NOTES

1. Julián Castro-Rea (2006), ‘Are US business priorities driving continental integration?’, *Edmonton Journal*, 27 March.
2. Robert A Pastor (2004), ‘North America’s second decade’, *Foreign Affairs*, **83** (1), (January/February), 124–5.
3. For an elaboration of the argument that continental free trade agreements combined with the WTO comprise an external constitution for its member-states, see Stephen Clarkson (2004), ‘Canada’s external

- constitution under global trade governance', in Ysolde Gendreau (ed.), *Dessiner la société par le droit (Mapping Society Through Law)* Les Éditions Thémis, CRDP, Montreal: Université de Montréal, pp. 1–31.
4. Stephen Clarkson, Sarah Davidson Ladly, Megan Merwart and Carlton Thorne (2005), 'The primitive realities of continental governance in North America', in Edgar Grande and Louis W. Pauly (eds), *Complex Sovereignty: Reconstituting Political Authority in the Twenty-first Century*. Toronto: University of Toronto Press, pp. 168–94.
  5. In contrast with the coercive control exercised by an imperial power, 'hegemon' is used in this chapter to denote the leader of a regime whose weaker members participate in formulating the norms and rules by which the system is governed.

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## 19 Multi-level governance in post-Soviet Eurasia: problems and promises

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### 19.1 INTRODUCTION

Regionalism and integration have become more and more important in contemporary world politics (Haas 1961; Haas and Schmitter 1964; Schmitter 1969; Laursen 2003). The number of regional unions has increased noticeably over the twentieth century. However, the destinies of these unions differ from each other significantly. Some of them, such as the European Union (EU) and North Atlantic Treaty Organization (NATO), turned out to be strong actors of world politics, and others present a sort of fluid, barely functioning organization. To the latter group belongs the Commonwealth of Independent States (CIS) that emerged in the aftermath of the dissolution of the Soviet Union (USSR) in 1991.

The dissolution of the USSR produced 15 independent states that started their search for regional affiliation and alliances. By now, very little has been written on the numerous attempts at regional integration and cooperation taking place in post-Soviet Eurasia: the CIS; the Economic Cooperation Organization (ECO); the Eurasian Economic Community (EURASEC or EEC); the Single Economic Space (SES); the Central Asia Regional Economic Cooperation Initiative (CAREC); the Central Asian Cooperation Organization (CACO); the Special Programme for the Economies of Central Asia (SPECA); the Shanghai Cooperation Organization (SCO) and so on. This chapter will focus on the CIS because it was the first and the most long-lasting attempt at the institutionalization of integration in the region. The CIS along with other attempts at regional integration between the post-Soviet states (PSSs) presents a case of post-Soviet Eurasian regionalism. The main question is how can multi-level governance (MLG) contribute to our understanding of post-Soviet Eurasian regionalism?

The concept of MLG is very useful in understanding the phenomenon of post-Soviet regionalism. As Chapter 1 underlines, interpretation of integration as negotiations among states (intergovernmentalism) or as a set of international institutions (supranationalism) is not sufficient to explain all the complexities of regionalism in general and in Eurasia in particular. The MLG holds up that policies are not formulated just between the supranational organization and the member governments. The actors of all levels can be involved. Supranational organization can engage actors at other than the national level, indeed circumventing national governments at least in some policy areas. This can entail alliances with the subnational level or the regional level (across borders of some states).

The post-Soviet regionalism presents a form of MLG as it includes different institutional layers (supranational and trans-subnational) and different groups of actors (governmental and non-governmental). It leads us to the distinction of two dimensions:

vertical (intergovernmental and supranational) and horizontal (transnational involving subnational actors, for example, regions).<sup>1</sup> Looking at these two dimensions highlights the contrast of failure of vertical integration, on the one hand, and the relative success of horizontal, on the other hand. Supranational and intergovernmental integration was later described as ‘civilized divorce’ of post-Soviet states (PSSs) (see, for example, Malfiet et al. 2007; Obydenkova 2008b). Despite the massive bureaucratic mechanisms, CIS as such was highly inefficient and failed to achieve any significant results.<sup>2</sup> In contrast, the horizontal dimension (sub-trans national cooperation) was much less formal and institutionalized, but much more successful as compared to the vertical one. The theoretical framework of MLG helps to analyse the CIS and to address this contradiction.

A practical question one may ask is why integration is an important issue in post-Soviet Eurasia? How would the PSSs benefit from it? Why are there so many attempts at regional integration across different PSSs? The virtues of regionalism in general are obvious, but in the context of Eurasia they are of vital importance for some of the PSSs. The PSSs share a number of problems which can be resolved only in the framework of close multi-level cooperation. These are environmental problems and natural threats, rebuilding weakened social systems, restructuring cross-border communication links, trade, recovering transport communication, combating drug- and human-trafficking, terrorist invasion from neighbouring Muslim countries, improving water and energy distribution systems and so on. Given that most of the PSSs are landlocked, some of them are heavily dependent on their immediate neighbours to resolve these issues and for access to the rest of the world. The water, energy and other resources are asymmetrically distributed across these countries, often with one country supplying them to another one. Thus, the issues of integration are of special, almost vital, importance for PSSs. Through integration, they can overcome their geographic isolation in the middle of Eurasia.

The working premise is that through various regional arrangements that operate across Eurasia, countries will be able to find new cooperative solutions to existing problems. The benefits would stem from creating a better regional investment climate, developing the region’s energy resources, better managing regional environmental assets and risks, and, last but not least, cooperating in education and knowledge sharing (UNDP 2005, p. 207).

The benefits of cooperation in the region are apparent. Given the historical legacies and experience of former networks, some ‘channels’ of integration could be preserved or recreated. A new ‘Union’ based on the rule of law and democratic and market-economic principles could be an engine of regime transition and economic transition in the PSSs. To what extent can MLG help explain why, despite the undeniable advantages of integration, has there been little progress over the past 18 years (1991–2009)?

The CIS presents a truly unique case study for MLG. In such schemes of regional integration as the EU, NAFTA and Mercosur, economic integration was the first stage of regional integration (see, for example, Moravcsik 1998; Schmitter 2004). It is also the case with other blocks of integration that the member states’ departure point is sovereignty and independence. The starting point for integration within the CIS was critically different. Both economic and political aspects of the CIS integration have been influenced by historical legacies – being once part of the politically and economically highly centralized country. This is the major feature which determines the peculiarities of the CIS integration and makes its analysis potentially an interesting contribution to the

study of regionalism. Moreover, the attempts at regional integration in the post-Soviet Eurasia also provide an opportunity to analyse the factors unfavourable to integration and to identify the impediments to this process. The issue motivating this study is that unsuccessful attempts should not be analysed less than successful ones.

The chapter is organized as follows. Section 19.2 will focus briefly on the origins of the CIS and outline the main stages of its development. Section 19.3 analyses the intergovernmental (vertical) aspect of MLG within the CIS in the areas of economic, political, military and security attempts at integration. Section 19.4 focuses on non-governmental (horizontal) cooperation within the CIS in cross-border trade and post-Soviet cross-country foreign direct investment (FDI). Finally, the conclusion conceptualizes the case of the CIS within the theoretical framework of MLG.

## 19.2 CIS: ORIGINS AND DEVELOPMENT

Since the dissolution of the USSR in 1991, there have been numerous projects at regional integration among the PSSs. The CIS was the first, the biggest and the most important attempt at multilateral integration in the region. Initially the CIS was supported by all PSSs except the Baltic States and Georgia. Eleven PSSs signed the founding documents of the CIS in December 1991 and Georgia joined the organization in 1993.

The CIS members differ widely across such factors as territory and population, economic and social development, political regimes and history. Table 19.1 demonstrates some of these disparities.

The PSSs incorporates over 100 nations and nationalities, including 50 traditionally Christian and almost 40 Islamic ones. It is also helpful for the analysis of the CIS to make a geopolitical distinction between European, Central Asian and Transcaucasian PSSs.

*Table 19.1 Divergence across the initial CIS member states*

Country	Population (1993) (in 1000s)	Area (1997) in (1000 sq. km)	Predominant religion	Location
Azerbaijan	7368	86.600	Islam	Transcaucasus
Armenia	3722	29.800	Christianity	Transcaucasus
Belarus	10 346	207.600	Christianity	Europe
Georgia	5447	69.700	Christianity	Transcaucasus
Kazakhstan	16 986	2 724.900	Islam	Central Asia
Kyrgyzstan	4502	199.900	Islam	Central Asia
Moldova	4348	33.800	Christianity	Europe
Russia	14 8673	17 075.400	Christianity	Europe & Asia
Tajikistan	5571	143.100	Islam	Central Asia
Turkmenistan	4254	491.200	Islam	Central Asia
Uzbekistan	21 703	447.400	Islam	Central Asia
Ukraine	52 244	603.700	Christianity	Europe
CIS	285 164	22 113.100	–	Eurasia

*Source:* This data is available in a number of internet datasets. See, for example, <http://www.cis.minsk.by/>.

The origin of the CIS and the huge diversity of its initial member states make it an even more interesting case study. There are two main periods to be distinguished in the existence of the CIS. The first one includes the period 1991–2001 which coincided with Yeltsin's presidency in Russia. The second one started with Putin's first presidency in 2001 and lasts up until now. During its first period the CIS was meant by Yeltsin's government to imitate the EU's experience in economic integration. Its numerous founding treaties and agreements not only often duplicated the EU institutions but also addressed more issues. Thus, for example, in the 1990s, formally the CIS was meant to possess coordinating powers in the realm of trade, finance, lawmaking and security.<sup>3</sup> The most significant issues for the CIS have been the establishment of a full-fledged free trade zone and economic union between the member states, promotion of cooperation on democratization and cross-border crime prevention. The CIS has been involved in numerous activities across the post-Soviet space. With a wide range of diplomatic representatives, government officials, countless treaties and agreements, the CIS formally 'appears as among the most developed intergovernmental organizations' (Willerton and Beznosov 2007, p. 50).

The beginning of Putin's first term as president was characterized as the period of 'pragmatism', 'rationalization' and 'economization' of the relationship between Russia and the other PSSs (see, for example, Kobrinskaya 2007; Vinokurov 2007). The new energy policy, increase in gas and oil prices for some of the PSSs, disputes over gas prices with Ukraine at the end of 2005 and beginning of 2006, and with Belarus in 2007 have marked a new stage in the development of the CIS.<sup>4</sup>

The economic pragmatism substituted ideological inspirations as the guidelines for cooperation within the CIS. Around the same time, Russia banned the import of some goods from Georgia and Moldova.<sup>5</sup> Only 15 years later after the creation of the CIS, Putin described the CIS as 'civilized divorce'.<sup>6</sup> In the same speech, he also stated that the CIS was created to soften the consequences of the collapse of the USSR for the population, to minimize the losses in economy of Soviet space and to resolve humanitarian issues.<sup>7</sup> In the words of Putin, the CIS became 'a very useful club for the exchange of information, for discussion of general political topics and regulating humanitarian and administrative issues'. Thus, there seems to be a puzzle posed by a gap between grand hopes for the CIS in the 1990s and its radically diminished significance in the 2000s.

To address this puzzle, we proceed to analyse two different aspects of MLG within the post-Soviet regionalism: intergovernmental (or supranational) and transnational (non-governmental cross-border cooperation). The chapter addresses the former aspect as a 'vertical' dimension and the later one as a 'horizontal' layer of MLG. The following two sections refer to vertical and horizontal dimensions of Eurasian regionalism. They are meant to analyse and to explain why the vertical dimension was less successful than the horizontal one.

### 19.3 VERTICAL ASPECT: SUPRANATIONALISM AND INTERGOVERNMENTAL LEVEL

Vertical integration includes the creation of supranational institutions regulating different areas such as economic and political integration, and military and security aspects.



Table 19.2 *Background conditions: the share of internal export and import*

Soviet Republics in 1989	Export % of GNP	Import % of GNP	EU's members in 1958	Export % of GNP	Import % of GNP
Russia	7.3	7.7	England	2.2 (UK 3)*	2.4
Armenia	25.4	24.3	Belgium	–	–
Azerbaijan	25.4	15.6	Luxemburg	22.9	15.1
Belarus	23.5	19.3	Denmark	10.6	8.3
Georgia	23.6	19.8	Germany	4.3 (6)*	3.7
Kazakhstan	9.9	15.9	Greece	–	–
Kyrgyzstan	17.6	20.8	Ireland	26.4	24.0
Moldova	23.2	22.0	Spain	–	–
Tajikistan	18.3	24.4	Italy	2.3	2.3
Turkmenistan	19.7	21.2	Netherlands	15.6	17.3
Uzbekistan	15.3	20.1	Portugal	–	–
Ukraine	12.5	12.9	France	2.2 (3)*	2.3
<b>Total</b>	<b>11.6</b>	<b>12.1</b>		<b>4.4</b>	<b>4.1</b>

*Note:* The cases marked\* are the data cited in Moravcsik (1998 p. 88) and given in parenthesis.

*Source:* Adapted from Shishkov (2001) p. 391. Calculated from *Narodnoe hoziatstvo SSSR v 1990*, Moscow (1991), pp. 636, 639; *Eurostat. Monthly External Trade Bulletin, Special Issue 1958–77* Luxemburg (1978), pp. 23, 30, 32, 34; *European Economy* (1990), 14 (November), p. 195, 46 (December), pp. 257, 261; *Eurostat Basic Statistics of the Community*. (1991), Luxembourg pp. 226, 259.

Vertical integration can be called formal as it involves a great deal of treaties, agreements, protocols at inter governmental level and has a high public visibility.

### 19.3.1 Economic Integration

Despite the fact that inter-regional trade flow has fallen after the collapse of the USSR, the rate of internal transactions is still pretty high. Even compared to the EEC, the CIS had a much higher rate of intra-regional trade for the moment of creation of the CIS (1989–91) than in the EEC in 1958.

Table 19.2 presents a number of interesting observations of background conditions of post-Soviet regionalism as compared to the situation within the EEC (beginning of European integration). However, starting from 1991, a radical change took place in the reorientation of export flows of PSSs. Thus, for example, Russia increased more than twice its exports to non-PSSs starting from 40.8 per cent in 1991 and reaching at 85.3 per cent of its total exports.<sup>8</sup> A set of countries increased exports about 30 times more starting from 1.5 per cent (Kirgizia and Georgia) and increased export flows up to 59.60 per cent for Kirgizia and 50.0 per cent for Georgia in 1999.<sup>9</sup> The PSSs import about 45 per cent of Russian oil and 19 per cent of construction equipment and thus remain Russia's most important trade partners (Kobrinskaya 2007, p. 14).

The core of economic integration of the CIS was the Economic Union Treaty. This treaty, signed by the Heads of PSSs (1993), states that 'The Treaty was based on the necessity of formation of the common economic space on the principles of free

Table 19.3 Progress of the PSSs in economic transition in 1992–98

Countries	Share of private sector in GDP (%)	Privatization of large enterprises	Privatization of small enterprises	Liberalization of prices	Freedom of market competition
Russia	70	3+	4	3–	2+
Georgia	60	3+	4	3	2
Kirgizia	60	3	4	3	2
Armenia	60	3	3	3	2
Kazakhstan	55	3	4	3	2
Ukraine	55	2+	3+	3	2
Moldova	45	3	3+	3	2
Azerbaijan	45	2	3	3	1
Uzbekistan	45	3–	3	2	2
Tajikistan	30	2	2+	3	1
Turkmenistan	25	2–	2	2	1
Belarus	20	1	2	2	2

Note: System of evaluation: 4: more than 50 per cent of programmes of economic transition and the progress in economic transition is significant; 3: more than 25 per cent of programmes; 2: progress is fair 1: almost no progress at all.

Source: Shishkov (2001, p. 409); The Economist Intelligence Unit (1999), *The Economic Report* London, March.

movement of goods, services, workers, capitals; elaboration of concerned money and credit, tax, price, customs and foreign economic policies, rapprochement of the methods of management of economic activities, creation of favorable conditions for development of direct production links.<sup>10</sup> This treaty was supposed to lead to the harmonization of economic legislation, common economic space (that is, implementation of the free movement of goods, services, capital and labour), and accompanied by monetary, budget, tax, currency and customs policies. However, each side failed to achieve any specific results in the area of economic integration.

There has been discussion about the creation of a 'Common Economic Space' between the countries of Russia, Ukraine, Belarus and Kazakhstan. However, the 'Common Economic Space' was never implemented.<sup>11</sup> The most intensive economic cooperation developed on bilateral grounds, for example, between Russia and Belarus, and, separately, between Russia and Armenia.<sup>12</sup> Overall, 44 out of 70 bilateral economic agreements have been implemented but none of the multi-lateral agreements.<sup>13</sup>

Some of the main aims of the CIS were the establishment of a free trade area (FTA), a custom union, a common market and economic union, political and economic cooperation, and the free movement of labour. However, a multilateral FTA, agreement on visa-free travel and close political cooperation were not established on a multi-lateral level.<sup>14</sup>

One of the main reasons for abandoning the plan for a fully fledged free trade zone was increasing heterogeneity of PSSs, differences in economic potentials and different degrees of economic transition (see, for example, Vinokurov 2007). Table 19.3 demonstrates different stages of development of PSSs in terms of transition to market economy through

percentage of private sector in GDP, privatization (of large and small enterprises), liberalization of prices and free competition.

The development of the PSSs was marked by the increased diversity in the economic and political post-Soviet transformation. The beginning of the CIS was also the beginning of transition. The country with the largest share of the private sector in GDP is Russia (70 per cent), followed by Georgia, Armenia and Kirgizia (all of them have 60 per cent of the private sector), Kazakhstan and Ukraine (55 per cent each), and the one with the lowest is Belarus (only 20 per cent of the private sector). The index provides us with very valuable information demonstrating the diversity of economic transition among PSSs. In terms of economic transition, Russia seems to be the most progressive as it scored the highest among the PSSs: privatization of large enterprises evaluated as more than 37 per cent of programmes of economic transition, privatization of small enterprises as more than 50 per cent, and the progress was defined as 'significant', and freedom of market competition evaluated as 'fair' (Shishkov 2001, p. 409).

As a result, there is incompatibility of economic models of PSSs. In contrast, the experience of the EU demonstrates that economic compatibility, the independent and self-sufficient market economy of each actor-state is a prerequisite of future success of regional integration. Thus, as long as the divergence of economic models and economic transition of the PSSs remain, there is little hope for successful economic integration in the region.

### **19.3.2 Military and Security Aspects**

The main document outlining military and security aspects of the new regional block is the Collective Security Treaty signed by Armenia, Kazakhstan, Kyrgyzstan, Russia, Tajikistan and Uzbekistan in 1992, and by Azerbaijan, Georgia and Belarus in 1993. According to the treaty, all participating states assume the obligation to abstain from the use or threat of force against each other and from joining other military alliances. An aggression against one state would be perceived as an aggression against all.<sup>15</sup> In 1999, Azerbaijan, Georgia and Uzbekistan withdrew from the treaty.

According to the survey conducted by Willerton and Beznosov (2007, p. 50), out of 200 legally binding documents produced within the CIS, there have been 53 multilateral security-related treaties. Among the issues addressed in these treaties have been terrorism, interstate war, ethnic conflicts, territorial disputes, biological, chemical and nuclear weapons, natural disasters, immigration, drug trafficking, and so on. However, almost none of these agreements had been implemented due to the selective withdrawal of some of the PSSs. In contrast, bilateral agreements between Russia and different PSSs, particularly with Armenia, Belarus, Kazakhstan, Kyrgyzstan and Tajikistan, were much more successful. Thus, for example, Armenia agreed to share costs on the issue of the military base in Armenia (102 divisions) (Vinokurov 2007). The CIS was recognized to be unable to implement even partially the Collective Security Treaty as it was initially intended (Willerton and Beznosov 2007, p. 60). Despite the failure of grand strategies, small issues have been accomplished (for example, the Russian Federation (RF) has supplied the CSTO's members with armaments at domestic prices; a common communication system is to be established, Vinokurov 2007).

### 19.3.3 Political Integration

Unlike any other form of integration (economic or military), political integration is generally considered to be the stage most difficult to achieve. Economic integration brings about material gains. The benefits of political integration are less obvious. Out of all the organizations that emerged in post-Soviet space, only the CIS addressed explicitly the issues of political integration.

Some of the presumably most important political aims of the CIS have been the problems of ethnic minorities and territorial borders. They became one of the most crucial problems to be solved. The majority of conflicts in the post-Soviet territory emerged from ethnic separatist movements: Nagorno-Karabakh in Azerbaijan, Chechnya in Russia and Abkhazia in Georgia. However, the CIS did not contribute to conflict resolution and conflict prevention because it lacked the necessary mechanisms of conflict resolution or preventive diplomacy. Common CIS citizenship was not established either. Again the bilateral approach thrived. Russia managed to conclude a few bilateral treaties addressing these problems, for example, dual citizenship agreements were signed with Tajikistan and Turkmenistan (Webber 1997, p. 63).

Another contentious issue of the CIS members was the borders between former Soviet states. Most of the 'internal' Soviet borders were contested. This includes Kazakhstan and its borders with Russia, Kyrgyzstan which borders with Tajikistan, Uzbekistan and Kazakhstan and so on. A number of the CIS documents (the CIS Founding Agreement and the Alma-Ata Declaration) addressed this issue, calling for a respect for territorial borders and the inviolability of existing borders at the point of the acquisition of independence.<sup>16</sup>

The common language of the CIS was one of the political issues. Russian was recognized as an official language in Belarus, Kyrgyzstan, Russia and Kazakhstan and in some of the separatists regions.<sup>17</sup>

Political transition may present yet another obstacle to the development of effective vertical integration. Table 19.4 gives some of the estimations on regime transition by the European Bank of Reconstruction and Development and the World Bank.<sup>18</sup>

As Table 19.4 demonstrates, the most advanced CIS members in the regime transition reached level '3' (with '4' being the highest). The scale used in the last six columns ranges from 0 to 100. The index of '100' represents the top level in the best governed developed country (Ofer and Panfret 2004, p. 22). The table demonstrates very low levels of the democratic government on average. A relatively high level of democratization was found in Armenia, Russia, Georgia, Moldova, Kazakhstan and Kyrgyzstan.

Estimating the results of the 18 years of the CIS's existence, it is impossible to ignore that progress has been more than modest. On the other hand, there have also been certain achievements in macro-level integration within the CIS which should not be overlooked. From the point of view of the political elite of some of the PSSs, the CIS should be preserved because 'the volume of interactions between the PSSs is very big and interdependence of post-Soviet economies is huge'<sup>19</sup> and because there are much more problems uniting the PSSs than just an economic integration which can be discussed only within the framework of the CIS, for example, communication between people, crossing borders, pensions, social transfers, immigrants – all these issues which were left unresolved after the collapse of the USSR.<sup>20</sup> Some scholars have underlined that the CIS has

Table 19.4 *Six components of democratic governance: estimation for 2000/2001*

Country	Average transition score	Political stability; no violence	Government effectiveness	Regulatory quality	Rule of law	Control of corruption
Belarus	2–	50	16.9	2.4	20	54.7
Kazakhstan	3–	59.3	31.9	23.7	31.8	23
Russia	3–	33.3	33.1	6.5	17.1	12.4
Turkmenistan	1+	52.5	9.4	3	12.9	6.2
Uzbekistán	2	13	21.3	11.2	27.6	29.2
Georgia	3	14.8	28.1	17.8	39.4	28.6
Armenia	3–	17.9	15	23.1	45.3	24.2
Moldova	3–	40.1	12.5	12.4	40	23
Kyrgyzstan	3–	39.5	31.9	20.7	26.5	20.5
Ukraine	2+	26.5	26.9	13.6	31.2	19.3
Azerbaijan	2+	22.2	18.1	39.1	21.8	10.6
Tajikistan	2+	3.1	7.5	5.9	4.7	9.3
Average CIS	–	22.1	20.2	18.0	29.6	20.6

*Note:* Not including the Baltic States.

*Source:* The first column is based on the database of the European Bank of Reconstruction and Development (EBRD (2002), *Transition Report*, System of evaluation: 4: more than 50 per cent of programmes of economic transition and the progress in economic transition is significant; 3: more than 25 per cent of programmes; 2: progress is fair; 1: almost no progress at all. And the rest of the columns are based on the World Bank Institute, New Governance Indicators database, reproduced in Ofer and Pomfret (2004, p. 21). For the columns with the last six indicators grades are assigned according to the scale between 0 and 100 with index for developed countries equal to 100.

managed to accomplish small but important tasks in such fields as mutual recognition of various documents and licences, displaced people, immigration, pensions and other social benefits (see, for example, Vinokurov 2007).

However, the question remains why the results were not quite successful on an inter-governmental level. By now, the most successful attempts at MLG had taken place within the EU with all its members being ‘Europeans’. In other words, all ‘old’ and ‘new’ members of the EU – Western European states and Eastern (or Central) European ones – belong to the same continent, Europe. Scholars of the European regionalism underlined ‘unusual’ homogeneity of the first six original member states of European integration. Their common conservative and Catholic background and high degree of mutual trust might have made them initiate the cooperation (see, for example, Schmitter 2005, p. 269). In contrast, the perspective member states of post-Soviet regionalism did not only belong to different confessions within Christianity but included two different often juxtaposed religions – Christianity and Islam.

The literature on regionalism often asserted the ideas of ‘common heritage’, ‘historical and cultural legacies’, continental belonging as important factors that contributed to the success of European integration. In contrast, the PSSs present a cross-continental and religious mosaic.

Geopolitical location seems to be an important factor in post-Soviet regionalism. Indeed, the states located in the ‘European’ part of the former USSR (for example,

Moldova and Ukraine) were less inclined to post-Soviet (re)integration. In contrast, most of the states isolated in Central Asia supported the initiative of regional integration.

Another important explanation of this phenomenon is the deficit of political regime homogeneity across the PSSs. Apart from the disparities of the actual and potential CIS members across economic development, geography and religions, there are also the significant disparities among the vectors of regime transition (ranging from democratic to authoritarian). The variable which seems to present the crucial difference between Europe and post-Soviet Eurasia is 'pluralism'. While the elite of Soviet states were all authoritarian and, thus, 'compatible', the pluralism was absent. The absence of trust on an intergovernmental level also explains why bilateralism thrived and multilateralism was diminished.

Among other explanations for the failure of the creation of functioning supranational multilateral organization is 'the shadow of the past', that is, being part of highly unitary Soviet states and a long time without sovereignty made the nation states unwilling to transfer even the most insignificant of their powers to a new supranational organization, the CIS. In addition, the PSSs did not have a sufficient and necessary experience of sovereignty which is critical for forming and entering a supranational organization. The 'shadow of the past' was combined with the 'shadow of the future' involving a fear of the possibility of the recreation of the USSR within the new supranational organization under a different name of the CIS.

To sum up, the intergovernmental attempts at integration were damaged by such factors as divergence in economic and political transformation, lack of democratic and market economy institutions, ethno-national conflicts, border and territorial disputes, religious and geopolitical differences, and a lack of mutual trust. On an intergovernmental level within the CIS the bilateralism was the only efficient way to progress in cooperation.

#### 19.4 HORIZONTAL ASPECTS: SUB-TRANSNATIONAL LEVEL AND CROSS-BORDER COOPERATION

Horizontal integration involves transnational networks and non-governmental actors. In contrast to the vertical dimension of MLG, it is much less formal and almost invisible within the CIS. However, in contrast to the poor outcome of supranational attempts at integration within the CIS, the outcomes of sub-transnational cooperation have been quite different.

In the post-Soviet space it takes the forms of cross-border interactions, migration flows, transregional cooperation of non-governmental actors, private businesses, trade flows across the countries, FDIs across the PSSs and, last but not least, social networks and personal interconnections on all levels. Theoretically sub-transnational aspects of MLG structures and processes are described as horizontal and informal in contrast to supranational structures of the CIS which are vertical and formal (*ibid.*). The main reason for the development of horizontal aspect of MLG is the high level of social integration and informal communication channels inherited from the Soviet Union, which are claimed to be even higher than within the European Union (Sterzhneva 1999; Libman 2007; p. 405).

*Table 19.5 The percentage of the respondents to the question: Which form of Integration between the former republics of the USSR would you prefer?*

Answers	2001	2002	2003	2006
Some of the PSSs could create closer voluntary unions	32	27	25	23
Recreation of the USSR as it was	23	21	25	18
Intensive integration of all PSSs as the EU	15	19	19	19
Sustaining the CIS in its present form	13	12	10	17
Entire independence of all PSSs	12	12	12	12
I do not know	5	9	9	11

*Source:* Adapted by the Author from opinion polls conducted by the Analytical Centre of Levada, 'Russians about the collapse of the USSR and the perspectives of the CIS', November 2006; Social Survey by the Analytical Centre of Levada, 'Russians about the collapse of the USSR and the perspectives of the CIS'. The survey was conducted in November 2006 with the participation of 1600 people in 46 regions of Russia. The distribution of answers is in percents along with the data of the same survey held in 2001, 2002 and 2003.

The PSSs still share common infrastructure (for example, electricity networks) communication transportation links (for example, railways). For some of the PSSs, such as, for example, Tajikistan and Moldova, cross-border labour migration plays an important role in economic development (see, for example, Libman 2007). Russian is still considered to be a lingua franca in post-Soviet space. A high percentage of the post-Soviet population has relatives living in other post-Soviet countries than their own. For example, about 35 per cent of Russians, 69 per cent of Byelorussians and 57 per cent of Ukrainians have relatives in other PSSs (Libman 2007, p. 405).<sup>21</sup> In the context of social integration, the attitude of the population is an important factor. According to social surveys (opinion polls), the tendencies shown in Table 19.5 among the citizens were prevailing.

Apart from the social integration, the PSSs are still interconnected through private business inter-regional trade flows. According to the statistical reports, the annual outflow of Russian investments to other PSSs increased by more than 4.7 times from 1999 to 2004.<sup>22</sup> However, many of the transnational private business networks are statistically invisible because of the use of 'shadow' and offshore mechanisms (Libman 2007). As UNCTAD (2004) demonstrates, the top destinations of Russian FDI projects abroad are Belarus, Ukraine, Uzbekistan and Kazakhstan. These four countries account for about 45 per cent of all cross-border mergers and acquisitions in post-Soviet Eurasia.<sup>23</sup> The main sectors of Russian FDI projects in the post-Soviet space are power utilities, oil and gas, telecommunications and mobile phone corporations (Libman 2007, p. 408).

Energy relations between Russia and other PSSs present another good example of the Soviet legacy. Interconnected by pipelines and transit channels between producers, consumers and suppliers, the PSSs present a complicated system of numerous transactions. The energy relations between the PSSs reflect these complexities. As research points out, often even top people within the energy industry do not know exactly what happens, how and why (Pirani 2009; Obydenkova 2010).

Among the PSSs, Russia remains the main and the most powerful player in the post-Soviet landscape. It is a producer, customer, supplier and a transit state. Russia

purchases gas from Central Asia; transits it to the EU and PSSs; it sells its own energy and energy imported from Central Asia to the EU and to other energy-poor countries like Armenia, Moldova, Belarus, Ukraine and Georgia.

Gas imports from Turkmenistan make up only 7 per cent of Russia's gas balance. Imports from all Central Asian producers – Turkmenistan, Uzbekistan and Kazakhstan – make up 10 per cent of Russia's gas balance. Russia produces a total of around 607 bcm of natural gas per year. Turkmenistan exports 48 bcm to Russia. Ukraine imports a total of 55 bcm from Russia. Thus, producer-, transit- and consumer-states form a triangle of interdependence. Russia's imports from Turkmenistan corresponds to 87 per cent of Russia's exports to Ukraine. In addition, Russia also imports about 16 bcm from Kazakhstan and Uzbekistan.<sup>24</sup>

At the same time, Russia is itself dependent on such transit countries as Belarus and Ukraine. These two countries are transporting about 85 per cent of Russia's natural gas exports to the EU. The major oil pipeline to the EU goes through Belarus (Druzhba pipeline accounts for about one-third of Russia's oil exports to the EU). And about 80 per cent of Russia's gas destined to Europe crosses Ukraine and another 20 per cent go through Belarus (Perovic 2008, p. 3).

To sum up, the non-governmental cooperation, cross-border trade and FDI's across the PSSs were quite formidable compared to vertical integration. There are a few reasons for this phenomenon and all are linked directly or indirectly to such Soviet legacies as the ethnic mosaic of the population, Russian as a lingua franca in the region, already existing railroads connecting states, infrastructure and very interdependent economy. The mosaic of different ethnicities spread across all PSSs, the interconnection between them, mixed marriages, common spoken language – all this made the social aspect of the USSR dissolution and the Eurasian regionalism far more significant.

The economy of the PSSs was not self-sufficient as such and was dependent on other states providing them with the necessary raw or half manufactured materials and products. These interdependencies contributed to the necessity of the preservation of already existing economic and trade links.

In its turn, the economic aspect involves a tangled web of interconnections between different industries and even of different aspects of the same industry located in different countries. This created a high level of economic interdependence between PSSs which could not automatically disappear with the dissolution of the USSR. With the emergence of private business, it could not overlook the advantages of this already existing web of interconnections created in the Soviet period. Trade and business were built on these interconnections, thus sometimes intensifying and developing them.

## 19.5 CONCLUSION

The case study of the CIS is an excellent example of the diversity between the levels and speed of development of different levels of MLG. For example, the supranational level of the CIS and of other organizations in this region has not been successful and was often described as failure in integration. However, on the regional, cross-border, transborder level, the integration was partly preserved and partly developed further. Consequently, there is a multitude of actors involved in post-Soviet Eurasian regionalism (for example,



private actors, small and middle business, transnational corporations). Thus, MLG with its focus on multi-level and multi-actor approaches provides for better understanding of the phenomenon under study. In its turn, the case of the CIS contributes the idea of multi-speediness in regional cooperation, through different outcomes in integration at different levels, that is, fast developing networking on a trans- an sub national level, cross-border transactions and slow unsuccessful cooperation on an intergovernmental level.

The distinction between horizontal and vertical interactions among states and non-state actors is quite useful in this context. The CIS failed to develop the vertical intergovernmental (supranational) aspect of MLG. However, the horizontal aspect of MLG in the post-Soviet space has developed fast.

Nonetheless, the clear connection and coordination between the vertical and horizontal layers seems to be missing. In the case of the EU, the interaction between supranational integration and regional transborder regionalization within the EU member states was quite straightforward. The first one has encouraged the later one. The European integration through the Committee of the Regions encouraged transregional cooperation and regionalization. In the case of PSSs, the connection seems to be the opposite. While the supranational links were decreasing from big projects (for example, free economic zone and common currency) to small summits, often called ‘discussion clubs’,<sup>25</sup> the intraregional cooperation between subnational actors (for example, private business) was developing quite intensively. This phenomenon presents a unique case study for MLG and can hardly be conceptualized within a different theoretical framework.

In an attempt to classify the case of post-Soviet Eurasian regionalism according to the two ideal types of MLG described in Chapter 1, the CIS is closer to MLG Type II. In other words, post-Soviet Eurasian regionalism is ‘a complex, fluid patchworks of innumerable, overlapping jurisdictions’. However, this governance structure is not functionally limited to only one policy area but to a number of areas. It includes both public and private actors.

Among the deficits present in this case are the absences of executive, binding institutions and binding agreements. It presents the case of so-called open regionalism, that is, the actors can ‘pop in’ and ‘pop out’ at different stages and choose to avoid different agreements. Indeed, decision-making also became ineffective and inefficient for other reasons. First, it involved tremendous transaction costs. Second, the presence of high asymmetries between PSSs in terms of size, population, the level of economic development and trajectories of political development present another serious obstacle.

Such factors as authoritarian regime, supra-presidentialism, lack of substantial experience of independence and sovereignty, and ongoing process of transition resulting in a lack of market economy on a national level – all this has led to bilateralism on a supranational level, an unwillingness to transfer any powers to supranational institutions and intergovernmental mistrust. The MLG was diminished by bilateral agreement within the CIS. It posed serious constraints to the development of integration in the region. In addition, the ‘shadow of the past’ and the ‘shadow of the future’, seen as prospects of reintegration of the former USSR within a new supranational organization, presented one of the main obstacles to the development of regional cooperation. Thus, prospects of reintegration became an obstacle to the development of cooperation in the region.

Among the virtues identified in Chapter 1, the following aspects are particularly

important. First and foremost, the social aspect is highly significant in the case of post-Soviet regionalism. Any form of regional cooperation is welcomed by the population of some of the PSSs as long as it provides some social benefits, for example, moving across the borders, providing energy, vital natural resources such as, for example, supply of water (particularly within Central Asia). It can also be said that MLG in the region provides some responses to globalizing and localizing trends. Another issue of high importance is the protection of the rights of territorial and non-territorial minorities. This issue was not resolved but neither ignored. The issues of legal and illegal immigrants, displaced people in the result of ethnic and territorial conflicts and disputable territories have received lots of attention within both the CIS and other organizations in the region.

The Eurasian regionalism is indeed a peculiar case study and can challenge a number of theories of regional integration. The major peculiarity is that in Eurasia the process of integration was paralleled by the processes of actual de-territorialization, fragmentation and disintegration, yet even more complicated by economic and political regime transition within the PSSs. The experience of post-Soviet Eurasia is indeed unique in this sense and should be analysed in further studies of MLG. These studies will not only profit from existing theories of MLG but also contribute to their future development.

## NOTES

1. On new regionalism and regional integration, see, for example, Obydenkova 2006; on the role of sub-nation regions in foreign trade, see Sarychev (2006).
2. See, for example, Ofer and Pomfret (2004), Sahn (2006) and Libman (2007); On post Soviet States and Cooperation in post-Soviet Eurasia, see Tishkov (1997), Stroev et al. (1999) and Obydenkova (2008).
3. The CIS member states interact and coordinate through the Council of the Heads of States, Inter-Parliamentary Assembly, Economic Court, Economic Council, Executive Committee, Council of the Heads of Governments, Interstate Bank, Council of Foreign Ministers and Council of Defence Ministers.
4. For a summary on energy issues within the CIS and on EU-Russia Energy dialogue, see, for example, Obydenkova (2010).
5. Along with Russia, Latvia also stopped importing Georgian and Moldavian wine on the grounds of low quality of the product (see, for example, Kobrinskaya 2007).
6. Press conference of Russian-Armenian negotiations, held on 25 March 2005 in Yerevan.
7. Ibid.
8. Shishkov (2001, p. 440); *Statistical Handbook* (1994–95); tables 3, 8; Belkinda and Ivanova (1995), pp. 148–50; Vneshneekonomicheskaja deiatel'snost gosudarstv Sodrjuzestva, Statisticheskij sbornik, Moscow (1999); Statistika SNG (2000), *Statisticheskij biulleten*, 5, March.
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15. In 2002, the Collective Security Treaty became the Collective Security Treaty Organization (CSTO).
16. The CIS Alma-Ata Declaration Article 5. It is also referred to in Webber (1997, p. 62).
17. Russian is recognized in such regions as Abkhazia, Transnistria, and Moldova.

18. These indexes were summarized and analysed by Ofer and Pomfret (2004).
19. See, for example, the statements of the President of Armenia and President of the RF during the press conference, meeting the press, 25 March 2005.
20. Ibid.
21. 'The barometer of Eurasian integration', *Ekonomika I vremia* (2005), 5 July.
22. Goskomstat Statistics, CIS (2004) and Moscow (2005).
23. Vahtra (2005) indicates 50 per cent, Russian Moscow International Business Association indicates 45 per cent.
24. For these facts and data on gas exports and imports, see, for example, Overland (2009, p. 11).
25. See, for example, the speech of Putin at the press conference in Yerevan, 25 March 2005.

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## 20 Multi-level governance the ASEAN Way

*Miranda A. Schreurs*

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### 20.1 INTRODUCTION

In comparison with the politics of accommodation and cooperation that took root among Europe's largest economies – France, Germany and Great Britain – in the decades following World War II, unresolved territorial questions and ideological differences between Russia and China, China and Japan, and Russia and Japan left relations among Asia's largest economies cold and tense. Fostering interdependence in this political climate proved difficult. At a time when Europe's experiment with economic integration, first through the European Coal and Steel Community (1951) and then with the Treaty of Rome (1957), was proving a successful means of promoting peace and economic prosperity, the states of East and Southeast Asia were stuck in a politics of distrust.

Regional cooperation in Southeast Asia has been strongly influenced by the region's history.<sup>1</sup> Independence was slow to come to many Southeast Asian states. Once independence was gained, it was often followed by bloody internal strife among different ethnic groups and ideological supporters. Dictators and military generals ruled throughout much of the region. Cold War politics came into full play in East and Southeast Asia and divided countries along ideological lines. The struggle between communism and capitalism fed into bloody civil wars that led to the divisions of China and Taiwan and North and South Korea. It drew the USA deeper and deeper into the security politics of Southeast Asia, including in Vietnam. The war in Vietnam spilled over into neighboring Laos and Cambodia, where Pol Pot pursued a genocide campaign that led to the deaths of over a million people.

On the one hand, this regional instability strongly inhibited regional economic, political and social cooperation among countries of the region. Yet, at the same time, it was the very turmoil afflicting the region that led to the formation of the Association of Southeast Asian Nations (ASEAN) in 1967 among a group of countries seeking a path to greater regional stability. These initiatives have gained considerable steam in recent years.

### 20.2 THE CREATION OF AN ASEAN COMMUNITY

The ASEAN was established in 1967 as an anti-communist bloc by countries that had experienced years of conflict and tension among themselves: Thailand, Malaysia, Indonesia, the Philippines and Singapore. Much as was the case with the European Coal and Steel Community and the Treaty of Rome, the initial goal of the ASEAN was to promote peace and stability. The initial membership of five expanded to six when Brunei Darussalam joined in 1984. It was not until the latter half of the 1990s that

Vietnam (1995), the People's Democratic Republic of Lao (Laos) and Myanmar (1997), and Cambodia (1999) became members bringing the membership of the ASEAN to its current ten.

In its early years, some of the ASEAN's most important accomplishments were the diffusing of tensions among its original members. Over time, the ASEAN's potential as an economic bloc began to receive more attention. Agreements were arranged to eliminate tariffs and establish an ASEAN free trade area (AFTA). Work on non-tariff barriers began to be pursued as well.

In the early 2000s a goal to establish an ASEAN Community by 2020 took root. The Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015 moved that goal up by five years. The ASEAN Community is to be built on three pillars: the ASEAN Political Security Community, the ASEAN Economic Community and the ASEAN Socio-cultural Community.

In December 2008, an ASEAN Charter was adopted. The ASEAN Charter is a legal and institutional framework ratified by the ten member states. It formalizes the ASEAN's objectives, structure, accession rules and rules of procedure. It spells out the goals of the community: maintaining peace and stability throughout the region and promoting values of peace; strengthening the region's resilience through greater political, security, economic and socio-cultural cooperation; keeping the region free of nuclear weapons and weapons of mass destruction; enhancing economic cooperation and creating a single market; reducing poverty; and promoting sustainable development, among other goals. The official ASEAN motto is to be 'One Vision, One Identity, One Community.'

The ASEAN Charter identifies the ASEAN Summit (the heads of government of the ten member states) as the supreme policy-making body of the ASEAN. The ASEAN Summit is to meet twice a year. In addition, it can call on relevant ministers to meet to discuss specific issues. An ASEAN Coordinating Council, comprised of the ASEAN foreign ministers was established to prepare the ASEAN Summit meetings and coordinate the implementation of decisions and agreements reached in the summit. Three ASEAN Community Councils were formed as well: an ASEAN Political Security Community, the ASEAN Economic Community and the ASEAN Socio-cultural Community. The post of a secretary-general of the ASEAN with a five-year term and an ASEAN secretariat were established as well.

The ASEAN Economic Community blueprint addresses the path towards regional economic integration through the creation of a single market and production base. This means moving towards the free flow of goods, services, investment, capital and labor. Twelve priority sectors have been identified. The blueprint also addresses intellectual property rights, infrastructure development, e-commerce and taxation. Finally, it discusses the importance of dealing with economic divides within the region and accelerating the integration of Cambodia, Laos, Myanmar and Vietnam.

An ASEAN Political-Security Community blueprint was adopted in March 2009. The blueprint spells out the goals of strengthening democracy, enhancing good governance and the rule of law and promoting and protecting human rights and fundamental freedoms, with the eventual goal of building a rules-based community. There is considerable emphasis placed on the building of shared norms and rules.

Within the socio-cultural community, social and environmental issues and disaster management are addressed. Environmental protection has received considerable

attention within the ASEAN although cooperation remains limited compared with the case of the European Union (EU). Some of the most important achievements have been in developing common understandings of what environmental priorities within the ASEAN countries should be and identifying areas where cooperation is possible and desirable. Slowly, some more concrete steps towards areas of joint activity and the establishment of environmental agreements have also been taken. In the area of disaster management, a series of natural disasters, but especially the 2004 Indian Ocean Tsunami have resulted in the development of new regional institutions, agreements and cooperation.

### 20.3 COOPERATION: THE ASEAN WAY

Cooperation within the ASEAN follows a strongly intergovernmentalist approach. While the ASEAN was founded in 1967 out of the recognition that the states of Southeast Asia share many common cultural elements and values and that regional stability could be enhanced through greater cooperation, Southeast Asian countries have followed a distinctly different approach to cooperation from that known in Europe. The ASEAN Way embodies the principles upon which the ASEAN was founded: mutual respect of sovereignty and territorial integrity, non-interference in internal affairs, settlement of disputes through consultation and other peaceful means, and rejection of the use of force.<sup>2</sup> The 'ASEAN Way' protects national cultures and decision-making authority, but still promotes cooperation through common norm development. Consensus-based decision-making, as opposed to the European rules-based legal structure, defines international interactions in the region.<sup>3</sup>

Yet, there are some signs that the ASEAN is moving to accept some legally binding international agreements and treaties. There is a desire in the ASEAN to form an ASEAN Community in the coming decade that will allow for stronger coordination of national actions and regional cooperation. This is particularly evident in the cases of the environment and natural disaster management, cases that are considered in more detail below.

### 20.4 PRESSURES FOR THE DEVELOPMENT OF MORE REGIONAL APPROACHES TO ENVIRONMENTAL GOVERNANCE AND NATURAL DISASTER EMERGENCY AND RESPONSE

Numerous factors are pressuring the states of Southeast Asia towards more regional approaches to environmental and natural disaster management. This is resulting in greater coordination of national environmental and natural disaster policy priorities and strategies and more emphasis on regional coordination and cooperation. Still, there is reluctance in the region to allow for any degree of pooled sovereignty – a basis of multi-level environmental governance.

#### **20.4.1 Environmental and Pollution Threats**

Southeast Asia has experienced decades of rapid development and population growth. In part as a consequence, it is confronted by a myriad of environmental threats. As a particularly rich area in terms of biodiversity, the rapid loss of forests, natural seashores and marine coral reefs has become a major area of concern. Pressures on the natural environment are intensifying and the transboundary and regional impact of pollution and natural degradation are increasingly visible. The countries of the region are beginning to recognize that their long-term sustainability is dependent upon the protection of the region's rich ecological heritage. As a region that stretches along important shipping lanes, Southeast Asian countries must worry about oil spills and marine pollution. There is also much illegal logging, poaching, fishing, waste dumping and trading of protected species. All of these environmental matters are pressuring countries of the region to look for joint understandings of problems and common national responses.<sup>4</sup> Increasingly, efforts to address the regional dimensions of environmental pollution and natural degradation are being taken up by the ASEAN.

#### **20.4.2 Natural Disasters**

Paralleling these environmental concerns, a series of natural disasters that have wreaked havoc on countries of the region have heightened awareness of the importance of regional coordination and cooperation in disaster preparedness and response. The natural disasters afflicting Southeast Asia are typically associated with cyclones and typhoons, heavy rains and flooding, earthquakes, mudslides, volcanic eruptions and tsunamis. While often local in nature, some have been of such a large scale that they have required international emergency response, such as the earthquake in Sichuan, China in 2008 that killed close to 70 000 people or Cyclone Nargis that hit Myanmar in 2008, killing close to 150 000 people. Others are large enough to affect multiple countries. The series of tsunamis that were triggered by the 26 December 2004 Great Sumatra-Andaman earthquake and its aftershocks killed close to a quarter of a million people across Southeast and South Asia. One of the greatest tragedies is that had an early warning system and regional tsunami disaster management system been in place, tens of thousands of lives could probably have been saved.

#### **20.4.3 Health Pandemics**

The tropical climates of Southeast Asia, dense populations, inadequate sanitary conditions and a relatively high level of regional mobility make the area a high-risk area for the spread of disease. The region has been hit by a series of major health concerns in recent years, including what are popularly known as avian flu, swine flu and SARS. Outbreaks of avian flu in Indonesia, Thailand, Vietnam, Laos, China and Taiwan caused substantial economic loss to farmers who had to kill their poultry and in some countries resulted in multiple human deaths. Growing regional and international concerns about the possible outbreak of a flu pandemic are pushing countries of the region to find ways to promote greater cooperation in infectious disease management.



#### **20.4.4 The Influence of International Norms and Agreements**

Growing international norms for environmental protection and sustainability have had considerable influence on the countries of the region. ASEAN countries have joined in international global environmental agreements, such as the Biodiversity Convention, the United Nations Framework Convention on Climate Change and the Basel Convention on the Control of the Transboundary Movement of Hazardous Waste. There is growing acceptance in the region of the importance of protecting biodiversity and plant genetic resources, establishing national parks, protecting wildlife species, reducing pollution and protecting human health. Many of the norms found in international environmental agreements are being incorporated into national legislation. They are also leading to new regional initiatives. In relation to the Convention on Biological Diversity, for example, in 2004, ASEAN member states finalized a draft Framework Agreement on Access to, and Fair and Equitable Sharing of, Benefits Arising from the Utilization of Biological and Genetic Resources.

International organizations are promoting norm diffusion in the region as well. The United Nations Environment Programme (UNEP), the Asian Development Bank and the Global Environment Facility (GEF) of the World Bank are just some of the international organizations that have pushed the region towards greater regional cooperation. UNEP has supported the ASEAN financially, technically and substantively in efforts to promote environmental conservation and pollution control. The Asian Development Bank has financially supported ASEAN activities for pollution control. UNEP sponsored a conference on green growth strategies for Southeast Asia in August 2009.<sup>5</sup> The United Nations University-Institute of Advanced Studies held a regional consultation with indigenous peoples on preventing emissions from forest fires in Southeast Asia.<sup>6</sup>

Beyond this, international agreements sometimes result in the formation of regional committees or bodies that work to promote a regime's goals and objectives. There is, for example, an ozone officers' network for Southeast Asia and the Pacific that promotes the early phase-out of ozone depleting chemicals that are regulated by the Montreal Protocol.

#### **20.4.5 Non-Governmental Organizations and Experts**

Southeast Asia is a region that for years was dominated by dictatorships and thus has only a weak tradition of civil society activism. In recent years, however, there has been an explosion of environmental groups that are active in the region. Scientific and non-governmental organization (NGO) networks are expanding in the region. Many have formed bilateral and multilateral links. There are now bi-annual meetings of the Asian Pacific NGO Environmental Conference (APNEC) that bring together NGOs and other experts to discuss regional environmental concerns and priorities.<sup>7</sup> TRAFFIC, a joint initiative of the World Wildlife Fund (WWF) and the International Union for the Conservation of Nature, (IUCN) has worked with the ASEAN Expert Group on the Convention on International Trade in Endangered Species to address illegal trade in endangered species in the region.<sup>8</sup>

#### **20.4.6 The European Union**

The EU serves as a model for the ASEAN in the environmental field. ASEAN states often compare their integration efforts with those in the EU. While they are quick to point out differences, the EU is nevertheless an indication of the level and depth of cooperation that can be achieved across a group of states. Few in the ASEAN want to copy EU decision-making structures. Still, there is a strong interest in learning from EU experiences and borrowing selective elements of cooperation and integration found in the EU.

The EU is also becoming involved in promoting environmental regional cooperation in the ASEAN through, for example, its financial support of the creation of the ASEAN Centre for Biodiversity.<sup>9</sup> Also, in 2007, the EU and the ASEAN signed a joint declaration in which they agreed to cooperate on energy security and environment/climate matters. Specifically mentioned is cooperation in the development of renewable energies, reducing greenhouse gas emissions, sustainable development and management of natural resources, including forests.<sup>10</sup>

### **20.5 THE EU COMPARED WITH THE ASEAN IN ENVIRONMENTAL PROTECTION**

Over the course of the past four decades, the powers and capacities of EU environmental institutions has grown significantly. It is now no longer possible to understand environmental policy within an EU member state without also understanding the role played by EU environmental regulations and institutions and the interactions among policy actors and processes at the local, regional, national and international levels.

In the 1970s, environmental matters began to be addressed in the European Economic Community in response to growing global attention to environmental matters (for example the 1972 United Nations Conference on the Human Environment) as well as the need to harmonize environmental standards in order to further promote economic cooperation. In the 1980s, European environmental integration moved to a new level, as several more states joined the Community and member states agreed to cede more of their responsibilities to European institutions. While initially the Community was primarily a place for member states to negotiate with each other about common problems, over time the power and competencies of the Community expanded and it became an actor in its own right, setting political agendas and negotiating internationally. In the field of the environment, this occurred with the enactment of the Single European Act (1986), which amended the Treaty of Rome adding a section that called for environmental protection to be integrated into all areas of EC decision-making and giving the European Commission (EC) competency in environmental matters.

The 1992 Treaty of Maastricht, which created the EU, further strengthened environmental policy processes by giving the democratically elected European Parliament co-decision powers with the EC in most environmental matters. The European Court of Justice also began to play a stronger role in enforcing environmental regulations within the Community and penalizing states financially for non-compliance with EU regulations. There are now hundreds of EU environmental regulations and directives. By the

early 1990s, the EU had emerged as a global leader in addressing a wide range of environmental matters, and the European Environmental Commissioner became a common figure lobbying governments around the world to take global climate change and other environmental problems seriously.<sup>11</sup>

In comparison, environmental cooperation in Southeast Asia is still largely based on agreements and the building of common understandings of priorities and the sharing of information. Environmental cooperation in the ASEAN continues to function primarily through intergovernmentalism, not multilateralism. ASEAN institutions and authority remain weak, as member states have been reluctant to give up any degree of sovereignty in environmental decision-making.

This said, there are some indications that ASEAN member states are feeling a need to move beyond shared declarations of goals and information dissemination. The first legally binding environmental and natural disaster agreements have come into force. These developments suggest that the ASEAN could, in the coming years, do more to institutionalize and legalize regional cooperation. It needs to be remembered, however, that there are no ASEAN bodies equivalent to the European Commission, the European Parliament, the European Court of Justice or the European Environment Agency.

## 20.6 ASEAN: NORM DEVELOPMENT THROUGH RESOLUTIONS AND DECLARATIONS

A main focus of the ASEAN has been on the development of shared environmental norms and awareness and the strengthening of environmental information. This is often done in the form of environmental declarations. The 1981 Manila Declaration on the ASEAN Environment is an example. This was an important early step towards institutionalizing regional environmental cooperation through common action. It led to the establishment of a committee on the environment and called for cooperation on raising environmental awareness, ensuring environmental considerations be taken into account in development decisions, encouraging the enactment and enforcement of environmental protection and fostering environmental education in ASEAN countries. It also spelled out several priority areas for the region, including environmental management and impact assessment, nature conservation, marine environment, industry and environment, environmental education and training, and environmental information.<sup>12</sup>

The 1984 Bangkok Declaration on the ASEAN Environment noted that most ASEAN members had developed national environmental administrations and that as a next step in promoting cooperation, an ASEAN Development Strategy that aims at achieving 'sustained development and long-term conservation of environmental assets' be implemented.<sup>13</sup>

The 1987 Jakarta Resolution on Sustainable Development identifies areas for regional cooperation: the common seas, tropical rain forests, land resources and land-based pollution, air quality, and urban and rural pollution. As with the earlier resolutions little more is agreed to than areas where common work is needed. The environment ministers who issued it did, however, point to the need for new institutions and procedures. The resolution states that:

the ASEAN Environment Ministers are aware that the pursuit of sustainable development would be best served by the establishment of a regional body on the environment of sufficient stature whose task should include, but not be limited to: recommending policy guidelines on the implementation of the principle of sustainable development, facilitating the incorporation of environmental considerations into the programmes and activities of ASEAN committees, monitoring the quality of the environment and natural resources to enable the periodic compilation of ASEAN state of the environment reports, and enhancing cooperation on environmental matters.<sup>14</sup>

More recently, the ASEAN Declaration on Sustainability spells out ASEAN member states' agreement on the need to work towards a green ASEAN, the development of low emission technologies for the cleaner use of fossil fuels, the promotion of renewable and alternative energies, the development of a nuclear safety regime, to promote the sustainable use of forests, soil, coastal and marine environments, and to call upon the international community for support in reforestation and afforestation efforts as well as debt for sustainable development swaps.<sup>15</sup>

These resolutions and declarations are recognition of transnational and regional environmental matters. They play a role in the development of common goals and priorities for action. They are, however, simply statements of intent. They are not backed by any kind of regulatory force.

## 20.7 ASEAN MINISTERIAL MEETINGS ON THE ENVIRONMENT

The first ASEAN Ministerial Meetings on the Environment (AMMEs) was held in 1981. The development of resolutions and declarations is clearly tied to the AMMEs. At the seventh informal AMME in 2002, ten priority areas for cooperation were agreed upon: global environmental issues, land and forest fires and transboundary haze pollution, coastal and marine environment, sustainable forest management, sustainable management of natural parks and protected areas, freshwater resources, public awareness and environmental education, promotion of environmentally sound technologies and cleaner production, urban environmental management and governance, and sustainable development, monitoring and reporting and database harmonization. These priorities were then reaffirmed in the 2003 Yangon Resolution on Sustainable Development. The 10th AMME adopted the Cebu Resolution on Sustainable Development, and the 12th AMME adopted the Singapore Resolution on Environmental Sustainability and Climate Change.

## 20.8 ENVIRONMENTAL WORKING GROUPS

To promote activities related to areas of environmental priority spelled out in declarations and in relation to international agreements affecting the ASEAN, numerous working groups have been established. There are now ASEAN working groups for nature conservation and biodiversity, the coastal and marine environment, environmentally sustainable cities, water resource management, environmental education and

multilateral environmental agreements. Each working group is chaired by a different country.

In the case of sustainable cities, for example, Singapore initiated the idea of a Regional Environmental Sustainability Cities Program at the 10th ASEAN Environment Ministers forum in 2003. Singapore was then put in charge of establishing an ASEAN Working Group for Environmentally Sustainable Cities. Since this time, a Framework for Environmentally Sustainable Cities in ASEAN and a network among participating cities for the exchange of best practices has been developed. At the 10th ASEAN Environment Ministers meeting in Cebu, the Philippines, it was agreed that an ASEAN Environmentally Sustainable Cities Award be established.

## 20.9 SHAKY PROGRESS TOWARDS THE DEVELOPMENT OF REGIONAL HARD LAW FOR THE ENVIRONMENT

ASEAN environmental activity is picking up pace. There is still, however, little legally binding hard law in the ASEAN. The first effort in this direction was the 1985 Agreement on Conservation of Nature and Natural Resources. It is an impressive effort that was in many ways ahead of its time. Two years before the Brundtland Commission released its report, *Our Common Future*, this 1985 agreement recognized the importance of protecting natural resources ‘for present and future generations’ and that ‘conservation is necessary to ensure sustainability of development, and that socio-economic development is necessary for the achievement of conservation on a lasting basis.’ The agreement called on member states to develop national conservation strategies and plans for the protection of biological diversity and to introduce environmental impact assessments. It also called for the formation of a conservation strategy for the region. Six states must ratify it in order for it to come into force. It has, however, only been ratified by Indonesia, the Philippines and Thailand.<sup>16</sup>

A second effort at establishing a legally binding environmental agreement came in response to the smoke and haze problems caused by forest burning in Indonesia. Although the slash and burn agriculture of native peoples, such as the Dayak, have been an element of the Indonesian forest culture for centuries, in recent decades the pressures on Indonesian forests have grown in size and intensity as rain forests are being burned by outsiders in order to convert them into plantations for palm oil, wood pulp and the rubber industry. Since the early 1990s, giant wildfires in Indonesia – at least some of which have been triggered by fires set to clear land for cultivation – have frequently become so out of hand that they cause extensive smoke and haze damage not only in Indonesia, but to neighboring areas, including Malaysia, Singapore and Hong Kong. After several particularly bad forest fires years, during which air pollution levels were so high that they caused health concerns throughout the region, a Regional Haze Action Plan (1997) was developed. Five years later, this led to the ASEAN Agreement on Transboundary Haze Pollution (2002).

The objective of the agreement is to prevent and monitor transboundary haze pollution that is caused by land and forest fires. Mitigation of forest fires is to be pursued both through national efforts and regional and international cooperation.<sup>17</sup> This is the first environmental agreement with a legally binding character in the ASEAN. It entered

into force in November 2003 after receiving the sixth instrument of ratification from the government of Thailand. There are now regular Conferences of the Parties to the agreement and an ASEAN Coordination Centre for Transboundary Haze Pollution has been established. The problem, however, is that Indonesia has not ratified the agreement. Thus, it is primarily the down-wind victims that have agreed to the need for coordinated action to stop pollution from open burning, but the main source of the burning is not a member. The Indonesian parliament refused to ratify the agreement when a bill was debated in 2007. The justification given at the time was that the agreement does not address Indonesian concerns about transboundary illegal logging and illegal fishing. At the Third Dialogue on Transboundary Haze Pollution in December 2009, civil society groups urged Indonesia and the Philippines to ratify the agreement.<sup>18</sup>

## 20.10 THE REGIONAL DISASTER MANAGEMENT AGREEMENT

While the agreement on dealing with transboundary haze has stalled in the ratification process, all ten ASEAN states have ratified the ASEAN Agreement on Disaster Management and Emergency Response (AADMER). The agreement came into force on 24 December 2009.<sup>19</sup> The need for a regional disaster management and emergency response agreement was brought into discussion in the months after the 26 December 2004 Great Sumatra-Andaman earthquake Tsunami. The tsunami waves left a path of death and destruction of huge proportions. The lack of an early warning system and of coordinated structures for managing disaster response was a painful lesson of the tsunami and one that led to rapid policy change in the region.

Within two weeks of the tsunami, an ASEAN Leaders' Special Summit was convened among the leaders of the affected countries and heads of international organizations, including the Asian Development Bank, World Bank, International Monetary Fund and the United Nations. The main points of discussion focused on emergency relief, rehabilitation and reconstruction, and prevention and mitigation. At the meeting, the President of Indonesia called for a strengthening of the ASEAN Regional Program on Disaster Management that had coincidentally been launched earlier that year (in May 2004) and the drafting of an action plan for the establishment of an ASEAN Security Community to provide for coordinated use of military and logistics in rescue and relief operations.<sup>20</sup> The ASEAN Regional Program on Disaster Management covered the period 2004–10 and focused on such factors as the development of a disaster response action plan, training, information sharing (including the development of relevant websites), public education and cooperation with NGOs, among many other points. The importance of the initiatives outlined here took on new significance as a result of the tsunami catastrophe.

In July 2005 the ASEAN Agreement on Disaster Management and Emergency Response was formulated. The agreement established the ASEAN Coordinating Centre for Humanitarian Assistance on Disaster Management. This center was charged with, among other things, coordinating emergency response assistance offered by ASEAN parties in cases of disasters.<sup>21</sup> The agreement sets out shared objectives pertaining to national regulations and measures as well as regional initiatives to be taken to strengthen disaster management capacities through improving risk identification and monitoring,

prevention and mitigation, disaster early warning, emergency response and standby preparedness.

The AADMER is a significant step towards the greater use of legally binding agreements in the region. The principles of the ASEAN Way are firmly written into the principles of the agreement (1) the sovereignty and territorial integrity of the parties is to be respected and each affected party is to have primary responsibility for disaster response within its own territory, offers of assistance are to be provided upon request or with the consent of the affected state, and (2) overall control and direction of the assistance is to remain in the hands of the affected party. Yet, the agreement emphasizes the importance of strengthening cooperation and coordination. It also stresses the need for prevention, sustainable development and participation of all stakeholders.

## 20.11 CONCLUSION

The cases of the environment and natural disaster management are illustrative of changing ASEAN regional dynamics. There has been considerable growth in both national and regional environmental capacities and environmental programs have become commonplace. Some efforts have been made towards harmonization of environmental information and reporting procedures, setting up task forces (working groups), and in some cases the harmonizing of national environmental standards and programs. There are also now several environmental and natural disaster management agreements. The same is beginning to happen in other areas, such as with the establishment of working groups, networks and centers to address issues of energy, occupational health and safety, and food security. In the areas of drug trafficking and terrorism, for example, numerous measures to enhance cooperation have been taken. In 1997 an ASEAN agreement on customs was formulated; it aims in part to combat drug smuggling. Also in this year, a Declaration on Transnational Crime was signed. In 2007, an ASEAN Convention on Counter Terrorism was formed.

The ASEAN Charter is a major development and plans for the creation of an ASEAN Community by 2015 will mean considerable further integrative and cooperative activities and agreements in the coming years. These developments suggest some parallels to the European Economic Community in the 1970s and 1980s as it began the process of formulating wider regional goals and priorities, delineating measures to be taken to form an internal market and strengthening institutional structures.

Still, despite much activity and the major goal of realizing an ASEAN Community by 2015, cooperation and integration remains more limited and of a very different nature than that found within the EU. The cases of environmental protection and natural disaster management illustrate the growing commitment to regional cooperation, as well as the difficulties in institutionalizing and enforcing that cooperation. Environmental protection is one of the areas where cooperation within the ASEAN is most advanced. Participation in global environmental and disaster management agreements has been stimulating regional activities around specific environmental, sustainability and natural disaster issues and does add some elements of multi-level governmental activity. This can be seen, for example, in the case of natural disaster preparedness and training activities that are now occurring at the local, national, regional and international levels. Yet,

environmental and natural disaster management activities in the ASEAN are still largely a matter of inter-state coordination that is managed through national environment agencies, ASEAN working groups and the ASEAN secretariat.

In the EU's case, environmental decision-making became an increasingly integrated, albeit complex process of decision-making at multiple levels of government. Some decisions remain local, others national, still others Europe-wide. Often decision-making at one level is integrally tied to decisions at another. Coalition building can occur both horizontally, between local or national governments, for example, or vertically, between local governments and the EC or between the European Parliament and some member state governments. Civil society groups and business lobbies also influence the policy-making process.

In contrast, the ASEAN lacks institutional equivalents to the European Environment Agency, the European Parliament, the European Court of Justice or the Directorate-General for the Environment within the EC. The AMMEs do have some parallels to the European Council of Environmental Ministers, but whereas in the EU's case many environmental decisions can be reached by a qualified majority, in Southeast Asia's case unanimity remains the rule.

Thus, whereas by the late 1980s European institutions were gaining real environmental protection authorities, in ASEAN's case environmental cooperation is still largely a matter of norm harmonization, information exchange and goal setting. This is done largely through AMMEs, meetings of Senior Officials on the Environment and working groups on specific issues. As of the late 2000s, there were still only a limited number of ASEAN environmental and natural disaster agreements that had come into force.

The creation of an ASEAN Community is gaining political priority in the region. As the examples of environmental protection and natural disaster management suggest, it would be wrong to assume that the ASEAN is simply following the path that Europe took with a 30 to 40 year delay. While the ASEAN may well develop more legally binding agreements with time and develop new regional organizations, at least in the foreseeable future, it is likely to continue to pursue cooperation through the development of resolutions and declarations that aim at developing common goals and understandings, rather than forming large numbers of binding legal agreements. The ASEAN Way is a distinct model of regional cooperation and integration that has few of the multi-level governance characteristics found in the EU. It relies heavily on the diffusion of norms and development of consensual understandings as means for fostering change and promoting integration.

## NOTES

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# PART V

## GLOBAL GOVERNANCE



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## 21 The changing role of the United Nations: lessons for multi-level governance

*Inge Kaul*

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### 21.1 INTRODUCTION

Unlike the end of World War II, the Cold War's end in 1990 did not generate a 'San Francisco moment' – there was no rebirth of the United Nations (UN) (Weiss 2009). This has come as a surprise to many. The end of the international community's divide into East and West gave rise to hopes that in this new political era, long-avoided global challenges like world poverty, weapons proliferation, climate change, the creation of a multilateral free trade regime or the control of communicable diseases would finally be addressed in a decisive and effective manner – with the UN at the center of such a new, reinvigorated multilateralism.

Yet, just the opposite is happening. Despite the growing importance of global challenges and a growing realization on the part of states, including the most powerful ones, that global challenges require global, multilateral policy responses, the top management of today's UN struggles to prove the organization's continuing relevance and retain the support of member states.

The present chapter explores the reasons behind the non-occurrence of a 'San Francisco Moment' in the post-1990 era and asks what lessons about multi-level governance beyond the state can be drawn from this experience.

For the purposes of this chapter the UN's history is divided into a pre-1990 period and a post-1990 period. These two periods are examined in Sections 21.2 and 21.3, respectively. Section 21.4 distills the insights on multi-level governance gained from the discussion in the previous sections. The concluding section applies these insights and offers, for further research and debate, a tentative hypothesis about the future role of the UN.

The analysis suggests that the UN today is struggling, because we are transitioning from one world order – the world order of the Westphalian state, based on the core principle of non-interference by external forces into the internal affairs of countries – towards a new order which must accommodate a world of increasingly open national borders and deepening interdependence among countries. If global economic growth and development are henceforth to be less crisis-prone and more sustainable than so far, the new world order would need to be based on a conditional notion of sovereignty, applicable to all countries, and granting states the right to self-determination but also reminding them of their duties – towards people within their jurisdiction, other nations and the global natural environment.

By implication, the role of the state would also need to change. States would increasingly have to act as intermediaries between national interests and global policy demands and exigencies. In fact, many states are already performing this function, including the

most powerful ones. But to reduce their adjustment costs, they have shifted the debates on many key global issues and regime formation out of the UN to fora in which their voice counts, including the Group of major industrial countries (G-8) and the Group of Twenty (G-20), the Bretton Woods institutions and the Organization for Economic Cooperation and Development (OECD).<sup>1</sup>

As a result, the UN has lost much of its prior status as one of the world's pre-eminent global fora for policy exchanges. Its activities at present are mainly focused on developing countries, notably poor, failed and failing states. Moreover, from constituting the bedrock of unconditional national sovereignty the UN is now advocating a notion of conditional sovereignty and increasingly employing interventionist policy instruments itself – but this primarily only towards weaker developing countries, and often based on largely externally driven policy reforms.

By increasingly employing policy tools like targeting, monitoring, and a separation of priority setting and financing, a serious democracy deficit has emerged within the UN, ironically at a time when a number of developing countries like the BRICS states<sup>2</sup> are emerging as new economic and political powers on the international stage. As a result, commitment to the UN among many developing countries is also flagging, a fact, which has further lowered the interest in, and the support for, the organization among industrial countries.

Thus, the difference between 1945, the end of World War II, and 1990, the end of the Cold War, is that then the world was moving towards the completion of a several century-long process, namely the building of the Westphalian state world order, whereas now, for the present era of globalization, we are in search of a new but still largely undefined world order. Institutional adaptation is lagging for a variety of reasons. It should therefore not come as a surprise that 1990 did not witness a 'San Francisco moment.'

However, further change appears to be in the offing. The major powers are beginning to recognize the shortcomings and longer-term inefficiency of vertical, prescribed multilateralism; and developing countries are ever more decisively inserting their voice into international negotiations. A return to more horizontal multilateralism, based on more democratic international decision-making and positive – rather than coercive – incentive policies, seems to be gaining ground, as, for example, is evident from the recent decision to use an upgraded G-20 – rather than the G-8 – as a forum for addressing global issues like the current world economic and financial crisis.

But such informal G-type bodies lack credibility and reliability. Therefore, it could happen, as the hypothesis in the concluding section of this chapter suggests, that a G-type decision-making forum is brought under the umbrella of the UN. The main purpose of this group could be to foster, through the UN, the collective formulation of a post-Westphalian notion of sovereignty and commitment to it by all UN member states. This would enable states with full legitimacy to perform the role of an intermediary state, which at present many governments are exercising only hesitantly, because their constituencies still expect of them the behavior of a Westphalian state. If endowed with such a mandate, the UN would return to being a pre-eminent and foundational global institution.

## 21.2 THE PRE-1990 UNITED NATIONS<sup>3</sup>

For four decades, the role of the UN was more limited than its founders had envisioned (see Kennedy 2006; Schlesinger 2003). Nevertheless, during most of the pre-1990 era both the then major powers and other states perceived the UN as compatible with their national interests. The UN was helping to meet national goals better than states could have done alone.

According to the UN Charter the UN's purpose is to maintain international peace and security and promote the economic and social advancement of all peoples.<sup>4</sup> But judging from the detail with which the Charter drafters chose to elaborate these two goals, maintaining peace and security enjoys primacy. It is only in this area that the Charter sets forth a clear governance process.

Underlying the Charter is the idea that peace and security can be best achieved if all countries have a strong and direct national interest in this goal. The Charter envisions a universalization of the sovereign state model. It invites all 'peace-loving states' (Article 4.1) to join the UN and offers attractive membership benefits.

By joining the UN a country receives recognition as being sovereign and equal to all other member states (Article 2.1). Thus, becoming a UN member has been highly attractive to states, notably newly independent countries. Not surprisingly, UN membership rose from 51 founding states, which came together in San Francisco in 1945 to launch the organization, to about 150 in the early 1980s, before reaching the current number of 192 member states.<sup>5</sup>

Membership obligations are few, since only United Nations Security Council (UNSC) decisions under Chapter VII are of a binding nature on member states. The Charter also requires a pre-commitment from signatory states that should the UNSC deem it necessary to call for their support in maintaining international peace and security, they would recognize such a decision as binding (See articles 25 and 48).<sup>6</sup>

All other decisions taken by any UN body are only recommendations. For example, Charter Article 12 stipulates that the General Assembly (GA) 'may [only] make recommendations to Member States of the United Nations or the Security Council or both.' The same applies to the GA's subsidiary bodies, including the Economic and Social Council (ECOSOC) and its functional commissions, and hence, to the whole second policy purpose for which the UN was created – the economic and social advancement of all peoples, including in the area of human rights.<sup>7</sup>

Yet the fact that decisions in the economic and social area are only recommendations did not lead to inactivity in this field during the pre-1990 era. Earning the UN worldwide respect and admiration, states engaged in wide-ranging exchanges of views and reached important agreements, including the Universal Declaration of Human Rights (adopted in 1948), the Covenants on, respectively, Civil and Political Rights and Economic, Social and Cultural Rights (both adopted in 1966), the International Convention on the Suppression and Punishment of the Crime of Apartheid (of 1973) and the Convention on the Elimination of All Forms of Discrimination Against Women (of 1979).<sup>8</sup>

Even as the multipolar world, which, according to Kennedy (2006), the drafters of the UN Charter had anticipated, changed into the bipolar world of the Cold War era in the late 1940s, the UN retained its importance as a common venue for global policy debate.

The UNSC especially served as an ideological battlefield for East-West rivalry. This also, however, happened in other UN bodies. Much of this controversy played itself out in the human rights domain, with the USA and its Western allies advocating personal and civil rights while the former Soviet Union and other Eastern-bloc states advocated economic and social rights (Ramcharan 2007). This confrontation ensured the UN its place as a pre-eminent forum for international policy discussions. But it also unintentionally added considerable normative strength to the UN's activities in the human rights field. These achievements by now count among the organization's most important and lasting results.

In a similar way the organization's work in the peace and security field also generated an unexpected but important by-product. As the then major powers kept these matters under their close control, UN analysts usually agree that the organization's involvement in actual peace and security operations during the Cold War era was limited (Kono 2006; Krause 2007; Mani 2007; Mingst and Karns 2007). But funneled by progress in decolonization, and again Cold War considerations, member states allowed the UN to expedite the process of granting countries their recognition as sovereign states. For either the 'West' or the 'East', independent states were potential new allies.

As a result, the UN was able to bring to virtually full fruition the century-long process of the Westphalian Peace begun in 1648: the establishment of a world order based on the principle of state sovereignty. Jealously guarding their sovereignty and upholding the principle of non-intervention into the internal affairs of countries as enshrined in Charter Article 2.7, the world became nearly completely repartitioned into individual states.<sup>9</sup>

Although often stymied by world politics and with its performance record no doubt checkered, the pre-1990 UN had its successes. It contributed to the provision of at least three global public goods (GPGs),<sup>10</sup> which served all groups of member states:

- The Westphalian state order – to which the UN added the final steps by encouraging states to join and recognize the basic UN principle of non-interference.
- The institution of collective-security – which contributed to containment of the East-West conflict.
- The provision of policy platforms – such as the GA, UNSC or ECOSOC, which served all countries as a common platform for policy debate and negotiations and perhaps helped to realize what President Dwight D. Eisenhower had expected of the UN, namely 'to substitute the conference table for the battlefield' (quoted according to Schlesinger 2003, p. 287).

None of these goods could have been achieved by any state or group of states alone. They required the universality of the UN. For most newly independent developing countries UN membership generated a significant net benefit: their recognition as an equal and sovereign state. Moreover, this gain came – at least initially – at relatively low transaction costs due primarily to the non-binding nature of most UN decisions and the non-intrusiveness of the organization's operational modalities.

In addition, the UN and the norms and values it espoused raised hopes among people worldwide for greater freedom and prosperity for all – hopes which translated into broad-based public support of the organization and for states' participation in it (Coicaud 2001; Heiskanen 2001). This goodwill hid the emerging deep rifts between member

states, which during the post-1990 period became more pronounced, contributing to the UN's current loss of a clear and major purpose.

## 21.3 THE POST-1990 UNITED NATIONS

During the post-1990 era, the UN's position in global governance gradually weakened. This happened for three reasons, namely (1) the global power shift towards unipolarity and declining political support among the major Western-industrial countries; (2) UN reform efforts aimed at introducing a more conditional notion of sovereignty and adopting more interventionist policy approaches, notably in respect to weaker, developing countries; and (3) the resultant, more hesitant support for the organization also among developing countries.

### 21.3.1 Declining Major Power Support

The UN's compatibility with the interests of the major Western-industrial powers began to decline in the 1970s. One reason was that the number of developing states rose and these countries became organized and increasingly vocal in UN debates, notably through their collaboration in the Group of 77 (Sauvant 1981). They succeeded in focusing the UN agenda on issues of a new international economic order based on notions such as countries' right to development and strengthened intergovernmental risk management, foreign aid and other resource transfer mechanisms (see Toye and Toye 2004).

These efforts ran counter to the emergence of more market-oriented thinking, sometimes referred to as neo-liberalism in Western-industrial countries. In response to developing countries, the Western-industrial countries shifted debates on issues that concerned them more and more to fora like the G-7 and the Bretton Woods institutions, where they could be certain their views prevailed. The developing country debt crisis of the 1980s gave further impetus to this trend. Of course, the major-power nations continued using the UN as an East-West forum; however, they did this with greater hesitation and ambivalence than before.<sup>11</sup>

With the implosion of the former Soviet Union in 1991, the major-power bipolarity, which had prevailed until then, was transformed into unipolarity in the form of Western industrial-country dominance.<sup>12</sup> Globalization received a new catalyst. Yet it did not take long for some of the unintended and unwanted effects of greater openness to appear in the form of financial crises, the spreading communicable diseases, trade in illicit goods like drugs and weapons, and terrorist attacks, notably that of September 11 2001.

The response of the major powers has been to use their platforms even more actively for global agenda setting and defining the 'rules of the game.' Besides the G-7/8, there is also notably the G-20<sup>13</sup> and OECD, but also hybrid, public-private venues like the World Economic Forum, and intergovernmental organizations with weighted voting power like the Bretton Woods institutions.<sup>14</sup>

This shift of issues out of the UN was often justified and accompanied by criticism and complaints about inefficiency levied against the organization, particularly from American policymakers. But the out-migration of issues had, in some instances, also more technical and practical political reasons: Global problems need to be resolved lest



they continue roaming the global public domain, adversely affecting all or potentially anyone, including the powerful nations. Hence, as global challenges grew in importance, the demand for result orientation and effectiveness of international cooperation also increased. International cooperation arrangements that focused on addressing a single issue proliferated (Conceição 2006). This trend too led the UN to lose much of the centrality it had enjoyed in the earlier period.

### **21.3.2 Reconceptualizing Sovereignty**

But states, including Western-industrial nations took an important – and difficult to accomplish – new challenge to the UN in this second era of its existence. This is the challenge of introducing a revised, more conditional conceptualization and practice of sovereignty – applicable, however, mainly, if not exclusively, to developing countries.

In light of the rising number of intra-state wars and conflicts in the years following the end of the Cold War and the ensuing human tragedies, it was felt, as Thakur (2007) notes, that the international community had to confront a very basic dilemma: to engage in ‘complicity with evil’ (ibid., p. 391) for the sake of upholding a strict notion of state sovereignty; or to soften its approach to non-intervention for the sake of human security as well as maintaining international peace and security.

A choice was made to do the latter. Accordingly the recent years have been an active UN reform period. From once being the bedrock of the principle of non-interference, the UN has been transformed into an interventionist organization – a reversal which major powers under conditions of multipolarity or bipolarity might not have dared because they feared that some developing countries might change allegiances.

Reform initiatives have largely come from the top, notably from the Secretary-Generals and from outside, including independent experts and eminent-person commissions rather than from deliberations in member state bodies. They have been four-pronged, involving: ideas innovation; policy prescription and standardization; more direct UN outreach to non-state actors and into countries; and increased use of control and enforcement measures. None required a change of the UN Charter. But together, they have introduced a notion and UN policy practice of conditional sovereignty.

#### **Ideas innovation**

Post-1990 UN Secretary-Generals (SGs) assumed a more proactive role than their predecessors in ideas entrepreneurship and concept innovation, despite the fact that the Charter depicts the SG more as the organization’s top-level civil servant.<sup>15</sup>

Secretary-General Boutros Boutros-Ghali’s *Agenda for Peace* (1992), for example, provided the basic conceptual roadmap for the post-1990 UN peace operations, which was further developed in the so-called Brahimi report (United Nations 2000). According to these reports, creating a foundation for durable peace requires a comprehensive, multi-dimensional approach. As a result the post-1990 era saw not only a rise in the number of UN peace operations (from 15 launched up to the late 1980s to 45 between 1989 and 2005) but also a broadening of their mandate. Besides performing the more traditional tasks of ceasefire or truce monitoring, these operations now also engage in activities such as disarming combatants, human rights monitoring, state capacity

building, and election support and monitoring (Doyle and Sambanis 2007, pp. 328–32; Mingst and Karns 2007, pp. 97–109). Many peace operations now are, at the same time, ‘good governance’ operations.

Secretary-General Kofi Annan’s main contribution to ideas leadership has been his recommendation that member states endorse a new principle of responsibility to protect (United Nations 2005). The idea underpinning this principle is that while states have rights such as that to the inviolability of their territorial borders, they also have duties, notably to ensure the security of the people living within their territory. If they fail in the latter, they forfeit their sovereignty right and the international community has the responsibility to intervene and protect the security of people within the state (Thakur 2007).

These ideas not only implied a radical departure from previous policy stances of the UN, but their origin also lay outside the UN. ‘Responsibility to protect’ had been proposed by an independent commission convened by Kofi Annan, the High-level Panel on New Threats, Challenges and Change (2004). This panel based its work on the Canadian-supported International Commission on Intervention and State Sovereignty (ICISS), which, in turn, had taken the basic contours of this notion from a study produced by the Washington-based think-tank, the Brookings Institute.<sup>16</sup>

### **Policy prescription and standardization**

The proposed policy reforms have caused concern among member states especially because they coincided with the invasion of Iraq and were followed by programming and management reforms aimed at greater centralization and streamlining of UN operations. These had been recommended by another independent commission convened by Kofi Annan, the UN High-level Panel on UN System-wide Coherence (2006). Quite tellingly this panel chose as the title of its report ‘Delivering as One,’ which has become the main motto of the UN, and even, UN system-wide programming.

To achieve such streamlining, added emphasis has been placed on policy prescription and standardizing the ‘deliverables.’ The Millennium Development Goals (MDGs) launched in 2005, and now the main focus of UN development efforts, reflect both these trends. They comprise eight goals stated in quantifiable terms, to be achieved by all countries at defined target dates, with their attainment being under constant review and assessment, country-by-country, goal-by-goal.<sup>17</sup> The MDGs too generated controversy, not because developing countries oppose the goals as such, but rather because they were not the direct result of multilateral negotiation and because they involved a narrowing of the development concept and the standardization of the implied policy priorities.<sup>18</sup>

Moreover, rather than contributing undefined voluntary resources to UN operational entities like the United Nations Development Programme (UNDP) for use by recipient countries in line with their national priorities, donors now provide a growing volume of resources in the form of thematically oriented special trust funds, limiting the use of these funds to the specified special purpose, and thereby indirectly adding conditionality to UN assistance efforts. Human rights issues, including those pertaining to women and children, democracy and developing country adaptation to climate change figure prominently among these special-purpose, so-called ‘earmarked,’ financing arrangements.<sup>19</sup>

**Greater direct outreach**

While UN operations have become more streamlined, the organization's outreach efforts are becoming broader and more diverse. For example, UN conferences now typically involve large numbers of participants, with meetings organized in the context of the climate change process hitting the 10 000 mark.<sup>20</sup> The advantage clearly is a more open, consultative policy debate. But the disadvantage, especially for smaller delegations from developing countries, is that for them these events are increasingly difficult to follow (Chasek and Rajamani 2003).

Similarly, member states' ambassadors to the UN, the so-called permanent representatives, are no longer the main conduit between the country and the UN. They share this role with celebrities like movie and sports stars recruited as UN goodwill ambassadors (Cooper 2007); with some 50 to 60 Special and Personal Representatives and Envoys of the SG dealing with issues ranging from peace, human rights, HIV/AIDS, climate change, migration, sports, culture, responsibility to protect and others; the senior staff of the UN's more than 130 country offices in developing countries; and last but not least, with many civil society organizations (CSOs) also liaising between the UN and their home country.<sup>21</sup>

These trends have raised the question, in the minds of governments, again notably those from smaller developing countries, of 'whose' civil society and whose epistemic community are adding their voice to UN debates; and which states' interests are being reinforced through this process.

**Control and enforcement**

Monitoring and reporting activities have also intensified in the post-1990 era, and this is not only in the MDG area. To allow for more thorough and intensive human rights reviews, member states decided – again 'prodded by Secretary-General Kofi Annan' (Ramcharan 2007, p. 450) responding to sustained American criticism – to replace the earlier Human Rights Commission with the Human Rights Council in 2006.<sup>22</sup> Yet as Thakur and Weiss (2009) note, the organization's monitoring of national-level government action is perhaps most intensive and intrusive in the area of terrorism control. In the wake of September 11 the UNSC decided to create the Counter-Terrorism Committee, with a limited membership of 15 based on Security Council membership, to be supported notably for monitoring purposes by the Counter-Terrorism Executive Directorate.<sup>23</sup>

Also, whereas the UNSC had resorted to sanctions only twice in the pre-1990 era, they were, in the subsequent 15 years, used 16 times (Cortwright et al. 2007, pp. 353–7; Mingst and Karns 2007, pp. 88–9). Importantly, crimes against humanity also no longer go unpunished as the creation of UN ad hoc tribunals, mixed (country/UN) courts and the International Criminal Court demonstrate (see Thakur and Malcontent 2004, Goldstone 2007).

**21.3.3 Flagging Developing Country Support**

What is intriguing about this record of recent UN reforms is that they happened despite controversy and, usually, serious initial objections.<sup>24</sup>

Power politics certainly are a part of the explanation. An additional reason is that when feeling overwhelmed by the complexity of an issue and the speed of decision-

making, developing country delegation sometimes opt for a 'no objection' position, because in contrast to an objection this position usually requires no justification.

In the longer run, however, even non-binding decisions can change the global normative context. As Alvarez (2007, p. 59) argues, 'the [UN] Charter is regarded as a kind of "constitution" for the world or at least the basis for a system of hierarchically superior legal norms and values' (see also Alvarez 2006). Much the same applies to many other ideas and norms launched in the UN and released from there into the world, often with only grudging support from some states. They may be picked up and carried forward by interested non-state actors or be brought back, year after year, by concerned state parties and thereby gaining normative force and coming back to governments as firm expectations of a growing number of their constituencies.

Due to such a 'boomerang effect' (Zürn et al. 2007, p. 136) even initially non-binding decisions may later on govern governments so that states increasingly find themselves confronted with an ever-denser net of global policy expectations, which they have to consider when making national policy, because national or external constituencies demand this.

UN member states today are therefore often not so much divided in their views about overall goals and objectives. The more contentious issue in many instances is the fairness and transparency of the decision-making process, that is, 'whose voice counts?' The grand divide today is between 'global policymakers' and 'global policytakers.' This divide still leaves mainly Western-industrial countries on the former side and most other countries on the latter side.

Moreover, many developing countries perceive an unequal burden-sharing. Since current UN initiatives center on their countries, they are often expected to undertake domestic reform efforts entailing high political risks and economic costs for them. Yet industrial countries as the promoters of these reforms often do not match their words with deeds, notably requisite financing.<sup>25</sup>

Yet, like other major issues, voice reform too has been taken into the more controllable context of industrial country venues. This can be seen from the recent expansion of the G-8 to a G-8+5 to involve five important emerging market economies as well as from the use of the upgraded G-20 forum for addressing the 2008 global financial crisis.<sup>26</sup> As the debate about UNSC reform shows, voice reform in the UN has not yet succeeded, because it could bring up a host of difficult issues about decision-making in the UNSC and other UN bodies, including the GA (Luck 2003).

Thus, the UN's compatibility with the interests of member states, strong and weak, in this post-1990 period appears to be relatively low. The post-1990 era has brought relatively few additional gains for any country group. From the perspective of developing countries, it may even have meant some reversals. This is because of the increased intrusiveness of UN policies and the suggested revision of sovereignty, which mainly concern developing countries, but in its current formulation do not apply to global threats emanating from industrial countries like pollution or financial contagion effects.

The current UN is a highly divided UN, with industrial countries having chosen to address many of the major policy issues in non-UN fora; and developing countries, too, often 'exiting' – giving more attention to regional fora (Prado 2007) or just 'lying low' and avoiding decision-making.<sup>27</sup>

Many of these problems had already begun to emerge in 1990. They came more into

the open in the subsequent years with the end of the Cold War. Clearly, 1990 was not the time for a rebirth of the UN. In fact, it brought in an era of further UN decline.

So, to where will member states take the UN next? Before suggesting a possible answer to this question, it may be useful to draw lessons from the UN's evolution to date and see whether they offer a clue to what role the UN might assume in future.

#### 21.4 DISTILLING THE LESSONS: INSIGHTS INTO MULTI-LEVEL GOVERNANCE BEYOND THE NATION STATE

The foregoing analysis of the UN's evolution to date corroborates many findings of the rich literature on why International Organizations (IOs) exist and how they function.<sup>28</sup> For example, the discussion here has once again shown the efficiency reasons for which states may turn to IOs, such as overcoming collective action problems or reducing information deficits and transaction costs – or, conversely, retreating from the organization, when these costs are perceived as excessive. It has also confirmed that legitimacy concerns can prompt states to pursue issues multilaterally rather than unilaterally or bilaterally, as states did in respect to the proposed reconceptualization of sovereignty.

Also, we have seen that when appearing internationally, governments tend to behave very much like private actors nationally: they seek national (seen from a global perspective, quasi private) benefits. International cooperation works where national benefits from international cooperation are significant and clear, as was the case during the pre-1990 era of the UN's history. International cooperation is likely to be hesitant, or even falter where there is no clear national net gain to be derived from it or cooperation outcomes are perceived as entailing an uneven distribution of costs and benefits, as has often been the case during the post-1990 era.

The discussion has furthermore pointed to the important role of non-state actors in global governance, notably in creating the global normative framework. IOs like the UN in many cases unleash ideas, norms and values into the global public domain where they are then picked up and further propagated by non-state actors, a process which, following Finnemore and Sikkink (1998), can be described as the cascading of norms. Yet in many instances, the very non-state actors who pick up an IO decision are often also those who in the first place took the idea, norm or value to the IO. Thus, many IO decisions that trickle down to the national level do not lead to a denationalization of policies. Rather, they signal that people in different countries have shared identities and concerns such as gender equity, corruption control or poverty reduction – interests for which their government may not always show strong support in international debates. Similarly, 'responsibility to protect' no doubt has a number of active supporters also among Southern NGOs, even in its current conceptualization, which some developing country governments still find problematic.

But perhaps most important in respect to the question of the UN's possible future role is the finding that multi-level governance beyond the nation state is a process in flux. It changes in response to, among other things, shifts in global power relations; the nature of the challenges to be governed; the range of potential providers (for example, governments, intergovernmental organizations, private business, civil society, or hybrid actors

like public-private partnerships) and available venues; and importantly, the importance that states attach to different causes, at different times.

As regards global power relations, when comparing the findings of Sections 21.2 and 21.3 it appears that multipolarity and bipolarity are more conducive to effective international cooperation than unipolarity. A reason might be that under conditions of multipolarity (which, as noted earlier, the UN Charter drafters also expected to exist after World War II) and bipolarity (as it de facto existed during most of the pre-1990 era) policymaking tends to be more competitive, encouraging major powers also to consider the interests of others, lest they lose their actual or potential future allies.

As evident from the post-1990 UN era, unipolarity, especially when coupled with a strong sense of unwanted interdependence on the part of the major powers, encourages a toughening of the international relations between major and secondary powers, notably weak states. Under these conditions, there exists no alternative political camp to which the latter could defect.

Turning to the nature of the issues to be addressed, the discussion in sections 21.2 and 21.3 points to a toughening of UN policy approaches towards developing countries during the post-1990 era – the employment of more interventionist policy instruments and more externally induced, top-down institutional reform initiatives. These trends reflect the growing importance of GPGs such as spreading communicable diseases, the risk of global climate change, the concern about poverty and its ill-effects, as well as international terrorism, that is, challenges which could potentially affect all but which no country alone can tackle effectively and efficiently.

The provision of most GPGs requires a summation process, meaning that all countries have to provide national-level inputs (like a vaccination campaign) in order for the desired good (say, flu control) to emerge. Therefore, country compliance with international agreements is important, and to this end, also a tightening of the link between the different (national and international) levels of multi-level governance. Because, even if only one country reneges on a commitment like that to international terrorism control, the problem may remain unresolved (Sandler 2004).

Yet whereas the deepening policy interdependence brought by the growing importance of GPGs and the resultant added compulsion to cooperate would suggest in the interest of policy ownership and effectiveness to aim at matching the circle of those required to act (that is, in many cases, all countries) with the circle of decision-makers, UN reforms often went into just the opposite direction, towards more centralized and opaque decision-making processes, ignoring insights long gained from effective multi-level governance at the national level (see, for example, Oates 1972). As discussed in Section 21.3 and shown in Figure 21.1, the result has been a growing democratic governance deficit in the UN.<sup>29</sup> Rather than narrowing with deepening policy interdependence, the divide of member states into rule-makers and rule-takers has increased during the post-1990 era. A reason no doubt is that the UN, like other institutions, changes and adjusts to new realities only hesitantly due to such factors as lock-in effects, feedback and other information problems, or opposition from incumbents, that is, speak, the conventional major powers (North 1990). An additional factor in the case of the UN is that greater openness and policy interdependence coincided with a rise in the number of failed and failing states.

As also pointed out in Section 21.3, the growing importance of GPGs has led to a

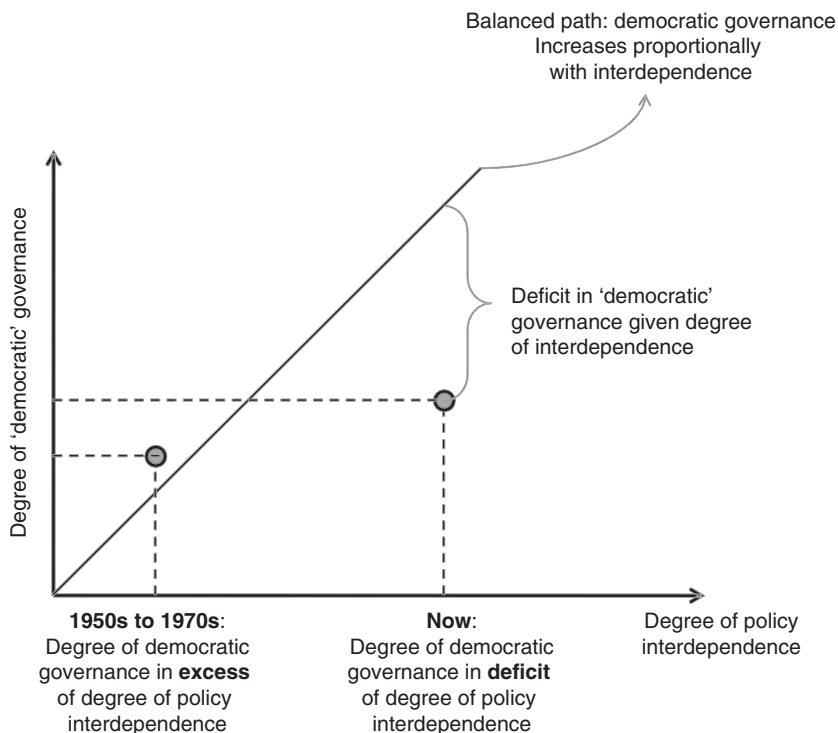


Figure 21.1 *The current deficit of international democratic governance in the UN*

multiplication and diversification of international cooperation mechanisms, often of a public-private or pure-private nature, offering more issue-specific policy responses and drawing on the comparative advantage of different actor groups. The implication of this trend for the 'big, old' multi-issue and multi-mandate organizations has often been a scaling-back of their activities to their core functions, primarily to serving member states as negotiating venues and as guardians of international norms. In the case of the UN, this has also happened. Many issues have migrated out to non-UN bodies, of which the UN may – or may not – be a member. The reason has either been that these other bodies promised greater issue focus, or that, as also discussed in Section 21.3, other bodies like the G-8 had a more limited and homogeneous membership, promising negotiating results to be achieved at lower transaction costs than in the 192 member state strong UN.

Finally, the discussion in Sections 21.2 and 21.3 has shown that states turn to IOs with particular purposes in mind – purposes to which they attach such high priority that they are willing to engage in international negotiation, and perhaps, even transfer of resources. As other studies have shown (see Kaul and Conceição 2006), governments' preference is not to centralize, not to engage internationally, and if they do, to be highly selective and offer but short-term commitments. Evidently, the pre-1990, first-generation UN was highly appreciated by most states, because it provided a unique service, especially the universalization of state commitment to the norm of non-interference, and hence to the Westphalian state order. The post-1990, second-generation UN saw a

thinning of its mandates and a narrowing of focus. For most issue areas it was but one player among several others.

Based on these insights it could thus be argued that three conditions would have to be met in order for a reinvigorated UN to re-emerge in the future:

1. Global power relations would need to shift more towards multipolarity or bipolarity and openness and interdependence would need to continue to keep GPG issues high on national and international policy agendas so as to create a demand and conducive political climate for multilateralism.
2. States, notably the major powers, would need to be willing to reduce the current democracy deficit marking UN decision-making in order to restore trust and confidence in fair negotiation processes and outcomes among all member states and their willingness to re-engage more actively;
3. There would need to exist a high-priority global governance role that states would feel they could best pursue through the UN rather than any other global platform.

But are trends discernible that could give rise to these conditions?

## 21.5 CONCLUSION: TOWARDS A SECOND-GENERATION UNITED NATIONS

Indeed, there exist a number of signs that suggest that states could in the future find it useful to foster a reinvigorated, second-generation UN. States might turn to the UN in order to lay the foundation for the emerging new, post-Westphalian world order. The UN could, as it did during the pre-1990 era, invite states to commit themselves to a reconceptualized principle of sovereignty – the principle of responsible sovereignty.

Among the encouraging signs is that interdependence among countries is, if anything, growing; and so is the awareness of this fact among world leaders. ‘No country can solve today’s problems alone’ has become a standard phrase in policy statements referring to challenges such as pandemics of the H1N1 type, global warming, international financial regulation and international terrorism control.<sup>30</sup>

The growing awareness of deepening interdependence has, in turn, changed assessments of unipolarity. It is increasingly seen as having advantages as well as disadvantages.

For example, Ikenberry (2008) argues that the power of the leading state under conditions of unipolarity is in some respects less restrained than under conditions of bipolarity, because the secondary powers have no longer the option to change sides and allegiance. At the same time, secondary states are no longer threatened by a rival superpower and now need less protection from the leading state and its allies. This weakens the legitimacy of the leading states’ position. For a superpower and its allies to enjoy external legitimacy and acceptance of their leadership by other states, they must be seen as not just pursuing their own narrow self-interest, but instead as also having in mind the concerns of other nations, and perhaps also those of the world as a whole. This paradox of power (Nye 2002) has led the USA now to pursue a ‘smart power’ approach: diplomacy that recognizes the importance of mutual advantage in international relations.

So it appears that current realities are shifting towards multipolarity; and that



multipolarity will bring with it – as it did in the 1940s – a strengthened recognition on the part of policymakers that global interdependence requires cross-border cooperation, and that in order to succeed, such cooperation must make sense for all concerned parties. Interdependence has blunted the teeth of power politics. In order for states and people to enjoy globalized public goods, such as climate stability or financial stability, suasion and positive incentive provision are today often the better strategy to pursue.

Multilateralism is thus on the rise; however, many issues are likely to be addressed through processes of small group multilateralism, such as the high-level consultations between China and the USA on issues of common concern, notably global climate change and international finance,<sup>31</sup> or the Six-Party Talks on North Korea's Nuclear Program (Bajoria and Zissis 2009). The search for a new global leadership group also continues, including proposals for the creation of a G-16 (as proposed by Jones et al. 2009) or a G-20 with expanded mandate (English et al. 2005; Carrin and Thakur 2008).

But what role could the UN possibly play in this new, emerging world of twenty-first century multilateralism?

Although the UN has in recent years become more open to the participation of non-state actors in its deliberations, it is still an organization not only of but also about states and inter-state relations. Its uniqueness lies in this field; and it is precisely also in this field that a major global reform effort would be required.

Greater openness and interdependence as well as the resultant growing importance of GPGs have changed the nature of inter-state relation in profound ways, and with it, the rationales for, and the economics of, international cooperation. Thus, in many cases national interests are best being pursued not through unilateral policy initiatives but multilateral ones, notably multilateral ones that generate significant, fair net gains for all involved parties (see, for example, Conceição and Mendoza 2006, Barrett 2007).

The pursuit of such multilateralism would, first of all, require a new model of the role of the state. Rather than pursuing narrowly defined national interests, states would have to pay more attention to the external policy environment – opportunities and constraints – when making national policy and engaging internationally. They would need to act as an intermediary between national priorities and external policy demands and exigencies.

Many states already behave like such an intermediary state (see Kaul 2006). Yet they often play this role hesitantly, because their constituencies may still expect them to act more unilaterally and to pursue more 'pure' national interests.

The intermediary state role is critically important for achieving, under today's conditions of porous national borders, less crisis-prone, more dynamic and sustainable growth and development. Therefore, it would be desirable to legitimize the new role of the intermediary state by reconceptualizing the principle of sovereignty – to reach global consensus on a principle of responsible sovereignty. As Biersteker (2006, p. 157) points out, meanings and conceptions of sovereignty 'are neither fixed nor constant over time.' They are socially constructed and have evolved as realities have changed. So we should not be surprised that, given the far-reaching changes that happened during the past decades, the sovereignty concept is once again to be revisited.<sup>32</sup>

Where else than in the UN could such a reconceptualization of, and recommitment to, sovereignty occur? As discussed in Sections 21.3 and 21.4, first steps in this direction have already been taken with member states' deliberations on 'responsibility to protect.' This

has been an important first step. But as the critique of 'responsibility to protect' shows, a broader, more comprehensive reconceptualization of the sovereignty notion might be required.

For example, a revised sovereignty notion could recognize states' right to self-determination but widen the range of their responsibilities. State duties could include the responsibility to ensure that people within their jurisdiction can lead a secure and decent life as well as the duty to respect the sovereignty of others by reigning in particular negative spillover effects into the global public domain, including the global natural environment. Of course, such an updated sovereignty concept should apply to all countries, weak and strong.

Given the persisting calls for a global 'voice reform,' for all countries to have an effective say in matters that concern them, the international negotiations on the concept of responsible sovereignty must be marked by fairness.<sup>33</sup> After all, the concept would form the core of the emerging new world order and, if accepted, bring about significant change in the role of the state and inter-state relations.

But could such a reconceptualization of sovereignty be an attractive proposition for states, notably governments, including major-power governments?

An unequivocal commitment to a principle of responsible sovereignty could help break the deadlocks in which many important negotiation processes find themselves today, including the negotiations on a new agreement on tackling the challenge of global climate change.<sup>34</sup> Taking a lead in accepting such a commitment could enhance the external legitimacy of the major powers – their recognition as global leaders in the eyes of the world community of state and non-state actors; and governments of all states, major and secondary, could also favor the principle because it might enhance, as noted, their domestic legitimacy when acting as an intermediary state.

However, under current international power relations and decision-making patterns many states often find themselves in the position of a policytaker, a fact that can erode their legitimacy as policymakers in the national context (Zürn 2006, p. 244). Consensus on a global norm of responsible sovereignty could thus help restrengthen state legitimacy – provided it is collectively constructed by the international community and emerging from a fair negotiation.

Therefore, states might consider it desirable to establish a global leadership group within the UN context, based on a charter, representative (and perhaps rotating) membership, and transparent and fair rules of decision-making. Its purpose would not be to get involved in the technical details of agreements on issues such as climate change or global financial regulation. Rather, its mandate would be to help elaborate and promote a principle of responsible sovereignty.<sup>35</sup>

The UN leadership group would not replace any of the issue-specific negotiating processes, nor other 'Gs' or UN -internal bodies like those of the UN itself, such as the UNSC or the Human Rights Council. Rather, it would complement all of those by providing a normative foundation for more effective multilateralism, not mean a loss but a gain in sovereignty, because unintended globalization and crises could be better prevented, and if they occur, managed.

Complementing the UN's architecture with such a leadership body could restore a sense of common purpose and benefit among member states, show a way towards combining globalization and sovereignty – in the mutual interest and to the benefit of all.<sup>36</sup>

If the creation of such a reformed, second-generation UN would occur in good time, it would constitute a significant but rather undramatic event. It would signal the beginning of a new world order – the world order of the intermediary state, based on the principle of responsible sovereignty. It would be an event of high importance; however, it would nevertheless be unlikely provoke another ‘San Francisco moment.’ On the other hand, if necessary change and institutional innovation are delayed and global crises assume disaster proportions, the post-catastrophe era might well see such a moment again. For now it is better not to hope for another ‘San Francisco moment.’

## NOTES

1. For background information on these groups and organizations, see <http://www.g7.utoronto.ca/>; <http://www.g20.org/>; <http://www.imf.org/>; <http://www.worldbank.org/> and <http://www.oecd.org/> (accessed 12 June 2010).
2. The BRICS states include Brazil, Russia, India, China and South Africa.
3. To clarify the scope of the analysis in this chapter, it should be noted that the focus is on the UN organization, not the full UN system of agencies. The UN organization, here referred to as UN, is comprised of the UN General Assembly, Security Council, Economic and Social Council, Trusteeship Council, International Court of Justice, the Secretariat headed by the Secretary-General, and the UN Funds and Programs. For an organizational chart and more details on the various parts of the UN, see the page ‘organization’ at <http://www.un.org/>. Also, while recognizing the increasingly important input of non-state actors to UN deliberations, the main concern of this chapter is to explore UN/state relations. The assessment of change in the UN’s role and functioning is based, as indicated in the text, on empirical facts and figures presented in the literature and other sources such as relevant websites.
4. The UN Charter can be found at <http://www.un.org/>.
5. For statistics on UN membership, see <http://www.un.org/members/list.shtml/>.
6. Yet by contributing to a collective security effort, states reconfirm the acceptance of this approach, and thus, gain themselves an added assurance that this security umbrella functions and will be there for them too should they ever face aggression. Also, collective security efforts are of an outward-oriented nature, flowing from a contributing member state through the UN towards an aggressor nation. The internal policy realm of the contributing nation is unlikely to be affected so that even a member state’s obligations under Chapter VII are implying few, if any, effects on its internal policy matters.
7. Interesting in this context is that judgments passed by the International Court of Justice (ICJ), another major UN organ, are, according to Article 36 of the Charter, to be binding upon a member state only if that state consented to seeking the Court’s opinion.
8. The text of these instruments is available at <http://www.2.ohchr.org/english/law/>.
9. However, the fact that the UN served as the bedrock of state sovereignty and was itself mostly respectful of the principle of non-intervention did not imply that it acted as a strong defender of state sovereignty where countries were nudged or even felt compelled to join either the Western or the Eastern bloc. It generally limited its role to granting sovereignty, even where state capacity was weak; and where sovereignty was, in Krasner’s (1999) words, an ‘organized hypocrisy.’ The UN was mostly a silent bystander when governments used sovereignty as a shield behind which to violate basic human rights. The reason for the most part was geopolitical (see Yoder 1989; Schlesinger 2003; Ramcharan 2007; Thakur 2007).
10. GPGs are public goods whose benefits or costs extend across countries in several regions, if not all countries, and perhaps even several generations. Public goods are goods in the public domain, potentially affecting all or anyone anywhere. If they are ‘pure,’ public goods have two main properties of publicness: (1) they are non-excludable or non-exclusive, that is, in the public domain there for all and (2) their consumption or use by one actor does not diminish their availability for others. For more detail, see among others, Kaul and Merdoza (2003), Kaul (2009), and Sandler (2004).
11. See on this point, for example, the studies in Foot et al. (2003).
12. Although the policy stance of the countries belonging to this group, mainly those of the Northern Transatlantic Alliance, differs in a number of respects, they nevertheless share many norms, priorities and policy approaches so that it seems warranted to characterize the post-1990 global power relations as marked by the dominance of this group of countries, and hence, by unipolarity.
13. See for the Group’s mandates and functioning <http://www.g20.org/>.

14. See, for example, various G-8 summit communiqués to be found at the website indicated in note 1 and on the websites of the individual summit meetings, also listed on the website indicated in note 1.
15. The UN Charter refers to the SG as the ‘organization’s chief administrator’ (Article 97), who besides exercising reporting functions (Article 98) ‘may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security (Article 99). See for a detailed assessment of the changing role of the SG Chesterman (2007).
16. More detail on the genesis of the principle of responsibility to protect can be found in Thakur (2005). The ICISS study is available at <http://www.iciss.gc.ca/>; and for the Brookings study, see Deng et al. (1996). See in this context also Ramachandran (2008) on the evolution of the concept of Preventive diplomacy in the UN.
17. For a list of the MDGs and the monitoring of progress towards their attainment, see <http://www.mdg-monitor.org/> (accessed 12 June 2010).
18. A list of goals quite similar to the MDGs had been set forth in OECD/DAC (1996).
19. See, for example, the section on ‘UNDP resources’ in UNDP’s Annual report 2009 available at <http://www.undp.org/publications/annualreport2009/report.shtml/>. For the Democracy Fund, see <http://www.un.org/democracyfund> and for the Peacebuilding Fund, see <http://www.unpbf.org/index.shtml/> (accessed 12 June 2010).
20. See, among others, the information on the Bali, Poznan and Copenhagen meetings, which form part of the climate change process, available at <http://unfccc.int> and also Schechter (2001).
21. For a list of the Special and Personal Representatives and Envoys of the SG, see <http://www.un.org/Depts/dpko/SRG/table.htm/>. As this list indicates, the Special and Personal representatives deal with a gamut of issues, ranging from peacebuilding to human rights, HIV/AIDS, climate change, migration, responsibility to protect, sports and other topics. In addition, there exist special rapporteurs and independent experts and representatives in human rights. For a list of those, see Ramcharan (2007, pp. 449–50).
22. For the mandate, structure and functioning of this body, see <http://www2.ohchr.org/english/bodies/hrcouncil/>.
23. For details on these entities, see <http://www.un.org/sc/ctc/>.
24. A common conclusion of several of the contributing authors to Weiss and Daws (2007) is that the post-1990 UN reforms are built on often still fragile or lacking consensus. See, for example, Malone (2007), Mani (2007), and Pugh (2007).
25. See the page on ‘UN Finance’ at <http://globalpolicy.org/> (accessed 12 June 2010).
26. The five developing countries invited to attend (parts of) G-8 summits are: Brazil, China, India, Mexico and South Africa.
27. Countries would not opt actually to quit the UN, because this would endanger their recognition as an equal and sovereign state by other states.
28. For a comprehensive overview of this literature, see Simmons and Martin (2006).
29. Democratic international governance as defined here would be given, if countries were able to have a fair and effective say in matters that concern them. A deficit of democratic governance arises when this is not the case. Some scholars (for example, Newman and Thakur 2006; Zürn, Chapter 5 in this volume) also use the term ‘democratic deficit’ to refer to the fact that the executive branch of governments usually represents states in IOs with limited, if any input from other societal actors or accountability to national constituencies.
30. See, for example, the communiqué of the G-20 summit meeting in April 2009 at <http://www.londonsummit.gov.uk/en/> (accessed 12 June 2010).
31. See the article on ‘High-level dialogue to bring US-China economic ties closer’ available at <http://business.globaltimes.cn/comment/2009-07/451054.html/> (accessed 12 June 2010).
32. See also on the evolution of the sovereignty concept Grimm (2009).
33. On the issue of fairness of process, see Albin (2001).
34. See Woods and Ghosh (2009) and <http://www.unfccc.int> (accessed 12 June 2010), especially the information and documentation on the ‘Copenhagen process’.
35. The notion of responsible sovereignty is, in fact, already gaining ground, as a web search will show. See, among others, [http://www.brookings.edu/events/2008/0715\\_mgi.aspx/](http://www.brookings.edu/events/2008/0715_mgi.aspx/) (accessed 12 June 2010) and Jones et al. (2009) who define responsible sovereignty as entailing ‘obligations and duties to one’s own citizens and to other sovereign states’ (pp. 9), adding ‘that responsible sovereignty requires all states to be accountable for their actions that have impacts beyond their borders’ (ibid.).
36. In order to enable the UN to concentrate on this task of laying the normative foundation for a new world order, it could also be desirable to establish its peace and security activities together perhaps with its humanitarian assistance efforts as a separate, specialized agency – at par with other specialized agencies like the Food and Agriculture Organization (FAO) and the World Health Organization (WHO). Such a reorganization would also better support today’s broadened concept of security, which includes as well as

military security such dimensions as health security, food security and environmental security. The UN proper would thus be freed to focus on its basic normative role. In addition, it could act, notably through the proposed new leadership forum, as a global stewardship council, assisting the international community in spotting and realizing opportunities of mutual gain and longer-term sustainability.

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## 22 Global governance through legislation

*Christoph Humrich and Bernhard Zangl*

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### 22.1 INTRODUCTION

Governance refers to norm-generating processes aimed at solving societal problems (see Introduction, this volume; Dingwerth and Pattberg 2006). Legislation can be understood as a process by which a specific form of norms, namely legal norms, comes into existence. Yet, legislation is just one form of law-making as it is distinguishable from other sources of law like natural law, customary law, judge-made law or treaty-making. We speak of legislation, if law-making exhibits the following three characteristics: (1) the law is made by actors with the authority to make new and change existing law at will;<sup>1</sup> (2) the process of law-making is structured by clearly specified procedural rules defining how law proper comes into existence;<sup>2</sup> and (3) this process does not require the consent of the entire legal community, that is, allows for non-consensual law-making.<sup>3</sup>

In modern national societies legislation is certainly the most important, albeit not necessarily the most common, type of law-making. In international society, in contrast, law-making through legislation was largely unknown until very recently. With the recent gradual emergence of international legislation an additional level of governance comes into existence. As soon as international law-making is no longer entirely subordinated to consent on the domestic level and as long as it does not take precedence over legislation on the domestic level, a multi-level system of governance exists (see Introduction).

In this chapter we will describe the evolution of legislative international law-making and thus the emergence of a multi-level system of governance. We deal with the law between states as it emerged from early-modern times in Europe and was (forcefully) universalized in subsequent centuries.<sup>4</sup> We will discuss the successive evolution of international legislation against the background of three waves which shaped international law after the dissolution of the medieval and early-modern multi-level system of governance: the law of coexistence, the law of cooperation (see Friedmann 1964) and constitutionalization (see List and Zangl 2003; Peters 2005, 2006).<sup>5</sup> We will detail the attributes of each of these waves of international legalization (as given in Table 22.1) and we will elaborate on the specific form international law-making took on during each wave and check to what extent it exhibits the characteristics of legislation (as summarized in Table 22.2). Finally, we will consider what this implies for the legitimacy of the emergent (post-)modern multi-level system of governance.

### 22.2 THE DISSOLUTION OF THE MEDIEVAL AND EARLY-MODERN MULTI-LEVEL SYSTEM OF GOVERNANCE

The premise of the evolution of modern international law as law between sovereign states was the dissolution of the medieval multi-level system of governance. As Reus-Smit put



Table 22.1 *General characteristics of international law during three waves of its development*

	Law of Coexistence	Law of Cooperation	Constitutionalization
<i>Understanding of sovereignty as International order</i>	ultimate internal and external authority primarily private order	bounded authority international public order	authorized authority cosmopolitan public order
<i>International law</i>	customs and mainly bilateral treaties	multilateral, public treaties	global order treaties
<i>Primary rules of international law</i>	constitution of borders, coordination of at-the-border conflicts	cross-border cooperation, behind-the-border issues, beyond-border values	border-less governance
<i>Secondary rules of international law</i>	some fundamental principles	some specified procedures	constitutional principles and highly specified procedures

Table 22.2 *Characteristics of legislation and norm-generation in the three waves of international law's development*

	Law of Coexistence	Law of Cooperation	Constitutionalization
<i>Authority to initiate law-making and changing process at will</i>	+	+	+
<i>Specified procedures in law-making process</i>	–	+	+
<i>Non-consensual modes for concluding law-making process</i>	–	–	+

it, this involved two processes: ‘the centralization and territorial demarcation of authority, and the rationalization and consolidation of hierarchy’ (Reus-Smit 1999, p. 93). Both processes came together in territorial potentates’ assertion and mutual recognition of sovereignty as ultimate law-making authority.<sup>6</sup>

In medieval times such an understanding of sovereignty was not yet developed.<sup>7</sup> While the legal order was hierarchically structured in principle, in practice it displayed complex interdependences both between different levels and sites of authority. There was a constant struggle about claims of (ultimate) authority, for instance, between secular and ecclesiastical sites of authority. Though the pope was considered ‘supreme guardian of all treaties’ (Grewe 2000, p. 90),<sup>8</sup> and the emperor guarantor of public order, neither the pope nor the emperor could legitimately claim or were able to ascertain – despite repeated attempts to achieve this – ultimate authority (ibid., pp. 88–95).

Nevertheless within the Holy Roman Empire a public order surely existed. It constituted a multi-level system of law in which divine law represented the highest level from

which natural law and finally human-made law derived. In this multi-level system, law and law-making came in many forms. Customs were cultivated and codified, arbitration was common practice and law-making in the Imperial Diet fitted our definition of legislation (*ibid.*, pp. 93ff.). Besides law-making in the Imperial Diet, law was also made in the form of contracts between individuals or collectives within or outside the empire. The precondition for entering into such contracts was a capacity to act in accordance with contractual obligations rather than any recognition of sovereignty as law-making authority. While legal contracts between persons with such a capacity could in principle cover any issue area, they were concluded between – and after that obliged – private actors rather than public authorities. Moreover, during this time ‘it is impossible to find specific rules prescribing the formalities relating to the conclusion of treaties’ (*ibid.*, p. 90). Rather, these law-making practices remained embedded in the order of natural law.

That this multi-level system of law and law-making slowly gave way to the more or less sharp distinction between domestic and international level marks the transition from the legal structure of the Middle Ages to modern law. As Osiander put it: ‘[t]he process by which the single society of medieval Europe, with its intertwining of multiple, “heteronomous” political authorities evolved into neatly divided, “sovereign” territorial states was a gradual one’ (Osiander 2001, p. 281).<sup>9</sup> At least three developments drove this process, in which the sovereign state emerged as a territorially defined entity claiming to be entitled to ultimate norm-setting authority for its internal and external affairs:<sup>10</sup> (1) the loss of authority of the pope, later aggravated by the Reformation (see Philpott 2001); (2) within the Holy Roman Empire the demise and final collapse of political and military control of the emperor; and (3) the factual ascertainment of political and legal control in a given territorial unit by potentates with the capacity to do so. With regard to the internal affairs of such a territorial unit ‘sovereignty . . . ended the “anarchy” of medieval society by making all members “subjects” to a central authority’ (Kratochwil 1989, p. 252). However, with regard to external affairs the assertion of sovereignty implied a new anarchy among sovereigns and thus ‘made it also necessary to conceive of relationships among “persons of sovereign authority”’ (*ibid.*). The first manifestations of such conceptions of relationships between the new sovereign authorities emerged in the form of the law of coexistence.<sup>11</sup>

## 22.3 NORM-GENERATION IN THE LAW OF COEXISTENCE

The first wave of international legalization began to take shape in the sixteenth century. The Peace of Augsburg in 1555 and the Peace of Westphalia in 1648 were not only steps to erode the medieval multi-level system and to establish sovereignty, but also to successively institute principles of order between the sovereigns. Through the Treaties of Utrecht, 1713, this wave reached its peak with the Congress of Vienna, beginning in 1814. It tailed off in the attempts to establish norms and institutions for peaceful coexistence at the turn of the twentieth century, which, however, had already witnessed a new emerging understanding of sovereignty, international law and law-making.

During the first wave, the emerging understanding of the external dimension of sovereignty mainly implied that states began to accept their mutual claims to have the sovereign right to exercise ultimate internal authority without intervention from abroad

and complete discretion as to their foreign affairs. Moreover, towards the end of this wave the understanding increasingly gained in importance that all states had equal sovereign rights – also indicating that any state had to respect any other state's right of existence.<sup>12</sup>

However, the understanding of sovereignty as unrestrained ultimate authority left little room for an extensive international public order. While the treaties from Augsburg to Vienna also contained some fundamental principles for a potential public order, the law of coexistence remained a quasi-private one. The bulk of treaties constituting international order were bilateral, between sovereign rulers, often negotiated secretly. While states went into commitments with other states, they did thus not create any obligations vis-à-vis the legal community of states as a whole. The treaties resembled private contracts rather than public law-making – as is also witnessed by their content. On the one hand, there were many treaties for mutual assistance in the case of war. On the other hand, after war, as Holsti put it in the case of the Peace of Westphalia and Utrecht, treaties mostly 'looked to the past' (Holsti 1991, p. 80); they aimed at restoring order by constituting new or reaffirming old borders and regulating 'at-the-border' conflicts, but they 'were not animated by any deep normative commitment to establishing general rules of international conduct' (Reus-Smit 1999, p. 107).<sup>13</sup> The law of coexistence thereby emerged through custom and defined the rules of diplomatic exchange and 'negative rules of abstention' (Friedmann 1964, p. 62). It helped to demarcate the borders of sovereign discretion and obliged states to refrain from actions violating these borders. However, threatening the use of force or the right to go to war against another sovereign remained at the sovereign discretion of the rulers. Moreover, powerful states could force less powerful states to act as they wished and wars for the extension of borders were quite common.<sup>14</sup> When the law of coexistence was concerned with 'behind-the-border issues' at all, the legal duties were meant to facilitate the peaceful coexistence of states rather than to police the internal sovereign discretion. For example, states that agreed to refrain from intervening in the affairs of religious minorities in their own societies very early in the history of international law merely did so to avoid conflict stemming from the different (and still border-transcending) religious allegiances and loyalties of the rulers (see Rae 2002, Cronin 2003).

The emerging international law of coexistence was no longer seen as embedded in or derived from natural law which had ruled out or made superfluous a specified procedure for law-making (Holsti 2004, p. 150).<sup>15</sup> Nor did it rely on specified rules for law-making. The ad hoc character of treaty law negated the establishment of secondary norms and otherwise law emerged from custom. Law-making nevertheless was related to some more secular (and changing) fundamental consensus principles such as the understanding of sovereign equality or, by contrast, specific great power responsibility (Osiander 1994); other than these and the principle of state consent, secondary rules for international law-making barely existed.

Overall, while 'states considered themselves competent to make legal rules' (Grewe 2000, p. 349), and the notion of positive law gained hold, law-making was not yet structured by clearly defined procedures, nor were norms in place that allowed binding law to be made independent from the consent of the sovereigns. Thus, law-making at that time cannot be considered as legislation in any appropriate sense. Despite some legal underpinnings of governance-like collective attempts in the aftermath of wars, '[i]nternational

law lacked both depth and breadth. It was a marginal factor in the constitution of actors and poorly linked to other interstate activities' (Reus-Smit 1999, p. 104).

## 22.4 NORM-GENERATION IN THE LAW OF COOPERATION

The second wave in the formation of modern international law began to take shape in the beginning of the nineteenth century. Major innovations with regard to norm-generation during this time were the practice of treaty-making in multilateral conferences (Baldwin 1907; Denmark and Hoffmann 2008) and, later, the institutionalization of what can be called an 'operating system' for international law, facilitating norm-generation in several ways (Diehl et al. 2003, Alvarez 2005, pp. 271ff). The organizational manifestation of this system was of course the United Nations (UN) which paved the way for an almost exponential growth in the number of multilateral treaties. The number of agreements signed every year first peaked in the 1960s and began to rise again in the 1990s (Denmark and Hoffmann 2008, pp. 188ff.). These agreements were designed to cope with the growing demand for international cooperation arising from growing interdependence within the emerging international community. Examples of these treaty-making processes include the various multilateral economic (see Braithwaite and Drahos 2000), environmental (see Mitchell 2003) and human rights conventions (see Martin 2006), making up the legal core of the respective functional regimes – that is, explicitly defining the 'principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations' (Krasner 1983, p. 2). Recently, this wave seems to have reached its pinnacle, as questions of effectiveness and legitimacy of existing regimes rather than the institutionalization of new regimes occupies law-makers in international society.

During this wave a new understanding of sovereignty emerged.<sup>16</sup> It can be regarded as both constitutive for, and a consequence of, the law of cooperation. The idea that the sovereign was bound by international law was increasingly realized (Reus-Smit 1999, pp. 122ff.). Externally this was mirrored in the renunciation of the right to go to war and internally by the constitutional recognition of human rights. In addition, states' conduct became increasingly bound by their self-commitment to the plethora of other international legal norms (Held 2002, pp. 5–20). With the strict understanding of sovereignty as ultimate authority in internal and external affairs this extensive cooperation would not have been possible. While states formally retain the ultimate authority to make law, in practice they recognize the bounded character of their sovereignty. States also came to understand that 'the only way [they] can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system' (Chayes and Chayes 1995, p. 27).

The most important change was the eventual creation of a more comprehensive international order. While the idea of a public order for an international community had still been flatly rejected at the Congress of Vienna in 1814 and discussed with partial success only at The Hague 1899 and 1907, the League of Nations and finally the UN aimed at providing such an order (Reus-Smit 1999, p. 141). The UN did away with the private order based on mainly bilateral commitments and established, through its numerous multilateral treaties, a reference point for the international community as a

whole. Moreover international law was no longer limited to negative rules of abstention, but included positive duties requiring states to act in a specific way towards their own society. Rather than just managing at-the-border conflicts, international law of many international regimes now also attempted to solve cross-border problems as, for instance, in many international environmental treaties, and behind-the-border issues such as in various agreements on labor standards or human rights. International law now even mirrored commitments to shared values of the emerging international community.

In the emerging public order the role of customary law was increasingly substituted with contract law, while law-making was now defined by increasingly specified procedures. With the International Law Commission (ILC)<sup>17</sup> and the International Court of Justice (ICJ), two bodies were created which, among other things, elaborated on the procedures for international law-making. The statute of the ICJ explicitly defines the sources of international law: customs, contracts, general principles of law recognized by civilized nations, judgments of the ICJ and teachings of ‘most highly qualified publicists.’<sup>18</sup> In subsequent judgments the ICJ went on to specify these sources, for instance, rendering more precisely the conditions under which international customary law can come about (see Shaw 2003, pp. 68–88). Endowed with its mandate to ‘progressively develop international law’ the ILC helped to codify the (customary) procedures of treaty-making.<sup>19</sup>

While international law-making was thus promoted by the existence of the UN (Grewe 2000, p. 663), it remained – contrary to what many UN supporters hoped for (for example, Falk 1966)<sup>20</sup> – law-making without a legislator, because it was tightly bound to the requirement of consensus. The UN Charter denies legislative powers to the General Assembly (Grewe 2000, p. 665) as it cannot pass resolutions of a binding character. Security Council (SC) resolutions, by contrast, are binding, but the SC was conceived as being concerned with law enforcement rather than law-making (Alvarez 2005). Law-making thus remains dependent on state consent. Neither custom, nor contract, or court’s decisions bind without the consent of the affected parties. Obligations emerging from treaties are considered null and void without explicit and unforced consent of the parties (see Shaw 2003, pp. 816ff.).<sup>21</sup> The emergence of custom requires the so-called *opinio juris* on the part of the states, that is, the expressive belief that they are legally bound; to discharge the respective duties and obligations from custom could be avoided by the possibility of so-called persistent objection (see *ibid.*, pp. 68–88). Law-making through judgments of the ICJ<sup>22</sup> depended on the states’ commitment to accept its jurisdiction as binding beforehand by agreeing to the respective optional clause (*ibid.*, pp. 974ff.).<sup>23</sup>

To summarize, in the era of the law of cooperation, international law-making processes are fulfilling two of three relevant characteristics of international legislation. The main form of law-making is the conclusion of international contracts. This is now increasingly done through well-established procedures and is also normally understood to be a public endeavor – either within the international legal community as a whole or in the functional and regional subsets of this community. In the process of functional legalization states give up ever-larger parts of their earlier sovereign discretion. While their sovereignty thus becomes bound, their obligations still only arise from sovereign consent. The functional regimes constitute a peculiar form of problem-solving, which also has constitutive and regulatory effects on other levels. Though observance of international obligations is generally high,<sup>24</sup> ‘the good news about compliance’ is not necessarily ‘good

news about cooperation' (Downs et al. 1996). In the law of cooperation the rule for the conclusion of a law-making process was consent. Thus, states, according to Downs et al., commit themselves only to obligations which do not run contrary to their interests anyway. This argument turns the attention back to law-making. As Geoffrey Palmer has accordingly observed, 'what is missing from the present institutional arrangements is the equivalent of a legislature' (Palmer 1992, p. 264). With regard to environmental problems, says Palmer, consent is one of the 'biggest obstacles' to the effectiveness of international law-making. Instead of enabling independent governance beyond the state, the consent requirement reduces international law-making to the coordination of national legislation. Thus, due to the consent requirement governance at the international level still remains subordinated to governance at the national level.

## 22.5 NORM-GENERATION AND CONSTITUTIONALIZATION OF INTERNATIONAL LAW

In the third wave of international legalization, the international order has become incrementally more constitutionalized, both on a macro-constitutional level of international community as a whole and on the micro-constitutional level of functional and regional regimes. This wave began with the founding of the UN, its Charter arguably displaying several characteristics of a constitution proper (Fassbender 1998). But the wave rose steeply only after the end of the Cold War and may not have reached its summit yet. We thus will not present the international order as being already constitutionalized, but rather highlight trends that might add up to the incremental constitutionalization of the international order. One of the most fundamental trends in this regard is the gradual overcoming of consent as the basis for international law.

The gradual constitutionalization of international law goes along with a transformation of sovereignty. Originally based on the claim to ultimate internal and external authority, sovereignty has been bound by self-commitment to international norms. Nevertheless, the claim itself remains unchallenged. 'By contrast the idea of constitutionalism implies that sovereignty is gradually complemented by other guiding principles' (Peters 2006, p. 586). While the notion of sovereignty was already disconnected from the effective control of the means of violence in a given territory and thus gained a primarily legal status in the law of cooperation, it now seems to become dependent on prior normative requirements. As the International Commission on Intervention and State Sovereignty (ICISS) formulated, 'a condition of any one state's sovereignty is the corresponding obligation to respect every other state's sovereignty' (ICISS 2001, p. 12). The difference to the mutual recognition of sovereignty emerging since the law of coexistence lies in the fact that sovereignty is made conditional here. Moreover, it is not only the external recognition of the other state's sovereignty, which is made a condition of sovereignty, but also the recognition of 'the responsibility to protect' (*ibid.*, p. 13). If a state is 'unable or unwilling' to fulfill this responsibility of sovereignty vis-à-vis its people, the responsibilities of sovereignty go over to the international community, which if circumstances demand may discharge these responsibilities at the cost of the territorial integrity of the state in question (*ibid.*, p. 29).<sup>25</sup> David Held termed this 'cosmopolitan sovereignty,' which refers to 'sovereignty stripped away from the idea of fixed borders and

territories governed by states alone, and is instead thought of as frameworks of political regulatory relations and activities, shaped and formed by an overarching cosmopolitan legal framework' (Held 2002, p. 33). Sovereignty thus becomes an authority which is itself authorized. It is authorized by prior constitutional principles of the international community, mainly by the recognition of fundamental human rights.

As a consequence, the international legal order is no longer strictly based on law between states. Rather the international public order gives way to a cosmopolitan public order. The emergence of this cosmopolitan public order is backed by norms and norm-generating processes which aim at expressing not the interests of individual states, but rather 'global community interests' (Peters 2006, p. 588). These may be contained in the concept of non-derogable duties, which have become embedded in international legal doctrine and practice in the form of peremptory norms, the so-called *jus cogens*.<sup>26</sup> The doctrine of *jus cogens* is still not very well developed and no explicit catalogue of *jus cogens* norms or any codification beyond case law exists. There seems to be at least some agreement that, among others, the prohibition of aggressive war, genocide, apartheid, slavery and torture are such peremptory norms. These norms seek to constrain, at least to some degree, the discretion of a sovereign ruler, as they declare treaties between sovereigns which conflict with these rules at the time of their conclusion, for instance, treaties to the effect of organizing genocide or endorsing slavery, as null and void.

Obviously, *jus cogens* does not constitute a very strong threat to sovereignty in its own right. But *jus cogens* norms are also considered to be norms *erga omnes*.<sup>27</sup> These norms broaden the possibilities for the enforcement of norms. While the doctrinal foundations of the law of coexistence limits the opportunity for sanctioning of non-compliance to the concretely harmed contractual parties, the notion of *erga omnes* endorses the right or even duty of the international community as a whole to sanction non-compliance with the respective norms. Both the non-derogable norms and these global order treaties rely on the understanding that the resulting obligations are owed to the global community rather than to the contracting parties. This of course presupposes the recognition of an international or even global legal community of its own from which the legitimacy of the rules is derived. In a sense then, treaties like major human rights conventions, but also some environmental and economic treaties, which differ from the functional and regional regimes of the law of cooperation by their virtually borderless regulatory intent, can be seen as codifications of this community's interest. Such treaties explicitly accept or endorse effects on third parties, such as notions to compel non-members to compliance with their provisions as well.

The gradual constitutionalization of the international order not only entails the transformation of the most fundamental principles of international law, it also means that the procedural norms of international law, both on the macro- and micro-constitutional level, change in character as they go beyond the principle that international law must be based on continuing state consent. On the level of the functional regimes three developments stand out.

First, the number of international courts or court-like dispute settlement mechanisms as a constitutionally sanctioned practice has significantly increased (see Romano 1999). These mechanisms are sometimes designed in a way that permits the rulings of a third party to take effect without the consent of the parties involved. A prime example is the

development of the world trade regime's dispute settlement mechanism from the General Agreement on Tariffs and Trade (GATT) to the World Trade Organization (WTO) (see Zangl 2006, 2008).

Second, international regimes are increasingly complemented with bodies to monitor compliance with their provisions (for example in Lanchbery 1998; Victor et al. 1998). One early example is the International Atomic Energy Agency (IAEA) inspections to make sure that state parties to the Nuclear Non-Proliferation Treaty cannot divert material from their civil nuclear facilities for military purposes.

Third, many international regimes now provide for (qualified) majority voting. This trend towards majority voting applies in particular to regimes with a two-layered structure of a framework convention which provides for being amended by protocols. Whereas the framework convention depends on the parties' consent, amendments through protocols can be made by majority vote. Examples for this framework convention/protocol approach are the Vienna Convention for the Protection of the Ozone-layer (22 March 1985), and its famous Montreal Protocol (16 September 1987) which obliges states to reduce CFC production and consumption. Moreover, the trend towards majority voting also applies to international regimes in which state parties delegate decision-making to organs of an international organization. Take, for instance, the ministerial conference of the WTO which can make decisions by majority vote; the International Whaling Commission, which decided with two-thirds of its members in favor of a whaling moratorium that applies to all its member states; the ministerial conference of the Washington Convention on international trade in endangered species (CITES), which decided with a majority vote that ivory from elephants must not be traded (see Reeve 2002); or the International Labour Organization (ILO) 'Declaration on Fundamental Principles and Rights at Work' (19 June 1998) which committed by majority vote all ILO members to the norms of eight core labor conventions irrespective of whether they have consented to them (see Helfer 2008a). Whereas the increase of court-like bodies, monitoring bodies and majoritarian decision-making bodies are indicative of a general trend of legalization, the latter can also be regarded as indicating a trend towards international law-making as legislation.

This trend even applies to the macro-constitutional level, where the recent activities of the UNSC are indicative of truly legislative activities. Since the end of the Cold War the SC has on several occasions 'issued "generic resolutions" which may – due to their general and abstract character – aptly be qualified as law' (Peters 2006, p. 589). Particularly in reaction to the effectiveness deficits of anti-terrorist conventions, after the 9/11 attacks in 2001, the SC imposed obligations on UN members that would normally only emerge from treaties. In fact, many of the provisions enacted were taken from treaties that were far from uncontested, let alone universally ratified. Moreover, the SC did not content itself with responding to a particular crisis or a discrete threat, but 'purports to make general law for all states' (Alvarez 2005, p. 197). With this, as Helfer emphasizes, 'the Council assumed a new institutional role – that of a "global legislator"' (Helfer 2008b, p. 81; cf. Talmon 2005).<sup>28</sup>

To summarize, although the international law of cooperation with its positive duties already deeply intruded national legislation and thus bound sovereignty, the law of constitutionalization goes much deeper, by making states' sovereignty conditional to the fulfillment of fundamental human rights. Moreover, with the gradual erosion of the



consensus requirement international law-making acquires the status of legislation. As a consequence, international law-making is no longer entirely dependent on national legal Acts and thus becomes partially independent. While international law-making can thus affect domestic law the reverse remains true as well. International law-making still remains largely dependent on legal acts at the national level. But law-making has become a matter of multi-level governance.

## 22.6 THE LEGITIMACY OF INTERNATIONAL LEGISLATION

In the preceding sections we sought to trace the emergence of international legislation through three waves in the development of international law as a partially independent level of governance. The first wave established the notion of sovereignty as ultimate law-making authority and with it the recognized right of states to initiate law-making internally and externally at will. The norms resulting between the persons of sovereign authority and later between states determined the law of coexistence. In the second wave, an operating system of secondary rules was established that facilitated a process of law-making through the establishment of highly specified procedures. Thus, the international law of cooperation experienced exponential growth and it expanded in more and more functional subject areas. Law-making that resembles legislation, and thereby erodes the consent requirement of sovereign states, is a relatively recent development of a third wave, in which international law-making gradually becomes constitutionalized. As a consequence, legislation becomes part of a multi-level governance architecture in which legislation on one level is dependent on legislation on the other.

The transformation of international law-making as part of a deep transformation of the international order has fundamental consequences for the democratic legitimacy of political regulation. According to the democratic principle that those subjected to binding law should also have a say in law-making, the international law of coexistence did not pose a problem for democratic legitimacy. Seen from the domestic level, the strict principle of state sovereignty was a shield against foreign intervention or domination, and was meant to be a guarantee for domestic self-determination. Though there were of course very few, if any, democratic states proper in the era of the law of coexistence, state sovereignty at that time allowed – at least in principle – domestic law-making to be truly democratic in the sense of self-government, because it was effectively protected from any unwanted interference from international law and did not necessarily produce such effects on others itself. At the international level in turn, the principle of strict sovereignty implied that only states were bound by the law that had expressed their consent in the process of law-making. And as international law was mainly concerned with at-the-border issues – that is, inter-state conduct – this implied that all those who were affected by international law had complete control over the obligations that were deriving from the law. The principle of democratic law-making could thus be upheld on both the national and the international levels.

This changes, however, with the transition to the law of cooperation. Sovereignty still functions as a protective shield of national self-determination, but there are ever more international positive duties, which are regarded as not just at-the-border issues, but also as behind-the-border issues too. International law gained remarkable influence on

domestic law making in the second wave. As a consequence, states were no longer the only addressees of international law, but the people living in the respective states became – at least indirectly – addressees of international law too. Thus, while the authors of international legal obligations remained the same (that is, states) the addressees changed (from states to people). Sure, the requirement of consent still deeply embedded in the international law of cooperation allowed, at least in principle, a people to democratically opt out of any unwanted international legal obligation. Yet, as international law is mainly made by state governments rather than national parliaments, democratic control over law-making is much less direct or effective than in a purely domestic setting. The problem is nicely captured by the concept of a ‘new reason of state’ according to which the executive can exploit its law-making power on the international level to gain law-making leverage on the domestic level (Wolf 1999, 2000).

This democratic problem turns into a severe democratic deficit with the emergence of the law of constitutionalization (see Maus 2002). Sovereignty functions less and less as a protective shield of national self-determination. While the main authors of international law are still members of the international community of states, the law is increasingly directed at the people within states. At the same time the emergence of law-making without state consent – that is, legislation proper – undermines the even domestically rather optimistic idea that the people of a democratic state could and should have control over the rules to which they are subjected. If international law applies without consent, a people could be obliged to comply with international obligations, which their own government and political regulators may have even rejected.<sup>29</sup> How international legislation can be based on institutional structures, which guarantee that the addressees of law can also claim to be their authors, is thus still open to question. Political theorists have generally offered four precepts, which, however, all have their problematic edges.

First, the return to a law of cooperation or even a law of coexistence as, for instance, advocated by the so-called pluralists of the international society tradition (see Nardin 1983; Jackson 2000) is not realistic. Due to the demand for international law created by processes of globalization in the economic field as well as in the fields of security, communication and the environment the international community of states can hardly permit the process of international legalization to be reversed.

Second, the enhanced democratic domestic control of states’ international law-making activities as advocated by Maus (2007) hardly solves the problem. On the one hand, it may have adverse effects for international law-making as it becomes easier for domestic veto players to block international agreements their state representatives are willing to accept (see Putnam 1988). And, on the other hand, enhanced domestic democratic control of states’ international law-making activities does not improve the legitimacy of international legal obligations that were made without consent of the respective state.

Third, the increased participation of transnational civil society actors in international law-making can also not be satisfactory from a democratic point of view, because many civil society actors must stand up to the question of their own democratic legitimacy. Moreover, transnational civil society not even remotely resembles the dense and tight network of domestic civil societies within which there is at least some chance of equal representation and representative diversity of voices in the public sphere (Chandler 2004; Zürn 2004).

Finally, the visions of a fully fledged cosmopolitan democracy (for example, Held

1995) are still too far off the reality as to contemplate their possible contribution to the legitimization of international law-making through legislation in the near future.

To conclude, the evolution of international law-making has led to a constellation where national and international constitutionalized law-making processes increasingly complement each other. Yet, the emerging multi-level system of legislation also faces a severe deficit of democratic legitimacy, to which so far no convincing solution has been found.

## NOTES

1. On the one hand, this links legislation to positive law, excluding natural or divine law from the definition. On the other hand, it distinguishes legislation proper from judge-made law, as courts normally do not have the authority to initiate law-making on their own, but are dependent on delegation (see Boyle and Chinkin 2007, pp. 268ff.). It leaves open the question whether there is individual or collective legislation or a legislature.
2. This characteristic could be called ‘Hart-threshold.’ If, as Hart did, the unity of primary and secondary norms defines law proper, law-making requires the structuring of norm-making processes by at least some secondary principles or procedural rules (Hart 1994, pp. 81, 91ff.). This also distinguishes legislation as we use it here from the emergence of custom.
3. This last characteristic helps to distinguish legislation from the consensual nature of contracts. While contracts are invariably bound to the private interests of the parties, by departing from consensus, legislation opens up the possibility of law-making in the public interest.
4. On the one hand, we thus ignore other regional systems of international law (see Onuma 2000) and, on the other, we leave transnational law (Joerges et al. 2004, Brütisch and Lehmkuhl 2007) and the law of the European Union out of the picture (Craig and Harlow 1998; Türk 2006).
5. We deliberately chose the metaphor of a wave: the developmental processes can overlap and new forms may be on the rise while older ones may not have reached their breaking points or still make impact while tailing off.
6. The difference between ‘dispersed medieval authority (no sovereignty)’ and ‘centralized modern authority (sovereignty)’ is nicely depicted in (Jackson and Sörensen 2007, p. 12).
7. For the following, see Grewe (2000, pp. 37–136).
8. The curia often acted as notary in regard to law-like agreements, for instance, symbolically confirming and reinforcing the latter’s obligatory character by lending its emblems and seal to the documents (*ibid.*, p. 88).
9. This process was not only a gradual one, but also a region-specific one (Tilly 1990). It took off early in countries such as England, France and Sweden where sovereign states had emerged already in the sixteenth century and, thus, supranational law hardly played any role. It took off much later in other regions such as those of the Holy Roman Empire where the law of the Empire more or less effectively constrained its members until the eighteenth century (Randelzhofer 1967, p. 219).
10. For the emergence of the state in early modernity, see from different theoretical perspectives Krasner (1999), Randelzhofer (1967), Spruyt (1994), Teschke (2003), and Tilly (1990).
11. Giddens is thus right to claim that sovereignty simultaneously ‘provides an ordering principle for what is “internal” to states and what is “external” to them’ (Giddens 1987, p. 281).
12. For the rather long way to the recognition of sovereign equality, see Holsti (2004, p. 152; and Reus-Smit (1999, pp. 107ff.).
13. As Grewe puts it: ‘Treaties with exclusive law-making character, establishing only general abstract norms for future behaviour, were almost unknown’ (Grewe 2000, p. 360).
14. As Reus-Smit claims, states only ‘engaged in diplomatic action when particular circumstances demanded, when unilateral claims and the use of force failed to realize their objectives’ (Reus-Smit 1999, p. 107).
15. See Grewe (2000, pp. 187ff.) on the gradual substitution of positive law for natural law thinking.
16. For just two examples of a vast literature, see Chayes and Chayes (1995), who coined the term ‘new sovereignty’ and more recently Held (2002).
17. The ILC was institutionalized as a subsidiary organ of the UN General Assembly (by Resolution 174/III (21 November 1947), also containing the statute of the Commission) deriving its mandate from the UN Charter, which asks the General Assembly to encourage ‘the progressive development of international law and its codification’ (UN Charter Section 13 (1)).

18. See Statute of the International Court of Justice (26 June 1946), Section 38(1).
19. They were laid down in the Vienna Convention on the Law of Treaties (23 May 1969), which entered into force in 1980 and precisely defines the procedures through which international treaty law is to be created.
20. The UN was not created as a 'parliament of man' (Kennedy 2006)
21. As Alvarez cautions, 'the conclusion of multilateral conventions in organizational settings does not mean that the "international community" is "legislating" collectively' (Alvarez 2005, p. 274).
22. Even if the court changes law by applying and specifying it, Shaw points out that '[i]t cannot formally create law as it is not a legislative organ' (see Shaw 2003, p. 966).
23. The optional clause refers to Section 36(2) of the ICJ's statute, stating that the parties may declare their recognition of compulsory jurisdiction of the court.
24. For a notorious statement on compliance, see Henkin (1979). For an empirical confirmation, see Zürn and Joerges (2005).
25. This new understanding of sovereignty first developed by an international Commission outside the UN system was subsequently taken up by a High-level Panel of the UN Secretary General (UN High-level Panel on Threats 2004), the Final Declaration of the 2005 UN World Summit (A/Res/60/1 (24 October 2005) and in Security Council Resolutions S/Res/1674 (28 April 2006), S/Res/1706 (31 August 2006), and S/Res/1755(30 April 2007).
26. *Jus cogens* has been established by the Vienna Conventions on the Law of Treaties (Section 53; see Shaw 2003, p. 117).
27. The notion was developed in the so-called Barcelona Traction case of the ICJ (see Shaw 2003, p. 116).
28. The relevant resolutions are S/Res/1267 (15 October 1999), S/Res/1373 (28 September 2001) and S/Res/1540 (24 April 2004). Alvarez argues that these are 'part of an interlocking legislative agenda' (Alvarez 2005: 198). Moreover, he thinks, that 'It is the closest thing we have in international law to real "law-making" as some define it' (*ibid.*, p. 196).
29. There has been a hot debate on the extent of the normative problem involved here (for example, Moravcsik 2004; Zürn 2004).

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## 23 Transgovernmental networks and multi-level governance

*Anne-Marie Slaughter and Thomas N. Hale*

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Transgovernmental networks are informal institutions linking regulators, legislators, judges and other actors across national boundaries to carry out various aspects of global governance. They exhibit ‘pattern[s] of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the “domestic” from the “international” sphere’ (Slaughter 2004a, p. 14). They allow domestic officials to interact with their foreign counterparts directly, without much supervision by foreign offices or senior executive branch officials, and feature ‘loosely structured, peer-to-peer ties developed through frequent interaction rather than formal negotiation’ (Raustiala 2002, p. 5; see also Risse-Kappen 1995).

Transgovernmental networks occupy a middle place between traditional international organizations and ad hoc communication. They have emerged organically in response to the increasing complexity and transnational nature of contemporary problems, to which they are uniquely suited, challenging the distinction between domestic and foreign policy. They appear most commonly in the realm of regulatory policy – for example, commercial and financial regulation, environmental protection – but also extend to judicial and even legislative areas of government.

The concept of ‘network governance’<sup>1</sup> overlaps with the idea of multi-level governance (MLG) that animates this volume, but only partially. Recall the definition of MLG given in the Introduction to this volume: ‘a set of general-purpose or functional units that engage durably, with some degree of autonomy, in an enduring interaction and united in a common sectoral or communal governance arrangement that enjoys autonomy of its own.’ This broad definition can certainly include transgovernmental networks, especially since the editors explicitly state that ‘such an arrangement need not be constitutionally engrained’ to meet their definition. However, they also require ‘a certain durability of the arrangement and process to distinguish [MLG] from *mere* issue networks emerging across governance levels’ (emphasis added). While some government networks are indeed too ad hoc to meet this definition, others, like the Basel Committee on Banking Supervision (a group representing the central bankers of key industrialized countries), the International Organization of Securities Commissioners, or groups like the G-8 at the leaders level or the G-20 at the level of finance ministers, are not. That said, flexibility is a key feature of networks, and once a governance arrangement is overly formalized it can no longer be considered a network.

Another of the defining characteristics of government networks is their horizontality – the coming together of like government units across borders to accomplish collectively what they can no longer do on their own within their national jurisdictions. The concept of ‘multi-level’ governance, in contrast, suggests a degree of verticality – if not necessarily hierarchy – in the relations between components of a governance arrangement.

While some transgovernmental networks are vertical – for example, in the context of the European Union (EU) – and others are increasingly integrating state and local officials as well as national officials, the defining characteristic to date has been the interaction of counterparts or peers operating on the same level.

Most of the governance arrangements described in this chapter are thus at right angles to many of the other contributions to this volume. However, considering governmental networks in the context of MLG is important for three reasons. First, transgovernmental networks can have vertical structures, making them perfect examples of MLG (Slaughter 2004a). Second, as noted above, despite the vertical-horizontal distinction, network governance and MLG are both characterized by autonomous units interacting to pursue some governance objective. Both frameworks are thus likely to have insights for the other. Third, the real world is of course characterized by both vertical and horizontal governance arrangements. Exploring both together may shed light on the overall ‘governance matrix’.

## 23.1 OVERVIEW OF TRANSGOVERNMENTAL NETWORKS<sup>2</sup>

Transgovernmental networks have arisen in response to the complex governance challenges posed by increasing transnational interdependence. The phenomenon dates back at least to the 1970s, when Keohane and Nye (1974, pp. 39, 43) noted the growing importance of ‘transgovernmental’ activities. In 1972 Francis Bator testified before the US Congress, ‘it is a central fact of foreign relations that business is carried on by the separate departments with their counterpart bureaucracies abroad, through a variety of informal as well as formal connections.’<sup>3</sup> And indeed, the Basel Committee was founded in 1974.

By the late 1990s, however, transgovernmental networks had increased so dramatically in degree as to amount to a difference in kind. As the latest intense wave of globalization has made international cooperation increasingly necessary on a range of issues – from the economy to the environment to policing – ‘traditional’ forms of diplomacy have sometimes proven cumbersome. By strictly bifurcating the international and domestic spheres, traditional diplomacy – conducted through foreign ministries, ambassadors and international organizations – has been outstripped by the transnationality of many contemporary policy issues, which operate simultaneously the domestic and international realms.

By associating ‘domestic’ officials in networks that stretch between nations, transgovernmental networks perform three important functions. First, they expand the state’s capacity to confront transnational issues. So many areas of policymaking now require international coordination that foreign ministries alone are simply unable to handle the full portfolio of extra-national assignments. Similarly, domestic officials find they are unable to adequately fulfill their responsibilities without consulting and coordinating with foreign counterparts.

Second, and related to the first point, international cooperation now extends to many highly technical issues – for example, financial regulation or environmental monitoring – in which foreign ministries simply lack expertise. The expanded scope and depth of contemporary interdependence sometimes necessitates technocratic responses only specialized ‘domestic’ officials can provide.



Third, networks allow for flexibility and responsiveness in a way that traditional diplomatic channels and international institutions often do not, increasing efficiency. Because networks are not formal institutions, they can often reach outcomes with lower transaction costs than international institutions. Networks focus attention on information exchange, discussion and coordination, avoiding many of the obstacles that inevitably draw out efforts to negotiate formal treaties or pass resolutions. Moreover, by bringing together the actual officials responsible for a certain policy area – as opposed to diplomats responsible for liaising with other countries – networks can also increase the efficiency of international coordination.

Transgovernmental networks can be categorized both by the relationships they establish and the functions they perform. As noted above, transgovernmental relationships can be either horizontal or vertical. Networks between actors at the same level (for example, judge-to-judge or regulator-to-regulator) are horizontal, and form the majority of transgovernmental networks. However, some vertical networks between supranational officials and national-level officials also exist. For example, in the EU, supranational officials work closely with their domestic counterparts to ensure that EU policy is implemented in the national context.

Networks come in many different varieties, but can be grouped in three basic types: information networks, enforcement networks and harmonization networks. Horizontal information networks, as the name suggests, bring together regulators, judges or legislators to exchange information and to collect and distill best practices. This information exchange can also take place through technical assistance and training programs provided by one country's officials to another. The direction of such training is not always developed country to developing country either; it can also be from developed country to developed country, as when US antitrust officials spent six months training their New Zealand counterparts.

Enforcement networks typically spring up due to the inability of government officials in one country to enforce that country's laws, either by means of a regulatory agency or through a court. But enforcement cooperation must also inevitably involve a great deal of information exchange and can also involve assistance programs of various types. Legislators can also collaborate on how to draft complementary legislation so as to avoid enforcement loopholes.

Finally, harmonization networks, which are typically authorized by treaty or executive agreement, bring regulators together to ensure that their rules in a particular substantive area conform to a common regulatory standard. Judges can also engage in the equivalent activity, but in a much more ad hoc manner. Harmonization is often politically very controversial, with critics charging that the 'technical' process of achieving convergence ignores the many winners and losers in domestic publics, most of whom do not have any input into the process.

## 23.2 THE PROLIFERATION AND EVOLUTION OF TRANSGOVERNMENTAL NETWORKS

Transgovernmental networks are everywhere, having proliferated into almost every area of government regulation. They have been used to address the leading problems of the

day, ranging from high politics questions of national security and official corruption to more mundane issues such as common policies on airplane regulation. Legal scholars have identified and considered the implications of regulatory cooperation in tax, anti-trust, food and drug, and telecommunications regulation.<sup>4</sup> Indeed, in the EU alone, Sabel and Zeitlin (2006) have documented disaggregated forms of coordinative governance (which to them are network-like, but branded as examples of ‘directly-deliberative polyarchy’) in privatized network infrastructure, public health and safety, employment and social protection, other forms of regulation, and even rights-sensitive areas like the protection of race, gender and disabled status, all after combing carefully through an exhaustive literature.

A few examples may prove instructive. Consider the International Network for Environmental Compliance and Enforcement (INECE), a ‘partnership among government and non-government compliance and enforcement practitioners from over 150 countries.’<sup>5</sup> Founded in 1989, this network of some 4000 domestic environmental regulators allows participants to share experiences and best practices, to develop common standards and to coordinate around transboundary issues. Originally a joint project of the US and Dutch environmental agencies, INECE has evolved into a global and increasingly institutionalized organization.

The International Competition Network (ICN) has followed a similar trajectory in the antitrust sphere. In the mid-1990s antitrust regulators felt that the growing size and number of transnational corporations required coordinated responses from regulators across jurisdictions. After much consultation, in 2001 14 countries launched the ICN to provide ‘competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns’ with the hope of allowing ‘a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the global antitrust community.’<sup>6</sup> The ICN does not make antitrust laws, but rather relies on working groups to develop recommendations and guidelines to specific problems that are then implemented by national regulators.

The Basel Committee on Banking Supervision, described briefly above, was founded in 1974 by the central bank governors of the Group of Ten industrialized economies ‘to enhance understanding of key supervisory issues and improve the quality of banking supervision worldwide . . . by exchanging information on national supervisory issues, approaches and techniques, with a view to promoting common understanding.’<sup>7</sup> By the 1970s the need for greater coordination and centralized information exchange among central bankers had become apparent. Once created the Basel Committee also took on a policymaking function by promulgating a global accord on capital adequacy standards (Basel I). In 1997 the Committee issued a ‘Set of Core Principles for Effective Banking Supervision,’ which its members have worked actively to promote in many other countries around the world.<sup>8</sup>

By the 2000s, the Basel Committee had developed four sub-committees, one of which is a regular liaison to 16 supervisory authorities around the world as well as regional and international financial institutions. It also undertook an elaborate process of consultation to revise Basel I and issue new ‘Basel II’ standards for capital adequacy and other banking issues. The Committee meets regularly with central bankers from important emerging markets, holds biannual international conferences of banking supervisors,

circulates published and unpublished papers to banking supervisors around the world and offers technical assistance on banking supervision in many countries.<sup>9</sup>

Expanding even more, the Basel Committee Secretariat now acts as Secretariat to the 'Joint Forum' and the 'Coordination Group,' both entities created to foster cooperation among central bankers, insurance supervisors and securities commissioners.<sup>10</sup> The Bank for International Settlements, the 'traditional' international institution that hosts the Basel Committee and other regulatory networks, now describes itself in part as a 'hub for central bankers,'<sup>11</sup> linking to central bank websites and related sources of information and expertise all over the world. It also provides secretariat functions for related organizations of financial regulators, such as the Financial Stability Forum and the International Organization of Insurance Supervisors.<sup>12</sup> The result is nothing less than a new global financial architecture, but one created by informal networks rather than formal institutions.

Governmental networks are also increasingly important at the regional level, especially in Asia, where formal institutions remain weak. The Association of Southeast Asian Nations (ASEAN), arguably the most institutionalized intergovernmental organization in Asia, was founded not by a formal treaty but through a 'multilateral declaration.' In the beginning, formal governance of the organization was placed in an annual meeting of foreign ministers and most of the bargaining and negotiation occurred in the Senior Officials Meeting, a network of senior officials in foreign ministries that did not even have a formal status within the ASEAN. The informality and decentralization of ASEAN's structure is complemented by its institutional principles. Instead of emphasizing legal commitments and mutual obligations, the ASEAN takes as its guiding precepts *musyawarah* (consultation) and *mufakat* (consensus), concepts originating in the practice of Southeast Asian village life.

In addition to the ASEAN itself, the most important transgovernmental networks in Asia today are horizontal information networks focused on economic policy, a response to the region's deepening economic integration. The ASEAN+3 network (consisting of the ten ASEAN member states plus China, Korea and Japan) has become the region's premier forum for financial coordination. It is complemented by the ASEAN Surveillance Process, the Manila Framework Group (MFG), the Executives Meeting of East Asia-Pacific Central Banks (EMEAP), and trans-regional forums such as Asia Pacific Economic Cooperation (APEC) and Asia-Europe Meeting (ASEM). The premier security institution for China, the Shanghai Cooperation Organization, also exhibits much more of a network structure than more formalized defense institutions like the North Atlantic Treaty Organization (NATO).

The proliferation of transgovernmental networks will continue and likely increase. Their informal nature has thus far foiled efforts to generate a comprehensive list of these organizations, and so scholars cannot say precisely how broad their impact is. However, calls for the expansion of these networks at the highest levels indicate they will grow even more important to multilateral cooperation in the future. To take just one example, the US Center for Disease Control (CDC) director Julie Geberding's experience with managing the SARS crisis affirmed the extreme difficulty of trying to manage a global crisis affecting hundreds of agencies and authorities at different levels of national and international governance through a national hierarchy – the CDC itself (Gerberding 2003). Faced with responsibility for a problem but lacking the authority to command all the

necessary actors, Gerberding discovered that a networked approach was the only way to confront the global pandemic.

Beyond specific issues, a major study by the Brookings Institution on 'Managing Global Insecurity' recommends the expansion of the G-8 to a G-16, creating a leaders network that would include developed and developing country leaders.<sup>13</sup> The 2004 UN High-level Panel on Threats, Challenge and Change endorsed a similar proposal for a leaders network of some 20 countries. The 'E-8' – a group of the largest polluters aimed at addressing climate change – is another proposal. From high politics to the more mundane realms of everyday technical cooperation, networks are necessary.

### 23.3 HOW TRANSGOVERNMENTAL NETWORKS WORK

The Basel Committee describes its own authority and role as follows:

The Committee does not possess any formal supranational supervisory authority, and its conclusions do not, and were never intended to, have legal force. Rather, it formulates broad supervisory standards and guidelines and recommends statements of best practice in the expectation that individual authorities will take steps to implement them through detailed arrangements – statutory or otherwise – which are best suited to their own national systems. In this way, the Committee encourages convergence towards common approaches and common standards without attempting detailed harmonisation of member countries' supervisory techniques.<sup>14</sup>

That, in a nutshell, is how most transgovernmental networks, at least information networks, work. They have no formal legal authority, and instead operate through exchanging and distilling information and expertise. They are able to exploit the institutional benefits unique to the network form, which are produced in a variety of different ways.

First, on the informational level, networks serve as fora for experimentation and sharing, which leads to learning. As Powell puts it, networks are 'based on complex communication channels,' and so are able not only to communicate information but also to generate new meanings and interpretations of the information transmitted, thereby providing 'a context for learning by doing.'<sup>15</sup> The mechanics of this kind of learning- and experiment-based governance have been explored in depth by Sabel and coauthors, principally in the domestic context.<sup>16</sup> Indeed, these types of learning networks are an increasingly common feature of domestic governance in many countries.<sup>17</sup> They are also important in many private transnational networks, like the UN Global Compact, which serves, in part, as a platform for multinational corporations to share methods for making their business practices more environmentally and socially sustainable.<sup>18</sup> However, this 'wiki-government' remains under-utilized in the realm of state-to-state relations.<sup>19</sup>

Second, regarding coordination, networks may provide a platform for mutual influence. In very few networks do participants have direct influence over one another. Instead, they must try to convince their counterparts to follow a certain course of action through argumentation and persuasion. Influence thus comes not solely from a nation's power or wealth, but rather from an actor's ability to earn the trust of their peers.

Kal Raustiala finds that this process can lead to significant policy coordination (Raustiala 2002). Looking at regulatory networks in the securities, competition and environmental fields, Raustiala shows that transgovernmental networks serve as channels for

'regulatory export' from advanced nations to developing countries. Through technical advice and example-setting, networks in each of these areas have served to strengthen regulatory capacity within and across states.

Third, networks provide a way to coordinate actions across states without many of the transaction costs associated with international institutions or traditional diplomacy. Simply by providing a regularized environment in which relevant actors can interact with one another, networks lower the transaction costs of coordinating actions like enforcement or rule-making. The role of traditional international institutions in providing information and lowering the transaction costs of coordination is well established in international relations theory.<sup>20</sup> Networks bring many of the benefits of traditional organizations – for example, information sharing, monitoring, the creation of focal points – without many of the costs, such as decreased autonomy, principle-agent dilemmas or administrative burdens.

Consequently, this lighter, more flexible form of institutionalism cannot achieve some of the deeper benefits of traditional institutions, such as allowing states to make credible, enforceable commitments to one another. Nor do they allow the state to delegate tasks to an international organization, because it is state officials themselves who comprise the network. Networks thus represent a distinct form of international cooperation from 'traditional' institutions.

Fourth, transgovernmental networks can be a normatively attractive form of global governance. Traditional international institutions and other forms of global governance are sometimes said to suffer from a 'democratic deficit.' Far removed from public pressure and electoral politics, international institutions such as the World Bank or International Monetary Fund – to cite two of the most prominent examples – have been accused of trampling the interests of marginalized peoples or poor countries to promote their preferred policies. Because transgovernmental networks are made from national officials, they are more closely linked to states and thus, in theory, bound by the same accountability mechanisms that control national governments. By giving states a way to solve transnational problems directly, governmental networks elide a potential legitimacy problem that bedevils many other areas of global governance.

Governmental networks also suffer some deficiencies, of course, and are by no means the ideal institutional arrangement for every setting. First, the very flexibility that makes networks useful may also render them toothless when strong enforcement powers are necessary to sustain international cooperation. For example, it is difficult to imagine the World Trade Organization functioning as a network. Formal rules and the possibility of enforcing those rules through the regulated withdrawal of trade concessions are necessary to make the parties agree to liberalization.

Second, while transgovernmental networks avoid the accountability concerns of delegating to international institutions, they sometimes face legitimacy problems of their own (Slaughter 2004b). To the extent they empower domestic officials to act without approval from their domestic superiors, networks may take power out of the hands of elected officials and into the hands of enterprising bureaucrats. This problem is reinforced by the technical nature of many transgovernmental networks. By bringing together experts and specialists from different countries, transgovernmental networks gain efficiency and capacity but may lose sight of potential trade-offs with other policy areas. For example, the US public interest organization Public Citizen has criticized harmonization networks

– which seek to facilitate economic coordination – for being secretive and biased toward industry. Moreover, because they are not official government agencies but simply ad hoc transnational committees, they are shielded from the accountability guarantees enshrined in domestic administrative law (Slaughter 2004a).

Projects aimed at developing global administrative law could address some of these defects.<sup>21</sup> In other cases the participants in government networks have themselves realized the need for much greater transparency and participation.<sup>22</sup> One of us has also called repeatedly for the creation of legislative networks to correspond to regulatory networks, to enhance national legislative oversight (Slaughter 2004a). In EU member states, national parliamentarians serving on committees focused on EU affairs realized that they needed to network with one another quite independently of the EU Parliament. Legislators themselves often realize that they are being left out of the action. As transgovernmental networks grow not only in number but also in the number and types of tasks they are asked to undertake, mechanisms for increased accountability will grow with them.

#### 23.4 WHAT TRANSGOVERNMENTAL NETWORKS CAN CONTRIBUTE TO THE STUDY OF MULTI-LEVEL GOVERNANCE

Transgovernmental networks are a relatively young form of international cooperation.<sup>23</sup> For this reason their potential uses – as well as their potential pitfalls – are not fully understood or explored. Their two dominant characteristics however – the network form and the reliance more on national government officials than supranational or international bureaucracies – highlights two dimensions that should not be overlooked in the study of MLG. Indeed, a number of specific insights can be drawn to enhance our understanding of MLG.

First is the question of how the social nature of networks affects their political functions. We have argued that networking is a form of creating and storing relational capital. But do the government officials who participate in networks also develop a common sense of values and norms? Most observers of transgovernmental networks – and most scholars of networks of all kinds – believe this kind of socialization is at least possible. In the transgovernmental context, such socialization can enhance trust and coordination between countries, thus making networks more effective. However, some observers have worried that socialization may also lead bureaucrats to place the values of the network over national interests, though no specific instances are cited in the literature.

In general, socialization – the transfusion of norms, values and identities amongst actors – is not well understood in the political literature. More research is needed to understand the mechanisms through which socialization might occur within transgovernmental networks, the relation between socialization and the operation of networks, and the conditions under which socialization does and does not occur.<sup>24</sup> Socialization is likely also a fruitful area of study for MLG. Do vertical channels of governance create shared identities and values, or are such channels stratified into different levels?

Second, a better understanding of the effect of networks on their participants can contribute to our understanding of how best to manage networks for maximum efficiency

and impact. In the business literature much is made of ‘orchestrating networks.’ The Hong Kong-based Li and Fung Ltd, the largest sourcing company in the world, essentially links different partners at different times to produce different products around the world. Orchestration differs from management in a vertical organization. It purportedly ‘requires a more fluid approach that empowers partners and employees, yet demands that control be maintained at the same time (Fung et al. 2007, p. 11)’ The aim is to unleash the kind of creativity and collaboration that produces Wikipedia while still maintaining quality control and enough discipline to ensure that holes get filled and new projects undertaken. Fung et al. write about moving from a firm to a network, from control to empowerment, and from specialization to integration (*ibid.*, p. 15). Other business authors write about ‘team leadership’ and working within decentralized organizations where no one individual is really in charge.<sup>25</sup> Indeed, the mantra of team leadership is ‘strength through shared responsibility,’ which is a way of describing collective responsibility for a common problem, a requirement for solving global problems like terrorism and climate change that cannot be contained within national borders.

It is of course not clear to what extent management practices in the business community will translate into the government arena. But as both national governments and international organizations adapt to operating in a networked world, it will be very important to understand the optimal functions for a small secretariat or ‘central node’ of a horizontal network and to know which functions are best allocated to traditional organizations and which are better handled by networks. Government officials can also learn from some of the large non-governmental organizations; CARE, for instance, operates supply networks that in some ways resemble Li and Fung. They use information technology to identify individuals all over the world who can take part in disaster relief teams ready to be deployed at once.

Third, scholars need to better understand the way influence and power operates within transgovernmental networks. In formal international institutions, a state’s influence is often a function of its power vis-à-vis other states. Power relations are often even institutionalized in the laws governing an institution – consider the proportional voting system in the World Trade Organization or International Monetary Fund or the permanent members of the United Nations Security Council, for example. Influence within a transgovernmental network is certainly also a function of state power, but may also include other factors. The goal of many networks is to share experience, deliberate over experiences, learn from colleagues and coordinate action around ‘best practices.’ To become influential an actor must win colleagues over to their point of view by means of their technical expertise, practical experience or reasoned argument.

Conventional economic or diplomatic levers may play a role where national interests are directly at stake, but much of the work of transgovernmental networks falls outside the realm of competitive diplomatic wrangling. In this way networks favor a different set of skills and competencies than traditional institutions. Convincing one’s peers of the rightness of a common course of action is qualitatively different from lobbying an interlocutor to do what you want them to do. While networks certainly include both kinds of interactions, their ability to highlight the former may broaden the range of successful cooperation beyond that available in traditional institutions.

All these questions are also relevant to various forms of MLG. The central task facing

scholars both of transgovernmental networks and other informal institutional groupings is to understand how policy is made in these relatively unstructured environments.

## 23.5 CONCLUSION

In the vocabulary and conceptual framework of this volume, those government networks that qualify as MLG fit the MLG II ideal type; ‘a complex, fluid patchwork of innumerable, overlapping jurisdictions’ that is generally limited to one policy area and is not constitutionalized (see Introduction in this volume). With respect to the identifying features set forth in the Introduction, they fall into the following categories:

- type and number of actors: only public (although a more accurate description would be ‘mostly public’ or ‘principally public’)
- type of interplay 1: adaptive networks
- type of interplay 2: decentralized power structure
- type of interplay 3: concurrent powers
- breadth I: functional jurisdictions
- breadth II: without a public/political space.

Transgovernmental networks are not just looser forms of international cooperation. They are forms that empower new actors and enable them to do new things. They turn what was once a foreign ministry monopoly on communications with foreign governments into a highway open to all domestic ministries. Equally important, they allow regional and municipal officials to communicate not only with their counterparts in other countries, but also with officials at different levels. The governor of California, for instance, can communicate with top communist party officials in Beijing about the Californian approach to combating climate change.

Once these different participants are communicating on a regular basis, they can spark ideas off each other, much as bloggers do when they read each other’s posts and respond on their blogs, creating a fast-moving conversation that often produces quite different results than the more staid mainstream media with its op-eds and news and analysis columns. They can also share information about projects that different ministries in different governments are working on and invite collaboration – in real time.

Finally, and perhaps most important in terms of more traditional international relations, building these networks in good times is creating valuable capital for addressing crises. In a world with multiple threats from states, non-state actors and nature itself, in which a regional and even a global financial collapse can happen in a matter of days, and in which planning for one set of events is likely above all to ensure that a nation is unprepared for another, networking may be the best national security strategy of all.

## NOTES

1. For a recent overview of the ‘network governance’ literature, see Sorensen and Torfing, (2007).
2. Parts of this section are drawn from Slaughter (2004a) and Slaughter and Zaring (2006).



3. Testimony of Francis Bator before the Subcommittee on Foreign Economic Policy, Committee on Foreign Affairs, House of Representatives, 25 July 1972. *U.S. Foreign Economic Policy: Implications for the Organization of the Executive Branch*, 110-11, quoted in Keohane and Nye, (1974, pp. 39, 42).
4. A full list of references is given in Slaughter and Zaring (2006, p. 216).
5. International Network for Environmental Compliance and Enforcement (2008), 'About the International Network for Environmental Compliance and Enforcement', cited 19 February 2008, available at <http://www.inece.org/>.
6. International Competition Network (2008), cited 19 February 2008.
7. Bank for International Settlements (2008), cited 19 February 19 2008.
8. Ibid.
9. Ibid.
10. Ibid.
11. Ibid.
12. Ibid.
13. Bruce Jones, Carlos Pascual and Stephen John Stedman (2008), *A Plan for Action: A New Era of International Cooperation for a Changing World*, November, Washington, DC: Brookings Institute.
14. Bank for International Settlements (2008), cited 19 February 2008.
15. Powell (1990, p. 325).
16. Sabel and Zeitlin (2006).
17. See, for example, Sorensen and Torfing (2007).
18. Ruggie (2002).
19. Noveck (2008).
20. The seminal work is Keohane (1984).
21. See, for example, Benedict Kingsbury, Nico Krisch and Richard Stewart (2005), 'The emergence of global administrative law', *Law and Contemporary Problems*, **38**, (3-4), 15-61.
22. See, for example, Barr and Miller (2006).
23. It is difficult to measure the age of this phenomenon or to track its growth precisely because no definitive list of these networks exists. However, almost none of the networks mentioned in the literature predate the 1970s and most date only to the 1990s. They can thus be associated with the most recent epoch of globalization.
24. Wang, for example, finds little evidence that multilateral institutions have socialized Chinese foreign policy (Wang 2000). See generally Checkels (2005).
25. George Barna (2001), *The Power of Team Leadership: Finding Strength in Shared Responsibility*, Colorado Springs, CO: Waterbrook Press, Mark Kelly, Robert Ferguson and George Alwon (2001), *Mastering Team Leadership: 7 Essential Coaching Skills*, Mark Kelly Books.

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## 24 Global governance through public-private partnerships

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### 24.1 TRANSNATIONAL PUBLIC-PRIVATE PARTNERSHIPS – AN EMERGING NEW FORM OF MULTI-LEVEL GOVERNANCE

Transnational public-private partnerships (PPPs) reflect the fact that ‘modern governance is – and according to many, should be – dispersed across multiple centers of authority’ (Hooghe and Marks 2003, p. 233). The transnational PPPs that we focus on constitute a MLG II type of governance (see Section 24.2), in which non-state actors co-govern along with state actors for the provision of collective goods and adopt governance functions that have formerly been the sole authority of sovereign states. Seen from this angle, transnational PPPs are a prime example of a multi-level governance structure – even more, if we account for the fact that the literature on multi-level governance points not only to the vertical dispersion of central government authority to actors located at other territorial levels but also horizontally, to non-state actors (Bache and Flinders 2004, p. 4).

The GAVI Alliance, for instance, is a global health partnership that aims at saving ‘children’s lives and protect people’s health by increasing access to immunisation in poor countries.’<sup>2</sup> The PPP includes governments, international organizations, foundations, civil society organizations and vaccine manufacturers, which accomplish different functions at multiple levels to ensure that the immunization coverage in developing countries increases. While the overall steering of the alliance is accomplished at the transnational level through a partnership board and a secretariat, the implementation of the country programs is done through public-private networks, and can include a different set of actors that have country-specific and local expertise. Authority and decision-making competences are therefore widely spread and restricted to specific tasks.

Another example is the Global Water Partnership (GWP), which was initiated by the United Nations Development Programme (UNDP) and the World Bank to promote sustainable water management and planning. The GWP, founded in 1996 in Stockholm, includes representatives from governments, multilateral banks, intergovernmental organizations, professional associations and the private sector. It promotes the application of an Integrated Water Resources Management (IWRM) approach through its regional- and country-level partnerships, whereby it seeks to involve stakeholders at the transnational, regional and national level. The GWP aims to support countries to manage their water resources sustainably and, at the same time, represents an ‘international “network of networks” to encourage learning and sharing of global experience’ on IWRM.<sup>3</sup>

Through the inclusion of a diverse set of state and non-state actors from multiple levels, proponents suggest that PPPs bridge global rules and local practices. The broad participation of various actors shall bring necessary resources and information into the policy formulation and implementation processes across global, regional, national and local levels (Reinicke 1998; Reinicke and Deng 2000; Vaillancourt Rosenau 2000; Brinkerhoff 2002a; Benner et al. 2003; Witte and Reinicke 2005; Biermann et al. 2007). Whether this set-up really brings about better governance has yet to be seen. Therefore, scholars increasingly conceptualize the effectiveness of PPP as the dependent variable of their research design and look for explanations for their performance (for an overview, see Schäferhoff et al. 2009). Over the course of the last decade, transnational PPPs have become a central theme in international relations (IR).<sup>4</sup>

To be sure, the ‘universe’ of PPPs varies according to the definition one applies. This chapter focuses on transnational PPPs that are defined as ‘institutionalized transboundary interactions between public and private actors, which aim at the provision of collective goods’ (ibid.) and that span across different territorial tiers and levels.<sup>5</sup> We moreover focus on those transnational PPPs that are trisectoral, that is, include public actors, such as governments and international organizations, and two types of private actors, namely for-profit business actors and non-profit civil society actors. While there are (mostly community-level) PPPs that are concerned with the provision of private or club goods (for example, in water business), our definition is limited to those multi-level regimes that aim to contribute to the provision of collective goods, that is, pursue a public purpose. Many such non-commercial PPPs, for example, strive to help implement the Millennium Development Goals. While all these transnational PPPs deploy a certain degree of autonomy and durability, their institutional set-up varies, ranging from loose cooperation to highly formalized initiatives that rely on precise rules, strong obligations or compliance mechanisms to foster compliance with the PPP’s rules. Some PPPs remain loose networks; others acquire the quality of transnational actors (Risse 2002). In this context, recent research tries to explore what institutional design of PPPs delivers the best results under given circumstances in a particular policy area (Andonova 2006; Biermann et al. 2007; Liese and Beisheim forthcoming).

## 24.2 PPPs AND MULTI-LEVEL GOVERNANCE

Currently, there is not much research that focuses explicitly on multi-level governance through PPPs.<sup>6</sup> Rather, most of the literature focuses on the emergence, effectiveness and legitimacy of PPPs. Nevertheless, this literature addresses typical research questions regarding PPPs in multi-level governance. Reviewing this literature, we first describe transnational PPPs as multi-level regimes (MLG II as defined in the Introduction of this handbook) and analyse their typical activities at the various levels. Second, we investigate the origins of PPPs, that is, why PPPs evolved and are seen by many as innovative governance tools. Third, we will discuss some virtues and deficits, focusing on the question: under what conditions are PPPs effective and legitimate instruments of multi-level governance? Finally, we point out some open questions for further research.

### 24.2.1 PPPs as Multi-level Regimes

Transnational PPPs are territorially overarching entities, bringing together international or regional organizations, and public and private partners from various countries, in most cases with the goal of implementing projects at the local level in several countries. As a functional unit within a broader system of multi-level governance, they enjoy decision autonomy as they usually have a supreme decision-making body and a secretariat at the transnational level. At the same time, decision-making competences are often distributed between different actors and functional levels whose authority is usually restricted to specific tasks or functions. This being the case, it is one of the major challenges for PPPs to organize decision-making and implementation processes effectively across different levels, namely the transnational, regional, national and local level.

Most PPPs are task-specific institutions – the magnitude and complexity of their tasks, however, varies. Consequently, the scope of the PPPs and the ‘scale of governance’ (Hooghe and Marks 2003, p. 236) they provide varies according to the task at hand. The literature distinguishes three major types of PPPs: PPPs in the areas of (1) service provision, (2) knowledge exchange and (3) standard setting.<sup>7</sup> Especially within development cooperation, numerous PPPs were formed in recent years to (1) deliver specific services at the national and local level, for example, the ‘Global Fund’ financially supporting the distribution of antiretroviral therapies to combat HIV/AIDS, or ‘Water and Sanitation for the Urban Poor’ supporting the construction of water supply systems (Witte and Reinicke 2005, pp. 24–34). A second type of PPP aims at awareness-raising and the exchange of knowledge and expertise (2). An example is the ‘Global Network on Energy for Sustainable Development,’ which intends to synthesize and distribute knowledge with regard to innovative energy policies in developing countries. Finally, PPPs are also engaged in (3) standard setting, aiming at the regulation of state and corporate behavior. The Kimberley Process Certification Scheme and the Extractive Industries Transparency Initiative are examples of such PPPs (Williams 2004; Kantz 2007). This type of PPP is prominently discussed in the corporate social responsibility (CSR) literature as a tool for implementing CSR standards in corporations’ day-to-day operations (Utting 2002; Ruggie 2004). A PPP’s degree of institutionalization<sup>8</sup> seems to depend on the tasks fulfilled by PPPs: research shows that PPPs that aim at knowledge provision and awareness-raising are less institutionalized, because they usually do not face severe cheating problems and can do without precise rules, strong obligations and compliance mechanisms (Campe and Beisheim 2009; Liese and Beisheim forthcoming). Service-providing and standard-setting PPPs, on the other hand, face cheating problems like violating CSR standards or the misuse of development aid; they therefore tend to be more institutionalized. This finding is consistent with the argument that the institutional design of international institutions largely depends on the underlying situation structure (Snidal 1985; Zürn 1992).

In the following, we give some examples for typical (1) transnational, (2) national and local level, and also (3) regional activities of transnational PPPs. The overall steering of PPPs usually takes place at the (1) transnational level. Most transnational PPPs have a governance board that includes representatives from the public and the private sector.<sup>9</sup> The tasks of such governance boards include the guidance of the overall mission of the PPP, the development of work plans and the control of budgets. This implies that the

transnational level is often crucial with respect to the political guidance and internal governance of the partnership. For example, the governance bodies formulate the policies to which the PPPs' members – for example, the recipients of the PPPs' services or corporate actors as norm-targets – have to comply with and they control the budget for the respective projects supporting or controlling this compliance. Decision-making procedures in the governance bodies vary, meaning that decisions are taken by consensus or a qualified majority. Some PPPs allocate board seats through quota to guarantee a balanced representation from all sectors and regions, for example, the Global Fund to Fight AIDS and Tuberculosis (Brown 2009). In other cases, board members are appointed, and appointment is based on merit, expertise or political considerations. As a result, not all stakeholders might be 'on board.' The Global Village Energy Partnership International (GVEP), for instance, has a very small trustee board, in which non-governmental organizations (NGOs) are not represented.<sup>10</sup> Apart from the governance board, PPPs often have a secretariat that manages the day-to-day business at the transnational level. Depending on its budget and workload, its staff sizes vary. It ranges, for example, from three officers in the secretariat of the Global Network for Energy for Sustainable Development (GNESD) up to 280 officers in the Global Fund's secretariat.<sup>11</sup> The secretariat can be a powerful entity with a strong influence on policy decisions and governance processes across all levels. It often employs high-profiled policy experts that have a strong influence concerning the formulation and implementation of policies. Moreover, in many cases it offers facilitation and support services to members and partners.

While the transnational level is important for the overall steering of the PPP, especially in terms of policy formulation and budget control, decisions about policy implementation are often taken at the (2) country level. The GAVI Alliance serves as a good example to illustrate this point (Lu et al. 2006; Buse and Harmer 2007; Schäferhoff 2009). This PPP supplies financial support and vaccines to developing countries that have applied for this support and meet GAVI's requirements. To warrant broad stakeholder participation, GAVI requires the recipient countries to install an 'Interagency Coordinating Committee' (ICC). These national-level ICCs are supposed to be comprised of all relevant actors from the public and the private sector dealing with immunization in order to mobilize all available country expertise and to implement the vaccination programs effectively. GAVI also requires that actors from the local level are included in the ICCs to ensure that the needs of affected people are systematically considered. ICCs have proven to be most effective when the governments of recipient countries worked hand in hand with international organizations, NGOs and other stakeholders. Country ownership – in the sense that all affected actors participate in the implementation process and not only the government – seems therefore to contribute to the success of the immunization programs. With respect to the ICCs, it is also crucial that the recipients of GAVI's support – usually governmental agencies – are accountable to the ICCs. Hence, the ICCs illustrate the fact that the influence of governments is rather diminishing, as they are not alone in control of the implementation process but have to cooperate with other actors (Lu et al. 2006; Schäferhoff 2009).

Many other PPPs also have programs on the national and local levels. The GWP has installed numerous 'Country Water Partnerships,' which intend to develop national water plans that apply the IWRM approach (Campe and Beisheim 2009).<sup>12</sup> Again, stakeholder involvement is more pronounced at the country level than it is at the transnational

level. Similarly, the Global Compact also encourages the set-up of local networks, and the inclusion of stakeholders at the local level seems to be greater than it is, for instance, in the Global Compact Board which does not exhibit any requirements for geographical representation.

While in general activities of transnational PPPs at the (3) regional level seem to be rather limited, some use the regional level as a kind of 'bridge' between the transnational and the national/local level. For example, the GAVI Alliance uses its Regional Working Groups as 'focal points' to secure an efficient information flow between the global and the national level. The working groups correspond to the World Health Organization (WHO) regions and coordinate the actions of the partner agencies in the regions. So, by and large, the aim is to link up activities at the different levels, seeking to coordinate development cooperation efforts by different agencies in the regions. This does not always work perfectly: the GWP, for example, created 'Regional Water Partnerships', which are intended to promote transboundary cooperation in river basin management, and at the same time trigger the formation of new 'Country Water Partnerships.' A recent review, however, shows that only few regional partnerships have in fact promoted transboundary cooperation.<sup>13</sup>

#### **24.2.2 Origins of Transnational PPPs as Multi-level Regimes**

Although the participation of non-state actors in governance systems is historically by no means a new phenomenon, the number of transnational PPPs has risen significantly in recent years. Today one can find them in almost all policy areas, including security, development cooperation, environmental politics and human rights. The partnerships that have been created in the run-up to the World Summit on Sustainable Development (WSSD) in Johannesburg 2002, and the 'United Nations Global Compact,' initiated by the former General-Secretary Kofi Annan, are prominent examples (Andonova and Levy 2003; Ruggie 2004). According to Broadwater and Kaul (2005), there are at least 400 transnational PPPs – compared to 50 in the 1980s – addressing global challenges, such as the fight against climate change, malnutrition, poverty, communicable diseases or the trade of blood diamonds. Their sample, however, is far from extensive and does, for instance, not include most of the roughly 300 so-called 'Type II' partnerships launched at the WSSD to put the Johannesburg Plan of Implementation into practice.<sup>14</sup>

Scholars and political actors alike disagree about why PPPs proliferated over the last decade and became an influential institutional form in world politics. Studies often outline complex interdependence as a central condition for the emergence of PPPs (Bull et al. 2004; Bäckstrand 2006b).<sup>15</sup> And indeed, most PPPs deal with problems that could not be solved by one actor or country alone. Part of the literature therefore explains the emergence of PPPs with their ability to connect actors and their specific resources across levels: PPPs arise because complex transboundary problems create a demand for effective multi-level governance solutions, and since state actors have failed to address global challenges effectively, PPPs evolve as an innovative instrument better suited to target them (Reinicke and Deng 2000; Nelson 2002). Yet, this functional explanation is contested. The general weakness of functional explanations also applies to PPPs: we do not see the emergence of PPPs in each and every issue area in which we observe a functional

demand for them. Critics point out that functionalist explanations have a blind spot because they do not account for the interests of actors. For example, Andonova and Levy (2003) argue with respect to the WSSD partnerships that these cannot be found in areas where institutional failure and governance gaps are especially pronounced but where they correspond with interests and capacities of Northern donors and international organizations. Hence, PPPs are often not necessarily formed to close governance gaps but to advance the interests of specific actors.

As a result, to account for and to theorize on the rise of transnational PPPs, the analytical distinction between (1) interests, (2) power and (3) ideas has proven to be helpful (Beisheim et al. 2007; Liese and Beisheim forthcoming). First, the emergence of transnational PPPs can be explained by examining actors' incentives in creating and maintaining PPPs. From this rational choice perspective, PPPs will be formed if the interests of actors overlap and each of them can expect benefits. To achieve their individual objectives, actors might be dependent on resources that other actors have at their disposal, meaning that actors have an interest in exchanging resources. International organizations increasingly face resource constraints, and are consequently looking for private partners with the necessary resources to foster the implementation of international agreements, such as the Millennium Development Goals. On the other hand, with ongoing globalization, corporations have an interest in access to new markets, and in obtaining knowledge, for instance, about market developments. Since corporations are players on international markets, partnering with state actors also helps them to be regarded as good and legitimate corporate citizens. Brand image has become a crucial factor for corporations, so gaining legitimacy and improving their image is a major incentive for corporations to join PPPs. Participation in PPPs is interesting for NGOs when this gives them access to directly influencing global politics. In summary, resource dependency is a crucial factor for the formation of PPPs.

Second, powerful actors also play a central role for the formation of PPPs. As public or private donors – like OECD governments, foundations or corporations – supply funding for PPPs' activities, they are powerful actors and, therefore, are often in 'the driver's seat.' Especially in the beginning, they bear most of the cooperation costs and, therefore, are able to shape the governance structure of the PPP (Liese and Beisheim forthcoming). Sometimes, the establishment of PPPs can be a means for them to sideline ineffective and bureaucratic public actors, especially the United Nations (UN) organizations. Various PPPs, such as the Global Fund to Fight AIDS, Tuberculosis and Malaria, were explicitly created by donors outside the UN system to bypass the bureaucratic procedures of certain UN organizations – to circumvent long-winded decision-making procedures (Radelet 2004; Schäferhoff 2008).

Third, constructivist theories may account for the fact that PPPs have proliferated since the end of the 1990s. PPPs have become a dominant 'script' in the 1990s, and represent a 'template for action' for development cooperation (Liese 2008). PPPs attracted support by high-level representatives of the UN and governments, and have been praised as flexible and effective institutions. It can be argued that actors form PPPs in response to such a script and thus follow the logic of appropriateness. In other words, just as multi-level governance itself, PPPs have become a dominant paradigm for policy-making and might reflect a 'world-time context' that advocates the participation of private actors in transnational politics (Keck and Sikkink 1998, p. 909).



### 24.2.3 Virtues and Deficiencies of Transnational PPPs

PPPs are believed to close both the operational and the participation gaps in world politics, meaning that they are seen as effective and legitimate governance tools (Reinicke and Deng 2000, p. viii). We have already discussed a few factors that may explain PPPs' effectiveness.<sup>16</sup> Focusing on the main perspective of this handbook, we can observe that the activities of PPPs across different levels and across borders pose substantial challenges to effective PPP management. While, as mentioned above, the overall steering and the policy-setting mostly take place at the transnational level, the implementation has to be done at the national and local level. The structural necessity to coordinate these different levels hampers the work of transnational PPPs. The GWP has encountered difficulties in responding to the communication and information needs which vary across regions and actors (Campe and Beisheim 2009).<sup>17</sup> The management of the complex network of the GWP, which includes, as introduced above, the overarching transnational partnership, and country and regional partnerships, has struggled with facilitating the communication among the different actors and partnership bodies. Although the network approach was deliberately chosen to foster implementation on the ground and to allow for bottom-up activities, its management is at the same time the greatest challenge for the GWP. A certain degree of institutionalization, efficient communication and information management – something that is usually done by the partnership secretariat – is therefore crucial for keeping the partners at the different levels active. Flexibility and institutionalized 'learning' is also crucial for PPPs, as partners have to keep pace with constantly changing challenges and demands and need to adapt quickly (Liese and Beisheim forthcoming).

Despite the rhetoric of 'partnership', PPPs can seriously suffer from 'organizational dysfunctions,' because they include multiple organizations with very diverse organizational interests and cultures (Schäferhoff 2008, 2009). The Roll Back Malaria Partnership, for instance, has suffered from competitive struggles among partnership members over policy influence and material resources, which seriously hindered effectiveness. Especially bureaucrats from the WHO were reluctant to support Roll Back Malaria, and hindered the effective achievement of the partnership goals with respect to combating malaria. On the one hand, WHO staff perceived Roll Back Malaria as a competitor with regard to donor funding and with regard to the control over anti-malaria policies. On the other hand, WHO's internal organizational culture also strongly contributed to the fact that the partnership largely failed. Due to longstanding organizational routines, the staff of the WHO was reluctant to support a close cooperation with non-state actors, and interfered in the partnership procedures in a very negative way. Such dysfunctional behavior can be alleviated through strong organizational leadership exerted by partnership donors, who use their strong bargaining power to solve or contain conflicts (Schäferhoff 2009).

Aside from the critical question of under what conditions PPPs are effective governance tools, there is also debate concerning their legitimacy. While some authors claim that PPPs bridge the 'participation gap' in global governance (Reinicke and Deng 2002), others stress that the involvement of private actors in collective decision-making causes serious accountability problems (Ottaway 2001; Bäckstrand 2006a, 2006b; Brühl 2007). Both groups give most attention to the participatory quality of decision-making processes ('input legitimacy,' Scharpf 1999; Wolf 2006). In general, the level of inclusion and

participation is significantly higher in governance bodies that predominantly perform advisory functions and less in the aforementioned governance boards with decisional power. Many PPPs have created global assemblies to which all stakeholders are invited to participate. The Global Reporting Initiative has established the 'Stakeholder Council,' the Roll Back Malaria Partnership organizes an annual 'Forum' and the GWP has set up the so-called 'Network.' These meetings are officially organized to ensure that the interests of affected persons or groups are taken into account – or, at least, to give a wide circle of stakeholders an opportunity to express their views. This form of 'stakeholder democracy' relates to the ongoing theoretical discussion in the international relations literature on new forms of democratic multi-level governance (Zürn 1998; Held and König-Archibugi 2005; Benz and Papadopoulos 2006; Risse 2006; Wolf 2006, 2008; Brunnengräber and Walk 2007). There is good reason to expect that a high degree of input legitimacy has positive effects on the effectiveness of PPPs: while inclusiveness and deliberation are relevant to build up trust and gain legitimacy among stakeholders, transparency and accountability mechanisms are important to maintain the legitimacy of transnational governance institutions (Beisheim and Dingwerth 2010). Empirical studies find this to be relevant mainly for standard-setting PPPs (Liese and Beisheim forthcoming; Steets forthcoming 2010). Besides, case studies reveal that mechanisms through which affected actors can control the decision-making in the supreme governance bodies of PPPs are largely absent (Dingwerth 2007, p. 131; Schäferhoff et al. 2009). Correspondingly, most of the above-mentioned stakeholder forums lack any power to hold their supreme governance bodies accountable. An exception is the stakeholder council of the Global Reporting Initiative: as the council elects the members of the board, it is at least able to exert some control on the general course of the partnership, although it cannot directly influence the decision-making of the board. But even this power is rather unusual. Moreover, empirical research shows that transnational PPPs tend to replicate the geographical imbalances known from intergovernmental arenas, as affected actors from the South are under-represented in most transnational PPPs (Buse and Harmer 2007; Dingwerth 2008; Schäferhoff et al. 2009). Many PPPs are, however, more inclusive at the national and local level, where PPPs often depend on the knowledge of local stakeholders to implement their policies and programs effectively.

In general, PPPs face a trade-off between input legitimacy and effective performance (Börzel and Risse 2005; Schäferhoff et al. 2009). The consultation of stakeholders and, more important, their inclusion into decision-making processes is very time-consuming and does therefore slow down short-term progress. Because donors require them to demonstrate substantial results in a very short time frame, PPPs focus on the output they generate, while participatory elements tend to become secondary. Accordingly, the 'output legitimacy' of PPPs, that is, their perceived problem-solving effectiveness, is often seen as the main source of their legitimacy.

Beyond that, there has been debate on the general legitimacy of PPPs as they extend the political authority of non-state actors and reflect the fact that the state is no longer the sole or principal source of authority (Cutler et al. 1999; Hall and Biersteker 2002). The proliferation of PPPs is therefore usually interpreted as an expression of the contemporary reconfiguration of authority in world politics. Nevertheless, opinion is divided on what this change means for governance beyond the state. Proponents suggest that PPPs foster the effectiveness and legitimacy of global governance (Reinicke and Deng 2000),

and argue that the upsurge of non-state actors increasingly leads to a 'new global public domain,' which constitutes a transnational arena of discourse and action concerning the production of global public goods (Ruggie 2004). Critics consider the rise of PPPs as a shift towards a neoliberal world order that challenges the authority of state actors and threatens successful and legitimate multilateral cooperation (Richter 2003; Zammit 2003); more moderate critics point out risks and side effects (Martens 2007).

### 24.3 OPEN QUESTIONS FOR RESEARCH

We have argued in this chapter that PPPs are instances of multi-level governance and represent a prime example for the vertical and horizontal dispersion of authority. Research on transnational PPPs has taken off in recent years; now we wait for comparative theory-guided studies to achieve conclusive results on the question under which conditions PPPs are effective and legitimate governance tools. Such research is difficult as PPPs are moving targets: when faced with new challenges and demands they tend to change their organizational structures at a brisk pace. Further research could devote more attention to these dynamic developments.

Recent studies suggest that there seems to be a trend towards a specific institutional set-up of PPPs that is to meet the demands for effectiveness and legitimacy (Bäckstrand 2006a, 2006b; Dingwerth and Pattberg 2009; Beisheim et al. 2008; Campe 2008): many PPPs have a small, powerful board and a strong secretariat to ensure effective and efficient partnership management. In addition, PPPs dispose of an inclusive and participatory stakeholder forum, which enhances their perceived legitimacy. Further research could investigate whether this governance structure in fact evolves into a 'best practice' model of PPPs, how this convergence can be explained and what its actual effects are. Studies could also focus more on the diverging political ideas or cultural and ethical barriers that have to be overcome within transnational PPPs (Hemmati et al. 2002).

In a wider context, the consequences of the emergence of such multi-level forms of governance for the power and authority of traditional international or national actors are still under-researched. It remains an open question whether PPPs pose a threat to the authority of states or whether states can even extend their spheres of influence by achieving better outcomes through the inclusion of non-state actors. It has been argued, however, that 'PPP should not be seen as zero-sum games between states and private actors,' but that research should focus on the question under which conditions PPPs can contribute to effective and legitimate problem-solving (Börzel and Risse 2005, p. 196). Maybe governance through PPPs even needs a certain degree of government to function properly. Future research on PPPs should, thus, specify what specific roles state and non-state actors play on the various levels, how the interactions between them work and what kind of institutional design contributes to the success of PPPs.

## NOTES

1. This chapter refers to results of the DFG-funded project 'Transnational *Public Private Partnerships for Environment, Health and Social Rights: Determinants of Success*,' part of the Berlin SFB 700

- 'Governance in Areas of Limited Statehood', <http://www.sfb-governance.de/ppp> (accessed 16 June 2010). See Beisheim et al. (2005). We would like to thank Andrea Liese, Christopher Kaan, Thomas Risse and Cornelia Ulbert for input.
2. See <http://www.gavi.org/vision/strategy/index.php> (accessed 16 June 2010). The GAVI Alliance was formerly known as Global Alliance for Vaccines and Immunization. The GAVI Alliance also implements the 'International Finance Facility for Immunisation' that supplies large funds for health system strengthening and immunization in developing countries.
  3. PARC – The Performance Assessment Resource Centre (2003), *External Review of the Global Water Partnership*, Final report, p. 11.
  4. Andonova (2006), Bäckstrand (2006a, 2006b), Bailes (2004), Beisheim et al. (2007, 2008), Benner et al. (2005), Biermann et al. (2007), Bitzer et al. (2008), Börzel and Risse (2005), Brinkerhoff (2002b), Broadwater and Kaul (2005), Brühl (2007), Bull and McNeill (2007), Dingwerth (2007), Esty and Ivanova (2002), Glasbergen et al. (2007), Huckel et al. (2007), Martens (2007), Nelson (2002), O'Rourke (2006), Ottaway (2001), Reinicke and Deng (2000), Ruggie (2003), Vaillancourt Rosenau (2000), Schäferhoff et al. (2009), Thérien and Pouliot (2006), Utting and Zammit (2006), Wolf (2008) and Zammit (2003).
  5. On national PPPs, see Krumm and Mause (2009) and Vaillancourt Rosenau (2000).
  6. Yamamoto (2007) discusses PPP as an example of multi-level governance, showing the continuity and adaptability of the New Public Management paradigm.
  7. Beisheim et al. (2008); see also Witte and Reinicke (2005). These are ideal-types, and there is a lot of overlap.
  8. The institutional degree can be mapped with reference to legalization theory, which comprises the three dimensions of obligation, precision and delegation (Abbott et al. 2000). Obligation refers to how binding the rules of an institution are, precision relates to how unambiguous the rules are and, finally, delegation refers to the degree to which third parties may apply and implement the rules (*ibid.*, p. 401).
  9. For instance, the GWP is governed by 'steering committees,' and the Global Fund and the Global Village Energy Partnership (GVEP International) have international 'boards.'
  10. 'GVEP. Undated. Trustees of GVEP International', [http://www.gvepinternational.org/\\_file/337/GVEP%20International%20Trustees%20Bio%20Jan%202008.pdf](http://www.gvepinternational.org/_file/337/GVEP%20International%20Trustees%20Bio%20Jan%202008.pdf) (accessed 20 April 2008).
  11. <http://www.gnesd.org/contact.htm> (accessed 20 April 2008).
  12. PARC – The Performance Assessment Resource Centre (2008), *Global Water Partnership Joint Donor External Evaluation*, Final report.
  13. *Ibid.*, p. 20.
  14. On the WSSD partnerships, see also Hale and Mauzerall (2004), Biermann et al. (2007) and Bäckstrand (2006b).
  15. Complex interdependence is also often mentioned as an explanation for multi-level governance itself; see Benz (2004, p. 131).
  16. Our own research outlines three factors that contribute to effective PPP, that is, a high degree of institutionalization, efficient process management and strong leadership (Beisheim et al. 2008; Liese and Beisheim forthcoming).
  17. PARC – The Performance Assessment Resource Centre (2003), *External Review of the Global Water Partnership*, Final report.

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## 25 Civil society in multi-level governance

*Jan Aart Scholte*

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### 25.1 INTRODUCTION

Contemporary history has seen a shift in the overall mode of governance. Instead of the Westphalian, sovereigntist, statist structure that characterized societal regulation in the modern era, governance today tends to transpire through multi-actor, transscalar, diffuse and decentered networks. The present volume describes this condition as ‘multi-level governance.’

How do citizens engage this altered mode of governance? Other contributions to this handbook focus on official aspects of multi-level regulation. Yet multi-level governance, like all governance, is a question of the governed as well as the governors. It is therefore important that this handbook also devotes an entry to citizen participation in, and control over, multi-level regulatory apparatuses.

Such a discussion is conveniently framed around the notion of ‘civil society.’ Many students of multi-level governance have referred in this regard to ‘non-state actors’; yet this negative vocabulary stresses what the phenomenon is not rather than what it is. Moreover, the phrase ‘non-state actors’ can encompass not only citizen groups, but also firms and non-state governance bodies. ‘Civil society’ has the attractions of being a positive and more circumscribed term.

To be sure, the concept of civil society has been diversely interpreted and remains considerably contested (Cohen and Arato 1992). However, for present purposes it can be understood as that arena of politics where associations of citizens seek, from outside political parties, to shape rules that govern social life. Civil society associations encompass innumerable and diverse non-governmental organizations (NGOs) and social movements.

Modern political theory has normally discussed civil society in the context of individual countries and their governments. Hence thinkers such as Locke, Hegel and Gramsci have shared a basic premise that civil society relates to the state. Yet the more fundamental point is that civil society relates to a governance apparatus. Hence when the overall mode of governance shifts, as is ongoing in contemporary history, patterns of civil society activity can be expected to shift in tandem.

This chapter explores changes and continuities in civil society that are unfolding with the current move from statist to multi-level governance. Section 25.2 briefly elaborates on the concept of civil society, noting in particular the wide variety of activities that fall within this category. Section 25.3 identifies how civil society itself, like governance in general, has in recent times acquired a multi-level character. The third step in the discussion considers the involvement of civil society actors in policy-making processes under conditions of multi-level governance. Section 25.4 examines the different direct and indirect ways that citizen associations engage the formulation, implementation, enforcement and review of rules in the new mode of governance. Section 25.5 indicates some of



the impacts that civil society interventions can have on multi-level governance: in terms of institutional design, policy decisions and deeper structures. Finally, Section 25.6 assesses in what ways and to what extents civil society involvements advance democracy in multi-level governance. It is concluded in this regard that, while civil society can and often does generate greater citizen participation and control in multi-level regulatory processes, this potential has to date been far from fully realized.

Throughout, a larger underlying question lingers: whether civil society operations reinforce existing regulatory frameworks through processes of cooptation; or whether these citizen interventions contest and change the rules through processes of resistance. Both tendencies are present, for example, in the World Economic Forum (WEF, 'Davos'), on the one hand, and the World Social Forum (WSF, 'Porto Alegre'), on the other. Thus civil society engagement of multi-level governance involves struggles over the future shape of world order.

## 25.2 CIVIL SOCIETY

As indicated above, civil society can be considered as a political space where citizens group themselves outside political parties in efforts to affect governance. As understood here, then, civil society activities are an enactment of citizenship, that is, practices through which people claim rights and fulfill responsibilities as members of a given polity. Civil society initiatives are also collective, involving citizens assembling in associations that share concerns about, and mobilize around, a particular problem of public affairs. As self-consciously political actions, civil society interventions aim to influence the ways that power in society is acquired, distributed and exercised. However, civil society endeavors to shape governance do not – in the way of political parties – strive to attain or retain public office.

Much civil society activity in respect of contemporary multi-level governance occurs through NGOs (Florini 2000; Clark 2003; Batliwala and Brown 2006). These citizen associations are formally organized, legally registered and professionally staffed not-for-profit operations. Usually their advocacy addresses a particular issue, such as business conditions, consumer protection, democracy promotion, development, disability, ecology, gender relations, human rights, humanitarian relief, labor conditions, poverty, professional standards, sexuality or youth affairs. Many of the more regularized exchanges between governance agencies and civil society groups transpire via NGOs. Indeed, many officials today tend to equate civil society with NGOs.

Yet much civil society activity in contemporary politics is more loosely organized in social movements (Smith and Johnston 2002; Notes from Nowhere 2003; Eschle and Maiguascha 2005). For example, many citizen mobilizations along lines of caste, (under) class, ethnicity, faith and kinship do not adopt a bureaucratic form of organization. Likewise animal rights promoters, groupings of the homeless and the landless, peace campaigns, racist militants, student protests and alter-globalization strivings often have a more informal and fluid character. Governance bodies have tended to find it a more difficult institutional exercise to interact with social movements. Moreover, officials can be reluctant to engage with the more radical objectives of societal transformation that some social movements espouse.

Across NGOs as well as social movements, civil society activities as conceptualized here vary enormously. In terms of size, for example, the citizen groups range from handfuls to millions of participants. In organizational form the associations are formal and informal, vertical and horizontal, unitary and federated. In cultural character civil society mobilizations appear not only in contexts of Western modernity, but also express indigenous life-worlds, religious revivalisms, caste politics and so on (Hann and Dunn 1996). In duration these citizen initiatives can last from minutes (in the case of spontaneous street protests) to millennia (in the case of some faith-based movements). In geographical scope civil society activities are variously global, regional, national, provincial and/or local. Huge diversity is also found among civil society associations in terms of their resource levels (ranging from the most meager to the most ample) and their funding sources (including member subscriptions, official contracts and philanthropic grants). Civil society actions furthermore adopt the broadest spectrum of ideological orientations, including the most conservative and the most revolutionary. With regard to tactics these collective endeavors of citizens can be peaceful or violent; they can operate behind the scenes or in full public view; they can be open-minded or dogmatic. In short, civil society activities show as much diversity as is found among commercial ventures or governance operations.

Moreover, the distinction between civil society and other circles is not always clear-cut. For example, a number of civil society associations have dense connections (both formal and informal) with official institutions. Some civil society organizations are also closely related to political parties, for instance, in the case of some trade unions and youth groups. The line between civil society activities and commercial operations can also blur, as witnessed in regard to fair trade associations and business lobbies. Thus, as with most analytical concepts, civil society is neater in theory than in practice.

Finally in this definitional excursion it should be stressed that civil society does not always live up to the adjective. On the contrary, these activities can sometimes be decidedly 'uncivil' (Chambers and Kopstein 2001; Kopecky and Mudde 2002). To be sure, civil society nurtures much altruism, decency, generosity and integrity, but in some quarters it also hosts arrogance, crime, fraud, greed, hatred, immorality, narcissism and violence. The Interahamwe and the Ku Klux Klan also fall in the realm of civil society. Hence politics in civil society are no less messy than politics elsewhere.

### 25.3 MULTI-LEVEL CIVIL SOCIETY

Given its focus on shaping societal regulation, civil society relates to a governance apparatus, that is, an amalgam of sites where rules for social relations are formulated, implemented, monitored and enforced. In the past, when societal regulation occurred nearly exclusively through the state, civil society mobilizations correspondingly focused almost entirely on national governments. However, as this handbook elaborates, governance today emanates from a multi-level and polycentric structure. Not surprisingly, civil society attentions have reoriented to address this reconfigured frame of governance. The multi-level character of contemporary civil society is evident in several respects.

For one thing, civil society associations now directly engage a host of other governance institutions in addition to the state. A number of NGOs in particular have acquired

considerable experience in lobbying global and regional regulatory agencies (Walker and Thompson 2008; Scholte 2011). In addition, many citizen groups have developed relationships with substate governments, separately from – and sometimes in opposition to – the national authorities. Meanwhile many global, regional and local institutions, as well as states, have since the 1980s recruited specially designated civil society liaison officers and/or have elaborated written guidelines for staff on relations with civil society organizations.

To access the various tiers of contemporary governance many civil society associations today organize themselves across global, regional, country, provincial and local levels (Edwards and Gaventa 2001). For example, the human rights promoter Amnesty International has a global secretariat, national branches and local chapters. In a more loosely coordinated fashion, the campaign for cancellation of poor country debts has operated globally through the Jubilee 2000 initiative, regionally through hubs such as the African Network for Debt and Development (AFRODAD), nationally through bodies like the Freedom from Debt Coalition in the Philippines, and subnationally through, for example, provincial and local citizen committees that monitor the use of monies released through debt relief.

NGO offices have proliferated in Brussels, Geneva, New York and Washington as activists place themselves in the vicinity of global and regional governance institutions. Several umbrella and platform bodies have also developed to facilitate NGO engagement of suprastate agencies. The Conference of Non-Governmental Organizations (CONGO) and Social Watch have provided venues for civil society to congregate in relation to the United Nations (UN) system. The Bridge Initiative and the World Forum of Civil Society Networks-UBUNTU have sought to facilitate civil society exchanges with a wider range of multilateral institutions. CIVICUS-Worldwide Alliance for Citizen Participation, the State of the World Forum, and the WEF have also constructed broad tents for civil society from across the planet.

Even social movements that have little interest in direct interactions with official circles have developed multi-level approaches to advancing their respective causes. For example, the peasant movement *Vía Campesina* has a global secretariat and coordinating committee, regional caucuses and national members, many of whom are in turn composed of provincial and local affiliates (Desmarais 2007). Similarly, since 2001 the WSF process has convened meetings globally (at Porto Alegre, Mumbai, Nairobi and Belém) and regionally (with forums of the Americas, Asia and Europe), as well as nationally and locally (Smith et al. 2007; Sen and Waterman 2008). The 2006 edition of the WSF took what was dubbed a ‘polycentric’ approach by convening on three continents in succession (at Bamako, Caracas and Karachi). The 2008 edition took shape as a ‘global day of action’ with events in hundreds of localities across the world.

A multi-level approach to civil society organization has made sense in contemporary politics inasmuch as many of the issues addressed span multiple geographical scales. The problems are at one and the same time global challenges with regional variations, national contexts and localized manifestations. Such is the case with ecological changes, financial crises, epidemics, production chains, armed conflicts and so on. A citizen campaign today must encompass and interconnect the different scales of its focal issue if it is to comprehend the matter adequately and mobilize effectively.

The multi-level character of twenty-first century civil society is moreover evident in

the infrastructure that citizen action groups utilize. Air, water, rail and road networks are transscalar frameworks for travel. Post, telephone, the internet and mass media are transscalar frameworks for communication. Likewise, contemporary civil society organizations draw resources from a financial infrastructure that has interlinked global, regional, national, provincial and local dimensions.

Finally, civil society has acquired a multi-level quality in terms of the identities and associated solidarities that these citizen actions now express. To be sure, national affiliations remain important in contemporary civil society; however, they have lost the overwhelming hold on political imaginations that they exercised prior to the late twentieth century. Thus NGOs and social movements today also rally followers with appeals to collective bonds on global, regional, provincial and local scales. The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) thus draws on a non-territorial identity in sexual orientation, whereas mobilizations of Amazonian Indians are largely based in regional solidarity around a transboundary river basin. Meanwhile many women's associations have seen no contradiction in concurrently affirming a global front in UN conferences, regional cohesion in campaigns on European Union (EU) directives, national unity at the country level, and local solidarity with regard to particularistic concerns. In such ways civil society activities today enact a transscalar form of citizenship, as the people involved assert rights and responsibilities in respect of several overlapping polities at the same time.

True, the recent shift from a state-centered to a multi-level civil society needs to be kept in perspective. For one thing, multi-level civil society activity has a longer history. Certain movements for human rights, religious revival and more have for generations operated transnationally and subnationally as well as nationally. In addition, the extent of recent transformations must not be exaggerated. Many civil society activities still operate primarily in a country-nation-state framework. So, as ever, change is accompanied by continuity. Yet, these qualifications having been made, it can still be affirmed that civil society today has far stronger multi-level features of the kind described above than at any previous time. Moreover, moves towards greater transscalarity in civil society look set to continue in the decades to come.

## 25.4 CIVIL SOCIETY INVOLVEMENT IN MULTI-LEVEL POLICY PROCESSES

Multi-level civil society engages multi-level governance. The involvements are both direct (when citizen groups interact with the regulatory agencies themselves) and indirect (when citizen associations intervene in governance processes through third parties like parliaments and the mass media). The paragraphs that follow survey this spectrum of tactics, before the next section assesses the impacts that these various civil society interventions have on multi-level governance.

In terms of direct engagement, civil society associations in some cases take officially recognized positions within the agencies of multi-level governance. For example, civil society actors have held several seats on the board and committees of the Internet Corporation for Assigned Names and Numbers (ICANN), the body created in 1998 to regulate domain identifiers on the internet. Similarly, civil society organizations have

occupied designated seats on the global board and the country coordinating mechanisms of the Global Fund to Fight AIDS, Tuberculosis and Malaria, launched in 2001. The bureau of the International Assessment of Agricultural Knowledge, Science and Technology for Development (IAASTD), founded in 2002, has involved 22 civil society representatives along with 30 governments. The International Labour Organization (ILO) has from its beginnings in the 1920s involved a tripartite structure of governments, employer associations and trade unions.

Officially recognized civil society participation in multi-level governance also comes through accreditation schemes. For example, the UN has accorded formal consultative status to 3287 NGOs as of 2009. Other civil society actors can apply for accreditation to attend particular UN meetings (Martens 2005). The Bretton Woods institutions and the World Trade Organization (WTO) have similar accreditation arrangements for their ministerial conferences. Meanwhile a notable number of governments have since the 1990s come to include civil society figures on their official delegations to global governance conferences, for example, of the WTO and the World Health Organization (WHO).

Many agencies of contemporary multi-level governance have incorporated more or less official mechanisms for civil society consultation into their policy-making processes. Some institutions have created specialized bureaus for relations with civil society associations, such as the NGO Liaison Service (NGLS) at the UN and the Civil Society Unit at the European Investment Bank (EIB). In global policy processes, the Organization for Economic Cooperation and Development (OECD) regularly consults a Business and Industry Advisory Committee (BIAC) and a Trade Union Advisory Committee (TUAC). On a regional scale the Southern Common Market (Mercosur) likewise has a Socioeconomic Advisory Forum. On a national scale a number of governments of low-income countries have since 2000 undertaken consultations of civil society actors when formulating a Poverty Reduction Strategy Paper (PRSP) for bilateral and multilateral donors of development assistance.

Many other consultations of civil society in multi-level governance have had an ad hoc character. For example, the Canadian government usually meets with interested NGOs ahead of its attendance of global governance forums. Since 2000 the host leader of the annual Group of 8 (G8) Summit has normally had some form of interaction with selected civil society bodies. Resident representatives of the World Bank and to a lesser extent the International Monetary Fund (IMF) meet with civil society associations in the country where they are based. The Organization of the Islamic Conference (OIC) has also recently begun informal interactions with NGOs.

In addition to consulting civil society actors in the course of policy formulation, many institutions in contemporary multi-level governance involve citizen groups in policy implementation and review. Relief and development agencies such as the UN High Commissioner for Refugees and the World Bank have frequently contracted NGOs for service delivery activities. Other civil society bodies have contributed to policy monitoring and assessment exercises, including by official bodies such as the Independent Evaluation Office (IEO) of the IMF.

Other involvement of civil society in multi-level governance occurs through indirect channels, when NGOs and social movements engage policy processes via other bodies and venues. For instance, sometimes citizen action groups seek to influence regulatory

agencies at one level by lobbying institutions at another level, in what is sometimes called a 'boomerang effect' (Keck and Sikkink 1998). In this vein human rights organizations have often utilized global mechanisms to push for change in state practices, for example, in respect of child rights and indigenous peoples. From another angle a number of development NGOs have engaged EU committees on trade and finance in attempts to influence global economic institutions. In addition, many civil society associations have lobbied ministers and ministries at the national level with the aim of shaping state policies in respect of regional and global governance. On still other occasions advocacy groups have sought to reach the state and suprastate levels of governance via substate governments. Thus, for example, environmental campaigners urged the State of California and the City of Seattle to back the Kyoto Protocol when the Bush administration refused to ratify this global instrument on climate change.

Further indirect civil society action in multi-level governance transpires via legislative bodies, mainly when citizen activists engage national parliaments on issues of regional and global governance. Using such tactics civil society organizations have on multiple occasions pressed the US Congress to make funding of global regulatory bodies conditional upon the adoption of certain policy positions or institutional reforms. Citizen movements have also campaigned in several countries (Britain, Canada, France and so on) for greater accountability of national executives to national legislatures for positions taken in global and regional institutions. Occasionally, as in Malawi, civil society associations have sponsored workshops and other activities to raise the capacities of national parliamentarians to address issues of suprastate governance. In the EU some NGOs have taken their concerns on global governance to the regional European Parliament.

Another tactic of indirect advocacy has seen civil society associations engage multi-level governance through political parties. Although civil society by common definition excludes political parties, many NGOs and social movements seek to shape policy with interventions in party politics. In this vein a number of trade unions have historically affiliated with labor parties; some religious organizations have worked with faith-based parties; and, more recently, environmental lobbies have collaborated with green parties. Such links between civil society and political parties have sometimes operated across levels when, for example, Greenpeace International has engaged with nationally based ecology parties.

Still other indirect civil society activism in multi-level governance has occurred by way of the mass media. For example, citizen groups may feed information and analysis to journalists, write letters and feature articles for newspapers, make interviews with the broadcast media and produce documentaries. Tens of thousands of civil society associations moreover maintain their own websites and/or seek to mobilize followings via collective sites such as OneWorld.net, YouTube and Facebook Causes (Rodgers 2003). From time to time civil society actors have also promoted training of journalists on issues pertaining to multi-level governance, for example, through bodies such as the Eastern Africa Media Institute.

Then there are possibilities for civil society actors to relate with multi-level governance via the commercial sector. For instance, many local and national consumer campaigns have pressed companies for higher regional and global norms on labor rights, ecological sustainability and health standards. Human rights organizations reinforced official global, regional, national and local sanctions against the apartheid regime in South

Africa with campaigns to boycott transnational corporations that continued to invest in the country. More recently a number of NGOs have lobbied companies to comply with corporate social and environmental responsibility schemes such as the Global Compact and the Global Reporting Initiative (GRI). Meanwhile Al-Qaeda made its opposition to prevailing frameworks of world governance most emphatic with the 9/11 attacks on Wall Street.

With quieter persistence many civil society associations engage multi-level governance indirectly through public education activities. For example, the youth group Check Your Head has facilitated hundreds of workshops on global issues in schools across the province of British Columbia. At universities initiatives such as the International Student Festival in Trondheim (ISFiT) and People & Planet have raised awareness of transscalar governance. In France the Third World Information Network (RITIMO) has maintained over 50 resource centers across the country 'for sustainable development and international solidarity.'

Finally among the many direct and indirect tactics available to civil society campaigns are public demonstrations. The protests involve direct confrontation insofar as they often transpire outside the meeting places of local, provincial, national, regional and global regulatory institutions. However, these actions also entail an indirect approach inasmuch as many (though by no means all) of the demonstrators refuse to pursue face-to-face discussions with official circles. Well-publicized civil society marches on major global and regional governance events include the so-called 'Battle of Seattle' at the 1999 WTO Ministerial Conference, street gatherings at the Gothenburg EU summit in 2001, and the mass rallies around the Gleneagles G8 meeting in 2005 (Della Porta et al. 2006). In addition, many smaller, often more spontaneous and less reported demonstrations have occurred across the global South, including many so-called 'IMF riots' against structural adjustment programs in the 1980s and 1990s.

## 25.5 CIVIL SOCIETY IMPACTS ON MULTI-LEVEL GOVERNANCE

Having reviewed the large and varied involvements that civil society associations have in multi-level governance, a bigger question of course arises as to the consequences of all this activity. Exact determinations of citizen group impacts – with all of the notoriously difficult methodological problems surrounding issues of causality – lie beyond the scope of the present survey discussion. However, it is possible to identify several broad types of civil society influence in multi-level governance.

One general area where civil society actions have shaped multi-level governance is in the creation of the regulatory institutions. For example, NGOs were among the active proponents for the establishment of the UN in the 1940s. The proposal to convene the Uruguay Round that formed the WTO initially came from a meeting of the WEF in 1984. Citizen action groups have also founded and operated several private global governance institutions, including the Forestry Stewardship Council (FSC) and the World Fair Trade Organization (WFTO).

Other civil society actions have contributed to the institutional reform of existing agencies of multi-level governance. For instance, NGOs and social movements were

among the main actors who pressed for the creation of an Inspection Panel at the World Bank in 1994 and an IEO at the IMF in 2001. Persistent civil society agitation about the unrepresentative character of the G8 arguably helped to prompt inclusion of the so-called 'Outreach 5' (Brazil, China, India, Mexico and South Africa) in parts of summit meetings since 2005, as well as the creation of the G20 in 2009. Civil society organizations were also among the major advocates to upgrade the UN Commission on Human Rights to a Human Rights Council in 2006. On the other hand, long-running civil society calls for reform of the UN Security Council and the Executive Boards of the Bretton Woods institutions have so far brought little institutional change.

As well as affecting institutional design civil society campaigns have also affected institutional agendas in multi-level governance: that is, what issues are addressed and with what relative priority. In this regard citizen action groups have largely pushed questions of human rights and humanitarian intervention to higher prominence in regional and global agencies over the past half-century. More recently NGOs have spurred the adoption and pursuit of the Millennium Development Goals (MDGs) of poverty reduction across all tiers of governance. Persistent civil society pressure has also arguably put the issue of HIV/AIDS higher on the agenda of contemporary governance than it would otherwise have reached. Critical questions about internet governance took the headlines at the World Summit on the Information Society (WSIS) in 2003–05 substantially as a result of insistence from certain quarters of civil society. NGO advocacy has similarly made rules concerning intellectual property a matter of greater deliberation in contemporary multi-level governance.

In a more general fashion civil society engagement has on various occasions shaped the discourses that circulate in multi-level governance: that is, not just what matters are raised in the regulatory agencies, but also the language that is used to discuss them. For example, talk of 'sustainable development,' 'decent work,' 'the responsibility to protect' (R2P), 'transparency' and indeed 'civil society' itself has entered contemporary public policy largely through civil society channels. Around the turn of the millennium NGO and social movement advocacy, including through mass demonstrations, arguably played a notable role in shifting the prevailing discourse of economic policy. In place of the so-called 'Washington Consensus' on globalization through marketization that dominated in the 1980s and early 1990s came a 'Post-Washington Consensus' that has put greater emphasis on regulatory interventions to promote market stability, social standards and care for the environment in contemporary capitalism (Stiglitz 2002).

Changes in the agendas and discourses of multi-level governance have often helped to generate changes in concrete policy measures as well. For instance, in line with 'Post-Washington' thinking long civil society campaigns for the cancellation of poor country debts bore considerable fruit between 1996 and 2005. Persistent NGO calls for transparency have encouraged many regulatory agencies to practice greater and timelier disclosure of official documentation. Other civil society actions in multi-level governance that have contributed to policy shifts include campaigns on access to essential medicines, the abolition of land mines and compensations for people displaced through large development projects.

Then there is the larger question of whether, taken in aggregate, civil society impacts on institutions, agendas, discourses and policies contribute towards changes in the deeper structures of society and politics. Such shifts would generally have the largest and



most lasting impacts on people's lives. However, these slow movements of what Fernand Braudel called the *longue durée* of history are also more difficult to perceive, measure and attribute.

That said, it can be suggested that the very acts of civil society engagement of multi-level governance (as against of states alone) are playing a part in effecting the historical transition from a statist to a polycentric, multi-level mode of regulation. In addition, by operating on several scales of governance (as against the national level alone) civil society associations are furthering a reconstruction of social geography through concurrent processes of globalization, regionalization and localization. A third structural shift is encouraged when citizen groups in multi-level governance mobilize around – and advance – other political solidarities in addition to national identities. By rallying people in terms of caste, class, disability, faith, gender, race, sexuality and other non-territorial affiliations, civil society activism is fostering a pluralist structure of identity in place of the preceding overriding focus on nationality. Some civil society mobilization – for example, by religious revivalist groups and indigenous peoples – has furthermore challenged deeper structures of modern rationalist knowledge. Certain other civil society initiatives – for instance, to promote local currencies and a care economy – have gone against underlying principles of capitalist production.

The relationship between civil society activism and underlying social structures raises key questions about the role of citizen mobilization in processes of social change. Some citizen activism in respect of multi-level governance has what might be called a 'conformist' nature: that is, it reproduces and reinforces existing governance arrangements. Other civil society engagement of multi-level arrangements operates on what might be termed 'reformist' lines: that is, it alters particular regulatory frameworks and agencies without touching the deeper rules that are embedded in social structure. A third category of citizen group action has what might be dubbed a 'transformist' character: that is, it reconstructs the underlying social order. Contemporary civil society engagement of multi-level governance arguably has had some transformational implications for deeper structures of governance, geography and identity. However, the consequences for primary ordering principles of (rationalist) knowledge and (capitalist) production in multi-level governance have generally not extended beyond modest reforms.

## 25.6 DEMOCRATIZING MULTI-LEVEL GOVERNANCE?

Considering the many modes of civil society engagement of multi-level governance and their multiple impacts, what can be concluded regarding this citizen action as a force for democracy in a post-statist world (Scholte 2002; Scholte 2004; Goodhart 2005; Steffek 2008)? As other contributions to this volume have noted, the rise of multi-level governance has raised many concerns about the future of democracy. How can 'rule by the people' be secured in the new structure of regulation when inherited democratic practices tend to center on the state alone? Many commentators have suggested that civil society could provide (a significant part of) the answer to so-called 'democratic deficits' in multi-level governance (Falk 2000; MacKenzie 2009). Is it the case?

Certainly a number of civil society contributions to more democratic multi-level governance can be recorded. These citizen groups have helped to articulate problems

with contemporary democracy, to advance citizen learning, to enhance institutional accountability, to promote equal opportunity and to enlarge the voice for unrecognized peoples. However, the overall scale of these democratizing impacts to date is less impressive than it could be. Moreover, experience shows that civil society activities in respect of multi-level governance do not automatically further democracy. Indeed, the democratic credentials of civil society associations themselves often pose major challenges. The remaining paragraphs below elaborate on each of these points in turn.

As regards articulation of the problems, civil society groups have been among the main actors to turn the spotlight on shortfalls of democratic practice in multi-level governance. Civil society initiatives such as the Global Accountability Project at the One World Trust have identified in detail what many citizens have felt intuitively: namely, that contemporary multi-level regulation is often lacking in adequate participation and control by the people that it affects (Blagescu et al. 2005). Spaces such as the WSF have fostered citizen debates on the nature and prospects of democracy in a more transscalar world that is ruled through multi-level governance processes. Moreover, numerous civil society initiatives such as peace movements and Dalit solidarity networks have pursued alternative ways to practice democracy (Hardtman 2003).

In addition to highlighting the problem and exploring responses to it, civil society activities have advanced democracy in multi-level governance through programs of citizen learning. Democracy cannot prevail when the people concerned are poorly aware of their situation and the policy options available to them. To practice collective self-determination a public needs to have at hand relevant information, analytical tools and mobilization skills. Many civil society initiatives have sought to provide affected people with these resources in respect of multi-level governance. The means to raise awareness have included the promotion of relevant curricular changes in schools and universities; the provision of 'popular education' outside formal institutions of learning; efforts to influence mainstream mass media; the creation of independent media outlets; the production and circulation of pedagogic literature; and the use of art forms ranging from theater to graffiti as vehicles of civic learning about governance in today's world.

Many civil society interventions have also furthered democracy in multi-level governance by increasing the accountability of the institutions to the people whose livelihoods they affect (Scholte 2011). For instance, a number of NGO coalitions have lobbied with positive effect for greater transparency on the part of previously rather secretive corners of multi-level governance (such as transgovernmental networks of financial regulators). In addition, many of the mechanisms of citizen consultation described earlier have developed as a result of civil society pressure to include non-official parties in policy-making processes. Citizen action groups have also raised accountability in multi-level governance through their substantial monitoring and evaluation of the regulatory agencies. Countless groups have published studies, issued report cards, and in other ways scrutinized the workings of global, regional, national and local governance bodies. Sometimes advocacy by civil society associations has furthermore prompted the authorities to correct their mistakes, for example, with apologies, resignations, policy changes and/or institutional reorganizations.

Apart from efforts to highlight democratic deficits, to raise citizen awareness and to promote institutional accountability, civil society activities have advanced democracy in multi-level governance by promoting a progressive redistribution of resources. Veritable

democracy arguably only prevails when all affected persons have equivalent opportunities to participate; yet such equality is patently far from the norm in contemporary politics. Many civil society associations have addressed this dimension of democratic deficits by highlighting arbitrary hierarchies in multi-level regulation (for example, on lines of countries, classes, castes, cultures, genders, races, (dis)abilities and so on). Some citizen action groups have also sought to redress these inequalities, for example, with the promotion of resource transfers through measures such as aid and fair trade. Certain civil society organizations have advocated for global redistributive taxes (for example, on air travel and currency transactions) and for new rules that would improve the political opportunities of poorly resourced people (for example, creative commons licenses and a global anti-trust authority).

Finally this brief survey of civil society contributions to more democratic multi-level governance needs also to note the many occasions when NGOs and social movements have enlarged political space for peoples that have tended otherwise to be unrecognized (and sometimes also repressively silenced). For example, civil society associations have figured significantly in the creation and operation of the UN Permanent Forum on Indigenous Issues (UNPFII). Likewise, other citizen action initiatives have given voice to political identities such as outcasts and underclasses that rarely obtain seats in official representative bodies such as parliaments and executive boards. These civil society activities have arguably also furthered a spirit of more constructive negotiation among diverse life-worlds, in place of the violent suppression of 'difference' that often prevailed in modern statist politics.

In multiple ways, then, multi-level governance is more democratic for having civil society involvement. That said, the extents of these democratizing contributions must not be exaggerated. Many citizen groups are poorly aware of multi-level governance processes and do little to advance democracy in these arenas. Moreover, most agencies of multi-level governance could do much more to derive democratizing benefits from their relations with civil society groups. In short, so far the promise has outstripped the practice in civil society promotion of democratic multi-level governance.

Nor is civil society always and everywhere a democratizing force in contemporary multi-level governance. As noted earlier, civil society is not always civil, and some citizen action groups can pursue anti-democratic agendas. Moreover, many civil society associations have shaky democratic credentials in their own internal governance. Often the organizations have limited accountability to wider society – in some cases even to the particular constituency that they purport to serve. Critical questions are rightly posed about democratic practices of transparency, consultation, monitoring and correction on the part of the citizen groups themselves (Edwards 2000; Jordan and van Tuijll 2006). As one human rights activist in Uganda has put it, 'when you point a finger, you need to do it with a clean hand' (Scholte 2004, p. 98).

Moreover, civil society activities can reproduce and enlarge counter-democratic social inequalities as well as combat them. Indeed, the NGO sector as a whole has arguably mirrored many of the same patterns of dominance and subordination that mark society at large. Formally organized civil society in particular has tended to be weighted towards countries of the global North, major urban centers, Western cultures, propertied and professional classes, and male, middle-aged and white leadership. Counter to many assumptions and expectations, then, civil society can actually perpetuate and deepen

privilege in multi-level governance. Thus, while civil society activities can be a significant force for democracy in multi-level governance, they achieve positive influences in this regard as a result of concerted efforts rather than as an inherent outcome.

## 25.7 CONCLUSION

This chapter has indicated that multi-level governance is not a matter of official institutions alone, but also involves civil society that is itself acquiring more pronounced transscalar qualities. As regulatory arrangements come to span and interlink multiple spaces – global, regional, national, provincial, local – civil society activities are doing the same. Just as the state and (national) civil society have been two sides of governance in the modern era, so it appears that multi-level regulation and multi-level civil society will be two sides of the emergent circumstance as well.

In this equation each side is simultaneously driving the other. On the one hand, multi-level civil society has helped to generate multi-level governance. Citizen associations have often pressed for the creation and expansion of governance institutions ‘above’ and ‘below’ the state. Civil society groups (especially NGOs) have also frequently supported policy formulation and execution in multi-level governance arrangements. On the other hand, multi-level governance has also helped to create multi-level civil society. Citizen associations have continually responded to new opportunities of access and influence, in addition to the state, offered by local, provincial, regional and global regulatory bodies.

Given the many constructive potentials identified in this chapter, civil society involvement in multi-level regulatory processes could fruitfully be proactively enlarged. That said, as the chapter has also made clear, the benefits for effective and legitimate multi-level governance in the twenty-first century do not flow automatically. To realize more fully their prospective positive impacts civil society actors will need to approach multi-level governance with more capacity, more coordination, more inclusion of marginalized circles and more accountability (their own) than has tended to prevail so far.

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PART VI

POLICY AREAS



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## 26 Social policy and multi-level governance

*Alexander Graser and Stein Kuhnle*

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‘Social policy’ and ‘multi-level governance’ – there is some unease in combining these two concepts, although the multi-level provision of social policy has for long been a reality. But as a traditionally – and maybe genuinely – local matter, social policy might still not lend itself as easily to centralization, transnationalization or even globalization as might be the case for other policy fields. In the following, we will first circumscribe what is commonly understood as ‘social policy.’ In a second step, we will sketch and critically discuss the dominant paradigm regarding the role of social policy in multi-level systems. In our last section, we will turn to some real cases in order to identify trends and to illustrate the variety of multi-level arrangements in social policy.

### 26.1 SOCIAL POLICY – AN AMORPHOUS CONCEPT

Social policy is difficult to define. What is ‘social’? The definition can be based upon the concerned areas of public policy, the aims of the respective policies or the instruments chosen.

#### 26.1.1 Areas of Public Policy

The easiest way to start is to define social policy by the areas of public policy normally subsumed under the title of ‘social policy’ in academic studies of social policies, schools of social policy – the first dating back to the Department of Social Science and Administration at the London School of Economics and Political Science in 1912 – or textbooks on the subject.<sup>1</sup> If we do, we will find that income maintenance schemes (or social insurance against certain risks), social services (for example, care for elderly, children) and health services are core fields. To a large, but varying extent employment services and regulations, housing (for example, direct housing allowances or indirect subsidies through tax policies; public housing) and education are covered under the umbrella term ‘social policy.’ All of these fields obviously have explicit social aims, and are, in modern, developed nation-states, greatly interlinked.

A broad definition makes more sense than a narrow one – policies in any of the fields mentioned cover various dimensions of social well-being, security, opportunity and equality. In fact, it is hard to think of any public policy that in one way or other does not have a social dimension. All policies concerned with the distribution of resources and opportunities are essentially ‘social.’ Defense policy, industrial policy, regional policy, environmental policy, trade policy, macro and micro economic policies in general, all in various ways affect social conditions and well-being and contribute to the distribution of public and individual welfare. Theoretically and empirically speaking, policies not



subsumed under ‘social policy’ may even offer a greater contribution to welfare than social policies *sensu stricto*.

### **26.1.2 Aims**

For pragmatic reasons, however, we shall in this context understand ‘social policy’ to be more directly concerned with aims to alleviate poverty, provide basic income security, protect against social risks such as occupational injuries and diseases, sickness, unemployment and old age, and aims to promote equality of opportunity and outcome.

Aims can of course be specified in different ways, and history and contemporary observations provide ample examples of variations between nation-states and governments across time and space. Not only can similar aims be pursued by different policies and policy instruments, apparently identical aims can also be formulated on the basis of different motives, for example, humanitarian and altruistic motives, motives of social integration and harmony, motives of investment in human capital, motives of social order and control or motives of buying off social protest. Some see social policy as a ‘contradiction of capitalism,’ and the term ‘welfare capitalism’ is not generally understood as a concept with positive connotations. Both at a high level of theoretical abstraction and at the level of parliamentary practical politics, social policy has been regarded both as a means to save capitalism and to undermine it. Views on the role and contents of social policy within and across European political parties have changed over time ever since national social insurance legislation was set on a firm discursive footing through Bismarck’s policies of the 1880s, marking, as some see it, the birth of the modern welfare state, although not conceived or conceptualized as such at the time.

### **26.1.3 Instruments**

The aims, however operationalized across time and space, have been and are pursued by different policies and instruments. Policies and instruments chosen can be based on specific values and interests; on specific contextual constellations of social, economic and political forces and institutional frameworks, as well as on theoretical assumptions and/or empirical knowledge or perceptions about how policies and instruments are supposed to work or actually work. Various combinations of these factors can be conducive to opting for one or the other instrument. Instruments first chosen can be quite decisive for possible future paths of institutional or policy development. A policy or instrument, which at a later stage can be looked upon as politically desirable, can in practice meet insurmountable political or legal obstacles given early political choices. Effects can be intended or non-intended, and nations and governments learn from own experience or the experiences of other nations. Policy learning takes place within and across nations. Social policy ideas have always crossed politically constructed borders. ‘Social policy’ is a field where a number of scientific disciplines are at work and have, or demand to have, a say: law, economics, sociology, philosophy, political science, history, psychology and medicine. The strength of disciplines varies across time and space, producing different ‘knowledge input’ to social policy-making in varying social, cultural and political contexts. For all of these reasons social policies vary across nations. An academic industry of creating typologies of welfare states or ‘welfare regimes’ based on certain institutional

characteristics has grown. One way to distinguish different welfare regimes is to claim that they rely on different composite ‘packages’ of policy instruments.

Social policies can involve the transfer of cash or provision of benefits- or services-in-kind; social policies can be universal or ‘targeted,’ that is, cover all citizens or residents of a nation-state, or cover everybody within a social category (for example, all people below or above a certain age, all families with children, all gainfully employed) or be restricted to beneficiaries based on a means-, income- or other kind of test of eligibility. Social security can be more or less tax-financed and/or more or less based on contributions by employees and employers. Cash benefits, for example, sickness and unemployment benefits and pensions, can be more or less ‘equal’ or more or less linked to what is paid in; health services, medicine and personal social services can be ‘free’ at the point of access and provision or more or less based on co-payment. Governments use tax policies in different ways to give incentives to promote individual or family welfare, for example, tax subsidies for individuals or companies investing in health or pension insurance, or for individuals investing in the construction or refurbishment of their own house. Social policies can cover labor market relations that in various ways regulate employment and dismissal conditions, labor disputes, wage settlements, gender equality; and anti-discrimination at the work place. Social policies can differ as to organization and administration, for example, as to the division of labor or responsibility between administrative levels or sectors, or as to the degree of cooperation or coordination with non-governmental welfare and labor organizations, and private, commercial or non-profit companies.

## 26.2 SOCIAL POLICY IN A MULTI-LEVEL SETTING: THEORETICAL CONSIDERATIONS

Among the many theoretical approaches dealing with our topic,<sup>2</sup> there is one particularly widespread and maybe dominant paradigm that portrays social policy as a competitive disadvantage for the sub-units of a multi-level system.<sup>3</sup> In the following, we will first sketch the content of this paradigm and then critically discuss it with regard to both its limits and its policy implications.

### 26.2.1 Content

The paradigm can be conceptualized as a ‘magic triangle,’ that is a conflict of three collective aims.<sup>4</sup> The first is to pursue social policies, the second is to allow for regional autonomy in devising such social policies, and the third is to maintain or increase the permeability of the borders within a multi-level system. Any two of these aims would seem to be reconcilable only if the third is compromised. More specifically, social policy would be shielded against any downward pressures resulting from regional competition if either it were pursued only on the most central level or if the different jurisdictions within the multi-level system were separated by absolutely impermeable borders. Conversely, any step towards decentralization of social policies within a multi-level system or of deborderization between its different jurisdictions would increase the competitive pressure on the pursuit of social policies and potentially lead to a ‘race to the bottom.’<sup>5</sup>

There are various mechanisms which might convey such pressure. They relate to different dimensions of the permeability of borders. One is the mobility of persons who might move across borders in order to either maximize the social benefits they receive, or to minimize the taxes and contributions they have to pay within the respective system. The latter rationale applies not only to persons but also to employers. So, a second relevant dimension of permeability is that for firms or investment more generally. But even if all firms and employees were bound to stay within their respective jurisdictions, the competitive pressure could be generated by the mere transfer of goods and services across borders. For again, the taxes and contributions paid by their providers into the welfare or social security system might raise the respective costs and result in a relative disadvantage compared to their competitors from other jurisdictions.

### **26.2.2 Limits**

All these dimensions of permeability are governed and can potentially be restricted by regulation. But of course the law determines only the upper limits to these different kinds of transborder mobility. There can be other obstacles to such mobility as well. This is true most notably for personal mobility, which will typically depend on many other factors beyond the optimization of the individual tax-benefit ratio. Cultural and especially language barriers may play a role; people may lack sufficient information or have personal ties that prevent them from moving.

Such restrictions of mobility, both legal and factual, may reduce or even prevent any competitive pressure from arising. They can thus put limits on the predictive value of the 'magic triangle' paradigm, in many cases eroding its plausibility altogether. It is not surprising, therefore, that in the literature critical statements abound regarding this paradigm, acknowledging at the same time, however, the fact that it has become and so far remained 'almost a commonplace.'<sup>6</sup>

In fact, the spread of the paradigm may itself contribute to its predictive quality. For it may indeed occur that there is a discernible downward pressure on decentralized social policy despite the absence of any corresponding mobility.<sup>7</sup> This observation suggests that the mere anticipation (or fear or even threat) of such mobility may be sufficient for the triangle to operate. Under such circumstances, the paradigm may be an inadequate description of social reality in the first place, but can become a self-fulfilling prophecy nevertheless. It is all the more important therefore to keep sight of the limits to its applicability.

In any event, not all kinds of social policy are equally liable to the competitive pressure as predicted by the 'magic triangle.' First, even from the perspective of regional competition, social policy need not always be a disadvantage but may indeed yield 'good returns' with regard to a region's overall economic attractiveness. This would primarily apply to measures such as basic poverty prevention, educational benefits and so on, but it could also be said about other kinds of social policies which in a more general sense strengthen social cohesion or which advance the formation of a region's 'human capital.' Second, a policy's susceptibility to such competitive pressures is likely to increase with the degree to which it contains redistributive elements and thus departs from the operational mode of the market economy. Along these lines, tax-financed welfare schemes

would be affected more strongly than those in the realm of social insurance where contributions and benefits are more closely linked through market-like reciprocity. Third, the distinction between cash and in-kind benefits may play an important role because the former tend to be more portable which may in turn strengthen the mechanisms that convey the competitive pressure. Child allowances, for example, may therefore be more susceptible to a downward spiral than would be the case for the provision of childcare facilities that can only be enjoyed locally. Finally, as the paradigm presupposes informed individuals, government benefits and levies are more likely to be affected than are other kinds of regulation whose effects are less transparent. A case in point may be protective employment regulation such as unfair dismissal, anti-discrimination or the provisions of collective labor law.

The competitive pressure is, moreover, dependent also upon the socio-economic environment within which the social policies are applied. First, due to its dependence on the above factors, the competitive pressure is likely to affect some parts of the economy more severely than others – and, by the same token, it may affect different (types of) national economies in a different fashion.<sup>8</sup> Second, the intensity of the pressure is likely to vary depending on the overall economic situation. Severe poverty can be expected to enhance mobility, even across relatively impermeable national borders. The large numbers of migrants claiming benefits in South Africa may be viewed as indicative of this.<sup>9</sup> Moreover, one may assume that it is not only the absolute wealth of a region that matters but also the size of the gap between the benefit levels of adjacent regions. For example, it was for this reason that the 2004 European Union (EU) enlargement gave rise to serious concerns<sup>10</sup> on the part of the ‘old’ member states who feared that they would become ‘welfare magnets.’ These concerns ultimately led to (transitional) restrictions of the permeability of the EU’s former eastern border.

### **26.2.3 Policy Implications**

Speaking of such restrictive measures, one may ask more generally about the policy responses which this paradigm would call for. First of all, the above indicates that there is a wide array of conceivable regulatory tools. Some of the concrete examples highlighted in Section 26.3 below will give an idea of this variety.<sup>11</sup> In theory, there are innumerable ways of how to fine-tune both the (im)permeability of territorial borders as well as the extent of (de)centralization within a multi-level system. However, not all of these instruments will be available in any given setting as there are likely to be legal constraints, most notably the constitutional (or quasi-constitutional) division of competences and guarantees of fundamental rights (or economic freedoms). Moreover, the background of institutional arrangements influences the interplay of the involved actors and thus impacts indirectly on the political viability of any of the policy tools.

Second, it is not only the permissibility and viability of such policy measures that is highly contextual. The same is true for the actual need for any such measures, and for their concrete choice and design. All of this depends, as has been illustrated above, on the kind of social policy at hand, on the regulatory environment and on the socio-economic conditions. Also, the appropriate tools need not be regulatory in nature. For example, the above suggests that in some cases the competitive pressure is not conveyed by actual mobility but just by its anticipation. Here, information policies might be sufficient to

alleviate the pressure. Similarly, it may often suffice to resort to voluntary modes of coordination<sup>12</sup> among regional jurisdictions instead of using compulsory instruments on the central level.

Finally, it may for many reasons not be regarded as desirable in the first place to even try to alleviate the competitive pressure. One basis for this may be the argument that such pressure, whether real or not, in fact does not lead to a curtailment, but rather to a counter reaction, that is, to an advancement or at least entrenchment of social policies.<sup>13</sup> To the extent that such effects – paradoxical ones if viewed from the perspective of the ‘magic triangle’ – can be established, pressure alleviation would not be necessary. Another argument against such alleviation is that the pressure might help enhance the efficiency of the provision of social benefits. Or, more categorically, the pressure may even be hailed as a much-needed tool to cut back on welfare state structures that in this view have sprawled anyway beyond any reasonable measure.

## 26.3 SOCIAL POLICY IN A MULTI-LEVEL SETTING – REAL OBSERVATIONS

In this last section, we take a brief look at four cases, starting at the local and moving up to the global level. This account will, of course, be far from comprehensive. But it might be illustrative of the issues raised in the preceding sections.

### 26.3.1 The Local Roots: Early Social Policies in Western Europe

Before the emergence of industrial capitalist economies and developing nation-states in Western Europe during the eighteenth century, social policy was mainly about poverty, begging and vagrancy, and a matter for concern for local authorities and the Church. With the growing political importance of national states and economies, national governments, for various reasons (law and order, repression, control of mobility, ‘welfare’), took an interest in regulating the treatment of the poor. Typically, the execution of laws on poor relief was left to local authorities.<sup>14</sup>

The American and French revolutions introduced new conceptions of rights of the individual, and combined with the simultaneously developing industrialization and the growth of wage labor, new economic, social and political forces were set in motion. These directly or indirectly put pressure on national governments in Western Europe to take a more active and independent role in the field of social policy. Although small-scale social insurance schemes had been introduced in various European countries from the 1840s, the comprehensive program for national social insurance introduced by Bismarck in Imperial Germany in the 1880s can be said to signify a social innovation, which came to have a path-breaking importance in elevating social protection as a core concern of national governments.

Local authorities in most countries – unitary as well as federal states – have, however, retained an important role in the pursuit of social policies. They have continuously maintained and developed their responsibility for last-resort cash poor or social assistance benefits and for new social care functions for the population at large. But they are not the only players anymore. Instead, they have become an integral part of much more

complicated systems of co-financing with 'higher' levels of government and co-existence with other subnational or national schemes of social security.

### **26.3.2 Partial Centralization: 'Cooperative Federalism' in US Social Policy**

Given its overall size and the relative strength of its sub-units, the federal system of the USA is a particularly illustrative case for the interplay of the federal and the state actors.<sup>15</sup> As a matter of constitutional law, interstate borders are highly permeable in the USA. This has been contested at times, especially with regard to the access of interstate migrants to state welfare schemes. But the Supreme Court has repeatedly enforced what it considers a constitutional right to such personal mobility.<sup>16</sup> In real terms, mobility indeed seems to be high in the USA. There is little evidence, however, for any welfare-induced migration.<sup>17</sup>

Furthermore, the constitutional division of competences is relatively flexible in the field of social policy. As a general rule, federal law prevails in case of conflict with state law, and there are not any substantive restrictions for the federal level in this particular policy field. But the states can act as well, and for long, they indeed used to be the main actors. It was only in the 1930s that the first major legislation in the field of social policy was enacted on the federal level: the Social Security Act, which was part of Roosevelt's New Deal reforms and has since been considered the backbone of the US system of social security. But the states have always retained an important role, not only with regard to social insurance, but also to welfare schemes.<sup>18</sup>

The overall level of social expenditure in the USA is generally considered to be comparatively low.<sup>19</sup> Without suggesting any causal inferences here,<sup>20</sup> this observation corresponds to what the 'magic triangle' would predict for a multi-level system within which the internal borders' permeability is high. Moreover, with this permeability being highly entrenched, one would expect that whenever it is sought to alleviate any perceived competitive pressure on decentralized social policy, the only option is to (partly) centralize it.

And indeed the variety of policy tools to that extent is a most remarkable feature of social policy in the USA.<sup>21</sup> Some branches of social policy have been completely centralized, as is the case most notably for the public pension scheme and health insurance for the elderly. In other areas, federal and state benefits co-exist. This is true, for example, in the field of basic welfare schemes where the provision of food stamps as a nationwide program may be complemented by additional benefits on state level. Moreover, many benefits are provided by both federal and state governments in a cooperative mode, and such cooperation may take various forms. At times, the federal level finances a socket which the states may or must supplement, whereas in other cases, the federal government would provide matching grants, thus setting incentives for the states to raise the overall benefit level. Often, the federal funds would, moreover, be linked to substantive requirements regarding the respective schemes. Finally, there are branches of social policy in which the involvement of the federal level is hardly visible but may still be important. In the field of unemployment insurance, for example, it is mainly through tax incentives that the federal level influences state policies. And at times, even the mere 'threat' of introducing a federal statute may have been an effective tool of pressure alleviation. This may have been the case with regard to the schemes of workmen's compensation in the USA.

### 26.3.3 Coordination and Regulation: The ‘Social Dimension’ of the EU

The multi-level system of the EU differs significantly from that of the USA. More recent in its origins and supranational ‘by nature,’ it is far more heterogeneous and less integrated, with the central level being much weaker with regard to its institutional setup, legal competences and spending power. These differences are particularly important in the realm of social policy.

Europe’s advanced welfare states predate European integration, which in its early days was largely about economic integration – or, using the above vocabulary, about gradually increasing the permeability of national borders. Accordingly, there were hardly any competences in the field of social policy allocated to the supranational level. In fact, its first major activities in the social realm were intended to remove the obstacles that the incompatibility of national systems of social security posed to labor mobility across borders.<sup>22</sup> Without such ‘coordination,’ workers would run the risk of losing their various social entitlements (such as pension rights, health or unemployment benefits) when seeking employment in another country. A uniform scheme of coordination was developed on the supranational level, replacing what had hitherto been addressed largely through bi- and multilateral agreements.

With economic integration progressing, however, the perceived lack of a ‘social dimension’ of the supranational community became increasingly topical. To be sure, there had for long been a considerable body of social regulation in a wider sense, addressing, *inter alia*, aspects of consumer protection, work place safety, gender equality and also other kinds of discrimination. These kinds of regulation have gradually been expanded so that in many of its member states, the EU can nowadays be viewed as the major driving force in these fields of regulation.

In other, more traditional areas of social policy though, and especially in those requiring a ‘purse,’ supranational activities have remained residual. Although the respective competences have incrementally been widened,<sup>23</sup> there is little prospect at present that the EU would replace the member states as main actors in these fields. Instead, its most recent focus is on a new mode, the so-called ‘open method of coordination’.<sup>24</sup> In a number of policy fields, the supranational level has thus adopted the role of an initiator and facilitator of a continuous discourse between the major actors and stakeholders of the respective national systems. These institutionalized exchanges are meant to allow for mutual policy learning and the common identification of best practices and benchmarks. Current assessments of this soft and deliberative policy tool vary, and it may indeed be too early still for a prognosis of its impact.

While social policy thus continues to be a mainly national affair, the permeability of the internal borders remains a highly contested issue within the EU. This is true not only when it comes to the accession of new members states (see above), but applies also to the old ones. As long as centralization is not a viable option, a balance has to be struck between shielding decentralized social policy and promoting supranational integration. Recent issues have, for example, been the reach of national health insurance coverage with regard to transborder services,<sup>25</sup> or the access of private insurance companies to other member states’ ‘markets’ for social insurance,<sup>26</sup> or the extendibility of decentralized minimum wage policies to service providers from another member state.<sup>27</sup> And, quite remarkably, such fine-tuning is regularly left to the judicial branch.<sup>28</sup>

### **26.3.4 Emergent Global Discourses and Actors**

Social policy as a field of academic study has traditionally been concerned with the national level. And yet, social policies cross national borders, either through active policy learning among nation-states or, more and more, through development of common ideas, perspectives and recommendations in various international fora. Globalization of core social security policies (at the national level) has taken place since the early (European) attempts at national social insurance towards the end of the nineteenth century. Nations have learnt, 'positively' or 'negatively,' from each other.

Also, a number of international governmental organizations (IGOs) which have developed over the last 100 years, in particular since World War II, have come to play important roles as collectors of statistics and providers of overviews on social legislation, monitors of national developments and analysts of effects of policies. Increasingly, these actors also discuss and recommend policies in various fields (labor market, social insurance, pensions and so on.) and coordinate policies of different nations. This might not be a sufficient basis to claim that global social policies exist. But through different IGOs, with varying memberships, nation-states take part in 'global' social policy discourses. The International Labour Organization, the World Health Organization, other United Nations organizations, the World Bank and the Organization for Economic Cooperation and Development are examples of IGOs which – with different purposes and mandates – play a role in the global social policy arena. More and more, national and transnational NGOs, social movements, trade unions and professional organizations also take part in the global social policy discourse and are, variously, actively engaged in the politics of social (policy) development in many countries.

In summary, there seems to be a tendency towards a globalization of social policies, promoted by both the transnationalization of the social policy discourse as well as the emergence of the new and increasing institutionalization of existing social policy actors in the transnational realm. As a result, the dividing line between social policy and development cooperation is blurred. Arguably, this is most visible in the fields of poverty alleviation and health policy.

## **26.4 OUTLOOK: GLOBALIZATION OF SOCIAL POLICIES**

The trend towards a globalization of social policy is likely to continue. To be sure, the existence of well-developed welfare states at the national level reduces the objective need for transnational social policies. But, on the other hand, continued and strengthened economic globalization (freer flow of capital, labor, people in general, ideas, goods and services) will likely maintain the countervailing tendency towards increased activities on political levels beyond the nation-state. The persistent poverty in some regions of the world, and its increased perception as a global rather than national problem, point in the same direction. Furthermore, political globalization will likely encourage more attention to global social policy issues – issues of social inequality, redistribution, regulation and provision. In an increasingly interdependent world, the heightened vulnerability to economic and social risks of both nations and people may stimulate more political interest in 'global public goods' such as international financial stability, health and



global distributive justice. Actors at the national level will likely be more concerned both with the impact of global developmental trends and of IGOs on national politics, and for these reasons also more likely to see a need to be more active in such international organizations so as to influence the development of policies and regulation in the realms of social protection, human rights, labor and trade.

## NOTES

1. See, for example, Michael Hill (1980), *Understanding Social Policy*, Oxford: Basil Blackwell; and Martin Bulmer, Jane Lewis and David Piachaud (eds) (1989), *The Goals of Social Policy*, London: Routledge.
2. There are at least two pertinent discourses: one is about the effects of globalization on the welfare state, the other relates more specifically to the interaction of different political levels with regard to social policy, but is most often confined to specific, mostly federal systems. A good insight into the latter is provided by Herbert Obinger, Stephan Leibfried and Francis G. Castles (2005), *Federalism and the Welfare State*, Cambridge: Cambridge University Press; see especially their 'Introduction' pp. 29ff. For an overview on the former discourse, see Philipp Genschel (2004), 'Globalisation and the welfare state – a retrospective', *Journal of European Public Policy*, **11** (4), 613ff.; and Geoffrey Garrett (1998), 'Global markets and national politics: collision course or virtuous circle?', *International Organization*, **52** (4), Autumn, 787ff.
3. For a prominent version of this argument, see Ramesh Mishra (1999), *Globalization and the Welfare State*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing.
4. On this conceptualization as 'magic triangle,' see, Alexander Graser (2001), 'Dezentrale Wohlfahrtsstaatlichkeit im föderalen Binnenmarkt', Berlin; for a shorter version in English, see Alexander Graser (2001), 'Towards a multi-level system of social security in Europe?', in D. Pieters (ed.), *Confidence and Changes: Managing Social Protection in the New Millennium*, The Hague: Kluwer Law International, pp. 215ff..
5. For an empirical corroboration of this argument from the US context, see Paul E. Peterson and Mark C. Rom (1990), *Welfare Magnets*, Washington DC: The Brookings Institution; and Paul E. Peterson (1995), *The Price of Federalism*, Washington, DC: The Brookings Institution.
6. For the quote, see Mark Kleinman (2002), *A European Welfare State?*, New York: Palgrave Macmillan, p. 60. Similar views – combining a critical assessment of the paradigm with the diagnosis of its prevalence – are ubiquitous; for a succinct version, see Elmar Rieger and Stephen Leibfried (1998), 'Welfare state limits to globalization', *Politics and Society*, **26** (3), September, 364: 'the general notion of an inexorable globalization pressure to shrink welfare states is untenable'; see also Bruno Palier and Rob Sykes (2001), 'Challenges and change: issues and perspectives in the analysis of globalization and the European welfare states', in Bruno Palier, Robert Sykes and Pauline M. Prior (eds), *Globalization and European Welfare States*, Houndmills, Basingstoke and New York: Palgrave Macmillan, pp. 1ff.; and Duane Swank (2002), *Global Capital, Political Institutions and Policy Change in Developed Welfare States*, Cambridge: Cambridge University Press.
7. This seems to have been the case with regard to the US income support schemes for incomplete families (called 'AFDC' and later 'TANF'): the state benefit levels display the effects of some downward pressure, and yet the mobility of the respective recipients is negligibly low. For a more detailed account of this example, see Alexander Graser (2008), 'Approaching the social union?', in Erik Oddvar Eriksen, Christian Joerges and Florian Rödl (eds), *Law, Democracy, and Solidarity in a Post-National Union*, Abingdon, Oxon: Routledge, pp. 140ff..
8. For a broad comparative study of the different 'vulnerabilities,' see Fritz W. Scharpf and Vivian Schmidt (eds) (2000), *Welfare and Work in the Open Economy*, Oxford: Oxford University Press.
9. For a detailed discussion of this phenomenon and an impressingly generous treatment of the ensuing problems of inclusion, see the decisions of the *Constitutional Court of South Africa in Khosa et al. v Minister of Social Development et al.* (CCT12/03) *Mahlaule et al. v Minister of Social Development et al.* (CCT13/03).
10. For a particularly pessimistic estimate, see Hans-Werner, Sinn Gebhardt Haig, Martin Werding et al. (2001), 'EU-Erweiterung und Arbeitskräftemigration', Munich, pp. 5–23. For a more moderate prognosis, see Heinz Fassmann and Roniner Münz (2002), 'Die Osterweiterung der EU und ihre Konsequenzen für die Ost-West-Wanderung', in Berg Bade and Roniner Münz (eds), *Migrationsreport 2002*, Frankfurt am Main: Campus Verlag, pp. 61ff.
11. While the case of US federalism (Subsection 26.3.2) will mainly serve to illustrate the devices of partial

- centralization, the case of the EU (Subsection 26.3.3) is relevant primarily with regard to the issue of border permeability.
12. See subsection 26.3.3 below for an institutionalized example of such voluntary coordination, the so-called 'open method of coordination.'
  13. See, for example, Rieger and Leibfried, 'Welfare states limit to globalization', p. 365, note 6. A short rendition of some more far-reaching approaches is given by Torben Iversen and Thomas R. Cusack (2000), 'The causes of welfare state expansion', *World Politics*, **52**, April 313ff.
  14. Gaston V. Rimlinger (1971), *Welfare Policy and Industrialization in Europe, America, and Russia*, New York: Wiley.
  15. For a recent analysis of the US system see David Finegold (2005), 'The United States Federalism and its counter-factuals', in H. Obinger, S. Leibfried and F.G. Castles (eds), *Federalism and the Welfare State*, Cambridge: Cambridge University Press, pp. 138ff.
  16. The two core decisions are *Shapiro v Thompson*, 394 U.S. 618 (1969) and *Saenz v Doe and Roe*, 526 U.S. 489 (1999). Both decisions granted interstate migrants unlimited access to tax-financed basic income support for families which the defendant states had tried to restrict. For other kinds of state benefits or services, exceptions to the general rule of unrestricted interstate migration may apply. For details, see Alexander Graser (2000), 'Do hard cases make bad law? Zur Entscheidung des US Supreme Court in Sachen Saenz v. Roe', *Heidelberg Journal of International Law*, **60**, 367ff.
  17. See Finegold, 'The United States and its counter-factuals', at pp. 140 ff., note 15 and the evidence cited there. Also, the findings in Saenz (see Graser, 'Do hard cases make bad law?') are symptomatic in that respect. Extending full benefits to all newly arrived migrants would in that case have had miniscule budgetary effects.
  18. Their regulatory autonomy seems to have grown again, especially since the welfare reforms of the 1990s when the trend towards devolution reached the realm of social policy. And even their relative share in government expenditure on social policy has experienced a slight growth throughout the past decades; see Finegold, 'The United States and its counter-factuals', especially pp. 152, 171ff., note 15.
  19. For detailed comparative data, see Obinger et al. (eds), 'Introduction', p. 28, note 2.
  20. But see David B. Robertson (1989), 'The bias of American federalism: the limits of welfare-state development in the progressive era', *Journal of Policy History*, **1**, 269 ff., who uses this paradigm to explain the relative delay of the development of social policies in the USA.
  21. For a table displaying the varying extent of federal and state involvement in different social programs, see Finegold, 'The United States and its counter-factuals', p. 155, note 15. For a detailed account of the policy instruments, see Graser, 'Do hard cases make bad law', note 4.
  22. See Regulations 3/58 and 4/58 (European Economic Community) (EEC), which were indeed among the very first legal instruments issued by the EEC. Their successors were Regulations 1408/71 and 574/72 (EEC), and, more recently, Regulation 883/2004 (EC). For a condensed account of the evolution of this regulatory field, see Bernd Schulte (2007), 'Die Geschichte der Reform der Verordnung (EWG) 1408/71', in Deutsche Rentenversicherung Bund (ed.), *Die Reform des Europäischen Sozialrechts*, Berlin: Die Reform des Europäischen Sozialrechts, p. 9ff. An early example of a regional/transnational agreement on social insurance for workers mobile across national borders is the mutual convention between Denmark, Norway and Sweden on workers' accident insurance in 1919, in the 1920s joined by Finland and Iceland; see Klaus Petersen (2006), 'Constructing Nordic Welfare Nordic Social Political Cooperation 1919–1955', in Niels Finn Christiansen, Klaus Petersen, Nils Edling and Per Haave (eds), *The Nordic Model of Welfare: A Historical Reappraisal*, Copenhagen: Museum Tusulanum Press, University of Copenhagen, p. 82.
  23. For the current stage, see in particular Article 136 TEC. For an account of its development, see Bernd Schulte (2008), 'Internationales, supranationales und zwischenstaatliches Recht', in Baron Bernd von Maydell, Franz Ruland and Ulrich (eds) Becker, *Sozialrechtshandbuch*, 4th edn, Baden-Baden: Nomos, Section 33, no. 8, pp. 13ff.
  24. For an early wave of assessments of the first experiences with this device in the realm of social policy, see Marcus Göbel (2002), *Von der Konvergenzstrategie zur offenen Methode der Koordinierung*, Baden-Baden: Nomos; B. Cantillon and J. Vandamme (eds) (2004), *The Open Method of Coordination and Minimum Income Protection in Europe*, Leuven: ACC; Association of German Person Insurers (2003), *Open Method of Coordination in the Field of pensions – quo vadis?*, Series DRV-Schriften 50, international conference 26–27 March, Berlin. and, focusing on health care, Jorens (ed.) (2003), *Open Method of Coordination*, Baden-Baden: Nomos.
  25. The first – and at the time quite unsettling – decisions of the European Court of Justice (ECJ) in this field were related to the transborder purchase of glasses and dental care; see C-120/95 – Decker and C-158/96 – Kohll.
  26. This issue is salient, for example, for the corporatist structures in German workmen's compensation and work place safety. For a systematic account, see Richard Giesen (2003), *Wettbewerb*

*und Berufsgenossenschaften*, edited by Stiftung Marktwirtschaft, Berlin: Berufsgenossenschaften und Wettbewerb.

27. See the recent decision (3 April 2008) of the ECJ in Ruffert, C-346/06.
28. For a critical assessment of such extensive judicial power and its exercise by the ECJ, see Scharpf (2007), 'Reflections on multi-level legitimacy', MPIfG Working Papers 07/3, available at <http://www.mpifg.de/pu/workpap/wp07.3.pdf>. For a more extensive presentations of his argument, see also his earlier contribution 'Politische Optionen im vollendeten Binnenmarkt' (2003), in Jachtenfuchs and Kohler-Koch (eds), *Europäische Integration*, 2nd edn, Opladen, pp. 219ff.

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## 27 Multi-level environmental governance

*Sonja Wälti*

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### 27.1 INTRODUCTION

The expansion and paradigm shifts in the development of today's environmental policies have been intrinsically linked to the development of multi-level governance arrangements. The early regulatory approaches to environmental degradation of the 1960s and 1970s have coincided with centralizing tendencies, in the USA earlier than in other contexts. The 1980s increasing recognition of the limits of central government again coincided with increasing trust in and responsibilities for subnational levels of government. Especially in federal countries, some environmental responsibilities were handed back to subnational governments. Then the mounting distrust of the 1990s in central steering, and in governmental steering altogether, brought about decentralized, voluntary and 'softer' environmental policy instruments. The most recent decade, finally, may well become known for the globalization of environmental problems and the internationalization of environmental policies, thus mirroring the study of multi-level governance's claim to look beyond the nation-state.

Nowhere does environmental policy expansion coincide as closely with the development of multi-level governance arrangements as in the European Union (EU), where legislative activity in environmental matters peaked between 1987 and 1993 (McCormick 2001, pp. 55–61), just prior to the emergence of research on multi-level governance in the early 1990s. While a claim that multi-level governance emerged due to the specific demands of environmental policies would be hard to verify, there are some plausible links. Most importantly, the nature of environmental problems inevitably brings multiple levels of government into play. Problems are often felt locally while solutions are inherently national due to the spillovers that characterize many environmental problems. Yet, while programs are national, their implementation tends to call for subnational involvement in order to effectively reach the fragmented target groups implicated in environmental pollution and degradation. Second, the fact that many of the ultimate target groups of environmental policies, namely industries and consumers, are private has possibly made environmental policy more receptive to the general shift from government to (multi-level) governance. Lastly, the globalization of environmental problems has further fostered the need for multi-level solutions.

This contribution pursues two goals: First, it aims to retrace various theoretical frameworks that pertain to how environmental problems are addressed across levels of government, highlighting how multi-level governance has contributed to existing federalism perspectives. Second, it examines what implications various patterns of multi-level governance have for the environment. Is multi-level governance beneficial or detrimental to the environment? What does the state of the research tell us about the caveats and conditions under which we can expect positive outcomes? The different theories pertaining to environmental protection across levels of government yield very different, and

often contradictory, predictions about how best to serve environmental policy goals. Proceeding in this manner entails, in the first instance, looking at multi-level governance as a novel theoretical framework that has provided a new lens by which to examine environmental governance; in the second instance, multi-level governance serves as a generic term to capture various forms of multi-tiered governing arrangements.

The following sections review various theoretical frameworks that have shed light on how, and how successfully, environmental policies have been governed across levels of government. For each, I outline their theoretical claims, report some of the most important empirical findings to date, and then examine how different types of multi-level governance patterns may perform when it comes to environmental policy. To develop these predictions, I draw on the distinction between multi-level polities and multi-level regimes outlined in the Introduction to this Handbook. I will conclude by examining what contributions multi-level governance, as a novel theoretical approach, has made to a better understanding of how the presence of multiple governmental tiers affects environmental policy performance and where future research should develop more insight.

## 27.2 ECONOMIC FEDERALISM

When asking how policies are or should be governed across levels of government, economic – also referred to as functional or fiscal – theory of federalism (see Peterson 1995) offers a convenient starting point to demonstrate how the specificities of environmental problems affect their governance. Economic federalism suggests that if environmental spillovers across jurisdictional boundaries occur, as is often the case with air and water pollution, higher levels of authority are best suited to govern those areas (Rose-Ackerman 1995; Oates 2000). If national public goods or large-scale spillover problems, such as air quality, public land and rare species, are at stake, the central government will do best, whereby ‘best’ means most efficient (Pareto-optimal), that is, maximizing aggregate social welfare. Global commons and spillovers call for supranational policies. Only environmental problems of a local nature, such as household waste management or stationary water and soil pollution, could be left to local governance levels.

These efficiency considerations have driven the development of environmental policies in many multi-level contexts, most notably the USA and the EU. The difficulty has been that many areas of environmental policy, especially those affecting production and product standards, are intrinsically linked with domestic and international economic, agricultural and trade policy. Many environmental problems also pertain to health and safety hazards. Therefore, the reality of environmental policy often looks more centralized than economic federalism tends to predict. The question is then: does this benefit the environment or is it detrimental? Economic federalism suggests that environmental policy performance is affected by the allocation of resources and functions between levels of government. We can expect countries that succeed in regulating environmental matters by the functionally appropriate level of government to develop more successful environmental policies. Of interest is what type of countries may be best equipped to get it right.

The prevailing pattern of multi-level governance in a country should, in principle,

not matter in how effectively they address problems that span their entire territory, such as public goods and large-scale spillovers. It is possible that multi-level polities such as federal and regionalized countries (multi-level polity, according to the Introduction), which are characterized by the decentralization of policy powers and accountability, take somewhat longer to adopt central policies when needed because of a more cumbersome multi-level decision-making process (see Section 27.6 on multi-level governance below). On the other hand, multi-level polities may be somewhat more likely to effectively address local environmental problems than centralized ones because they can rely on local governments that are held accountable by their constituents.

The performance of different multi-level governance arrangements may vary most notably when it comes to addressing regional environmental problems, which are neither national nor local in scope. Multi-level polities may be well equipped to solve problems at the subnational level, but only so long as they do not cross multiple jurisdictions (Oates 2000), as subnational environmental challenges such as the management of resources and large ecosystems often do (Gerber et al. 2009). Multi-level regimes, which are characterized by a fluid patchwork of overlapping jurisdictions (see the Introduction to this Handbook), could generally be expected to do better in the face of often spatially and functionally fluid and overlapping environmental problems. In contrast, the more locally accountable multi-level polities may be particularly effective in matching people's preferences and willingness to pay for services they receive, including hazardous waste management or the monitoring of local water and soil quality (see Livingston 1987; Breton 2000).

Comparative policy research has time and again concluded that federal, regionalized and highly decentralized countries do not perform differently than unitary and highly centralized countries when it comes to governing the environment (Wälti 2004). And when differences are apparent, economic federalism does not explain them well. In fact, there is even counter-intuitive evidence that more localized environmental problems such as water quality are less effectively addressed in multi-level polities, while problems suffering from externalities and national public goods seem to fare better when multiple levels are involved (Ringquist 1993).

## 27.3 LEGAL AND ADMINISTRATIVE FEDERALISM<sup>1</sup>

Comparative federalism has traditionally characterized multi-level governance arrangements from a legal and administrative point of view by examining the distribution of powers, resources and organization across levels of government (for example, Watts 1999). While traditional comparative federalism has not served to systematically examine (environmental) policy performance, some theoretical claims can nevertheless be derived. Elazar's federal principle of combined self-rule and shared rule (see Elazar 1973) meets particular challenges when dealing with environmental problems due to the fact that the primary target groups of environmental regulation and incentives – producers and consumers – inevitably become the dual subjects of the federation and the constituent units. Like few other policies, environmental policies generally necessitate but also struggle with shared authority. Having said this, legal and administrative approaches to federalism have pointed to significant differences in how powers, resources and organizational

means are allocated across levels of government. These institutional differences affect how well they cope with environmental problems (Rabe and Lowry 1999).

In dual (also called 'competitive') federal arrangements, which characterize namely Anglo-Saxon federations, both national and subnational administrative units share – and sometimes compete over – environmental policy powers. Dual multi-level arrangements have the advantage of being 'direct', that is, the regulating agency is also responsible for carrying out its policies (Salamon 2002, p. 29). For example, the US Environmental Protection Agency has its own law enforcement system and carries out its own inspections. Such arrangements may foster regulatory approaches to environmental problems, at least during times of high environmental activism and if significant regulatory powers are centralized, which is the case in the USA for example. Implementation is likely swifter and more linear. The downside of dual arrangements, however, is the potential for conflict, stalemate and inaction, as is arguably the case in Canada (Rabe 1999; Weibust 2009). The involved governmental levels can conveniently shift the blame if held accountable; and, unless the problem pressure is unusually high, neither may initiate centralization to resolve environmental problems.

Cooperative federal patterns, such as the ones that predominate in Germany and Switzerland, are often thought to experience difficulties in swiftly adopting central policies because, unlike dual federal patterns, even when they are ready, they cannot preempt subnational level powers but instead have compromise on joint policies. Yet, the fact is that both Germany and Switzerland have acted as forerunners in many environmental policy developments. Problem pressure and an environmentally sensitive public are often credited with environmental policy success in these countries (Knoepfel 1995; Weidner 1995; Wurzel 2002, pp. 4–36); but the presence of multiple governmental levels has helped vocal environmental movements secure policy change.

Once adopted, environmental policies may experience multiple barriers to implementation in cooperative federal arrangements due to their tendency to delegate policy implementation to subnational level agencies. Implementation research has identified this aspect of bureaucratic discretion as the 'principal-agent problem,' denoting the difficulty the principal has to oversee its agent when chains of command are long and fragmented. Implementation may take longer and be spottier due to the multiple opportunities for policies to be thwarted to fit regional and local interests, and regulatory approaches to environmental problems seem less promising. In contrast, delegated implementation is also said to make the bureaucracy responsive and accountable to local concerns and thus improve environmental outcomes. This accountability effect is likely more pronounced in the case of particularly visible environmental policies, meaning policies whose outputs and/or outcomes can be immediately monitored by the public (Wilson 1989). Many aspects of environmental quality are localized by nature but probably none more so than policies governing air, water and waste. Cooperative multi-level arrangements may be more open to public participation and stakeholder involvement, which, as outlined above, seems to have helped environmental policies.

While traditional comparative federalism, by stressing legal and administrative aspects, has limited itself to the study of federal countries – and thus multi-level polities – it is conceivable to extend the insight gained to multi-level regimes. They too can function with separate or concurrent powers, resources can be more or less decentralized and organizational capabilities are conceivably more or less developed. The flexibility and

adaptability of multi-level regimes makes them promising candidates to respond swiftly and effectively to ecological problems characterized by natural rather than institutional boundaries. Multi-level regimes may also find it easier to cope with the ever-growing complexity of supranational environmental governance levels.

## 27.4 POLICY DIFFUSION, TRANSFER AND CONVERGENCE

The preceding sets of theoretical propositions have focused on the vertical aspects of multi-level environmental governance. Horizontal intergovernmental relations also come into play and are by all accounts crucial in affecting environmental policy. Environmental policy innovation and diffusion have received attention not only at the domestic level (for example, Kern 2000; Sapat 2004; Daley and Garand 2005) but also at the international level (for example, Liefferink and Andersen 2002; Tews et al. 2003; Albrecht and Arts 2005; Busch and Jörgens 2005; Jörgens 2005; Holzinger et al. 2008).

Environmental policy diffusion takes place when jurisdictions emulate one another's practices. In environmental policy, diffusion typically involves borrowing other jurisdiction's policy instruments or administrative practices (for example, Jordan et al. 2003). Policy transfer, although denoting a more active horizontal exchange of practices, is often used indiscriminately. 'Pioneers' are thought to adopt certain practices, which neighbors then adopt and adapt (Andersen and Liefferink 1997; Liefferink et al. 2009). 'Laggards' take especially long or never adopt the new practice. Neighborhood plays a crucial role in diffusion, whereby jurisdictions in close geographic, linguistic, political or economic proximity may more easily follow one another's lead. Although the micro-processes in policy diffusion are still being researched, the diffusion of ideas and practices within policy communities involving both public and private actors are thought to be very important (Jordan et al. 2003, pp. 18–19).

As a result of policy diffusion and transfer, policies in different jurisdictions converge over time until a new wave of innovation takes place followed again by convergence. Innovation and diffusion patterns can differ greatly but are often S-curve patterned. Few pioneers start a new trend that is followed by others in an accelerated pattern before tapering off while the laggards finally follow suit or are forced into compliance. Aside from neighborhood effects, policy convergence may also be due to similarities in problems or similarities in internal (domestic) conditions. Or convergence may be the result of overarching national or international policies, which happen to lead to similar responses at the national or subnational level. In environmental policy matters, all three of these trends undoubtedly coexist, making it particularly hard to distinguish them, despite the promising advances in modeling and testing for such patterns (see Daley and Garand 2005; Holzinger et al. 2008).

Convergence is most pronounced at the policy level (whether there is a policy or not) and less so at the instrumental level (what policy instruments or settings prevail) (Sommerer et al. 2008). Jurisdictions converge most when it comes to trade-related policies. Not surprisingly, the obligation to adopt a policy due to harmonization requirements significantly drives convergence. The EU's increasing influence on environmental policy matters, in both member and future member states, seems to have become the most important predictor of a country's willingness to embrace stricter environmental



policies (Zürn and Jörges 2005; Liefferink et al. 2009). But other than EU-related environmental regimes also foster convergence. Inter-jurisdictional communication within policy networks seems to play a central role, thus corroborating that policy innovation, transfer and diffusion may happen via these channels (Sommerer et al. 2008). The horizontal and vertical paths policy innovation and diffusion have been captured in the so-called ‘vertical interaction model,’ which postulates that policy diffusion is often accelerated (and occasionally decelerated) by vertical transfers: innovations are uploaded and subsequently funneled downward within a multi-level governance arrangement.

Multi-level governance arrangements are often credited with a high capacity to innovate because new ideas and practices can emerge and be tested in independent territorial ‘policy laboratories’ without putting the entire system at risk. The sheer presence of multiple governance levels likely fosters environmental policy innovation. Although it is difficult to make clear predictions, it seems plausible that multi-level polities may have a greater capacity to innovate due to their ability to problem-solve across different policy fields.

## 27.5 INTER-JURISDICTIONAL COMPETITION

Albeit a separate line of argument and emanating from a largely distinct body of literature, inter-jurisdictional environmental competition is closely related to policy diffusion as they are both forms of a jurisdiction’s responsiveness to the policies of its neighbors. However, the assumed micro-processes underpinning competition are different from those thought to be involved in policy diffusion. The interests and behaviors of consumers and producers are assumed to be at the core of inter-jurisdictional competition, though institutional factors are sometimes also taken into account. While diffusion theories suggest that policies merely converge, inter-jurisdictional competition theory often predicts the direction in which change happens, that is, whether policies improve or deteriorate.

Fiscal federalism has traditionally paid special attention to inter-jurisdictional competition by contending that federal and decentralized polities are particularly efficient because they allow consumers and producers to (re)locate in the jurisdiction that best matches their needs (including environmental quality) for the least tax burdens (for example, Weingast 1995). However, the efficiency-enhancing effect of competition hinges on the congruence of each jurisdiction’s service and tax powers. If there is no such congruence one jurisdiction can free-ride on the services of others or offload negative externalities to them for free. Hence, as spillovers between jurisdictions grow, as is the case in many fields of environmental policy, the assumption that inter-jurisdictional competition benefits policies becomes questionable (Rose-Ackerman 1995; Oates 2000). Indeed, in the presence of significant spillovers inter-jurisdictional competition may even become ruinous. Some jurisdictions may relax environmental requirements to attract economic development, jobs and tax revenues. In fact, knowing that other jurisdictions are doing the same, they may each go beyond what is optimal for their own jurisdiction. The dynamics of this cut-throat inter-jurisdictional competition have become known as ‘race to the bottom’ (Stewart 1977; Vogel 1995), a term which is confusing because

competitive dynamics may not cause a net worsening of the environment but simply depress an otherwise improving trend (Wälti 2009).

The pessimistic outlook for multi-level governance arrangements to develop and sustain regional, national and international environmental policies due to inter-jurisdictional competition has seen many revisions. First, industries may be only moderately responsive to environmental regulation. Considerations such as the presence of skilled labor, general tax conditions, the proximity to markets and other production sites probably outweigh their attention to environmental requirements (Jaffe et al. 1995; Braun 1998, p. 257). The relocation into another jurisdiction also entails significant moving costs.

Second, jurisdictions may not actually respond to the threat – perceived or real – of relocating industries. With an eye on environmentally sensitive voter-taxpayers who are willing to pay a price for environmental quality (for example, Cragg and Kahn 1997), governments may prefer to resist business interests (Revesz 1992). Indeed, some may even consider moving to high-quality areas just as they do to access transportation or secure good schools for their children. As a result, jurisdictions may ratchet up pollution control and thus become a center for high-tech and low-pollution industries to suit the needs and skills of their pollution-sensitive population. In the context of the USA, this has become known as the ‘California Effect’ (Vogel 1995). The framing of issues also plays a role. When priority is given to investments and job creation, authorities may be inclined to give into deregulation to meet lower standards in neighboring states. In contrast, when sustainable growth is in demand, authorities may be receptive to pro-environmental regulatory pressure. To be sure, these are political and institutional explanations (see below). What matters here is that once a jurisdiction has locked into a course of action, whatever the reason, it has an interest to impose this course on others.

It is unclear what net effect inter-jurisdictional competition has on the environment. Clearer is that its effect depends on the environmental problem structure. Environmental problems involving large-scale spillovers are especially prone to competition if not regulated centrally. There is also less hope for environmental problems resulting from stationary production processes than there is for problems resulting from mobile products (Scharpf 1999, pp. 91–101). The voter-taxpayer and consumer can more immediately affect the environmental quality of products such as cars by choosing to buy those that are more fuel-efficient or by requesting that the home jurisdiction mandate them to be fuel-efficient. If a jurisdiction responds to such a request by regulating a product such as cars, both that jurisdiction and the affected industry will want the new fuel-efficiency standards imposed at a larger scale and industry-wide. This is especially true if the new demands emanate from a large market, such as California in the USA or Germany in the EU. This ‘California Effect’ is further enhanced if the resulting increases in production costs and potential job losses occur in other (car-producing) jurisdictions. In the case of environmental problems that emanate from production processes, which is more common for point-source pollution, the same dynamics do not play out (but see Scharpf 1999, p. 98).

While there is some empirical evidence that firms are sensitive to environmental standards and may even shift production accordingly (Henderson 1996; Braun 1998; Levinson 1999), there is none confirming that in response jurisdictions undercut one another’s environmental policies (see List and Gerking 2000; Fredriksson and Millimet 2002; Arts et al. 2008). The contrary seems to hold true: if anything, intergovernmental

environmental relations have been characterized by a ‘race to the top,’ though there is evidence that only some jurisdictions participate in what Fredriksson and Millimet (2002) call ‘yardstick competition.’

By all accounts, multi-level regimes composed of single-purpose jurisdictions can be expected to be more responsive to inter-jurisdictional environmental competition than multi-level polities, which have to accommodate diverse political demands and policy needs. Whether that competition is beneficial or detrimental hinges on their ability to efficiently allocate powers and resources between levels of authority, as discussed under economic federalism in Section 27.2 above.

## 27.6 MULTI-LEVEL GOVERNANCE

Environmental policies have time and again shown to be sensitive to politics. Environmental movements and the emergence of green parties or green factions within established parties were instrumental in the development of environmental policies (Neumayer 2003; Scruggs 2003). Environmental policy expansion and performance also seems to have benefitted from institutional contexts characterized by accommodative bargaining arrangements (Crepaz 1995). Yet, the theoretical frameworks that have been outlined so far pay surprisingly little attention to multi-level politics.

Multi-level governance, here understood as a novel approach to explaining policy performance, provides a powerful backdrop to pooling and probing a variety of political explanations to the emergence and success of environmental policies. It is particularly powerful in examining how institutional and actor-centered factors jointly affect policy performance. In the early stages of environmental policy formation, the presence of multiple levels of government brought greater opportunities for green movements and parties to emerge and become a significant force (Weidner 1995). Multi-level party politics is naturally more significant in multi-level polities where jurisdictions provide ample opportunities for party politics. Green parties and forces have had an easier time emerging and sustaining themselves in proportional electoral systems, such as Germany and Switzerland, than in contexts of majoritarian politics as is prevalent in the USA and Canada. This may be one of the most significant differences explaining the EU’s bypassing the USA in environmental matters in recent years. Even when green forces are present, the lack or weakness of a country-wide and vertically integrated party system, as is the case in Canada and Switzerland, for example, can also curb efforts to expand environmental policies.

The presence of multiple levels of government has also increased opportunities for interest and advocacy groups. The assumption has long been that corporatism may hinder environmental efforts by providing business interests with veto points to block unwanted policies. The puzzling empirical reality, however, is that corporatism seems to have had a favorable effect on environmental policy expansion and performance (Crepaz 1995; Neumayer 2003; Scruggs 2003). Recent research suggests that in fact this holds true only for multi-tiered contexts (Wälti 2004). This result suggests that multi-level governance structures turn accommodative bargaining arrangements into access points for environmental advocacy groups. Similar dynamics have been uncovered beyond the nation-state, where non-state actors drive the development of international

environmental regimes, in some cases (for example, forest certification) even in the absence of strong state control and relying solely on the market place (Cashore et al. 2007). It is conceivable that these dynamics can play out both in multi-level polities and in multi-level regimes. Indeed, the latter may even be more receptive to accommodative bargaining precisely due to the lack or weakness of politically and electorally accountable jurisdictions.

Lastly, intergovernmental politics, that is, the strategic behavior of jurisdictions within a federation or regionalized system, also hinges on the prevailing multi-level governance patterns. For example, regardless of the path by which pioneering jurisdictions press ahead with their environmental policies, they subsequently have an intrinsic interest in leveling the playing field by uploading their comparatively more stringent policies and thus ultimately subjecting other jurisdictions to them (Scharpf 1999; Liefferink and Andersen 2002; Vogel 2004, pp. 84–120). In many areas of environmental policy, this has resulted in an intergovernmental dynamic of pioneers ‘ratcheting up’ environmental policies rather than in a ‘race to the bottom,’ as predicted by inter-jurisdictional competition. Environmental problems are particularly sensitive to this dynamic because political elites can often respond to diffuse environmental interests (Pollack 1997) by imposing concentrated costs, for example, on certain industries. What is more, this constellation of diffuse benefits and concentrated costs often fuels ‘entrepreneurial politics’ (Wilson 1989, p. 72), which may more easily translate into innovation in multi-level contexts, most notably by multiplying opportunities for policy entrepreneurs to initiate new ideas. These dynamics can play out in multi-level polities as well as in multi-level regimes, as the experience of the EU demonstrates.

## 27.7 CONCLUSION AND DIRECTIONS FOR FUTURE RESEARCH

Considering the rich array of theories and empirical findings that have furthered our understanding of how the interplay between levels of governments has affected environmental policies, what has multi-level governance contributed to our understanding of environmental governance; and what may it yet contribute?

The most direct and visible contribution is undoubtedly that there is an opportunity to think of the dynamics discussed in this chapter as generally applicable to any situation when multiple governance and governmental levels exist. The invitation to examine domestic and international findings indiscriminately, indeed to connect and compound those findings, opens up exciting opportunities for the advancement of knowledge and the connection of previously separate academic communities. The following consequences of this trend seem particularly noteworthy and point to future avenues of research.

The state-centeredness of comparative environmental policy research is complemented by the study of international regimes, which are responsible for an increasing number of policy initiatives affecting national and subnational environmental policies. Especially when studying the effectiveness of international regimes, we may draw on the longstanding tradition of domestic implementation research, which has always paid significant attention to multi-level dynamics.

Levels beyond the nation-state may receive further attention, while at the same time

additional subnational levels – local, regional or city levels – shift into view. The exploration of connections and interactions between the supranational and the local level are without doubt particularly promising in environmental policy matters, and their study promises to help improve policies.

By shifting our focus from multi-level government, which federalism scholars have long favored, to multi-level governance, new actors and processes catch our analytic attention. Yet, as in other areas, that attention may and should soon shift again to the institutionalization of initially fluid and informal arrangements. Worries about the democratic quality of multi-level governance arrangements will undoubtedly continue to be examined and addressed.

Unconventional avenues for comparative research open up, such as a more systematic comparative understanding of the USA and the EU, and possibly their juxtaposition with regional entities in other parts of the world. These comparisons will help point out what type of multi-level arrangements may be particularly effective. They also foster the diffusion of best practices.

The salience and particularity of the environmental policy field is that it adds another dimension to the multi-level mix, namely the natural (earth system) level (Winter 2006). Like no other policy field, environmental policies govern territorially complex natural systems such as urban or rural areas, riverbeds, watersheds, coastal zones, mountain ranges, island systems or climatic zones. These are often functional spaces with no, few or overlapping institutional boundaries. What is more, these functional spaces are increasingly connected by virtue of international law and policies: small island states form cooperatives, cities gather in networks and rainforest zones team up across seas. Multi-level governance promises to take them into account. By fostering flexibility and creativity in developing solutions to ever-evolving problems and across ever-shifting territories, multi-level governance may well promise better environmental policies.

## NOTE

1. While “administrative federalism” is often used to denote cooperative multi-level arrangements that combine central policy-making with decentralized implementation (what students of German and Swiss federalism call *Vollzugsföderalismus*), I subsume here theoretical claims that link policy outcomes to the multi-level administration of policies.

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## 28 Economic policy-making and multi-level governance

*Henrik Enderlein*

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### 28.1 INTRODUCTION

The central diagnosis from the assessment of economic policy management of the ‘Great Recession’ of 2007–09 is a paradox: the crisis was global, but the responses were national. If economic globalization has become a fact of life, it has not yet become a fact of politics. Indeed, many of the tools of economic policy-making still rest under the exclusive competence of national authorities (with the notable exception of the European Union (EU) as discussed below) and – even more importantly – are applied on the basis of largely national considerations. This triggers the question of the right level at which economic policy choices should be made. There is an interesting back-and-forth movement between upward and downward delegation of economic policy-making across levels, reaching from municipalities via subnational entities to the nation-state, regional actors, and the global level. For example, global economic coordination was at its heights after the emergence of the Bretton Woods system in the 1950s and 1960s; during this time, the global ‘level’ constituted an independent layer of economic policy authority. But with the breakdown of the Bretton Woods system, regional configurations – and in particular the EU – became more important. At the level of nation-states, there were times in which fiscal centralization was advocated, whereas current developments clearly point in the direction of decentralization and thus a downward delegation of economic competence in the multi-level system.

The purpose of this chapter is to provide a structured review of different configurations of economic policy-making in a multi-level context. The chapter takes as its guiding theme the relationship between the redistribution of wealth as a key effect of economic policy-making at a higher level of governance, and the difficulties that can arise for economic policy-making at a higher level of governance if such redistributive effects lack legitimacy. This theme derives from what Fritz W. Scharpf once called the ‘apparent trade-off between the greater effectiveness of larger and the greater legitimacy of smaller units’ (Scharpf 1988, p. 240) and is at the core of research in institutional economics (see also Geys and Konrad, Chapter 2 in this volume). The chapter will limit itself to an assessment of fiscal and monetary policy-making across different levels and take as its guiding theme the question of the appropriate level at which government intervention in the economy should take place.

Economic policy-making is almost by definition an area of multi-level governance (MLG). Yet it is impossible to place it into one of the rather narrowly circumscribed types of MLG that motivate many of the other contributions to this volume (see in particular the Introduction, Chapter 1 by Hooghe and Marks and Chapter 5 by Zürn). Rather, to study the multi-level character of economic policy-making, it is necessary to adopt a systematic distinction between different types of actors (mainly private and



Table 28.1 *The geographical scopes of macro-economic policy-making: three illustrations*

Fiscal Policy \ Monetary Policy	Subnational	National	Regional	Supranational
National	<b>Fiscal Federalism</b>			
Regional	<b>Economic and Monetary Union in Europe</b>			
Supranational	<b>International monetary cooperation and global economic governance</b>			

public)<sup>1</sup>, different types of policy areas (mainly monetary policy and fiscal policy, but also wage-setting, regulatory policy and trade) and different types of levels (mainly local or subnational, national, regional and global). To illustrate: certain areas of economic policy-making, such as ‘fiscal federalism,’ clearly fall into one category of MLG that can be described as an interaction of public actors in the area of fiscal policy-making at the subnational and national levels and thus clearly corresponds to the features of the first type of MLG (as argued by Hallerberg, Chapter 7 in this volume). Other areas of economic policy-making, such as international trade, come much closer to the more complex and fluid second type of MLG, which combines the interaction of private and public actors across different levels within a sophisticated and highly dynamic institutional framework for dispute settlement at the supranational level (for example, Zürn, Chapter 5 in this volume). In the area of international monetary cooperation, some scholars have gone as far as referring to a ‘non-system’ (Cohen 1998), given the lack of systematically structured modes of interaction.

The focus of the analysis is on the geographical scopes of fiscal and monetary policy and their interaction across the different levels (Table 28.1). I will discuss three variants of multi-level configurations as illustrations of different forms and degrees of institutionalization: types of fiscal federalism as examples of highly institutionalized forms of interaction between subnational and national policies, Economic and Monetary Union in Europe (EMU) as an example of an intermediate degree of institutionalization at the regional level, and international monetary cooperation and global economic governance as a relatively weak form of institutionalized interaction across different levels of governance (note that global economic governance is not a ‘level’ according to the definition applied in this handbook; the goal is thus not to describe it a deficient MLG system, but rather to understand the reasons of the absence of closer interaction – see Section 28.4).

These three illustrations and their allocation to a ‘level’ raise the question whether economic policy-making could and should be considered as a single MLG system (encompassing all layers from the subnational to the supranational level), or whether one can treat them as analytically separate. In this chapter, they will be looked at as analytically separate even if in reality they are at least inter-linked (for example, the Federal Republic of Germany, which is a fiscal federation, is part of EMU in Europe and an important player in international monetary cooperation and global economic governance). The reason for introducing this separation is twofold: first, each level is embedded in a separate legal framework (the fiscal constitution at the subnational/national level, the

European treaties at the regional level, and no real legal framework at the supranational level) and thus is based on its own functional logic, even if those logics do sometimes overlap; second, the practice of policy-making points towards an analytical separation of the layers by policy-makers themselves.

The guiding theme of the analysis is the degree of income redistribution within a given economic policy space – and the underlying social acceptance or legitimacy of it.<sup>2</sup> This theme has been a key ingredient in considerations of the optimal scale of government intervention. Some scholars refer to the trade-off between the greater effectiveness of large units and the greater legitimacy of small units (for example, Oates 1972, 1999; Scharpf 1988; Inman and Rubinfeld 1997, see also Hallerberg, Chapter 7 in this volume). Based on this perspective, research in economics and political science has tried to gain insights on the appropriate size of nations and has developed positive theories of integration and decentralization (Alesina and Spolaore 1997; Bolton and Roland 1997) and to understand the original bargain that establishes a federation (Riker 1964; Stepan 1999; see also Rodden 2006).

What this body of research does not sufficiently take into account is the importance of appropriate sources of legitimacy in dealing with potential redistributive implications from economic integration. Since economic policy choices almost by definition trigger redistributive implications, the focus in assessing the appropriate level of economic governance has to include considerations on how potential redistributive effects of economic policy-making are being mandated. Economic governance has to strike a balance between providing effective steering to the macro-economy while gaining sufficient citizen support given the redistributive implications of this steering process. To bring in two examples. In the area of fiscal policy, citizens will perceive a common budget at the federal level as legitimate if they support the redistributive implications from this common budget, yet they might seek secession if their own wealth is transferred via the central government to areas to which they do not feel close. The same thought holds in monetary policy: a single currency at the regional level (as in the European context) is likely to have redistributive implications and the legitimacy of this currency therefore hinges upon the common sense of belonging of citizens to the common regional area (Enderlein 2006a).

The literature provides us with two key ways of linking legitimacy and economic policy institutions: as long as economic integration is welfare-increasing, non-majoritarian types of governance (such as delegation to an independent authority) are likely to generate acceptable levels of legitimacy, deriving from the achievement of a desired policy output – in this case we refer to ‘output legitimacy’ (for example, Scharpf 1999, see also Majone 2001). From a more input-oriented perspective of legitimacy, one might put a stronger focus on the potential redistributive spillovers from an integrated economic space and argue that such effects would all form clearly majoritarian types of legitimization. Otherwise, economic integration could be considered as producing undesired results, and the legitimacy of economic and/or political consequences would be put into question, as they would lack a sufficient degree of embeddedness in the democratic decision-making process to be considered legitimate.

In order to gain a better understanding of how those different levels of economic governance can be considered as responses to the trade-off identified and discussed in this section, I will review the nature of the trade-off and solutions to it at the three main levels of economic governance: domestic (within a fiscal federation), regional (within a highly

Table 28.2 *Types of multi-level economic governance*

	Fiscal Federalism	Regional economic integration (Economic and Monetary Union in Europe)	Global economic governance
Type of MLG	MLG 1	MLG 2	Unclear
Main organizing principles	Full legal, political, and economic integration. Varieties of fiscal federalism provide different solutions to the trade-off.	Some legal and economic integration, no real political integration. EMU struggles with finding solutions to the trade-off.	Open coordination. In fiscal and monetary policy, global coordination is almost inexistent; the solution of the trade-off is avoided.
Main types of legitimacy	Mainly input legitimacy through joint decision-taking on economic policy matters in a fiscal federation. Some elements of output legitimacy, based on solidaristic redistributions.	Almost exclusively output legitimacy, based on clear mandates and objectives.	Very few channels of legitimacy.
Degree of economic redistribution	Very high (but depending on the type of fiscal federalism).	Medium. Some redistribution via the common monetary policy. No fiscal redistribution.	Low.
Degree of effectiveness	High (but depending on the type of fiscal federalism).	High in monetary policy, low in fiscal policy.	Low.

integrated common economic space such as the EU) and global (within the framework of loosely structured institutions and fora that are geared towards coordinating macro-economic policies in the world economy).

The results of this review are summarized in Table 28.2.

## 28.2 ECONOMIC POLICY-MAKING AND FISCAL FEDERALISM

The international variety of different types of multi-layered fiscal frameworks is high. Almost all nation-states delegate at least some expenditure and/or tax-raising powers to subnational entities, yet there are fundamental differences in the scope and nature of such delegation. In some countries, the amount spent by subnational layers of government outweighs the amount spent at the central level (for example, in Canada, where

roughly two-thirds of government outlays are spent under the authority of the provinces), whereas it stays at very low levels in other countries (for example, in Belgium, which is constitutionally a federation, with only 12 percent). Also, the nature of delegation widely differs across countries with some subnational units enjoying extensive tax-raising and borrowing autonomy even if they have fairly little political powers (for example, municipalities in the constitutionally unitary Scandinavian countries), while other politically strong regions in federations have almost no tax autonomy and operate under fairly tight borrowing restrictions (for example, in Austria).

Interestingly, not all states granting a considerable amount of autonomy to subnational units are federations in a technical sense. We can look at fiscally federal states as states that are either constitutionally set up as federations, or states that are not federations in the legal sense but delegate a significant share of at least one of the two main components of fiscal policy (tax-raising autonomy or expenditure autonomy) to subnational entities. The latter group has been discussed under the heading of 'fiscal federalism in unitary states' (Molander 2004). Jonathan Rodden has noted that constitutional indicators of federalism and indicators of fiscal decentralization are generally not correlated (Rodden 2004, p. 487). This is a puzzle, since it raises the question of the linkages between legal structures of federalism and fiscal decentralization. Moreover, taking into account the now rapidly emerging literature that seeks to explain the type of federalism adopted in a federal bargain on the basis of the expected redistributive implications, the question of the compatibility and trade-offs in different types of federal regimes has become of considerable theoretical importance.

On this issue, two strands of existing research can be isolated. First, several contributions have detected a positive correlation between fiscal decentralization and inequality, and/or have pointed to the difficulty of decentralized fiscal frameworks to ensure compensation mechanisms within the federation (Peterson 1995; Prud'homme 1995; Linz and Stepan 2000). This finding is also confirmed in the field of welfare state research, showing a lower degree of welfare state activity in federal countries (Huber et al. 1993). A second wave of research is now putting strong emphasis on the emergence of certain types of decentralized fiscal structures in anticipation of such redistributive implications. This literature inverts the causal claim brought forward in the literature on the impact of federalism on inequality, linking the adoption of a certain regime type to maximization strategies on the basis of redistribution in the federal system by the actors involved in the federal bargain (see Beramendi 2007a for an overview). This literature has isolated two main causal mechanisms. First, larger and economically and/or ethnically more heterogeneous societies will result in a more decentralized and less redistributive scheme (Beramendi 2007b; see also Bolton and Roland 1997). Second, redistributive implications of the federal bargain will trigger demand for compensatory mechanisms by the center (Casella and Weingast 1995; see also Mattli 1999).

It is straightforward to assess this variety in terms of the trade-off between effectiveness and legitimacy, as outlined above. However, as the fiscal decision-taking in a fiscal federation is a clear type of hierarchical integration, thus generally involving power-sharing at the level of the federation (MLG I; see Hallerberg, this volume), the trade-off can be extended to a three-way choice, or trilemma, that logically results in three possible answers to solve this trilemma, or three types of fiscal federalism. The three elements of the trilemma are (1) the effectiveness of the fiscal framework capture by the principle

of fiscal equivalence, that is, the congruence between the geographical scopes of government actions and their financing; (2) the degree of redistribution through the principle of equality of living conditions across the subnational entities; and (3) the degree of legitimacy at the level of the federation through the principle of power-sharing between the federal level and the subnational entities in decisions on fiscal issues. One can argue that these three elements cannot be reached simultaneously, thus putting constraints on the fiscal set-up to pursue two of these three goals at the expense of the third. The way this trade-off is solved gives a fundamental indication of the way economic policy-making is carried out at the domestic level in a multi-level context (cf. Enderlein 2009).

The principle of fiscal equivalence refers to the congruence between the geographical scopes of government actions and their financing (Olson 1969). Theoretically, each function of government should be financed at the level at which it is consumed (put simply: 'pay your own bills from your own income'). The main theoretical argument underlying the principle of fiscal equivalence relates to the avoidance of free-riding. If fiscal equivalence is not present, there is an incentive for beneficiaries of government actions not to contribute to their financing. Also disequilibrium between taxing and spending power may create peculiar incentive structures, with elected representatives having spending powers but no corresponding responsibility for raising the necessary funds through taxes. One could invert the famous dictum and argue that there should be 'no representation without taxation.'

Without entering into the rich discussion on the 'tax assignment problem' evoked by McLure (1994, 2000) that focuses on the optimal allocation of different taxes to different levels of government, one can derive from economic scholarship on multi-layered fiscal frameworks that the mobility of economic units requires that they should 'pay for the benefits that they receive from the public services that local governments provide to them' (Oates 1999, p. 1125). In other words, government revenue from its own taxes at the subnational level should match subnational government expenditures. Fiscal equivalence can be reached at different levels of subnational fiscal activity: low shares of expenditure, if matched by low shares of own tax income, fulfill the criterion as much as high shares of expenditure matched by high shares of tax income at the same level of government. In summary, it should be clear that from the perspective of general welfare the principle of fiscal equivalence constitutes a core feature in the design of a multi-layered fiscal system.

The second main feature in most fiscal federations is a certain type of power-sharing mechanism between the federal and subnational levels of government. This mechanism is the main source of input legitimacy. For a multitude of reasons that most often derive from the historical context in which the federation was established, there is the aim to give the smaller entities constituting the federation some co-competence in decisions with direct relevance to their constituents. While the degree and scope of co-decisions varies across federations, a few general theoretical statements can be formulated on the nature of this principle.

If the basis of federalism is the constitutional division of sovereignty between the central governing authority and its constitutive units, then the division of power in the legislative process (mainly through a second chamber) is its direct translation into the actual political function of the federation. The core component of this principle thus relates to the sources of legitimate government action. In analogy to the principle of fiscal

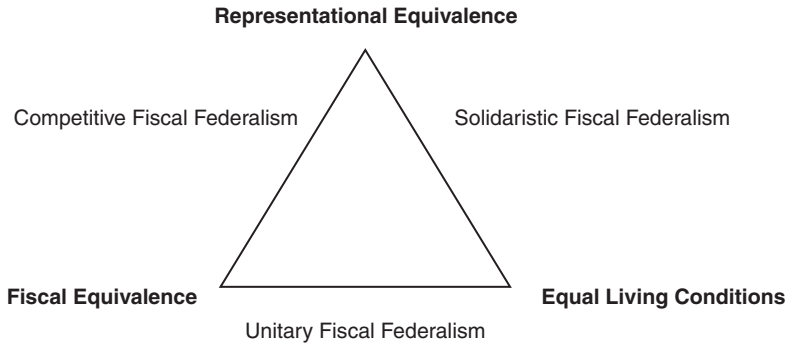


Figure 28.1 *The trilemma of fiscal federalism*

equivalence one could formulate a principle of ‘representational equivalence’ requiring that each function of government should be legitimated at the level at which it is consumed. This implies that decisions at the federal level that translate into a differentiating treatment of different subnational entities, or that have a direct impact on legal prerogatives of subnational entities, have to be adopted with input from the representatives of the subnational entities to be considered as legitimate.

The third main feature that is often present in fiscal federations is the objective to achieve a certain degree of equal living conditions across subnational entities, a principle that directly derives from the goal of a common national sense of belonging in multi-tiered systems of governance. It is based on output legitimacy and constitutes a normative basis for horizontal or vertical transfers within a federation. Yet the actual effect of equalization or compensation schemes clearly varies, with some schemes succeeding in balancing living conditions across subnational entities and others providing some payments but without reaching the desired goal.

Enderlein (2009) argues that the three features outlined above constitute a ‘trilemma,’ implying that of the three objectives only two can be reached simultaneously (Figure 28.1). The three-way choice is thus also the analytical basis for the emergence of three ideal-types of fiscally federal regimes which can be labeled ‘competitive fiscal federalism’ and refers to those regimes abandoning the principle of equal living conditions (countries coming close to this ideal-type include the USA, Canada, Australia and Switzerland), ‘solidaristic fiscal federalism’ and refers to those regimes abandoning the principle of fiscal equivalence (for example, Germany, Austria and to some extent Spain) and ‘unitary fiscal federalism’ (this oxymoron seeks to capture the contradictory nature of the regime type) and refers to those regimes abandoning the principle of representational equivalence (for example, Sweden, Finland, Denmark and Norway).

This short discussion of how to solve the trade-off between legitimacy (here both input and output legitimacy) and redistribution in fiscal federation indicates that the presence of a common legal/constitutional framework allows for stable and hierarchically structured relations that clearly correspond to MLG I features. Input legitimacy derives from the direct involvement of sub-units into decision-making at the highest layer of economic governance. In addition, some federations implement redistribution across sub-units on the basis of principles anchored in the Constitution or deriving from it, thus

building on output legitimacy to overcome the trade-off between legitimacy concerns and redistributive concerns.

In summary, fiscal federalism – even in its large organizational variety – constitutes the most elaborate form of multi-level economic policy-making. Obviously, its functioning hinges upon a strong degree of political integration. Fiscal federations function as long as the two main channels of legitimacy succeed in providing a mandate for redistribution. If this mandate disappears, secession is a possible outcome (Bolton et al. 1996; Oates 2005).

If this high degree of political integration is not present, as in the cases discussed in the two following sections, solving the trade-off between legitimacy concerns and redistribution requires more innovative institutional and organizational mechanisms.

### 28.3 ECONOMIC POLICY-MAKING IN THE EUROPEAN UNION

The establishment of EMU in Europe can be considered a very special case of multi-level economic policy-making. Member states decided to abandon their domestic monetary policy and to delegate it to the regional level, while preserving their domestic fiscal policy autonomy (subject to some requirements of coordination so as to ensure the avoidance of free-riding). EMU thus combines certain features of a federation (high possible degree of integration of one policy area, here monetary policy) without being able to rely on a high degree of political integration that usually characterizes fiscal federations. In addition, redistributive implications of a monetary union are likely to be much higher than in a nation-state. This is the consequence of two features. First, in a nation-state there are structural features that lower or counter redistributive mechanisms (for example, labor mobility and price adjustments). Second, the remaining disparities are countered by a common fiscal policy, as seen with fiscal federalism above. This combination affects and considerably restrains the possibility to solve the redistribution-legitimacy trade-off (cf. Eichengreen 1990; Verdun 1998).

Since EMU lacks both the structural integration features and the fiscal redistribution, the question can be raised to what extent the compatibility between efficiency and legitimacy in the EMU context is conditioned by a political dimension related to the willingness of citizens to accept the spillover effects and possible redistributive implications from the single currency. Our assessment comes to the conclusion that EMU is solving the trade-off between legitimacy and redistribution in a very special '*sui generis*' way (see also Enderlein and Verdun 2009).

What are the institutional features of EMU? The conduct of monetary policy is carried out within a strong legal framework, which has an almost constitutional character (Zilioli and Selmayr 2001). In this area, the EU thus constitutes a legally and functionally autonomous level of governance. This is not the case in the area of fiscal policy. The conduct of domestic fiscal policies is subject to two largely opposite requirements. On the one hand, member countries need to be given some fiscal autonomy to undertake stabilizing fiscal measures in the domestic economy. On the other hand, member countries' fiscal autonomy needs to be reduced if there is a credible risk that a country seeks fiscal free-riding on overall systemic stability.

EMU is characterized by a relatively high degree of economic heterogeneity across the participating countries (technically, the ‘optimum currency area’ criteria are not fulfilled; Mundell 1961; Sachs and Sala-i-Martin 1992) and the absence of a strong political authority capable of steering the currency union (‘asymmetry’ between economic and political union; Verdun 2000; see also Howarth 2007; Padoa-Schioppa 2004). Moreover, and in contrast to fiscal federations, the degree of political integration is low. Prior to the establishment of EMU, many policy discussions therefore focused on the chicken-and-egg issue of whether political union had to precede monetary union or vice versa (see Sadeh and Verdun 2009 for an overview). In the political discussions, this issue was most prominently raised in the opposition of the primarily French approach to monetary union under a *gouvernement économique* and the mainly German view that political union had to precede monetary union (Dyson and Featherstone 1999; Verdun 2000). Interestingly, the French approach would have come much closer to an output legitimacy-based fiscal federalist approach to multi-level economic governance, whereas the German view was that potential redistributive implications would have to be based on input legitimacy and that strong political integration was thus the necessary requirement for transferring economic policy-making authority to the European level.<sup>3</sup>

EMU was based on a compromise solution between those two approaches: fiscal policy-making was preserved at the domestic level, drew its legitimacy from the traditional channels of input legitimacy and was subject to very little positive coordination at the EU level, whereas monetary policy was completely transferred to the EU level, based almost entirely on output legitimacy and was not subject to any formal cooperation or coordination requirement with fiscal authorities.

The EMU chapter in the Maastricht Treaty is described as a rather rigid legal construction gearing at specific objectives, on which societal preferences have largely converged. Price stability and the soundness of fiscal policies are considered the constitutive pillars of the framework and enshrined with comparatively great detail in the Treaty and primary legislation, thus enjoying significant isolation from direct policy input (Gormley and de Haan 1996). The European Central Bank’s (ECB) mandate is exclusively geared towards the maintenance of price stability (the support of the general economic policies of the Community being only required if ‘without prejudice to the objective of price stability;’ EC Treaty Article 105(1)) and thus leaves little room for policy discretion. In a similar vein, the legal framework on fiscal policy coordination as set out in the Stability and Growth Pact (SGP) and the Excessive Deficit Procedure (EDP) is focused on sustainability issues (‘close to balance or in surplus;’ Council Regulations 1466/97 and 1467/97) rather than on welfare consequences of fiscal stances and their inter-temporal implications (for example, Fatás and Mihov 2003). Many analyses point to the normative origins of that approach as the emulation of the widely respected German case and its conceptual groundings in the monetarist literature in economics (mainly McNamara 1998; Dyson and Featherstone 1999).

Is EMU a stable configuration? Every monetary union that is far removed from being an ‘optimum currency area’ will at one point face the challenge of its own distributive implications, calling for some kind of rebalancing through redistribution (Mundell 1961; McKinnon 1963; Kenen 1969). Economic historians give several accounts of how the trade-off between preserving monetary union and preserving national cohesion ended



in the break-up of a previously politically integrated area (see Bordo and Jonung 2003 for an overview). In the present context, EMU still looks stable. The first decade of its existence (1999–2009) has resulted in a quite strange mixture of outcomes, which do not correspond to any of the many causal chains identified by its critics. EMU is generating welfare-distributing effects, yet its legitimacy is strong and the innovative or peculiar institutional framework is functioning quite well. Thus, one can draw the main conclusion that EMU has strengthened its *sui generis* character and might continue to do so in the coming years. Having said this, the big question for the next decade is whether this peculiar mixture of outcomes will stay the same even in the context of the global financial crisis (Enderlein and Verdun 2009).

When it comes to assessing the normative appropriateness of that framework, however, views differ greatly. First, it is argued that the delegation of some parts of economic policy-making to the European level is a simple matter of efficiency increases. In this perspective, monetary policy (often quoted together with competition policy) is interpreted as the area of economic governance that in basically every advanced industrial economy enjoys insulation from direct political contestation. Delegating this task to the European level should thus be considered as legitimate as keeping it in the national realm. In theoretical terms, the particular nature of monetary policy as a functionally and clearly delimited task geared towards the objective of price stability justifies the exclusive focus of legitimacy provisions on the output side (Verdun 1998, 2000), even though the typical problems deriving from such a principal-agent set-up are likely to arise (Elgie 2002). The ECB frequently uses this line of argumentation, pointing out that it has been entrusted with the task of pursuing a commonly agreed upon goal that does not hamper member states' own policy choices (ECB 2001, 2002). Though member states are generally obliged to consider their economic policies as a 'matter of common concern' (Article 121, Treaty on the Functioning of the European Union), they enjoy sufficient room for maneuver to follow citizens' policy inputs, thus complementing the output legitimacy dimension of monetary policy with an input dimension in the other areas. The multi-level framework of economic policy in EMU is thus justified as a 'symbiotic relationship between national and EU policy-making' (Moravcsik 2000, p. 606) based on a clear allocation of responsibilities. The overarching logic of that kind of literature is that policy delegation to the European level in the monetary area is about efficiency increases that outweigh potential redistributive effects or put possible redistributive effects at a normatively lower level. Such delegation thus caters to similar or the same types of legitimacy as in the national context, namely output-focused provisions of legitimacy. From the perspective of this argumentation, the legitimacy resources of economic governance in the EU are considered as area-specific and being separable on the basis of a functional differentiation of policy tasks.

A second set of arguments basically agrees with the functional importance and democratic legitimacy of delegating monetary policy to an independent central bank in the national realm. However, it takes into account the indirect impact of such delegation on those areas that even in the understanding of the aforementioned first set of arguments should stay under the prerogative of member states to ensure appropriate levels of legitimacy in EMU – mainly the area of welfare and social policies. The key argument is that the 'political decoupling' between economic and monetary integration, on the one hand, and welfare state policies at the domestic level, on the other, is of a largely artificial

nature and generates asymmetries (Hodson and Maher 2001). Since EMU needs to be built on a strongly integrated internal market, national economic policies cannot freely choose their preferred domestic approach but have to adjust to significant regulatory pressure deriving from economic and monetary integration. Scharpf observes that 'compared to the repertoire of policy choices that was available two or three decades ago, European *legal* constraints have greatly reduced the capacity of national governments to influence growth and employment in the economies for whose performances they are politically accountable' (Scharpf 2002, p. 648, emphasis in original). The impact of EMU on member states is not of a direct redistributive nature (as in the third approach, see below) but rather indirectly generated through spillover via regulatory effects. From the perspective of this argumentation, the legitimacy resources of economic governance in the EU cannot be separated if there are spillover effects from functionally differentiated policy tasks.

A third set of arguments focuses on the direct impact from a single monetary policy on economic output in member states. The main point is that EMU is not only about efficiency increases or regulatory spillover effects but also (and perhaps even more so) about welfare effects across member states. The logic is based on two considerations. First, EMU is not an optimum currency area, that is, the euro area is characterized by a considerable heterogeneity of the fundamental economic variables. The ECB's single interest rate is therefore likely to translate into country-specific effects generating higher or lower growth rates (Enderlein 2006b). Second, EMU lacks internal adjustment mechanisms that could react to such regionally specific effects of the single monetary policy – such as fiscal redistribution through a system of fiscal federalism or a larger EU budget that could compensate specific region through grants (as in the USA). The implications of this double-logic for the assessment of the legitimacy of EMU are far-reaching. If one assumes country-specific effects of EMU, then the present focus of legitimacy on the output side would appear inappropriate. Quite interestingly, such an assessment was explicitly discussed in very early writings on a common currency in Europe (for example, in the MacDougall Report, Commission 1977) but has largely disappeared from the forefront of policy discussions since then. In the perspective of an argumentation of this type, it is argued that the legitimacy of EMU directly requires either stronger input legitimacy or further political integration to allow for the necessary adjustment mechanisms (Siedentop 2001; McKay 2000, 2005).

In summary, it becomes clear that all three different perspectives think differently about the economic effects of EMU. Pareto-improving policies can generally be legitimized on the basis of their result only (output legitimacy, see above). Welfare-distributing policies, on the other hand, either require a direct type of procedural legitimacy (input legitimacy) or a very strong collective normative basis (often a common national identity) establishing the readiness of all participants to comply with the redistributive implications of an output-oriented type of policy. EMU is a '*sui-generis*' response to the legitimacy-redistribution trade-off in the presence of high structural discrepancies within the euro-area and a very low degree of political integration. EMU could thus turn out to become a role model for an innovative approach to MLG challenges in economic policy-making, in particular, since cooperation or integration at the global level is still relatively undeveloped.

## 28.4 GLOBAL ECONOMIC POLICY-MAKING

The main characteristics of economic policy-making at the global level differ greatly from the two previous levels. Strictly speaking, there is no global level in economic policy-making, and global economic governance clearly does not correspond to the definition of a 'level' as adopted in this handbook. None of the functions in the policy areas discussed here is carried out at the global level (an exception is trade, see below). Political integration and redistribution are absent. This has led some observers to qualify the global economic policy context as a 'non-system' (Cohen 1998). Yet it would not be correct to derive from this assessment that interaction of economic policy-makers at the global level is itself absent. But the main difference between the global level and the national and European levels is that one should refer to economic cooperation, rather than economic integration. Accordingly, the question is more on possible redistributive effects due to the absence of cooperation, rather than on redistribution and its legitimacy due to the presence of economic integration at the national and European levels.

To put the global level into context, it is important to acknowledge that the degree of international cooperation of economic policies has undergone fundamental changes since World War II. While the period 1945–71 was characterized by an almost hierarchical system of multi-level steering of exchange rates and capital flows, the period thereafter and until the outbreak of the recent financial market crisis largely lacked effective instances of coordination. Quite interestingly, the gathering of the Heads of State or Government from the five richest economies in the G5 context (later enlarged to the G7 context), served as an empirical reference point to one of the first variants of theorizing on MLG, the 'two-level games' approach by Robert Putnam (1988, the general approach is outlined in Chapter 3 by Mayer in this volume). As forcefully pointed out by the multi-level game literature, one of the key difficulties to come to cooperative agreements on international economic policy at the global level derives from the lack of internal agreement between the actors at the domestic level. As the previous sections show, cooperation at the global level has to cope with pre-existing multi-level interactions at both the domestic level (fiscal federalism) and the regional level (for example, European monetary integration).

This difficulty in the fiscal and monetary realm is different to the other big pillar of international economic relations: trade policy. In international trade, a highly institutionalized framework for multilateral cooperation has been successfully built in recent years (for example, Zangl 2008). The relatively high degree of regulatory control of international trade and the possibility to appeal to the World Trade Organization (WTO) have contributed to an understanding of global trade as an area of 'governance through legislation' (Humrich and Zangl, Chapter 22 in this volume). This does not imply, however, that global trade has no redistributive implications and thus does not require the same type of internal political support to be considered legitimate. In fact, the Common Agricultural Policy of the EU can be interpreted as a side-payment to those countries most directly affected in a negative way by the common European Trade Policy. Yet the governance structures of trade policy are, to a significantly lesser extent, of a multi-level nature in the domestic and/or regional context. In the EU, trade policy is an exclusive competence of the Community and therefore relatively little policy input from the subnational and national levels is required or possible (Meunier 2003).

In the area of monetary and fiscal cooperation, the core difficulty in achieving governance across different levels is the combination of (1) a high degree of complexity, (2) a low degree of institutionalization, and (3) a low degree of legitimacy. Given this combination, it is not surprising that the voluntary cooperation of fiscal and monetary actors at the global level is relatively rare. If we define cooperation as a significant modification of national economic policies in recognition of financial imbalances in the global economy, and with the purpose of correcting them, then failure to cooperate clearly leads to imbalances in the global economy.<sup>4</sup>

While international economic policy coordination is not embedded in a strong legal or organizational framework (in contrast to trade, see above), there are several multilateral organizations that act with a clear supranational mandate (for example, the International Monetary Fund, the World Bank and to some extent the Organization for Economic Cooperation and Development) and different semi-institutionalized forums that started on an entirely informal basis but later developed into more formalized gatherings bringing together the largest five to eight countries in the various G frameworks. Those frameworks of which the G7 was best known until Russia joined at the level of Heads of State or Government and transformed it into the G8 (although Russia stayed absent from the probably more relevant gathering for economic and financial issues of Central Bank Chiefs and Finance Ministers of the G7) have in common that they lack a permanent secretariat. The rotating presidency puts together the agenda. There is no institutionalized continuity.

With the 'Great Recession' it became clear that the G7/G8 framework was too narrow to allow for bringing in key players in the global imbalances that had developed in the decade 1998–2008, in particular China, for which reason the next largest existing framework – the G20 – was chosen as the context for a meeting of Heads of State and Government in Washington in the fall of 2008. This institutional adjustment is an interesting reaction to the cooperation failures at the global level in the past decade. As outlined above, the redistributive implications due to the absence of global economic policy cooperation are of central importance in solving the redistributive-legitimacy trade-off.

The main causes of the Great Recession are twofold. On the one hand, it is the result of a decade of global imbalances that were triggered mainly between China (and other countries in East Asia) and the USA. On the other hand, it is the consequence of changes in the business model of many banks that shifted from the traditional lending business to their own investment activities. Quite strikingly, both phenomena were not unknown to observers prior to the start of the crisis, yet the appropriate consequences were not drawn.

From the perspective of an assessment of MLG in economic policy-making, it is fascinating to detect that the global level was not capable of triggering international coordination that would have maximized the global public good of financial market stability or global macro-economic stability. Rather, one realizes the individual utility maximization of the key national actors involved.

This is particularly apparent in economic imbalances between East Asia and the USA, and more particularly between China and the USA. Right before the outbreak of the financial crisis, the USA had a current account deficit of 6.5 percent of GDP, largely financed by China, other East Asian economies and the oil-producing countries. Up to 2007, China, as the main lender, had purchased US debt worth 1 trillion US dollars.

This amount then increased to 2 trillion in the summer of 2008. China undertook this financing (240 billion US dollars per year or around 10 percent of Chinese GDP) to undervalue its currency and thereby access the consumption-intensive US market. This currency manipulation triggered artificially low interest rates in the USA and drove up consumer demand, credit demand and real estate prices. Somewhat similar stories can be told about Japan (which transferred 167 billion US dollars across the Pacific) or the oil-exporting countries (around 300 billion US dollars per year). In summary, the world money supply rose dramatically between 1998 and 2007.

Why did international monetary cooperation fail to prevent these developments? The main explanation is the paradoxical ‘win-win’ situation for actors participating in this financing exercise. For the USA, the capital inflows from Asia were a more than welcome contribution to an economy that was at risk of losing steam in the years 2001–03. Since the capital inflows were externally funded, inflationary pressure stayed low, also because prices for imports from Asia did not rise – due to the extensive currency intervention of Asian central banks. Real estate prices rose very quickly to historically unseen levels. At the same time, Asian economies benefited tremendously from this almost symbiotic relationship. China adopted the strategy of ‘export-led growth’ that thus far had only functioned in relatively small economies (South Korea, Hong Kong, Taiwan, Singapore). But given that China managed to tap the largest consumer market in the world (the USA) it managed to kick-start its economy from 1998 onwards. From a purely actor-centered perspective, the global financial imbalances therefore were a welcome external price to be paid for economic well-being at home.<sup>5</sup>

For the world economy as a whole, however, this individual utility maximization triggered an absence of global financial stability, which is often described as a global public good (mainly, but not only by theorists reasoning in terms of ‘hegemonic stability theory;’ Kindleberger 1973; Webb and Krasner 1989). The financial crisis is thus an example of the absence of effective worldwide economic policy coordination or global economic governance, which may trigger important and costly unintended consequences.

This leads to the question whether the global financial system can govern this type of market relations. Other than in the domestic fiscal federalism context, where a binding legal framework together with highly legitimate institutions can govern the economy, and other than in the regional context where – at least in Europe – the regional collective or public good can be provided through joint action and be based on a powerful compliance scheme, the global level clearly lacks the institutional structures that would have been required to prevent this crisis.

Why is there no global economic governance? If we look back at the previous sections of this chapter, it is quite straightforward to seek the explanation in the lack of willingness to engage in wealth redistribution. In the short run, rebalancing the global economy would have had massive redistributive effects through foregone gains on both sides of the Pacific. One can compare this situation to the temptation by politicians to use a dependent monetary policy authority for short-run expansionary policies that come at the cost of high medium- to long-term inflation. This ‘political business cycle’ (Nordhaus 1975) only ended when central banks were made independent. However, as central banks got their mandate directly from constituencies in the national or regional context, their provision of price stability as a public good was directly enjoying output legitimacy (see above). In the global context, this nexus between independence and legitimacy looks

impossible in the foreseeable future. Robert O. Keohane had already noted in 1984 that the creation of a 'regime' in international monetary coordination was decisively more difficult and complex than in other areas (Keohane 1984).

On the other hand, even global economic relations cannot be labeled as a rule-free setting. As briefly alluded to above, the steering of the global economy takes place in a setting of many informal and semi-formal forums and institutions that lack the direct enforcement and compliance mechanisms of the national (or in Europe regional) settings, but work through other institutionalized modes of social interaction that can give rise to rules and norms and thus contribute to the provision of public goods (for example, Kenen et al. 2004). In the build-up to the financial crisis, these governance mechanisms failed. But there are other instances in which global steering has worked, such as in the regulatory area under the auspices of the Bank of International Settlement (Simmons 2006).

In summary, economic policy-making at the global level lacks the holistic legal/hierarchical setting of the nation-state context and the at least partially successful enforcement/compliance scheme that are present in the context of EMU. The financial crisis has shown that the potentially redistributive implications of ensuring the provision of global financial and macro-economic stability made it impossible to provide the required global public good.

## 28.5 CONCLUSION

This chapter has analysed three different types of configurations of MLG in the area of economic policy-making. While it is obvious that monetary policy and fiscal policy cannot be considered as purely domestic economic policy tools, their use is still largely focused on domestic conditions. This is due to the potentially far-reaching redistributive implications of reorienting economic policy from the lowest layers of governance to the highest ones. Fiscal federalism is a prime example of true MLG in a hierarchically structured context. EMU in Europe is the most innovative attempt to strike a balance between effectiveness, redistribution and legitimacy concerns on the basis of overlapping forms of legitimacy and geographical scope (partly input legitimacy in the national context, partly output legitimacy in the European context). The global level lacks such forms. The very recent emergence of the G20 as a new forum for global economic governance does not yet have a sufficient track record to be judged on its effectiveness. The record of its predecessor (the G7/G8 framework) is clearly insufficient.

The questions whether a globalized market context ultimately requires a stronger integration of political steering mechanisms and whether such integration could be perceived as sufficiently legitimate remains open. The paradox that a global financial crisis almost exclusively triggers national policy responses is unlikely to disappear in the near future.

## NOTES

1. Many scholars of governance deliberately detach the concept of governance from the type of actors (public or private) involved in the interactions geared towards solving collective problems (for example, Mayntz 2004, 2008).

2. In this chapter, legitimacy is looked at from the descriptive perspective as 'social acceptance' and not as the normative validity of political decisions (cf. Zürn 2000, 2005, pp. 26–28 on this differentiation).
3. In the economic literature, a similar issue was discussed in a debate opposing the view that a single currency would create a lower synchronization of business cycles as a consequence of increased specialization in production and therefore an increase in so-called asymmetric, or sector-specific, shocks as opposed to the view summarized under the header of the 'endogeneity of optimum currency areas,' arguing that increased trade integration was likely to create business cycle convergence in a currency union (see Frankel and Rose 1998).
4. The discussion on an appropriate definition of 'cooperation' and also 'coordination' is detailed and lengthy. Political scientists in international political economy mainly work with the concept of cooperation achieved through coordination, as defined by Keohane on the basis of Lindblom (Keohane 1984; see also the discussion in Milner 1992) as the situation 'when actors adjust their behavior to the actual or anticipated preferences of others, through a process of policy coordination' (Keohane 1984, p. 51). Economists more often refer to the concept of coordination, as a stronger form of cooperation, as, for example, in Wallich (1984, p. 85; see also the discussion in Kenen et al. 2004): 'Cooperation falls well short of "coordination", a concept which implies a significant modification of national policies in recognition of international economic interdependence.'
5. The financial crisis of 2007–08 was triggered when real estate prices in the USA collapsed and via technically complex financial products (mortgage-backed securities and collateralized debt obligations) which severely affected the banking sector.

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## 29 International taxation and multi-level governance

*Thomas Rixen*

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International taxation may seem an unlikely topic for a handbook on multi-level governance (MLG): while the powers to tax and spend are often spread over multiple levels of government (see Geys and Konrad, Chapter 2 and Hallerberg, Chapter 7 in this volume), the national level is generally seen as the highest relevant level. The general perception is that taxation is purely a national affair and that there is no pertinent international level as regards taxes. I argue that this view is both right and wrong. For one, decisions on the design of national tax systems are indeed only taken at the national level. There are no revenue raising powers at the global level, nor is there a ‘constitutionalized’ assignment of other tax-related competencies to an international level. Thus, the power structure is decentralized and concurrent. On the other hand, it is warranted to speak of MLG in international taxation, because there is a longstanding tradition of international tax cooperation, which has become firmly institutionalized over time and has gained some degree of autonomy and influence over national tax policies.<sup>1</sup>

I argue that the governance structure of international taxation qualifies as MLG in the sense of MLG II (see the Introduction and Hooghe and Marks, Chapter 1 in this volume). International tax governance consists of a complex patchwork of functional jurisdictions interacting with one another. Significant governance services are performed by a transgovernmental network of tax experts, to which business actors also have access. This network operates in a soft law mode of governance, but nonetheless has a significant impact on binding national tax rules and bilateral double tax treaties. Originally, the sole purpose of this governance arrangement was to mitigate international double taxation in order to liberalize international trade and investment. However, under conditions of increasing globalization, and due to the particular construction of international tax governance, harmful tax competition is engendered. In response to this challenge, additional levels of governance have begun to proliferate. But since there has been no move towards more hierarchical and hard law modes of governance, the problem cannot be addressed effectively. In consequence, international tax governance is lopsided: it successfully achieves international liberalization but lacks success in re-regulating the negative side effects. Rather than continuing to rely on the mere interaction of different levels, what would be needed is a nested hierarchy of governance levels.<sup>2</sup>

I develop this argument by first providing an overview of the history, basic principles and rules of double tax avoidance (Section 29.1). In Section 29.2, I detail the multi-level character of the double tax avoidance regime. In Section 29.3, I show how the particular setup of international tax governance has engendered the problem of tax arbitrage and tax competition and, further, how this leads to a proliferation of yet more levels of governance. In Section 29.4, I evaluate international tax governance in terms of its legitimacy and effectiveness; and in Section 29.5, I contrast briefly these global developments with the experiences of the European Union (EU). While the EU has at its disposal a denser institutional structure and should thus be better able to implement effective tax

governance, its track record is disappointing. Section 29.6 summarizes and concludes this chapter.

## 29.1 THE PROBLEM OF INTERNATIONAL DOUBLE TAXATION AND ITS SOLUTION

Double taxation results from an overlap of jurisdiction to tax between a residence state, where the recipient of an income lives, and a source state, where that income was generated. If both states exert their power to tax to the full extent, the total burden on transborder economic activities is prohibitively high. In order to obtain the benefits of international liberalization, governments have a common interest in avoiding such double taxation. The basic conflict, and initially the sole question of international tax governance, is thus: which country has the right to tax the income, and which country must restrict its tax claims (see, for example, Li 2003, pp. 32–3)?

The search for an answer to this question began after World War I when many countries introduced income taxes. In the 1920s the International Chamber of Commerce (ICC) put the issue of double taxation on the international agenda. In response, the League of Nations commissioned reports by experts and convened several conferences of technical experts and government officials. During the League years the basic principles and rules were developed that have guided the avoidance of double taxation up to today. During the 1950s and 1960s the Organization for Economic Cooperation and Development (OECD) replaced the League of Nations (and briefly the United Nations (UN)) as the main multilateral policy forum for discussions of international tax issues (Picciotto 1992, pp. 1–63). Initially, the objective of these activities was to draft a multilateral tax treaty. But governments persistently rejected the idea of a binding multilateral treaty. They were nonetheless very supportive of developing a model convention (MC) that could be employed as a template for bilateral double tax agreements (DTAs). Governments insisted on keeping the MC non-binding, because that would allow the necessary flexibility to make nationally differing tax systems compatible to one another (Rixen 2008, pp. 86–101).

One of the reasons for governments rejecting a binding multilateral treaty was their unwillingness to agree on either pure residence or source taxation. For one, both principles can be justified on certain grounds. Emphasizing individual fairness among taxpayers means that the residence principle should be accorded more weight; it better allows taxes to be based on the principle of ability to pay, because the residence country is in a better position for assessing the taxpayer's worldwide income. In contrast, the consideration that the source country provides the infrastructure that permits the generation of income in the first place leads to favoring source taxation. Under the so-called benefit principle, taxes are viewed as a contribution for financing public goods that help to produce private income. Both of these arguments are simple and intuitive. None of the scholars that have discussed the issue of a desirable allocation of taxing rights have come out solely in favor of one or the other but, instead, have opted for some solution that accords different weights to these considerations (see, for example, Li 2003, pp. 49–57; Musgrave 2006, pp. 168–73). This normative indeterminacy has been further aggravated by a distributive conflict between net capital exporters and net capital importers, with the

former favoring residence taxation and the latter source taxation. Either principle would result in the allocation of a bigger share of the international tax base to the respective country (see, for example, Dagan 2000; Davies 2004, pp. 789–92).<sup>3</sup>

Accordingly, no general consensus on a best principle could be achieved. Instead, the solution embodied in the various MCs – which has remained unchanged in its fundamentals from the 1920s up to today – represents a compromise solution. Jurisdiction to tax is assigned to either the source country or the residence country for different kinds of income (schedular taxation). Broadly speaking, the primary (or exclusive) right to tax active business income is granted to the source country. The residence country, in contrast, has the primary (or exclusive) right to tax passive income, that is, income from financial investment such as interest, dividends or royalties (see, for example, Avi-Yonah 2006).<sup>4</sup> The residence country is obliged to provide relief from double taxation in cases of full or limited source taxation. This can either be done by granting a foreign tax credit for the tax paid at source, on the tax due in the home country, or by a full exemption of that income from home tax.

In line with the interests of governments, the particular solution embodied in the MC is sovereignty preserving. The MC defines a series of legal constructs intended to allocate the right to tax among the jurisdictions involved (see, for example, Bird and Wilkie 2000, pp. 91–5). For example, the concept of a permanent establishment (PE) codifies what is taxable as a separate entity of a multinational enterprise (MNE) in the source country. This and other constructs are chosen in such a way as to interfere as little as possible with national tax laws. They merely allocate the right to tax to governments, without prescribing whether or how they ought to exercise this right. Governments retain authority over designing all elements of their tax law – namely, the tax base, tax rate and system of taxation – independently from other governments.

International cooperation to avoid double taxation is thus largely administrative cooperation that seeks to disentangle overlapping national tax systems resulting from domestic, politically salient choices. The rules of double tax avoidance operate only on the interfaces of national tax systems. There is no harmonization, only coordination, of different national tax systems. Emblematic for the sovereignty-preserving setup of international taxation are the rules for allocating the profits of MNEs to the various countries in which they operate. Under the ‘separate entity approach,’ allocation is the same as what would result if the different entities of a multinational group were independent actors transacting on a market – the so-called arm’s length standard (see, for example, Avi-Yonah 1995; Eden 1998, pp. 103–21).

## 29.2 DOUBLE TAX AVOIDANCE AS MULTI-LEVEL GOVERNANCE

To what extent can this institutional arrangement be considered a MLG structure? The evolution of principles, norms and rules of international taxation results from an interplay of unilateral, bilateral and multilateral governance activities. The Committee on Fiscal Affairs (CFA) of the OECD is a multilateral body of government officials and tax experts, the same persons who negotiate bilateral treaties for their own countries. This body meets on a regular basis to discuss international tax issues and to review and update

the MC. Non-OECD member countries are invited to these meetings as observers. The CFA is the global forum for cooperation in matters of taxation (Radaelli 1998) and forms a transgovernmental network of national tax administrators, scientific advisors and technical experts. Private actors are also involved in these multilateral endeavors. In fact, the issue of international double taxation was put on the agenda of the League of Nations by the International Chamber of Commerce (ICC) which also participated in all of the meetings. Likewise, the Business and Industry Advisory Committee (BIAC) represents business interests within the CFA. Although business representatives have only advisory capacity, they have strong influence on the development of international taxation (Webb 2006).

Parallel to the drafting of the non-binding multilateral MC (and in some cases even prior to it), governments developed domestic tax rules to avoid double taxation (Rixen 2008, pp. 89–90).<sup>5</sup> Today, all countries provide relief from double taxation unilaterally. National tax codes contain provisions either for exempting foreign income from taxation, or granting a credit for taxes paid on such income in the source country. Sometimes, the national rules only foresee partial tax relief (deduction).<sup>6</sup> Additionally, governments conclude bilateral tax treaties which often grant more favorable tax treatment on a reciprocal basis than the unilateral rules foresee. Also, bilateral treaties contain provisions on information exchange between tax administrations and a mutual agreement procedure for addressing conflicts between treaty partners.

Thus, the governance of international double tax avoidance takes place on three levels. First, there is multilateral transgovernmental cooperation on a non-binding MC. Second, governments unilaterally adapt to the problem of overlapping tax claims by designing their domestic rules of international taxation appropriately. Third, they grant reciprocal tax concessions in binding bilateral DTAs (*ibid.*, pp. 63–85). These levels interact with one another. Technical innovations in bilateral treaties or in the domestic provisions of international taxation are integrated into the MC so that experiences made at the national and bilateral levels can be disseminated multilaterally to all parties. Other innovations are developed within the CFA which constantly strives to modernize and adapt the MC. In the course of such processes, a common understanding of double tax avoidance and the interpretation of rules is developed. Coordination within the CFA allows policy learning. Although there is no vertically integrated power structure, the interaction of the multilateral, bilateral and unilateral governance levels helped to create a shared normative understanding among actors. The MC serves as a ‘constructed focal point’ and the associated norm of ‘single taxation’ becomes a generally accepted standard influencing national policy making and treaty practices. As such, the principles, norms and rules of the OECD MC also effectively set limits on the policies that countries can pursue in their unilateral foreign tax policies (Avi-Yonah 2006).<sup>7</sup> The multilateral MC and the associated activities within the OECD form a functionally specialized governance level that ‘engage[s] durably, with some degree of autonomy, in an enduring interaction’ (see Introduction, this volume) with nation states’ domestic policies of international taxation and their bilateral treaty programs. Traditionally, there is no public or political space associated with this governance structure, because it operates on the administrative level.

This institutional structure is a functional response to the problem of double taxation. Since the underlying strategic structure is that of a coordination game with a distributive

conflict, agreements are self-enforcing and there is thus no need for hierarchical modes of governance (Rixen 2008, pp. 155–80; Rixen and Rohlfing 2007). Although it does not harmonize national tax systems, multi-level tax governance does achieve some measure of standardization of the interfaces between different tax systems. Thus it coordinates otherwise overlapping tax claims and successfully removed the tax obstacles to international investment which has since increased sharply. Much of this economic internationalization has taken place within integrated business structures. In 1970, there were about 7000 MNEs. Between 1990 and 2006, the number increased from 35 000 with 142 200 subsidiaries to 78 000 with at least 780 000 affiliates. The share of intra-firm trade of total trade increased from an estimated one-third in 1998 to one-half today (United Nations various years). At the same time, the tax burden in industrialized developed countries has been on the rise. This is evidenced by the increase in the average tax ratio, measuring the tax burden as a percentage of GDP in OECD countries from 21 percent in 1963 to 35.7 percent in 1993. Since then this ratio has remained more or less stable at 36.3 percent in 2003 (OECD 2006). This means that international tax governance gains in practical significance because the overall tax base subjected to its rules has grown, as has the burden of taxation. Since the 1960s the network of bilateral DTAs has grown continuously. Between 1978 and 1998 the number of treaties increased rapidly from 600 to over 1500. Today more than 3000 bilateral tax treaties connecting over 180 countries are in force (Owens and Bennett 2008, Rixen 2008, pp. 108–16). Basically all of these treaties follow the standard set in the MC.

### 29.3 ADDITIONAL GOVERNANCE LEVELS IN RESPONSE TO TAX ARBITRAGE AND COMPETITION

The successful liberalization of international economic activity and the particular construction of the DTA regime have led to unintended consequences. While the rules of double tax avoidance explicitly address only governments and tell them how to structure their international tax relations, the same rules implicitly pre-structure taxpayers' avoidance techniques. For example, the schedular structure of DTAs allows taxpayers to reclassify their financial flows in a tax-optimal way such as substituting debt for equity. Another method of avoidance that builds on an important aspect of international tax governance is the manipulation of arm's length transfer prices. With these and other similar techniques (for an overview, see Arnold and McIntyre 1995, pp. 8–17, 69–88), taxpayers ensure that profits are taxable in low-tax countries, while losses occur in high-tax states. What these methods have in common is that none of them relies on the relocation of real business activities, but rather involve the shifting of paper profits and losses. This form of tax arbitrage is possible because the DTA regime gives states the freedom to design their own national tax laws. The sovereignty-preserving approach to double tax cooperation creates an opportunity structure for taxpayers and governments: taxpayers demand tax optimization and seek to avoid taxes; governments can satisfy this demand with corresponding offers, because the international rules allow them to structure their national tax legislation as they wish. The DTA regime not only creates the institutional framework for the avoidance of double taxation, it also unintentionally provides the institutional foundation of tax arbitrage and competition.<sup>8</sup>

In reaction to tax arbitrage, international tax governance has undergone changes. Governments have developed unilateral measures against tax avoidance. One example is the so-called controlled foreign companies (CFC) legislation that is designed to inhibit the use of foreign subsidiaries in tax havens, which serve no substantive economic purpose but the tax privileged holding of assets for the group. Resident shareholders (for example, parent companies of MNEs) controlling a subsidiary in a tax haven are taxable on the subsidiary's passive income, even if that income is not distributed to those shareholders (Arnold 2000). Another area in which efforts at reform have been made is transfer pricing. In reaction to transfer pricing manipulation, governments have adopted stricter guidelines. Overall the new guidelines move the actual rules closer to considering the consolidated profits of the MNE, but take great care to formally reinforce the principle of separate entity accounting on a transactional basis (Bird and Wilkie 2000, p. 92). In many countries, with the introduction of advanced pricing agreements (APAs), this trend has become even more pronounced. APAs are mechanisms by which MNEs and tax administrations can bargain over the appropriate method of arriving at reasonable transfer prices, and thus basically commit to certain prices before the transactions actually take place. In all of these cases, the USA acted as a rule innovator and the new unilateral rules were subsequently diffused via the OECD to all major capital-exporting nations (Rixen 2008, pp. 122–31).

In addition to these unilateral approaches diffused via the OECD, there have also been international and collective efforts at reform. For example, in 1988 a multilateral convention on information exchange in tax-related matters (Council of Europe and OECD 2003) was developed, and has since been ratified by 16 countries. Another attempt to combat the problem of tax competition that has received some public attention was the Project on Harmful Tax Practices (OECD 1998), begun in the mid-1990s. The original aim of the project was to exert peer pressure on tax havens to modify their national tax laws so that it would no longer be possible for MNEs to merely book profits in a low-tax country without having any bona fide business activity there.<sup>9</sup> But, after resistance from tax havens and pressure from the USA following the change of government to the George W. Bush administration, the OECD project modified its original aim, so that now the goal is just to intensify information exchange and administrative cooperation (see, most recently, OECD 2008; for more on the OECD project, see Sharman 2006; Rixen 2007).

Recently, transnational civil society groups have begun to lobby international institutions and governments for changes in international taxation. They demand collective measures against harmful tax competition. This development occurred later than in other policy areas and is not yet as pronounced, possibly due to the technical complexities of the issue (Webb 2006, pp. 108–9). But at long last, even tax policy which traditionally has been politicized only in the national arena has slowly begun to develop a global political public space. This development is still in its infancy, however, and up to now it has not left a visible mark on the institutional structure (Rixen 2010).

These developments show that there are attempts to adapt the governance structure that was established to deal with the problem of double taxation to the new challenge of tax arbitrage by (1) using the established structure to coordinate unilateral responses, and (2) by developing further governance levels and involving additional actor groups. The OECD Project on Harmful Tax Practices, now operating within the Global Forum

on Taxation (consisting of over 80 participating countries), constitutes an additional governance arena, wherein the trend towards ‘hard’ modes of governance has become visible: OECD member countries threatened to employ ‘defensive measures’ if tax havens would not comply with their demands (OECD 1998, pp. 52–9). Ultimately, however, they reverted to the traditional ‘soft’ modes of governance, that is, non-binding recommendations and standards. In the wake of the financial crisis of 2008, OECD and G-20 countries have resorted to strong rhetoric against tax havens; but it remains to be seen whether they will indeed follow through on their threat of sanctions against non-complying states. All in all, the external shock of the financial crisis has so far not led to significant changes in the tax regime’s institutional trajectory (Rixen forthcoming). Also, in the case of APA programs, private actors have been included in the governance process in order to increase the effectiveness of determining transfer prices. This constitutes a form of hybrid public-private governance (Vögele and Brem 2003; König 2009).

All in all, these responses rely on administrative cooperation. While the focus of attention moves from merely disentangling overlapping tax claims to their enforcement, the institutional reaction to increased tax arbitrage and competition in the wake of globalization is essentially to try to solve the problem with ‘more of the same,’ that is, an intensification of horizontally interconnected MLG of Type II. Importantly however, international taxation does not develop into a multi-level system with hierarchically ordered levels nested within one another.

## 29.4 EVALUATING MULTI-LEVEL TAX GOVERNANCE

When evaluating the quality of international tax governance, the record is mixed. On the one hand, it has succeeded in achieving international liberalization. The institutional architecture is appropriate to strike a balance between providing sufficient flexibility to nation states reluctant to agree on a multilateral treaty, and at the same time achieving standardization of different decentralized bilateral bargains. The interaction between unilateral, bilateral and multilateral governance levels coordinates otherwise overlapping tax claims.

In contrast, however, this governance structure has not succeeded in effectively addressing the problems of tax arbitrage and competition. The institutional reactions can be interpreted as incomplete and insufficient adaptations to the functional requirements of the problem of tax arbitrage and competition, which is represented by an asymmetric prisoner’s dilemma. What would be needed are binding commitments from governments to abstain from harmful tax practices, and a supranational institution to monitor compliance and enforce the rules. One possible solution discussed in the literature would be a system of unitary taxation with formula apportionment (see, for example, Li 2003; Mintz and Weiner 2003).<sup>10</sup> This reform option would involve a move towards a formalized structure of shared competencies in the design of tax laws – MLG with nested hierarchies: the common tax base would be defined, administered and enforced on a supranational level, whereas the tax rates on this base could be determined at the decentralized nation state level (or sub-national levels). Other reform options one could devise would also hinge upon developing a supranational enforcement mechanism.

Due to the strong conflicts of interest inherent in an asymmetric prisoner’s dilemma



and the institutional rigidity of the established setup – caused by the properties of being the solution to a coordination game – such fundamental reform of international tax governance does not occur. Instead there are only incremental and indirect rule changes, an intensification of administrative cooperation and a proliferation of further governance levels that do not challenge the traditional logic of Type II MLG (Rixen forthcoming).<sup>11</sup>

The fundamental problem of the current institutional trajectory is that the measures implemented so far cannot address the problem of tax arbitrage directly, but can only provide an *ex post* remedy to unwanted tax arbitrage. While it is necessary and worthwhile to push for better information exchange and administrative cooperation in order to make international tax enforcement better, these instruments only intervene after the deed has been done, that is, after taxpayers have already avoided or evaded taxes. It is questionable, then, whether such an approach will prove cost-effective in the long run. As long as national tax systems retain so many differences, they will continue to present opportunities for international tax arbitrage (see, for example, Tanzi 1995, p. 9). In addition to these shortcomings, the current system of information exchange and administrative assistance also exhibits gaping loopholes (see, for example, Sullivan 2007). All in all, the current governance structure is ill-equipped to address the problems of tax competition and tax arbitrage.

The legitimacy of multi-level tax governance is questionable. For one, many have argued that the influence of the OECD (whose members are mostly developed and capital-exporting countries) on international tax governance has led to the residence principle being accorded higher priority than the source principle. This runs counter to the interests of developing countries who had no say in the creation and development of the OECD MC. The rival UN MC, which was developed in the 1970s and 1980s puts more emphasis on source taxation, but it has never become a potent challenger to its OECD counterpart, because the UN has not devoted many resources to international taxation. Civil society organizations have argued, however, that due to its more inclusive membership the UN would be better suited as the main forum of international tax governance, and they have called for a world tax authority under the tutelage of the UN (TJN 2005, pp. 52–4). Traditionally, international tax governance has not taken place in the public sphere; rather, it can be characterized as secluded and de-politicized decision making (Webb 2006). Despite growing pressure from transnational civil society, there has been no democratization of international tax governance (Rixen 2010). This represents another serious shortcoming, because international taxation has important distributive consequences for countries and individuals (see, for example, Keen and Simone 2004). Again, a move towards MLG with nested hierarchies could ameliorate the situation, because the creation of influential international institutions is one route to societal politicization (cf. Zürn et al. 2007).

## 29.5 DIRECT TAXATION IN THE EUROPEAN UNION

The prospects of achieving hierarchically nested MLG are not very good, as the experience of the EU demonstrates. Even within the EU, where economic integration is most advanced and where an elaborate institutional structure for intergovernmental

bargaining and supranational decision making is available (see Jachtenfuchs, Chapter 12 and Benz Chapter 13 in this volume), cooperation on direct tax issues remains underdeveloped. While negative integration to achieve the Single Market has made significant progress, positive integration still lags behind.

According to the European treaties, decisions affecting taxation have to be taken consensually in the Council of Ministers. However, the Community has the responsibility for the functioning of the Single Market and may thus propose harmonization measures if it deems them necessary to guarantee that the Single Market operates as intended. While the European Commission has undertaken efforts to coordinate direct taxes since the 1960s, the Council has often been reluctant to follow these initiatives (see Genschel 2002, pp. 128–231).<sup>12</sup> Even within the EU, double tax avoidance is achieved through bilateral tax treaties based on the OECD MC. However, the ‘parent-subsidiary’ directive of 1990 and the ‘interest and royalties’ directive of 2003 effectively multilateralize some of the provisions of bilateral treaties. These directives prescribe zero source withholding taxes on dividend, interest and royalty payments between associated companies.

While these measures are meant to remove tax obstacles within the Single Market, the EU has been less successful in efforts to regulate tax competition and arbitrage among member states. Proposals in the 1960s for a harmonization of tax rates and bases were rejected outright by EU member states. Later on, two projects with more modest ambitions were brought to conclusion. In 1997, the Council agreed on a soft law Code of Conduct for business taxation. Like the OECD project, this Code of Conduct was also aimed at harmful tax competition. Member states entered into a non-binding commitment to remove so-called preferential tax regimes, that is, schemes that offer more generous tax treatment to foreign corporations than would apply to domestic businesses. Despite its being non-binding, the code developed some bite because compliance with it was made a condition of accession for the Central and Eastern European countries. Also, the Commission applied the principles contained in the code to its state aid rules, which thus increased compliance among the EU-15 states (Radaelli and Kraemer 2008, pp. 327–8).<sup>13</sup>

After 35 years of heated negotiations, the European Savings Tax Directive took effect in July 2005. This directive targets tax evasion on interest income by requiring automatic information exchange among countries on the savings of foreign residents. Some tax havens, jealously guarding their bank secrecy, have opted to apply a withholding tax rather than to exchange information. Given the difficulties in finding any cooperative solutions at all in the tax competition game, the Savings Tax Directive can be viewed as an important step forward (Holzinger 2005); but due to certain loopholes in its construction, it is unlikely to be very effective. Empirical evidence supports this view (Klautke and Weichenrieder 2008). Discussions are currently underway in the Commission and the Council to broaden the Savings Tax Directive in geographic scope and with respect to the types of income that are covered by it (European Commission 2008).

Thus, the cooperative regulation of tax competition and arbitrage is underdeveloped in the EU. In addition, and in contrast to global tax governance, European governments are constrained in their possibilities to protect themselves unilaterally against tax arbitrage. The European Court of Justice (ECJ) has ruled many, though not all, unilateral anti-avoidance measures to be violations of the European treaties. The general argument

is that such rules submit cross-border transactions to higher tax burdens than similar domestic transactions. The ECJ does not accept member states' revenue needs as a justification for unilateral anti-avoidance rules and considers companies' exploitation of tax differentials in the Single Market as legitimate. Only in cases of 'purely artificial' arrangements are unilateral measures acceptable (see Terra and Wattel 2005, chapter 2; Genschel et al. 2007, pp. 310–13).<sup>14</sup>

Overall, the effect of ECJ rulings is ambivalent. On the one hand, they make tax competition fiercer; on the other, if member states cannot easily rely on unilateral anti-avoidance measures, this exerts pressure on them to come to collective solutions to the problem. This latter aspect is also emphasized by the European Commission (2007). In particular, it would like to see the adoption of a unitary tax base (Common Consolidated Corporate Tax Base, CCCTB), possibly combined with formula apportionment.

The adoption of a system of unitary taxation with formula apportionment, if appropriately designed, could be an important step towards more positive integration in European tax governance. It would involve, as described above, a move to hierarchically nested MLG. However, the prospect of achieving this is, at present, extremely dim. For one, the Commission's plans for a CCCTB have significant deficiencies (Rixen and Uhl 2007, pp. 12–7). Further, and more importantly, after the Irish defeat of the referendum on the Constitutional Treaty the plans do not enjoy political support any more (Hall 2008).

Although the preconditions within the EU for moving to hierarchically nested MLG would seem to be a priori better than on the global level, progress on the front of positive integration is currently stalemated, as the ECJ continues to safeguard negative integration and thus reinforce tax competition. At the same time, there is a serious democratic deficit in European tax governance (Ganghof and Genschel 2008). If tax competition cannot be effectively addressed within the EU, pessimism with regard to the global situation is warranted.

## 29.6 CONCLUSION

In this chapter I have described and analysed the MLG structure of international taxation and its development in reaction to tax arbitrage and competition. I have argued that the existing governance structure, Type II MLG, has evolved as a functional response to the problem of double taxation. It is characterized by the interaction of functional jurisdictions on the unilateral, bilateral and multilateral levels. While binding rules are only made on the unilateral (domestic) and bilateral levels, cooperation on the non-binding multilateral MC successfully achieves a certain degree of standardization. This institutional architecture provides sufficient flexibility to nation states reluctant to agree on a multilateral treaty and, at the same time, it achieves coordination of otherwise overlapping tax systems.

This success has unintended consequences. The sovereignty-preserving setup of international tax governance creates opportunities for tax arbitrage and tax competition. In response to this problem, we can observe incremental and indirect rule changes initiated on the unilateral level, an intensification of administrative cooperation and a proliferation of further governance levels. Overall, however, the traditional logic of Type II MLG

is not changed. Most importantly, international taxation does not develop a supra-national enforcement mechanism. Governments become entrapped in the unintended consequences of their initial institutional design choices which are difficult to change once established. Thus, the current governance structure is ill-equipped to address the problems of tax competition and tax arbitrage, and so international tax governance is lopsided: it successfully achieves international liberalization but fails to re-regulate the negative side effects. Although the EU's institutional arrangement differs from that of global tax governance, this basic result applies to the EU as well.

Improving upon this outcome would require the politicization of international taxation on all governance levels. Although national tax policies are highly politicized, international tax issues are not, even though recently pressure from transnational civil society has been growing. The power to tax is so intimately linked to the very core of national sovereignty and national political communities that there is not yet enough political imagination to envisage the sharing of competencies with supranational governance levels. It may therefore be a long way before a functionally adequate governance structure of international direct taxation materializes – a hierarchically ordered multi-level system.

## NOTES

1. This chapter only considers direct taxation, with a special focus on capital and, most importantly, business taxation. International issues of indirect taxation are not covered; they are not governed under the institutional arrangement that I describe in this chapter, but fall under the jurisdiction of General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO). Also, this chapter does not provide a comprehensive overview of all relevant legal and economic theories and concepts of international taxation; it touches upon them only insofar as they are relevant for understanding the design and the development of multi-level tax governance. For overviews of the legal and economic contributions, which make up the major part of the international tax literature, see for example, Graetz (2003) and Roin (2007).
2. There is a small literature about whether the governance structure is in line with important normative principles of international taxation (Bird 1988; Eden 1998; Bird and Mintz 2003; Avi-Yonah 2006). This debate is framed under the heading: 'Is there an international tax regime?' I adopt a different perspective and differentiate between the empirical fact of an existing governance structure and its normative evaluation.
3. In addition to concerns about fairness, there are just as important concerns about efficiency. The basic question is whether the residence or source principle is better suited to achieving tax neutrality. On the pros and cons of capital export neutrality (CEN), capital import neutrality (CIN), national neutrality (NN) and capital ownership neutrality (CON), see Frisch (1990) and Desai and Hines (2003).
4. While this describes the general pattern, there are many exceptions to this division of the tax base. The precise sharing rules are laid down in the so-called source rules of the typical bilateral tax treaty, Article 6-22 of the OECD MC (2005).
5. One of the first countries to introduce unilateral tax relief was the USA, which adopted the foreign tax credit in 1918. Through this move and through their active role within the OECD, they have heavily influenced the development of international tax governance.
6. Under the deduction method, taxes paid abroad are subtracted from the tax base to which the domestic tax rate is applied. This results in partial relief from double taxation.
7. In addition to this soft normative influence, there are also hard international constraints on governments' reform options for their national tax systems. As McLure and Zodrow (2007) report, the USA are unwilling to provide double tax relief for cash flow taxes that its residents have paid abroad. Many poorer countries consider this an important disadvantage in the competition for US investment and thus did not reform their income taxes into cash flow taxes.
8. Taxpayers engage in tax arbitrage which is defined as 'tak[ing] advantage of inconsistencies between different countries' tax rules to achieve a more favorable result than that which would have resulted from

- investing in a single jurisdiction' (Shaviro 2002, p. 319), whereas governments engage in tax competition if they try to attract mobile tax bases, for example, by deliberately offering tax arbitrage opportunities.
9. Importantly, the OECD project was not targeted against general competition by means of low tax rates. Such competition is considered legitimate by the OECD. It only targets preferential tax regimes, that is, tax systems that favor foreign over domestic taxpayers, and schemes which serve no other purpose than 'poaching' other countries' tax bases (OECD 1998, pp. 15–16).
  10. Unitary taxation with formula apportionment would replace the separate entity approach. This would curb many of the current techniques of tax arbitrage such as the manipulation of transfer prices or thin capitalization. Nevertheless, unitary taxation is not without problems itself (see, for example, Sorensen 2004).
  11. Rixen (2008) argues that the institutional development follows the logics of layering and functional conversion (Thelen 2003). These strategies of indirect and incremental change are employed if actors are unable to achieve direct change.
  12. The situation is different with respect to indirect taxation. Since differentials in indirect taxes are a direct obstacle to a frictionless market, the EU has succeeded in gaining significant influence over national indirect taxation (see Uhl 2008, pp. 16–56).
  13. In the theoretical economics literature there is a discussion about whether the ban on preferential tax regimes is in fact counterproductive because it intensifies general tax competition which will ultimately be more harmful (Keen 2001). Were this to prove the case, the success of the Code of Conduct would turn out to be a pyrrhic victory. But the jury is still out on this (see the brief discussion in Griffith et al. 2008, pp. 37–8).
  14. One case that has reached particular prominence was Cadbury Schweppes, in which the ECJ ruled that the UK's CFC legislation was a violation of the EU Treaty. This ruling is expected to have considerable adverse revenue effects on member states (ibid., p. 42).

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## 30 Standards for global markets: domestic and international institutions

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### 30.1 INTRODUCTION: STANDARDS AS INSTRUMENTS OF GOVERNANCE

Standards prescribe behavior or characteristics of people or inanimate objects, often in technical terms. There are many kinds of standards locally, nationally and internationally, including standards of academic excellence (Reeves 2004) or corporate social responsibility (Stewart and Spille 1998; Vogel 2005; Auld et al. 2008), health and safety standards (Cheit 1990; Büthe 2008b), capital adequacy standards for banks (Oatley and Nabors 1998; Singer 2007), standards for data privacy (Schaffer 2000; Farrell 2003; Bignami 2005; Newman 2008), labor rights standards (Mosley 2010) and accounting standards (Mattli and Büthe 2005a, 2005b; Nölke 2005; Véron et al. 2006).

Like norms and regulations, standards are instruments of governance. But standards differ from most social norms in that they are more explicit.<sup>1</sup> At the same time, standards differ from governmental regulations in that the use of, or compliance with, a standard is not mandatory. Only if a standard becomes the technical basis for a law or regulation – which often and increasingly occurs – does it become legally binding (Hamilton 1978; Salter 1988; Egan 2001).

We focus here on product standards, which are among the most important standards in the international political economy. Product standards specify design or performance characteristics of manufactured goods, such as their sizes, shapes or functions, ‘or the way [they are] labeled or packaged before [being] put on sale’ (WTO 1998, E3-2).<sup>2</sup>

Why do firms seek to make their products comply with certain standards? Even if there is no legal obligation, there may be social or political pressures or economic incentives to comply (Brunsson and Jacobsson 2000). A consumer buying a gas stove, for instance, might want to know whether it complies with a standard that specifies how the oven must be designed to ensure that heating the oven will not cause parts to expand to the point where it causes a gas leak. High-quality product standards can thus make government regulation (for public safety or consumer protection) leaner or even unnecessary (see also Newman and Bach 2004).<sup>3</sup> Purchasing managers for firms, who buy inputs such as intermediate goods in large quantities, similarly often pay close attention to whether the goods they purchase comply with certain product standards. Large-scale consumers, including government agencies, may even demand compliance as a condition of placing an order, using standards to communicate specifications and ensure consistent quality. Which technical specifications get written into a product standard therefore often matters to producers, consumers and policy-makers.

How then are these standards set? There are four basic ways in which product standards come about. (1) A public (governmental) agency with exclusive authority for a given



issue may develop a technical specification internally, with rule-based opportunities for input from external stakeholders. Such a specification may then be imposed as a regulatory or public procurement standard. (2) Multiple public agencies, each of which develops a technical specification internally but none of which has exclusive standard-setting authority, may compete for acceptance by users. If one succeeds in gaining widespread acceptance, for example, because it controls access to the most desirable market and producers want to use a single standard for their global production, its technical specification becomes a *de facto* standard. (3) Private actors develop technical specifications separately or in small groups, which then compete. One specification may then become a dominant *de facto* standard through market selection, such as the Microsoft Windows operating system or the Blu-ray optical disc formatting standard. (4) A broad range of stakeholders may cooperate voluntarily in a private (non-governmental) organization (NGO) that effectively has exclusive authority by being recognized as the legitimate forum for setting standards in the issue area in question, leading to what are often called consensus standards. These four ideal-typical ways of establishing technical standards differ in their main advantages and disadvantages and in who the key actors are, which we have discussed in greater detail elsewhere (for example, Mattli 2003, pp. 201–10; Büthe and Mattli 2010, 2011).<sup>4</sup>

Since institutionalized voluntary cooperation of private actors is for most industries in most countries the most important approach to setting product standards (for example, Hemenway 1975; Toth 1996), we focus here on this approach to standardization. In principle, the process is open to anyone who has a stake in the technical specifications of the product in question – subject to the rules and procedures of the standards-developing organization (SDO) that undertakes the standardization work. For product standards, these ‘stakeholders’ tend to be first and foremost the firms that manufacture the product and, if it is an intermediate good, the firms that buy it as an input. Stakeholders, however, may also include consumer groups, representatives of labor, government regulatory agencies, environmental groups, as well as other civil society organizations and sometimes academic researchers, though non-commercial interests tend to be under-represented in SDOs.<sup>5</sup>

Common characteristics of institutionalized standard-setting at the domestic and international levels include that the SDO is comprised of specialized working groups or committees, in which technical experts cooperate in developing the standard. To increase the legitimacy of the resulting standards, SDOs usually have a multi-stage standard-setting process with consensus procedures, and the final adoption of a technical specification as an official standard of the organization requires super-majorities in a voting procedure. The particular institutional structure above the working groups differs across SDOs, especially by country and region, as discussed below. At the international level, two SDOs account between themselves for about 85 percent of all international product standards: the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC).<sup>6</sup> Little known until the 1980s to anyone who was not an engineer or standards manager, they have become prominent in recent years, in part due to a stipulation in the Agreement on Technical Barriers to Trade (TBT) of the World Trade Organization (WTO). The TBT Agreement obliges all WTO member states to use international standards whenever possible as the technical basis of laws and regulations that affect market access. It has accelerated the internationalization

of standard-setting, that is, a shift from the domestic to the international level and above all to ISO and IEC.

Why does a particular technical specification become the ISO or IEC standard for a given product? How are conflicts of interest over these technical specifications decided in these private SDOs? And who gains and who loses when standards governance shifts from the domestic to the international level? Our chapter seeks to address these questions, as well as offer some more general insights into institutionalized multi-level governance, since the internationalization of standard-setting changes the role but does not diminish the importance of domestic (and regional) institutions for each country's stakeholders.

In the next section, we discuss the importance of product standards domestically and internationally. We note the increasing shift of standard-setting from the domestic to the international level over the course of the last two to three decades. But we also note a puzzling observation from interviews with standards experts in manufacturing firms in the USA and Europe: they mostly agree that standard-setting has shifted to the international level and will continue to do so, but they disagree in their normative assessments of this change in global governance. We present an explanation for this puzzle, which emphasizes the fit – or what we call 'complementarity' – between domestic and international institutions. We then draw on a five-country, multi-industry business survey, which we conducted in 2001/02, to examine various observable implications of this argument about institutional complementarity.

## 30.2 DOMESTIC AND INTERNATIONAL IMPORTANCE OF PRODUCT STANDARDS

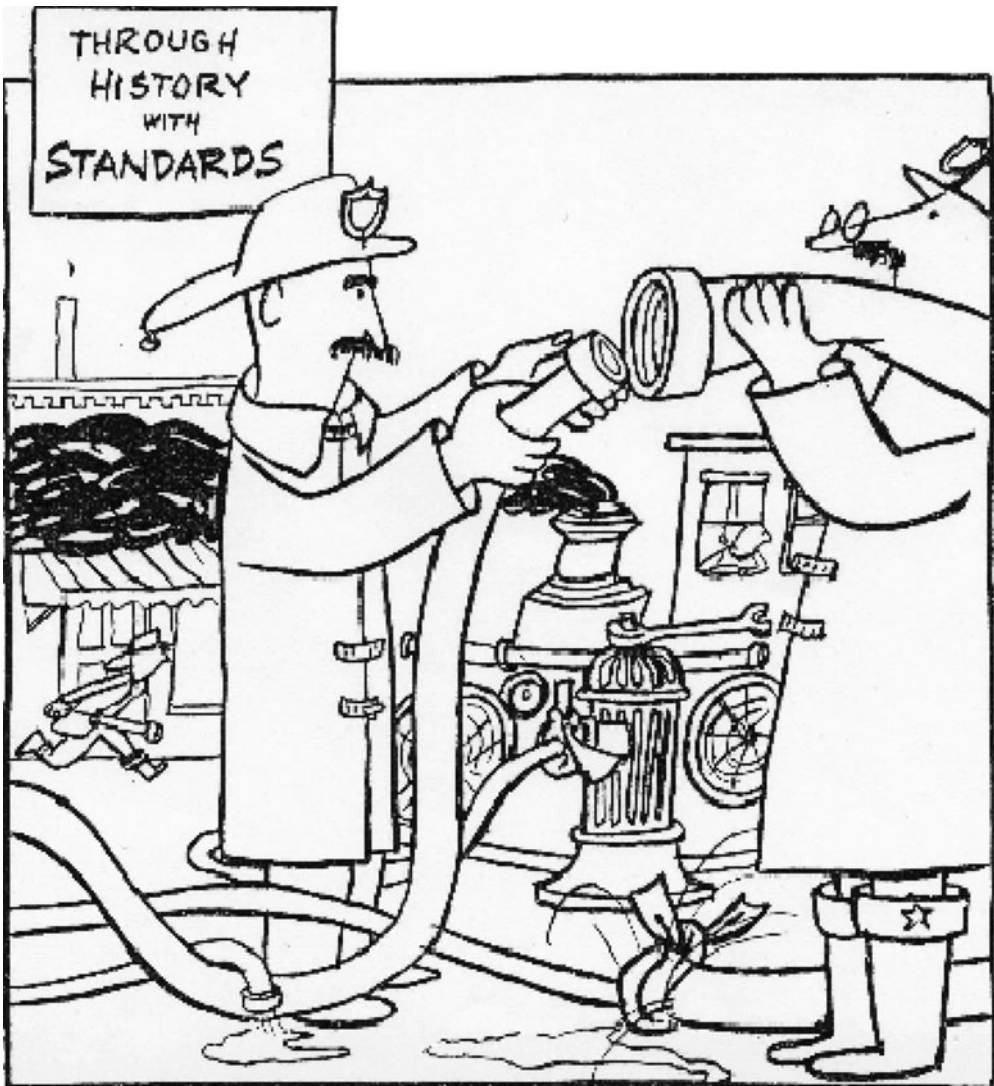
Product standards are ubiquitous. Length, width and thickness of credit and bank cards, as well as the location of the magnetic strip on such cards, are standardized, which allows the use of the cards in any automatic card reader, not just the automatic teller machines of one's own bank. Wheels and tires for cars and bicycles are manufactured to one of a limited number of standard sizes to ensure a tight fit and safe ride (under specified conditions that may also be written into the standards) – without the need to fit each tire individually to each wheel like horseshoes to a horse's hooves. The symbols used for warning lights on the dashboard of cars (such as the engine overheating symbol) or on medical devices (such as the laser radiation symbol) are usually drawn from lists of 'standard' symbols, which are independent of any particular language, culture or manufacturer (though cf. Liu et al. 2005). Wooden boards at a lumber yard or fine cabinetry made from wood or 'forest products' may carry a label indicating that the raw material has been harvested in ecologically sustainable ways (for example, Bartley 2003; Meidinger et al. 2003; Cashore et al. 2004). Other widely – if not always consciously – used standards include ISBN numbers, which assign a unique identifying number to books, and screw thread standards, which may specify the mechanical force that can be reliably sustained by parts held together by nuts and bolts, thus allowing the replacement of worn-out parts without loss. Similarly, the character-set identified in the non-visible encoding of web pages is just a reference to a standard, which tells the browser to display the characters on the web page in, for instance, Roman/Western script rather than in Chinese, Japanese or Arabic.

An individual firm may use product standards for a number of reasons. It may, for instance, use standards to specify characteristics of inputs that it purchases. To measure and improve internal processes and conduct quality control, a firm may specify standards that its own products must meet; the products can then be tested for compliance with this standard, before later stages of production or final sale.<sup>7</sup> It may also use standards to specify characteristics of its outputs, for instance, through classifications or quality grades of the goods produced.<sup>8</sup> Product standards thus provide information shortcuts or enable the interoperability or interconnectivity of different devices or parts.

Standardization has important implications for economic development and innovation. Industrialization is inconceivable without standardization. Even the production of 'customized' products often depends on precise standardization of the various parts to retain the economic benefits of economies of scale and ensure timely assembly and delivery. Product standards also increase the efficiency of markets to the benefit of consumers by reducing consumers' exclusive reliance on a particular producer (a problem well known to users of cell phones whose manufacturers tend to change the non-standardized battery shapes and connectors with every model, so as to make them incompatible with any other brand or model and thereby force consumers to buy same-brand replacements). At the same time, standardization allows competitive producers to achieve greater economies of scale by selling the same product to many customers. And by allowing engineers to build on established solutions to basic technical problems, product standards also facilitate cumulative technological development and can spur innovation.<sup>9</sup>

Standards, especially international standards, also facilitate trade (for example, Holzinger 2003, pp. 190ff.). The development of an international standard for freight containers, for instance, has played a major role in the spectacular reduction in international long distance shipping costs of the past 30 years, since the standardization of container dimensions made it possible to stack and move entire containers between ships, railroad cars, trucks and storage, rather than load and unload their content multiple times (Levinson 2006; Hummels 2007, especially p. 141).

Finally, standardization can be important for public safety. The 'Big Fire of Baltimore' of 1906, which destroyed much of the historic city, provides a good illustration. When news of the fire spread even faster than the fire itself, fire companies from nearby towns and the cities of Philadelphia, Washington and even New York came to Baltimore to help. But since the connectors between fire hoses and hydrants were not standardized, the out-of-town firemen were largely forced to idly stand by, since they could not connect their equipment to Baltimore's hydrants nor each other's hoses (see Figure 30.1). To be sure, Baltimore fire crews could connect their equipment, at least within any given neighborhood: There were local standards, but not national and certainly not international ones.



Source: American Standards Association (1965), *Through History with Standards: An Illustrated Textbook*, New York: ASA. Reproduced with permission.

Figure 30.1

### 30.3 SHIFT IN GOVERNANCE

#### 30.3.1 Patterns of Change

Fire hoses and hydrants were no exception. For many products, standards were originally developed in response to local needs, which were usually considered only in the local

context. Indeed, local standardization was usually appropriate and efficient, and until the late twentieth century, standardization remained a local or at most national affair. More recently, however, the globalization of product markets has greatly increased the economic and political salience of cross-national differences in standards.

By the 1980s, cross-national differences in standards came to be recognized as an important non-tariff barrier to trade (NTB; see Ray 1987; Grieco 1990). By 1998, cross-nationally divergent standards were estimated to result in \$20–40 billion in lost sales of goods and services for the USA alone (Mallett 1998–99). The increased prominence of standards as NTBs had multiple reasons. The reduction of tariffs in successive rounds of trade negotiations under the General Agreement on Tariffs and Trade (GATT) raised the visibility of non-tariff measures that had always been there but had mattered little when tariffs were high. More generally, the rapid international integration of product markets (for instance, due to the decrease in transportation costs) raised the economic importance of factors that perpetuated the fragmentation of markets. This development put the spotlight on differences in standards that often reflected differences in taste or accidents of history: US ‘letter’ size paper, for instance, is slightly shorter and wider than the ‘A4’ standard paper, which is common in most of the rest of the world – a divergence of standards that today is a familiar nuisance to all who have tried to print a document encoded in the other format and have been asked by their printers to load paper of a size they did not have. Yet, until it became common to send files to colleagues or business partners around the globe, this lack of compatibility in paper sizes was unknown to most (Büthe and Mattli 2011). Generally, when there are multiple possible solutions to a technical problem, such as connecting hoses and fire hydrants, separately developed technical standards often differ despite a common understanding of the underlying science and engineering.

Standards, however, did not just become more visible, they became more numerous and more specific when standards became more popular as instruments of public and private market governance – first in advanced industrialized countries, then also in developing countries.<sup>10</sup> Many of the new standards were introduced in order to protect domestic producers. A Japanese standard, for example, adopted in 1986 by the Consumer Product Safety Association at the request of the nascent Japanese ski manufacturing industry, required skis sold in Japan to comply with particular product design specifications (not met by any foreign manufacturers) in order to get a consumer safety seal, ostensibly because Japanese snow was ‘different,’ so that imported skis would be unsafe.<sup>11</sup> In sum, regardless of intent, divergent standards become NTBs when government regulations or local markets require compliance as a prerequisite for import or sale of the good, impeding trade or increasing the cost of production for the foreign producer.

In addition, when divergent standards require the duplication of product testing and certification, they also increase the costs of entry into foreign markets. US and European regulatory agencies that are responsible for traffic/motor vehicle safety, for instance, use different crash-test dummy standards (specifying height, weight and locations of required sensors) despite the June 2004 introduction of a ‘World Side Impact Dummy’ agreed with US and European participation. Manufacturers of cars and car parts such as air bags therefore have to undergo (at least) two sets of tests to get regulatory approval for their products. Testing procedures for pharmaceuticals and many other products similarly differ.

Standards are not just NTBs, however. They often fulfill multiple purposes, including non-trade related and legitimate public policy purposes (see Section 30.2 above). Lowering

or abolishing standards therefore may be neither socially nor even economically optimal. The increasing prominence of standards as NTBs has therefore only rarely led to demands for their abolition or ‘tariffication’ (replacing them with tariffs that result in equivalent reductions in trade). Instead, it has led to increasing demands for the international harmonization of standards – and a spectacular shift of standardization activity from the domestic to the regional and international levels (Büthe and Mattli 2011, chs 1 and 6).

As recently as the mid-1980s, the vast majority of new product standards were domestic standards, developed within each country separately for primary use in the domestic market. Today, for most advanced industrialized and developing countries alike, the overwhelming majority of new product standards consist of international standards – sometimes adopted as national standards with slight modifications, but substantively developed in the technical committees of an international SDO, such as ISO or IEC.

### 30.3.2 The Puzzle

In a series of interviews in the United States and Europe, we found that most experts expected the international harmonization of product standards in organizations like ISO to continue or even increase. We confirmed these findings in a subsequent international survey (described in more detail below), where we asked a large number of standards managers and technical experts from manufacturing firms to indicate whether (and how strongly) they agreed or disagreed with the statement: ‘Standards will increasingly be developed at the international level.’ The overwhelming majority of survey participants on both sides of the Atlantic agreed that the trend toward international standard-setting would continue (Figure 30.2,  $N = 1195$ ).

But when we asked interviewees and survey respondents for their normative assessments of this shift in governance, responses diverged strongly. In Europe, the vast majority considered the shift to the international level desirable, whereas experts from US firms were almost evenly split between those who favored and those who opposed the

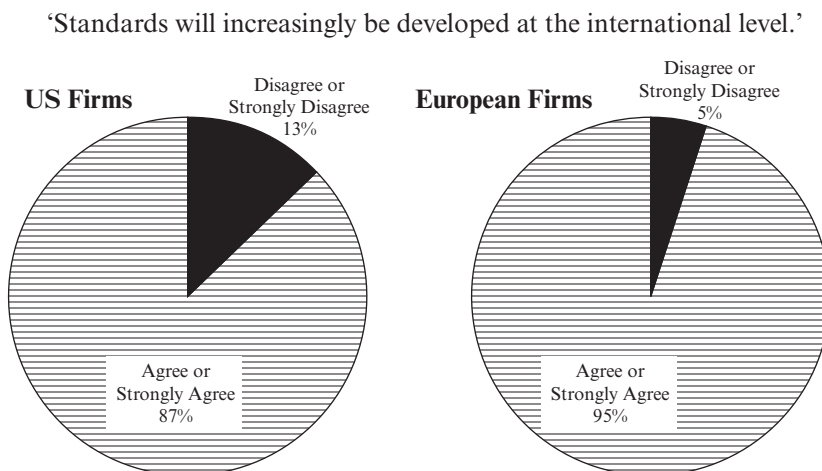


Figure 30.2 Expected trend toward globalization of standard-setting

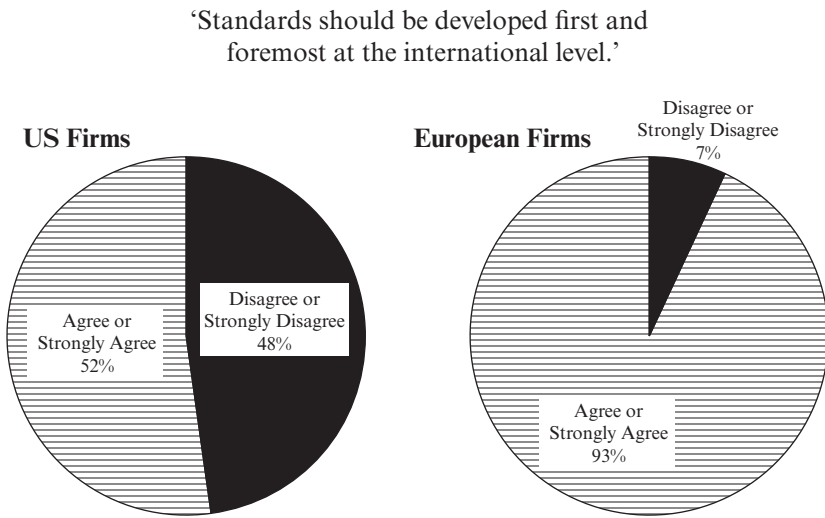


Figure 30.3 Normative assessment of the globalization of standard-setting

internationalization of standards-setting, as again captured most clearly by the survey response to the statement: ‘Standards *should* be developed first and foremost at the international level’ (Figure 30.3, *N* = 1116; emphasis in the original).

### 30.3.3 Deficiencies of Existing Theories of International Cooperation

Why would US and European firms differ so much in their normative assessments of this aspect of globalization even while they largely agree on what will happen? This divergence of positive and normative assessments is particularly puzzling because major theories of international cooperation would lead us to expect otherwise.

Scholars in the ‘Realist’ tradition of international relations emphasize the distribution of power among states as the key determinant of international cooperation, even in non-governmental institutional settings such as ISO (for example, Drezner 2004, 2007). As Krasner (1991) pointed out, international cooperation may bring benefits to all states (a ‘Pareto-improvement’), but the distribution of those benefits is often skewed in favor of (stakeholders from) more powerful countries. Specifically, in the realm of technical standards, international standardization may bring benefits such as the reduction of NTBs and thus a more efficient allocation of resources. Yet, since standardization usually involves the harmonization of previously differing products or practices, it also creates adjustment costs and conflicts of interest over the distribution of those costs (Krasner 1991). Electrical plugs and socket-outlets, for instance, remain strikingly non-standardized even among countries using the same voltage for their household electricity supply. Since the different plug and socket-outlets designs constitute a NTB – and some countries’ current designs deliver sub-optimal electrical safety – there are good reasons for international standardization. But switching to a common standard would require the use of hundreds of millions of adapters and ultimately the replacement of every outlet in many countries, since it has proven technically impossible to find a plug design that

is compatible with more than a few countries' outlets and still achieves current or better levels of electrical safety (see Büthe 2008a).

If the distribution of switching costs is a function of the distribution of power among states, stakeholders from internationally weak states might oppose international standardization normatively since they will disproportionately pay those costs. But by almost any 'Realist' measure of the distribution of power, the USA and Europe are very evenly matched in political and economic resources that can be used in non-coercive international cooperation (see, for example, Drezner 2007, pp. 35ff.). This theoretical logic therefore leads us to expect that the particular technical specification that becomes the international standard for a given product should, on balance, be equally beneficial to US firms as to European firms – that is, their normative assessments should not differ (contrary to what is captured in Figure 30.3).<sup>12</sup> Our empirical findings thus directly contradict the expectations derived from this major theoretical tradition in international relations.

An alternative set of expectations can be derived explicitly in Loya and Boli's original study of institutionalized international standardization (Loya and Boli 1999). Drawing on sociological ideal-types of science and engineering, they see standard-setting essentially as a scientific optimization problem: a search for the objectively best standard, given a clearly defined technical problem or objective. They argue that neither 'the competitive struggle between states' (*ibid.*, p. 196) nor the commercial interests of individual firms affect the process of international standard-setting in organizations like ISO and IEC, since the specialized technical expertise of the participants in ISO/IEC standardization and their joint/shared social status as scientists grants them a high degree of autonomy (see also Schofer 1999). Moreover, due to the universal nature of scientific method and rationality, Loya and Boli argue, everyone can agree on what the optimal solution is, as long as the institutional setting of the standards-developing organization is conducive to (a) making the scientific effort to arrive at that 'solution' and (b) exchanging information about the measurements and scientific procedures used.

Since this theoretical approach sees no distributional conflict, it leads us to expect that there should be no systematic differences in firms' experience with international standardization. But we find empirically that US firms on balance consider the shift from domestic to international standardization to be much less advantageous to them than European firms in the same industries (see Figure 30.3). Why?

### 30.4 INSTITUTIONAL COMPLEMENTARITY THEORY

Institutional Complementarity Theory (Mattli and Büthe 2003; Büthe and Mattli 2011) provides an answer to this specific question, but also suggests a general theory of international institutionalized cooperation. It focuses on the complementarity of domestic and international institutions. An abstract illustration best conveys the basic idea: assume that two countries differ in their domestic institutions,  $D_1$  and  $D_2$ . Assume further that achieving a given objective (shared by country 1 and country 2) requires coordinating policies or practices at the international level, where a single international institution  $I_0$  exists.<sup>13</sup> If the fit between  $D_1$  and  $I_0$  differs from the fit between  $D_2$  and  $I_0$ , thereby conferring upon actors from country 1 a strategic advantage over actors from country 2 for influencing the coordinated solution at the international level, we would



Table 30.1 *ISO/IEC organizational structure*

	ISO	IEC
central secretariat	1	1
technical committees (TCs)	210	96
subcommittees (SCs)	519	108
working groups (IEC: + project/maintenance teams)	2443	1118
individual participants (ISO/IEC estimates)	ca. 50000	ca. 10000

*Note:* Information as of 31 December 2009, from *ISO in Figures*; *IEC in Figures*; ‘List of [IEC] Technical Committees and Subcommittees’; IEC TC/SC figures include ISO-IEC joint TC1 and its subcommittees.

say that the institutional complementarity between the domestic institutions in country 1,  $D_1$ , and the international institution,  $I_0$ , is greater than between  $D_2$  and  $I_0$ . Note that the pertinent differences between  $D_1$  and  $D_2$  may have their origins in each country’s history long prior to the rise of the international institution to political-economic importance; the differences in institutional complementarity may thus be accidental (Büthe and Mattli 2011; see also Hall and Soskice 2001, p. 17; Höpner 2005).

Institutional Complementary Theory leads us to focus on institutional differences. Only if domestic institutions differ in how useful they are to domestic actors who seek to influence international outcomes can institutional complementarities explain why actors may differ across countries in their normative assessment of the shift of governance to the international level (or why a particular technical specification becomes the international standard for a given product). Developing specific theoretical expectations therefore requires contextual knowledge about the pertinent institutions. What is the structure of the international institution for standard-setting and how does it operate?

ISO and IEC are the two central SDOs at the international level, covering among them standardization in almost all major domains of economic life. Both are NGOs, though they are organized on the basis of national representation and employ a one-country-one-vote system in the final stages of standards adoption – reflecting the role of domestic-level SDOs in founding the organizations in 1947 and 1906, respectively (Verma 1973, pp. 1–13; Raeburn 2006; Büthe 2010). Membership in ISO is open to the body ‘most broadly representative of standardization’ in each country.<sup>14</sup> As of August 2010, ISO has 107 members; IEC 59.<sup>15</sup> For most advanced industrialized countries, the national member bodies are also non-governmental.<sup>16</sup>

The actual standardization work in ISO and IEC takes place in numerous specialized technical committees, subcommittees and working groups (Table 30.1). National member organizations often constitute mirror committees or working groups at the domestic level to provide input via the individuals who directly participate in ISO/IEC standardization as representatives of their member body. Given the technical expertise required, most of those individual participants come from industry, and their firms cover the costs of participation, but some also come from academic and not-for-profit research

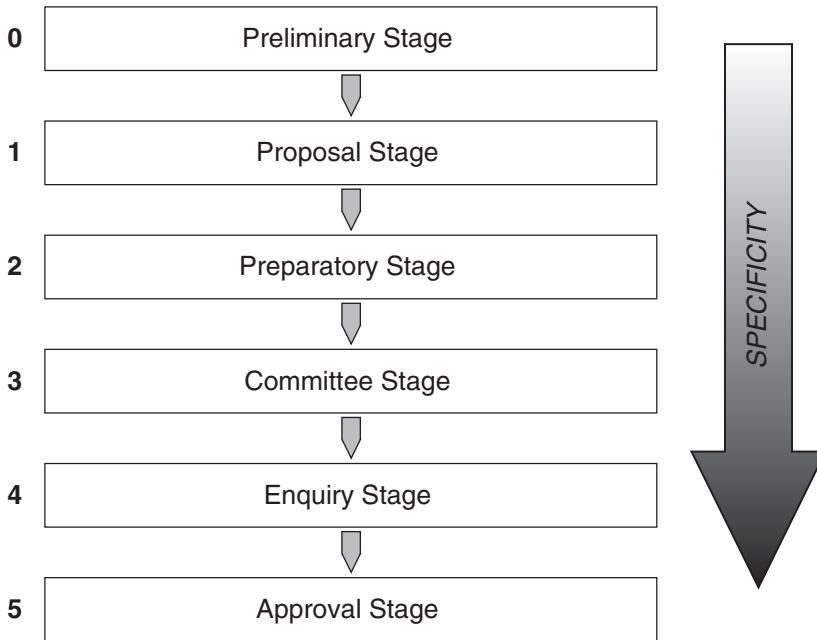


Figure 30.4 ISO/IEC standardization: a multi-stage process

institutes, public regulatory agencies, consumer organizations and other NGOs. The decentralized standardization work is coordinated by the organizations' relatively small secretariats in Geneva, which also coordinate the work among the two organizations. This coordination ensures consistency and the creation of only a single ISO or IEC standard for any given product or technical issue. The international institution thus is characterized by a high degree of coordination and organizational hierarchy, albeit with most of the initiatives coming from the bottom up rather than from the top down.

Standardization takes place in five distinct stages, preceded by an informal preliminary stage (Figure 30.4).<sup>17</sup> As discussed in greater detail elsewhere (for example, Mattli and Bütthe 2003; Bütthe 2010; Bütthe and Mattli 2011), the scope and fundamental principles of a new standard are decided during the early stages; the details during the later stages, with increasing specificity. More generally, standardization in ISO and IEC is an iterative process of proposals, discussions, and approval of successively more specific drafts in specialized working groups and committees, until the Draft International Standard and then the Final Draft International Standard are drawn up, which are subjected to a formal vote by all member bodies. Interviews with participants have confirmed that these stages describe not only the *de jure* but also the *de facto* standardization process. Throughout the process, there is a strong emphasis on achieving broad consensus among the participants. At the same time, in the interest of efficiency, the procedures do not allow returning to a previous stage – and the technical issues already settled then – unless the draft standard is outright rejected at a later stage.

These characteristics of the international standard-setting institution(s) have important implications for the actions and resources required to influence the content of

international standards. The decentralized nature of ISO/IEC standard-setting suggests that involvement is crucial. To put it bluntly: you have to play to win. Those who actively participate in the technical work – directly or indirectly – have many more opportunities to shape the scope and the specific content of the standard than those who only comment at the enquiry stage or later. Effective participation in turn should require early and good information, so as to allow stakeholders to determine the implications of a proposed new standard for their products (that is, to determine what their interests are) and to influence the technical specification accordingly.<sup>18</sup>

Having a voice in the standardization process from its beginning through the adoption of the final standard also requires economic resources to cover travel and accommodations for meetings. Participants also must be able to afford the time to follow and/or take part in the substantive discussions. Consequently, we would expect representatives of firms and member bodies from advanced industrialized countries to outnumber and play a much greater role in international standardization than representatives from developing countries. Representatives from industry are likely to vastly outnumber other stakeholders for the same reason.<sup>19</sup>

Consensus does not imply unanimity, but is defined by ISO/IEC Guide 2 as ‘the absence of sustained opposition,’ that is, opposition for which a technical rationale is provided by one or more member bodies. Therefore, technical expertise is also required to have any significant impact on the specific content of a standard. Objections that are not supported by technical reasons can be (and in fact have been) overruled as impermissible, which also should limit the potential for intervention in the process by governments/states to extraordinary cases.<sup>20</sup>

Finally, successful participation requires cohesiveness among the participants from a given national member body: consensus procedures combine with national representation to create a strong norm of trying to accommodate all technical objections from member bodies. Yet, if a country is unable to speak with a single voice, it undermines the credibility of its stakeholders’ claims that accommodating the preferences expressed by any of them constitutes an accommodation of the national member body’s consensus preference. Effective participation thus requires effective mechanisms for preference aggregation at the domestic level.

Economic resources and technical expertise mainly differ as a function of a country’s level of economic development. The quality and speed of information flows and the effectiveness of preference aggregation, by contrast, may differ even among advanced industrialized countries. We therefore focus on these aspects. If domestic institutions differ significantly in how well they convey information and aggregate preferences, then the resulting differences in institutional complementarity may explain the cross-national/regional differences in normative assessments of international standardization.

There is indeed a substantial difference between the domestic institutional structure for setting product standards in the USA and the institutional structure in Europe. In the USA, there are several dozen large general SDOs and several hundred specialized ones, including some 300 trade and industry associations and about 130 professional and scientific societies that develop product standards (for example, Toth 1996; Büthe and Witte 2004, pp. 27ff.). These autonomous SDOs are fiercely independent. They compete, often vigorously, not least because selling their own standards provides much of the revenue that sustains each of these SDOs as an organization. US product

standard-setting is thus characterized by extreme fragmentation, with no overarching institutional structure. In European countries, in contrast, there is usually a single national SDO, whose hierarchical organizational structure is similar to the structure of ISO and IEC. These basic institutional characteristics are common to all European countries, notwithstanding some differences among them (Tate 2001). In addition, there are two European regional standard-setting bodies, CEN and CENELEC, through which the European national bodies set regional standards (and thus may achieve a common position before standardization in ISO or IEC takes place). In sum, the US domestic institutions for product standardization are characterized by extreme fragmentation and competition among specialized standard-setters, whereas the decentralized technical standard-setting work in European countries is characterized by a high degree of coordination under the umbrella of a single domestic institution with a hierarchical structure, supplemented by European-wide private sector organizations of standardization.

These differences in institutional constellations have important implications for information flow and preference aggregation. The competing SDOs in the USA treat information that they may have about international standardization as a commercial asset: a private benefit that they share only with their members. While a given firm may be a member of several such organizations (directly or via its employees), the institutional fragmentation should be expected to impede efficient information flows about new standards developments at the international level – information which may originate from any number of different sources. Moreover, US firms frequently complain about the costliness of participating and paying fees in all the various domestic organizations that set standards for their industry (a cost they are often not willing to pay).

Hierarchical organizations, in contrast, have every incentive to build strong, institutionalized lines of communication between the different levels of the hierarchy. They should therefore be much better at disseminating information about new standards proposals to firms potentially affected by the new standard. Their entire institutional structure also is geared toward preference aggregation, since they exist to produce a single national standard. When standardization moves to the international level, this institutional structure can still be used to ensure that there will be a single national position that can be represented unambiguously at the international level, whereas institutional fragmentation provides no mechanism for speaking with a single voice internationally. This should put US firms at a persistent disadvantage vis-à-vis their European competitors, without giving them any way to prevent the shift of standardization to the international level since launching new standards projects in ISO and IEC is easy – and the increasing use of international standards for regulatory purposes by developing countries, including large ones like India and Brazil, effectively forces US firms to produce to these standards if they do not want to forego access to these fast-growing markets.

Institutional complementarity theory thus provides an explanation for the puzzle why US firms are much more ambiguous in their normative assessment of international standardization than European firms, even though both groups largely agree that the shift of standardization to the international level is occurring and will continue. But how do we know whether this explanation is right? Following King et al. (1994; see also Brady and Collier 2004), we look for additional ‘observable implications’ of the theory. We thus look beyond the puzzle that motivated our inquiry above to identify things that

we should find empirically if the logic of the theory holds, but have no reason to expect otherwise, that is, which cannot be derived from alternative theoretical approaches.

### 30.5 FURTHER OBSERVABLE IMPLICATIONS OF DOMESTIC INSTITUTIONAL DIFFERENCES FOR INTERNATIONAL STANDARDIZATION

To put our theoretical argument to systematic tests, we conducted a business survey among standards managers and experts in firms from five industries (chemicals, rubber and plastic products, medical devices, petroleum products, and iron and steel products) in the USA and four European countries (Germany, Spain, Sweden and the UK).<sup>21</sup> A response rate of 32 per cent, about twice as high as typical business surveys, yielded 1385 individual observations for quantitative (statistical) analysis.<sup>22</sup> Open-ended questions allowed respondents to provide additional free-text information for qualitative analysis.

Preliminarily, one might wonder whether US firms cannot simply reap the benefit of the large US market without having to get involved much in the international standardization process. It is conceivable that international standardization is simply the codification of current practice in the largest market or by the biggest multinational firms, which are still disproportionately American. This is what 'Realist' international relations scholars might expect. Alternatively, if Institutional Complementarity Theory is right, then even the initial proposals for new international standards should be closer to European firms' prior practice because the better fit between European domestic institutions and the international institution should make European firms better informed and more effective from the start of the international standardization process, when the scope of a new standard and its basic contours are defined in the first stage. So we asked firms to tell us how frequently the initial proposals for new ISO or IEC standards differ from their current practice – on a scale from 'rarely' to 'very often.' The responses are revealing. Not only are US firms not doing better, they are on average doing worse than European firms, as shown in Figure 30.5, and the difference is statistically significant.

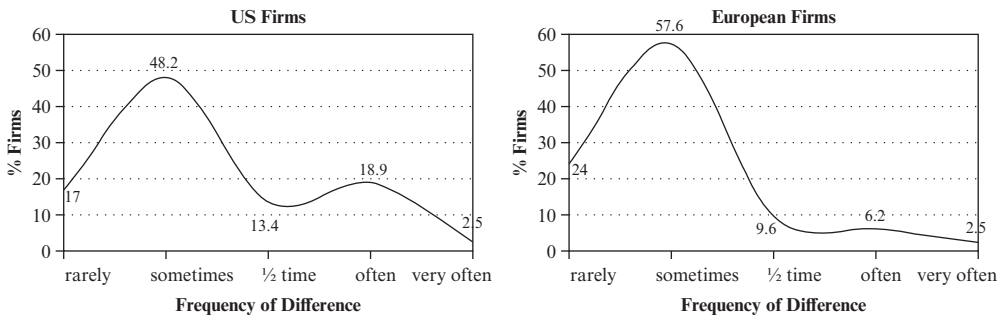
Given this baseline in favor of European firms, it would seem crucial for US firms (as well as European ones) to ensure that their technical preferences are taken into account when the initial proposal is modified during the standardization process before the final international standard is adopted and published. To discern what determines success in the international standardization process, we asked respondents: 'When you try [and] succeed, how important are the following reasons for being able to influence the technical specification of the proposed standard before it is finalized?' On both sides of the Atlantic, the great majority of firms considered being involved, and being involved early, important or even very important to their ability to influence the technical specification of a new or revised international standard (Table 30.2).

This was by far the most highly rated reason for success. In addition, the central importance of involvement was further corroborated by a statistical analysis of the frequency with which firms succeed in getting their technical preferences taken into account, which showed a high correlation with the frequency of involvement. Numerous

Average response on 5-point scale, where 2 = 'sometimes' and 3 = 'about half of the time.'

USA: 2.42

Europe: 2.06



Note:  $t$  of Difference of Means test ( $N = 1273$ ): 5.69; statistically significant at  $p < 0.01$ .

Figure 30.5 Frequency of divergence of new standards proposals from current practice

responses to the open-ended questions suggested that this correlation was indicative of involvement causing success.

Table 30.2 Reasons for being able to influence ISO/IEC technical specification

	US Firms	European Firms
Involvement (early)		
important or very important	73%	79%

Note:  $N = 1004$ .

What, then, explains involvement? To get at this question, we conducted a statistical analysis (ordered logit) of firms' involvement in international standardization, which controlled for each firm's export orientation, the above-mentioned frequency of divergence between initial proposals for new international standards and the firm's current practice, the switching costs if the initial proposals were adopted without change, and previous participation of any of the firm's employees on a committee or working group of a SDO – each of which increased the likelihood of involvement in international standardization. We also controlled for firm size, although our findings indicated that, after controlling for the other factors, it has no effect on whether or how frequently a firm gets involved in international standardization, and for having European subsidiaries in the case of US firms, which makes US firms more like European firms.

Institutional Complementarity Theory suggests that, after taking all of these factors into account, European firms should be more involved in ISO and IEC standardization than US firms, in part because they have better and more timely information about international standards proposals. It also suggests generally that firms with more timely information should be more involved. Our statistical findings strongly support all of these hypotheses, as illustrated by the change in probabilities of firm involvement in

*Table 30.3 Change in the probability of firm involvement in the technical specification of proposed international standards at a given level of frequency*

	Rarely or Never	Sometimes	Half of the Time	Often	Very Often or Always
European firms (vis-a-vis US firms)	-11.5%***	-1.2%*	+2.4%***	+6.9%***	+3.3%***

*Note:*  $N = 1167$ . \*  $p < 0.1$ ; \*\*  $p < 0.05$ ; \*\*\*  $p < 0.01$ .

Table 30.3. For instance, a European firm is almost 7 percent more likely to be ‘often’ involved in international standardization than an otherwise identical US firm, and European firms are 11.5 percent less likely than US firms to be rarely or never involved (for detailed results, see Büthe and Mattli 2011, chapter 7).

There may, of course, be alternative ways of influencing the technical content of an international standard. If governments intervened in the non-governmental international standards development process and were successful in doing so in proportion to state power, as ‘Realists’ suggest, then we should observe firms resorting quite often to asking the government for help – especially US firms, if their non-governmental domestic standard-setting institutions are less conducive to exerting influence internationally. So we asked firms how frequently they request intervention by their respective governments. As shown in the first two rows of Table 30.4, US firms resort to asking their members of Congress quite rarely and actually ask the Department of Commerce more rarely than European firms ask their respective government agencies/ministries. We thus find little support for governments serving as channels of influence.

Relatedly, the core argument of Institutional Complementarity Theory, namely that differences in domestic institutional structures lead to differences in institutional complementarities when it comes to international standardization, suggests that ANSI (the US

*Table 30.4 Frequency of use of different influence methods*

	Frequency	US Firms	European Firms
We contact our representatives in Congress and ask them to take action on our behalf	rarely	63.8%	N/A
	sometimes	11.5%	
	often	1.5%	
We ask the Department of Commerce [Europe: our government agency/ ministry] . . . to take action on our behalf	rarely	66.7%	59.6%
	sometimes	8.5%	12.3%
	often	0.2%	1.6%
We ask [our national standards organization] to get involved on our behalf	rarely	64.6%	41.4%
	sometimes	10.3%	21.7%
	often	3.1%	16.0%

*Note:* Difference between the sum of percentages in each cell and 100 is the percentage of respondents who did not make a frequency-of-use selection.  $N = 1011$  for Congress question;  $N = 1385$  otherwise. ‘ANSI’ was specified for last statement in US survey.

member body of ISO) should be less effective than its European counterparts in allowing its domestic firms to influence the technical specifications of a proposed standard. This yields another observable implication of the theory, namely that US firms should rarely ask ANSI for help. And indeed we find that US firms rely on ANSI much less frequently than European firms rely on their respective domestic – and non-governmental – SDO (last row of Table 30.4).

Finally, recall that international standardization is a multi-stage process, where the final stage involves approval and publication of the already finalized standard (see Figure 30.4). At each prior stage, the specificity increases, so that firms' ability to shape the technical details declines as the draft standard moves through the stages – which is why early involvement is so important. But to get involved, firms must know that a new international standard that affects them is being discussed in ISO or IEC, and Institutional Complementarity Theory suggests that European firms will tend to have this information at an earlier stage. So we asked firms about the stage of the standardization process at which they typically hear about such forthcoming standards. Their responses clearly indicate that, at each stage prior to the final stage, a greater share of European than US firms already knows about the forthcoming standard. More than 11 percent of European firms but less than 7 percent of US firms, for instance, typically hear about such a standard already during the preliminary planning stage. By the time of the public enquiry stage, which is the last stage during which firms can exert any influence over the technical specification, 83 percent of European firms but not even 70 percent of US firms know about it.

## 30.6 CONCLUSION

As a consequence of the globalization of product markets, international standards have become economically and politically ever more important as instruments of governance. Our analysis of international standardization as a political process has focused on Institutional Complementarity Theory, which draws our analytical attention to the structure and decision-making procedures of the domestic and international organizations in which institutionalized voluntary standardization takes place. It suggests theoretically, and our analysis has shown empirically, that power matters in international technical standardization and is unevenly distributed internationally. But rather than being simply derivative of the international distribution of the political and economic resources of states, influence in international standardization is largely a function of the differential fit between domestic rule-making institutions, on the one hand, and the pertinent organizations at the international level, on the other. Put another way, global governance involves institutions at multiple levels. Since structure and procedures of ISO or IEC require efficient information dissemination and effective aggregation of preferences, domestic (and regional) institutions that are geared toward fulfilling these functions allow economic interests from countries with such institutions to exert great influence in international standardization. Traditional state power is at best a poor substitute for greater institutional complementarity.

In closing, we want to emphasize four broader implications of these findings. First, power – unevenly distributed across countries – matters when technical standards for



global markets are developed. Standard-setting in transnational expert organizations such as ISO and IEC therefore should be analysed and understood as a political (not just as a technical) process. Second, the central importance of power makes international standard-setting in private (non-governmental) organizations analytically comparable to traditional international politics where states provide global governance. But global private governance also is distinctive. Institutions and institutional complementarities are a key source of power in private governance, whereas in traditional intergovernmental politics military and/or economic resources of states arguably determine global outcomes. Third, our analysis suggests broader insights for global governance: even as governance shifts from the domestic to the international level, domestic institutions can remain very important, and institutional analysis at multiple levels may be required to understand global outcomes. Finally, Institutional Complementarity Theory offers to the literature on multi-level governance an analytical framework for developing specific hypotheses about the interaction between political institutions at different levels of aggregation and thus a way to go beyond emphasizing the general importance of actors and institutions at multiple levels.

## NOTES

- \* For sharing their experiences with domestic and international standard-setting, we thank the participants of the product standards survey conducted by the International Standards Project (<http://www.standards-survey.com>), interviewees from regulatory agencies and the private sector as well as officials from standards-developing organizations, many of which spoke with us in not-for-attribution interviews. For comments on previous work on this issue, we are grateful to participants of presentations at Duke, Emory and Stanford Universities as well as Gloria Ayee, Sarah Bütthe, Henrik Enderlein, Jim Fearon, Alexander George, Ira Katznelson, Stephen Krasner, John Meyer, Paul Pierson and especially Bob Malkin. Tim Bütthe's research was supported in part by a fellowship from the Robert Wood Johnson Foundation Scholars in Health Policy Research Program at the University of California, Berkeley.
- 1. Unwritten rules may be considered to be nonetheless explicit (and thus a standard) if they have sufficient specificity and there is a widely shared, consistent understanding of what they entail. The rules of grammar and spelling of any language (and when and how they became standardized) are a most interesting example of such standards, but that example is beyond the scope of this chapter (see, for example, Weber 1976; de Swaan 1988, pp. 52–117; Laitin 1988; Vincent 1992; Fouse 2000; Poggeschi 2003).
- 2. Product standards are thus distinctive from 'management' process standards (such as ISO 9000- and ISO 14000-series standards; see Guler et al. 2002; Tamm Hallström 2004; Prakash and Potoski 2006), which specify aspects of the process used to produce certain outputs, rather than characteristics of the output itself.
- 3. Even if the individual consumer does not pay attention to the symbols printed on the box or stickers attached to the back of the appliance, through which the manufacturer seeks to convey the gas stove's compliance with this standard, the retail store who sells the consumer a gas stove that does not have such a common 'best practice' safety feature, or the certified technician who installs it, opens themselves up to legal liability. Retailers and service professionals such as electricians and plumbers thus ensure the importance of product standards for household appliances and many other consumer products, even while ironically diminishing the need of the consumer to be attentive to standards intended to advance their safety (see, for example, Vogel 1990).
- 4. In practice, hybrid forms also exist, such as standards consortia and hybrid public-private bodies. See also Bütthe and Witte (2004, pp. 32ff.) and Salter (1999).
- 5. Earlier concerns about the secretiveness of many standard-setting organizations and the resulting neglect of consumer interests (Nader 1965; Opala 1969) have largely subsided, though SDOs continue to differ in how transparent they are and to what extent real participation by non-commercial stakeholders is feasible.
- 6. As of January 2010, the ISO had produced more than 18000 standards; the IEC more than 5500.

7. For companies concerned with maintaining a good reputation or stimulating brand loyalty, this is an especially important reason for using standards. Such companies may even explicitly advertise adherence to a specific standard as a marketing strategy.
8. An individual firm may also strategically set and disseminate standards in the early stages of the development of a new technology to capture a market, though this concern arises more prominently in market-driven standardization than in institutionalized standardization (for example, Grindley 1995).
9. Standardization brings not only benefits – by reducing diversity, it can stifle innovation – but on balance, economic historians consider standardization to have been overwhelmingly beneficial (for example, Glie 1972; Hawkins et al. 1995; Swann 2000; Russell 2007; Egyedi and Blind 2008; Yates and Murphy 2008). Moreover, product standards that yield health and safety benefits are generally credited with having contributed to the greatly increased life expectancy, especially in advanced industrialized countries.
10. A full discussion of the reasons for the increase in standards and regulations is beyond the scope of this chapter; see, for example, Grewal (2008), D. Vogel (1995, 2003) and S. Vogel (1996).
11. Foreign ski manufacturers had been excluded from the meetings of the committee that developed the standard. The standard was withdrawn during the preliminary consultation phase of a GATT Standards Code dispute, launched by the US and European governments on behalf of their ski manufacturers, but not until the 1986/87 ski sales season was effectively over; see Rappoport (1986a, 1986b), Rodger (1986) and Sykes (1995, pp. 76ff.); see also Lecraw (1987).
12. Alternatively, if international standards were for some extraneous reason more beneficial to European firms, the USA should be able to halt or even reverse the move to international standards (and we therefore should not see the expectation of a continuing trend toward international standardization in Figure 30.2).
13.  $D_1$  or  $D_2$  may be non-governmental domestic SDOs, but could also, for instance, be institutions for making (government) foreign economic policy, such as trade policy.  $I_1$  might be the ISO for the realm of product standards; for the realm of trade policy, for instance, it may be the WTO.
14. Quote from ISO Statutes, Article 3.1.1; IEC membership is governed by Article 4 of the IEC Statutes, which requires national member bodies to be ‘fully representative of national interests in the fields of activity of the [IEC].’ A country’s IEC and ISO member bodies may differ or be the same.
15. In addition, ISO has 45 ‘corresponding members’ and 11 ‘subscriber members’; IEC has 22 ‘associate members’ and 81 ‘affiliates.’ These corresponding, associate, etc. members are mostly from developing or very small countries, which lack full SDOs at the domestic level. They have more limited participation rights in exchange for lower or no membership fees.
16. For many developing countries, the national ISO member bodies are governmental or hybrid public-private organizations.
17. ISO officially distinguishes a final ‘publication’ stage, but no further changes can occur after approval.
18. We assume that participants in international standardization pursue their self-interest strategically. For representatives of firms, most of which face intense competition in international markets, self-interest is primarily materially defined. Interviews and numerous responses to open-ended questions on our survey support this assumption (see Bütthe and Mattli 2011, ch. 7).
19. OECD countries also staff the great majority of committee chairmanships and secretariats, which provide administrative support but also provide opportunities for agenda-setting.
20. In addition, ISO, IEC and their private sector participants jealously guard their non-governmental status.
21. The industries were selected to include both traditional and fast-changing, high-tech industries, all of which have a large number of export-oriented firms in all five countries. Moreover 66 percent of US firms and 64 percent of European firms indicated that standards affect their export opportunities, suggesting well-balanced groups of actual respondents.
22. Not all survey participants answered all questions.

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## 31 International policing: embedding the state monopoly of force

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Policing is a key aspect of the state monopoly of the legitimate use of physical force, and the latter is generally regarded as a defining and essential characteristic of the modern sovereign state (Weber 1978, pp. 54–6; Poggi 1990). In a handbook on multi-level governance, international policing is thus not an obvious choice because states could be expected to protect sovereignty rather than to exercise it jointly in multi-level systems. If they nevertheless do so, we would anticipate relatively few and weak international institutions and states taking great care to keep these institutions under control and preferring the joint management of sovereignty to more intrusive forms.

While there is some truth in this expectation, it is only half of the story. The history and current form of international cooperation against transnational criminality show a different picture: for decades, the field has been marked by an increasing depth of cooperation. International police cooperation is by no means restricted to the European Union (EU) but also takes place within the United Nations (UN), the Council of Europe (CoE), the Organization for Economic Cooperation and Development (OECD) and a number of other organizations and regimes. As is the case in many other areas, international policing is increasingly marked by a dense web of multi-level structures, shaping, constraining and regulating state activity.

It is the aim of this chapter to shed light on these structures and their impact on the state monopoly on the legitimate use of physical force. In order to do so, the inquiry cannot be limited to the pure exercise of force by policemen but must also look at legitimating action, the definition of problems, the prescription of certain methods of action and the authorization of the use of force (Friedrichs 2008, pp. 5–7). In the following, we describe the form and intensity of cooperation within multi-level structures in international policing (Section 31.1) and explain its origins and shape (Section 31.2). Finally, we raise the question whether multi-level governance in the field of policing is effective and meets the standards of liberal democracies (Section 31.3). While international policing encompasses a number of different issues, our empirical examples stem from the most important ones: the fight against terrorism and the fight against drugs, including money laundering. Both are considered as major transnational security threats to the state and society. While terrorism most explicitly challenges the existence of the state, the paramount importance of drug enforcement is revealed by the fact that drug dealing and addiction endanger the health of citizens and that narcotics constitute the largest of all illicit markets, endangering the economic stability of states.

### 31.1 DEVELOPMENT AND FORM OF MULTI-LEVEL GOVERNANCE

Multi-level governance in the area of policing started in highly specific sectors where states reacted on perceived transnational problems by institutionalizing cooperation: the production and trade of certain drugs and terrorism.

In both fields, interstate cooperation was launched already in the early twentieth century (Dubin 1991; McAllister 2000). However, for many decades cooperation remained weak, informal and ad hoc. While Interpol, the international organization devoted to police cooperation, had already been created in the 1920s, most states considered it as ineffective and impractical (Anderson 1989). In the 1960s, police cooperation started slowly on a bilateral level, a famous example being the 'French Connection' when the USA exerted pressure on the French police to cooperate with US police forces cracking down on cross-border drug traffic (Cusack 1974, pp. 242–4). Among European states, this issue-specific bilateral cooperation developed into the creation of regular multilateral information exchange forums in the 1970s. The first and best-known was TREVI, an informal arrangement of the European Economic Community (EEC) member states which united ministers of the interior and which was kept as informal and even confidential as possible (Bigo 1996, p. 88). However, within the EEC police cooperation was to a large degree left out of this development well until the 1990s. The format of police cooperation in its early years confirms a standard hypothesis of international relations theory: states may be willing to enter into intensive cooperation and even to become part of multi-level institutions in order to avoid collective action problems or increase their welfare, but they will do their best to preserve the core of sovereignty intact. Hence, we cannot speak of multi-level governance during this period with its issue-specific, informal and ad hoc pattern of institution-building. In consequence, the term 'multi-level governance' should not be used interchangeably with 'international cooperation.' Rather, it should be restricted to instances in which a new level of governance emerges that is at least to some degree independent from the states which have originally created it.

Since the 1970s, the situation has changed fundamentally. The EU developed into a multi-level polity with increasing geographical range, increasing institutional depth and increasing policy scope incrementally including policing. With the creation of the third pillar, the Maastricht Treaty brought the field of police and justice formally into the EU structure. At the latest since the Treaty of Amsterdam, the EU has made the creation of an 'area of freedom, security, and justice' (AFSJ) a political priority equivalent to the creation of the internal market. The Nice Treaty and even more the Lisbon Treaty provide for substantial EU legislative powers in the field of policing, and the differences in the legislative process of this area as opposed to the classical community method used for market integration have substantially decreased. There is now a European Police Office (Europol) and a substantial amount of legislation, most notably the European Arrest Warrant (EAW).<sup>1</sup>

But these developments are not restricted to the EU. The UN has developed an almost universal system of drug control which not only defines very precisely what an illicit drug is and the duties of states to act against their use but also massively restricts the policy autonomy of the participating states. In 1989, the Financial Action Task Force (FATF), a technical body of the OECD, was established, which quickly became

the cornerstone of a regime on money laundering. It provides for tight supervision of financial flows even for relatively minor sums and substantial powers, for example, for the confiscation of suspect money or the blocking of bank accounts for the participating states and even touched upon the taboo of banking secrecy (Gilmore 2004). Next to the UN and the FATF, the Council of Europe adopted the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime in 1990, and only one year later the European Community agreed on a directive against money laundering which was amended by a new directive in 2001.<sup>2</sup> In summary, there are now partly overlapping systems of multi-level governance with a territorial character in the case of the EU and with a sectoral character for all others, most notably within the UN and the OECD (cf. Hooghe and Marks, Chapter 1 in this volume). More important than this difference, however, is what they have in common.

In the first place, these multi-level systems cover a wide variety of activities relating to the monopoly of force – with one notable exception: they do not create an actor which can legitimately use physical force independent from the states. Instead, they define problems, legitimate measures, provide for methods of prosecution and authorize action relating to the states' exercise of the monopoly of force. The UN drugs regime, for instance, contains an extensive list of substances which are considered to be illicit drugs, leaving no room for interpretation. The EAW contains a list of 32 offenses for which it applies obliging states to surrender the arrested person. These multi-level systems also authorize and proscribe what states have to do when they encounter the problems identified and legitimated.

A second important tendency is the trend away from a political decision-making process to a criteria-based judicial process. This entails a reduction of the freedom of choice for state authorities when and how to use their monopoly of force. This applies to the drugs regime which makes it virtually impossible for states to follow their own path by, for example, giving drugs to addicts in a controlled and supervised fashion. But the best illustration is the transformation from the European extradition regime to the EAW. Historically, states have in principle accepted the idea of extraditing their citizens to other states for trial. As states considered this to be a deep intervention into their sovereignty, extradition even among the consolidated democracies of the EU has traditionally been slow and subject to a final political authorization. The EAW introduces a new system based on the principle of 'mutual recognition,' which was originally developed in the context of product safety but which is now being transferred to standards for the rule of law and for criminal justice. It drastically reduces the possibilities of a political veto and only foresees a purely procedural legal appeal before the surrender actually takes place. States even surrender their own nationals to requesting states following this procedure. For many practitioners and scholars, the EAW is a true revolution (Plachta 2003).

## 31.2 EXPLAINING THE EMERGENCE AND FORM OF MULTI-LEVEL GOVERNANCE

Turning to the origins of multi-level governance in the field of international policing, we seek to address why it has emerged and to explain its form. With regard to the emergence



of multi-level governance, three aspects stand out. Most remarkably, the emergence and increase of cooperation is driven by a particular problem perception. Perceiving international terrorism, drug trafficking and money laundering as problems transgressing national territories has played a key role in pressuring states to agree on intensified cooperation and the build-up of new institutions. In the 1960s, states recognized that drug traffic routes go across continents; in the 1970s, terrorists of different national origins perpetrated acts all over Europe 'internationalizing' the problem; and with the increase of cross-border economic activities in the 1980s, the laundering of drug money was perceived as an enormous threat to the economic stability of states. Today, globalized trade and abolished customs control in certain regions have augmented the pressure for internationally coordinated responses against transnational criminal activity further. Moreover, this problem perception is very much event-driven – transnational crime fighting tends to follow the 'politics of the latest outrage.' For instance, after a series of attacks, most notably on the Olympic village in Munich in 1972, terrorism moved to the top of the international agenda and after the events of September 11 the fight acquired new momentum.

While the pressure stemming from problem perception explains the establishment of cooperation, the diffusion of specific norms through institutional structures has increased the intensity and binding character of international institutions against criminal activity. The international drug prohibition regime dating back to the early twentieth century structured by a series of three international drug treaties under the aegis of the UN is a case in point. Today's interpretation of drugs has been developed over the course of decades. The illegality of drugs and the interpretation of their use as deviant is something which is taken more or less for granted. Nearly all states of the world have signed the UN treaties, accepting legal constraints regarding the production, sale, possession and consumption of drugs (Levine 2003, p. 145). Prohibiting money laundering of drug profits pertinently shows that next to the binding character of the regime's rules, the acceptance of its underlying norms influences the compliance of the signatory states. States do not want to appear 'soft' on drug trafficking making it very difficult to articulate reservations against particular measures against money laundering (Dombrowski 1998, p. 15). Over four decades, the universal acceptance of drugs as illicit and the ensuing legal sanctions regarding trade and consumption has resulted in a 'global drug prohibition regime' (Nadelman 1990).

Finally, the effects of a perceived problem pressure and the diffusion of global norms have been paralleled and reinforced by functional and organizational spillover effects in the field of international policing. In particular, the completion of the EU's internal market with its abolition of internal borders established *de facto* a common internal security zone decreasing the validity of borders both as instruments of control and obstacles to transnational criminal activity (Monar 2001, pp. 754–5). The successive inclusion of the field of policing and justice within the EU structure leading to the AFSJ impressively demonstrates this spillover from the economic sphere. The introduction of the principle of mutual recognition within the framework of the EAW represents the major example for this effect. While originally introduced by the European Court of Justice (ECJ) in its famous 'Cassis de Dijon' ruling in 1979 for the area of economic cooperation, the application of mutual recognition in criminal matters now helps judicial decisions travel across borders. However, spillover effects can also be found outside the EU. When in

1988 states established the money laundering regime with the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the basic idea to make drug dealing more risky for drug traffickers was taken up quickly by other institutional forums like the FATF and the Council of Europe.

While international policing stems from various sources, its form is above all due to the general reluctance of states to cede national sovereignty to a supranational level. Overall, modes of cooperation are preferred that preserve a maximum of sovereignty and the development of the field clearly demonstrates this preference. In the 1970s and 1980s, ad hoc measures and expert-driven cooperation, mainly through different police networks (such as TREVI) were dominant. The epistemic communities of high-ranking police officials and their demands for pragmatic and functional cooperation have shaped to a great extent the preferences of states on the outlook of international policing (Bigo 1996). However, and despite these preferences for sovereignty-preserving forms of cooperation, the institutional framework matters. It is thus no surprise that over time the most intensive and intrusive forms of international police cooperation have emerged in the EU. Even more as the EU is one of the rare examples of a governance body in the international arena bundling together different policy competences (cf. Hooghe and Marks in this volume). EU member states favored efficiency-enhancing cooperation in the EU to the UN's sovereignty-preserving but less effective framework.

### 31.3 EVALUATING MULTI-LEVEL GOVERNANCE

Having described multi-level governance in the field of crime fighting, we have traced its origins and sought to explain its form. It is now time to take a step back for an evaluation. The main virtue has been on the side of capacities for effective problem-solving. While the central problems of transnational crime such as drug-trading and terrorism persist, institutions have been set up to deal with these problems. They seriously constrain national policies and work on a shared normative understanding of the problems at hand. The main deficit of multi-level governance is its record regarding the protection of individual rights and democratic participation. The evaluation can thus be framed according to the classic opposition of security versus freedom: security has been enhanced by the system, but freedom seems to suffer.

The straightforward way of proving effective problem-solving capacity would seem to be measuring problem reduction. In the case of crime fighting, one could think of falling crime rates. The difficulties with such numbers are however manifold. Not only is it notoriously difficult to compare data between countries, it is also difficult to compare data across time. Definitions of crime are socially constructed. Hence, they are subject to changes and can be easily criticized. Moreover, once a social phenomenon has been defined as a crime and moved into the focus of the prosecuting agencies, official numbers might rise and not fall: if more effort is put into crime detection, more crimes will be detected. Nonetheless, crime rates might be used as an indicator of problem-solving capacities. We could consider the number of drug-related deaths to be an indicator of the overall effectiveness of drug policies. It rose in Western Europe until the early 1990s and then stagnated with a slight decrease since 2000.<sup>3</sup> With regard to the EAW, arrests and surrenders constitute the relevant figures. The last Commission report on the EAW

(COM (2007) 407) mentions that 6900 warrants were issued in 2005, leading to 1770 arrests of which 86 percent were surrendered to the issuing member state. Numbers have increased in comparison to the preceding year. Surrender is much faster than under the old extradition procedures: it is now under five weeks, while it used to be around a year.

While these numbers hint at successes, we believe a different approach tells us more about problem-solving capacities. The question is whether institutions have been set up which are equipped to deal with problems effectively. The mere existence of institutional structures is not enough. Interaction in them has to be intensive enough to make successful cooperation possible. But what is more, the output produced should be of a binding character. It should not be mere talk, but ideally bind actors in two ways. First, the established rules ought to be binding: it should be difficult for actors not to comply with them. Second, the regime should establish norms that intrinsically guide actor behavior: they accept that the underlying rationale of the regime is right. If a regime is binding in this sense, it is well equipped to deal with problems effectively.

Both are the case in the issue area of international crime fighting. First, the nation-state's monopoly of force has become embedded into a system of multi-level decision-making that constrains national policies. The constraining effect is highly visible in the drug-prohibition regime. The UK and Germany have been repeatedly criticized for establishing shooting galleries and for testing the prescription of heroin to addicts. Second, the criminalization of drugs that is at the heart of the UN regime has become a universally accepted norm. Similarly, it is hardly disputed that the fight against money-laundering is a successful method to combat drug trafficking. The norm is so powerful that very elaborate prosecution systems have been set up and traditional taboos such as banking secrecy have had to give way. We can thus conclude that the multi-level governance of crime fighting is rather effective.

While making banking secrecy less absolute has been interpreted as a sign of effectiveness, it constitutes also a deficit. More security may come at the expense of freedom – and banking secrecy is one expression of the individual's right to privacy, which is a fundamental freedom. As exemplified in this case, multi-level policies against crime have impacted heavily on individual freedoms. The most significant impairments have occurred in the fields of informational freedom/privacy and of judicial rights. Informational freedom refers to the individual's right to determine or at least to know who possesses what information about him or her. One case in point is the exchange of data with Europol. Europol's main activity is currently the compilation and analysis of data. Data protection is not governed by a common standard, but by the national standards of the member state that inserted particular data into the system or – significantly – that has last edited it. However, all member states have to comply with the 1981 Convention on Data Protection by the CoE. For countries with a higher standard than that prescribed by the convention the arrangement may effectively lower standards (Lavenex and Wagner 2007, p. 238). The data protection standards may be further lowered by exchange with third countries. The impairments result directly from the multi-level nature of the cooperation.

The same is true for judicial rights. As has been outlined, the EAW is the first application of the principle of mutual recognition to the creation of the AFSJ. Mutual recognition measures are easier to agree on than harmonization legislation as they do not require substantive changes of national legislation and do not spell out the differences

between legislations (cf. Mitsilegas 2006; Lavenex 2007). However, some harmonization of procedural rights would be required to give them effect in proceedings across Europe – but the member states have not yet agreed on the proposed Framework Decision on procedural rights.

A further example regarding judicial rights is the listing of terrorists by the UN Security Council and the EU to freeze their financial assets. These decisions defy due process standards in several ways. Individuals should be notified of the decision, they should be given reasons for the decision and should be able to challenge it in court. However, due to the multi-level nature of the issue (national intelligence, international decision, national implementation) it is unclear whether such decisions can be challenged, and if so, in which courts (Frowein 2004, p. 76). The EU has adopted regulations that transpose the UN decisions, but also add further persons to the lists. The ECJ has been hesitant to check whether the listing harms fundamental rights (cf. Peers 2003, p. 239; Eeckhout 2007; Guild 2008, pp. 181–90). However, in its recent *OMPI*<sup>4</sup> judgment it required the Council to fulfill certain due process requirements when putting somebody's name on the list (fair hearing, statement of reasons and effective judicial protection). The Council subsequently changed the procedure so that listed persons will now be informed and given some reasons for their listing.

Multi-level governance has not only impacted negatively on individual freedoms. Policy-making in the issue area also performs poorly as regards democratic participation. The dominant mode of decision-making is executive multilateralism: executives are the only actors that have a say in the final decision and very often they are the only ones involved at all. While this system of governance has a multi-level nature, the units at the lower level are not made up of heterogeneous factions that could affect decision-making (cf. Mayer, Chapter 3 in this volume). Rather, all factions except for the executive are excluded. This is of course true of governance by intergovernmental networks, but also of EU governance in the field, which has been described as 'intensive transgovernmentalism' (Lavenex and Wallace 2005). National parliaments are confronted with fixed bargains and the European Parliament does not have a say either as it is merely consulted. However, the latter's involvement has gradually increased. With the Treaty of Lisbon it would get co-decision regarding some aspects of police cooperation. Mutual recognition as a method is democratic at first sight, as it keeps national legislation in place that has been adopted according to democratic processes. However, it subjects individuals to criminal law that has been produced in a political community that is not their own (Mitsilegas 2006, pp. 1287–8). Multi-level governance does not only limit participation in policy-making, it also depoliticizes policies as it withdraws certain policy options from political discourse. The prescription of heroin to addicts is not an option, but also pain treatment is complicated by the UN drugs regime. Development-oriented measures that could be an alternative to opium or coca crop eradication have a hard standing.

## 31.4 CONCLUSION

As in other issue areas, multi-level governance also exists in the field of policing. In fact, we have shown that the extent and the binding character of multi-level governance are

substantially higher than one might expect. While difficulties of agreement, weak forms of cooperation and a focus on technical expertise have marked the early years of international police cooperation, the picture has changed. During the last decades, states have entered into an increasingly dense web of institutions for police cooperation by no means restricted to the EU but including the UN and a number of other organizations and regimes. Today, the states' use of the police, and hence the use of their monopoly of force, becomes increasingly constrained by and embedded in international institutions. This is clear evidence of multi-level governance. States get entrapped by the unintentional consequences of initial, largely functional approaches to international police cooperation, which are difficult to change once established.

However, states do not 'give up' their monopoly of force – there is no sign of supranationalization of the actual use of force in the OECD world. Cooperation against transnational crime is much more about regulating the exercise of the monopoly of force by embedding it in a system of multi-level decision-making. Different levels assume different tasks in this multi-level system of governance: regulation and legitimation take place at higher levels, while the actual use of force is still located at the lower level. In our view, the EAW illustrates best this typical pattern of multi-level governance in areas close to the state monopoly of force. While the EAW does not allow police agents from one state to arrest a criminal in another state, a commonly agreed legal framework regulates how states should proceed when putting their monopoly of force into the service of other states. Hence, only states have police agents with the right to use force but this right is embedded into an increasing net of supranational or international regulation.

A perception of certain problems in the field of policing as crossing borders has led to the creation of policy-making institutions at a level beyond the nation-state that would match the territorial scale of the problems (cf. Geys and Konrad, Chapter 2 in this volume). Today, states jointly exercise policy-making authority by adopting substantial rules in the field of police activity. These substantial rules become increasingly precise and detailed and also include strong monitoring mechanisms. As a result, states still possess the monopoly of the use of physical force but the concrete usage and its legitimating reasons are increasingly determined by international or supranational institutions. States are not free any more to decide whom they want to extradite or rather not to extradite, whether they want to provide shooting galleries and under which conditions to confiscate money. These systems are difficult to change because such change would require supermajorities. Exit is equally close to impossible either because of a prevailing normative hegemony in the fields of drug control and money laundering or because it is linked to the overall structure of the EU. The EU in addition even increasingly introduces supranational jurisprudence into the field.

How effective and legitimate is this multi-level governance of international policing? Overall, it has been rather effective as it has been able to improve security, but this has come at the cost of less individual freedom and decision-making processes that do not meet democratic standards. Low politicization, low involvement of civil society versus executive multilateralism in decision-making characterize the field. Yet, if international police cooperation is meant to grow in the coming years, a balanced approach to freedom and security needs to be found. Multi-level governance in the field of policing should not come at the price of individual freedom and the lowering of established democratic standards.

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