

## 2 The Bretton Woods Moment

### Hierarchies, Networks, and Markets in the Long Twentieth Century

---

*Miles Kahler*

Rapid growth in global governance formats that diverge from formal, multilateral institutions has been framed as unprecedented. The labels differ – informal international law-making, private transnational regulatory organizations, private authority, new interdependence approach – but the conclusion is the same: the era of conventional intergovernmental organizations (IGOs) and the mode of governance that they represent has at best reached a plateau, and at worst faces erosion and decline.<sup>1</sup> These observations occur, somewhat paradoxically, during an era of globalization, an expansion of cross-border economic flows and deeper integration that was promoted by the very IGOs that are now viewed as less central to global governance.

This apparent paradox can be explained by the transitory monopoly that IGOs – and the states behind them – acquired during a particular historical moment, when hierarchies (national governments) reasserted their control over markets, internally and externally. This extension of the regulatory state was expressed internationally in the form of IGOs. Those IGOs, however, aimed to tame and constrain *both* markets and states, transferring to the global domain the regulated markets that had been built in the aftermath of war and depression and preventing the emergence of deviant forms of capitalist autarchy (and, during the Cold War, communist autarchy).

Before this mid-century Bretton Woods moment, less interventionist national governments allowed for the emergence of alternative forms of global governance. The expansion of international markets provided a challenge to both public and private actors, a challenge that was met by networks, often combining public and private actors, or by informal

The author thanks Kyle Evanoff and Frieder Dengler for their research assistance on this project. Lawrence Broz, Benjamin Cohen, Orfeo Fioretos, and Eric Helleiner provided valuable comments on an earlier version of this chapter.

<sup>1</sup> The labels applied, respectively by Pauwelyn et al. 2012; Abbott et al. 2016; Green 2013; Farrell and Newman 2014.

IGOs (IIGOs). Private governance attempted to deal with the uncertainties of markets (cartels) or the need to govern cross-border disputes (commercial arbitration) that could not be resolved through intergovernmental mechanisms. As international markets recovered in the post-1945 decades, these forms of governance resurfaced or were recreated as significant parts of global economic governance. During this latter period, however, reliance on deregulated markets as a means of constraining national governments also became part of the portfolio of global governance. With the global financial crisis of 2008–2009 and its aftermath, signs of a reversion to greater government intervention and a renewed reliance on regulation marked a further move in the cyclical influence of markets, hierarchies (both national governments and IGOs), and networks in the mix of global governance institutions.

In the first section that follows, the interwar decades (1920s and 1930s) are treated as a formative and often neglected period in global economic governance. Although economic governance was less dominated by national governments and their intergovernmental creations, governance innovations took place, and many persisted through the disruptions of depression and war. Networks and markets were important constituents of global governance. In economic domains, private and hybrid (public-private) modes of governance were significant parts of the global landscape.

Three issue areas illustrate this variety – international monetary and financial affairs, which were conducted largely by central banks (private or semi-private) and their private financial partners; cartels, through which many economic sectors governed themselves with little interference and considerable encouragement from national governments; and international commercial arbitration (ICA), which took its modern form in the decades after the First World War, offering private dispute resolution to international corporations. In the second section the Bretton Woods moment is viewed through the lens of the newly empowered regulatory state and its design of IGOs to constrain national policies and tame international markets. Finally, as the liberalization encouraged by those institutions expanded during the 1970s and 1980s, markets and networks resumed their earlier prominence in public and private global governance.

Throughout, a primary driver, which is also endogenous to this timeline of governance, is globalization – the expansion of cross-border flows of capital, goods, and labor. Globalization created the demand for governance, as well as shaping the supply, rendering IGOs less effective and alternative formats more appealing for both public and private actors. The era of dominance by hierarchies (national governments and formal

IGOs) in global governance was a moment born of particular historical circumstances (a closed world economy and triumphant regulatory states), circumstances that were inevitably undermined by the liberalization of the world economy. As the second era of globalization proceeded after 1970, the world returned to the new-old normal of economic governance: a mix of global governance institutions that reflected the IGO legacy but also awarded a greater role to networked, informal, and private modes of governance, as well as markets.

### **The Gold Standard and Networked Governance in International Monetary and Financial Affairs**

International monetary and financial governance during the 1920s represented one model of governance among three that have competed and coexisted over the past century: a network of central banks and private finance; an institutionalized IGO model (the Bretton Woods system, at least until 1973); and less institutionalized intergovernmental bargaining (the Tripartite Agreement of the late 1930s or the G7 framework of the 1970s and 1980s). Each of these was embedded in an international economy that was more or less open to cross-border financial flows, an environmental condition that influenced both the choices of national governments and the viability of these alternative forms of governance.

Before 1914 the gold standard was based on commitments to maintain a fixed parity between currencies and gold, usually reinforced by national legislation. Formal intergovernmental agreement was unnecessary given the depth of elite commitment to the gold standard. To the degree that this system, viewed as self-regulating, required crisis management, major central banks supplied the resources and limited cooperation that were necessary, although the level and importance of that cooperation remains contested.<sup>2</sup> The degree of ongoing central bank cooperation hardly merited the label of networked governance, since central bank cooperation was more often tacit than explicit, limited in time, and limited in scope to a few counterpart central banks. The line between public and private blurred in the governance of central banks themselves; ownership in many cases remained in the hands of private shareholders or, as in the case of the US Federal Reserve, governance was a blend of public and private.<sup>3</sup> In an era of large and unrestricted cross-border financial flows, both their responsibilities and their governance gave central banks close links to the private financial sector.

<sup>2</sup> Eichengreen 1992, 8; Gallarotti 1995, 80.      <sup>3</sup> Broz 1997.

After the First World War, market instability awarded central banks a more central role in the restored gold standard monetary order. Reconstruction of the gold standard became a major economic priority; Peter Temin has argued that financial leaders of the period “could not even conceptualize an orderly alternative to the gold standard.”<sup>4</sup> Central bankers understood, however, that pre-1914 institutional supports were insufficient: adherence to the gold standard and inflation-fighting credibility required reinforcement. Structural weaknesses had appeared, notably persistent surplus (United States, France) and deficit (United Kingdom) economies.<sup>5</sup> More importantly, the domestic political consensus that had sustained the gold standard was eroding as internationalist finance faced opposition from protectionist manufacturing sectors and the growing organizational and political power of labor and labor-based political parties.<sup>6</sup> Monetary policy was increasingly directed toward domestic economic ends rather than maintaining external balance and an exchange rate dictated by the gold standard.<sup>7</sup>

These political and structural strains in the interwar monetary system produced a gap between the domestic credibility and international cooperation required for system stability on the one hand, and their existing international and domestic supply on the other. Several institutional remedies were attempted during the 1920s; ultimately, all failed. The first was an attempted turn toward more formal hierarchy in monetary governance: explicit intergovernmental agreement on rules governing monetary and exchange rate policy, as a supplement or substitute for central bank cooperation. However, international monetary conferences after the First World War created neither formal institutions for consultation and coordination nor agreed rules to govern exchange rates.<sup>8</sup> Another intergovernmental vehicle, the League of Nations Financial Committee, participated, in partnership with private finance, in stabilizing individual economies during the 1920s. Its practices resembled later International Monetary Fund (IMF) conditionality with a critical difference: the loans disbursed originated with commercial lenders.<sup>9</sup>

Given the domestic political pressure placed on national commitments to the gold standard, shoring up the independence of central banks became a second institutional remedy for the postwar monetary system. At postwar international conferences in Brussels and Genoa participating governments approved the creation of independent central banks and monetary policies “freed from political pressure and ... conducted solely

<sup>4</sup> Temin 1989, 14.      <sup>5</sup> Eichengreen 1992.

<sup>6</sup> Simmons 1994.

<sup>7</sup> Eichengreen 1990, 1992; Simmons 1996.

<sup>8</sup> Pauly 1997; Eichengreen 1990, 1992.

<sup>9</sup> Pauly 1997; Jacobsson 1979.

on the lines of prudent finance.”<sup>10</sup> This shared model of central bank governance was also diffused to the periphery in technical assistance missions to Latin America and other developing regions by the “money doctor,” Princeton’s Edwin M. Kemmerer.<sup>11</sup>

Growing independence and close ties to private finance enabled central banks to create a third governance alternative: networked cooperation that would have been difficult for their more politically constrained governments. The central bank network that emerged in the 1920s was an early example of a transgovernmental network (TGN), connecting relatively autonomous actors in national governments to each other. Although central bankers recognized that closer central bank cooperation was necessary to defend the reconstituted gold standard, collaboration was often difficult to implement. Nevertheless, cooperation in the central bank network increased during the 1920s through exchange of information, routinized provision of services, negotiating loans for stabilization, and managing German reparations.

The central bank network was also connected to private financial diplomacy, which flourished in this era. International banks played a “quasi-governmental role” in US dollar diplomacy with China and Japan.<sup>12</sup> Thomas W. Lamont was regarded as J.P. Morgan’s “ambassador,” and considerable exchange in personnel occurred between the worlds of finance and diplomacy.<sup>13</sup> These overseas activities of US private finance were, in turn, promoted by national legislation, which relaxed regulatory restrictions on interfirm cooperation abroad.<sup>14</sup> Support from a national government that was itself reluctant to engage in global economic governance indicated that networked governance by private financial consortia often served public ends.

As Stephen Clarke suggests, despite limited international collaboration, central bankers soon reverted to their roles as *national* central bankers.<sup>15</sup> Central bank cooperation was relatively high when measured against compliance with the rules of the gold standard game: increased central bank independence produced both more consistent adherence to the gold standard and more limited current account imbalances.<sup>16</sup> Central bankers embraced the view that their adherence to “agreed rules of behavior, and especially to the principle that the maintenance of exchange rate stability should take precedence over all other economic objectives, was itself a form of cooperation that normally made other forms of cooperation redundant.”<sup>17</sup> Measured against a definition of

<sup>10</sup> Gregory 1955, 8.      <sup>11</sup> Drake 1989.      <sup>12</sup> Drake 1989, 175, 184–187.

<sup>13</sup> Pak 2013, 161.      <sup>14</sup> Pak 2013, 171–172.      <sup>15</sup> Clarke 1967.

<sup>16</sup> Simmons 1994, 138.      <sup>17</sup> Clarke 1967, 28.

cooperation as policy coordination, however, networked central bank collaboration proved inadequate to sustain the monetary order of the gold standard. As Simmons describes, greater independence meant a less cooperative stance on this measure; the narrower definition of cooperation dominated.<sup>18</sup>

The creation of the Bank for International Settlements (BIS) in 1930 epitomized global economic governance in monetary and financial affairs immediately before that monetary order collapsed during the Great Depression. The BIS was the first international financial organization, designed to facilitate the conversion of German reparations payments to commercial debt. The BIS was “conceived and designed by private financiers and central bankers” to reinforce Germany’s commitment to payment of its international debt obligations.<sup>19</sup> The organization had a second role, however. Rather than embodying an institutionalized hierarchy that supported central bank cooperation, the BIS served as a critical, central node in what had been a very loose network of collaboration among the major central banks. It became – and remains – a “club of central bankers,” dedicated to cooperation through “frequent meetings, visits, incessant exchange of information, common consultation and joint discussion.”<sup>20</sup> More ambitious institutional innovations, such as the “international corporation” (a proto-World Bank) proposed by the Bank of England’s Montague Norman, were rejected.

The failure of intergovernmental cooperation, in the form of the World Monetary and Economic Conference in June 1933, marked the effective end of the gold standard, although a gold bloc persisted until 1936. Central bank cooperation continued at the BIS, but the rebuilding of the international monetary regime, when it began in the 1930s, was dominated by national governments, first in the Tripartite Agreement of 1936 and later at Bretton Woods. The model of global economic governance characteristic of the gold standard – networked, with a prominent role for central banks and private financial institutions – did not disappear. It would reemerge when a new era of globalization commenced in the 1970s and 1980s.

An intergovernmental solution to international monetary and financial governance, in the form of an IGO, could not be negotiated during the 1920s and 1930s. That alternative may have required hierarchy: authority exerted by a dominant economic power or a collective of powers. The withdrawal of the US government from active participation in the League

<sup>18</sup> Simmons 1996. <sup>19</sup> Simmons 1993, 364.

<sup>20</sup> 1935 Annual Report of the BIS, cited in Toniolo and Clement 2005, 3. Also Jacobsson 1979, 95; Auboin 1955.

of Nations made it an unlikely partner; persistent political divides among the major European powers hindered collective intergovernmental action. Two other efforts to reinforce the gold standard – enhancing central bank independence through domestic means and building cooperation through a central bank network – worked at cross-purposes: greater independence from domestic political intervention weakened any impulse for more than the narrowest form of cooperation. As the economic crisis deepened, the networked cooperation of central banks was insufficient to preserve the gold standard. Efforts at preservation also demonstrated that too much cooperation of the wrong kind – strict compliance with the monetary rules of the game – could produce disastrous economic outcomes.

### **International Cartels: Governance in Private Hands**

Following the First World War, the limited role of national governments in both domestic political economies and global governance led to unmet demand for governance on the part of private actors. Private corporations were not devotees of untrammelled international markets. Given price volatility, particularly in commodity markets, firms in many sectors set out to tame markets through private governance in the form of cartels. As Fear describes, cartels are best considered as “voluntary, private contractual arrangements among independent enterprises to regulate the market.” They are “a strategic option between markets and hierarchies,” one that does not obliterate competition but can “reshape the rules of the game on which competition rests.”<sup>21</sup> In other words, private actors attempted to make and enforce rules to sustain a form of collective self-regulation. Their success – the persistence of cooperation over time – relied on features familiar from the literature on interstate cooperation, among them prior experience with collusion (organizational learning and the buildup of trust over time) and a more specialized and complex governance structure that served to reinforce credible commitments on the part of cartel partners.<sup>22</sup>

International cartels existed before the First World War, but “their coverage and impact became significantly more pronounced during the interwar period.”<sup>23</sup> The prevailing consensus among governments endorsed their stabilizing influence. For corporations operating across

<sup>21</sup> Fear 2006, 7.

<sup>22</sup> Storli 2014, 462; Spar 1994. See also Taylor 2007 on US domestic cartels and the positive effect of “institutionalization” for cartel success, measured by persistence.

<sup>23</sup> Fitzgerald 2015, 204.

national borders, they offered one of several strategies for expansion abroad; as a response to declining sales in periods of recession or depression (after the First World War and during the 1930s), cartels provided price stability and capacity rationalization through production quotas and agreed division of markets.<sup>24</sup> Price management was only one of their cooperative product lines, however, which could also extend to technology transfers and risk management.<sup>25</sup>

The international aluminum industry exemplified this form of private governance, which persisted through a series of cartels with different lifespans; the peak of intra-industry cooperation occurred in the 1930s.<sup>26</sup> After 1924, in the electrical equipment sector, suppliers controlled production, prices, and patents of electric lamps.<sup>27</sup> The diamond cartel, created by Cecil Rhodes in the nineteenth century, was strengthened by the acquisition of De Beers by Anglo-American in 1929. Other commodity sectors – tin, rubber, cocoa, coffee, sugar, tea, and bananas – were also cartelized. Most famously the 1928 Achnacarry Agreement among the world's three largest oil companies was designed to balance supply and demand through fixing market shares at existing levels.<sup>28</sup> By the outbreak of the Second World War it was estimated that 40 percent of world trade was governed by cartels.<sup>29</sup>

Governance of private cartels demonstrated varying degrees of hierarchy and institutionalization. In its most successful manifestation, the international aluminum cartel was incorporated as a holding company in Switzerland. Its regulation of the production of cartel members was sustained by the purchase of surplus stocks and enforced by “an independent audit company.”<sup>30</sup> Governance of the electric lamp cartel included a court of arbitration to hear disputes.<sup>31</sup>

Cartels were also supported or undermined by the hierarchies of national governments. International commodity cartels resembled contemporary multi-stakeholder agreements, in which imperial governments and their colonies, multinational corporations, and plantation owners engaged in “complicated economic diplomacy.”<sup>32</sup> Government enforcement rendered three of those cartels – tin, rubber, and tea – particularly effective.<sup>33</sup> In these cases, rather than influence through a shadow of hierarchy, national and imperial hierarchies directly supported private governance. US antitrust law and its exemptions also shaped the behavior of US corporations and their relations with international cartels.

<sup>24</sup> Fitzgerald 2015, 204; Koch 1945. <sup>25</sup> Fear 2006, 1.

<sup>26</sup> Bertilorenzi 2016; Storli 2014, 448–451. <sup>27</sup> Fitzgerald 2015, 229.

<sup>28</sup> Fitzgerald 2015, 229. <sup>29</sup> Fear 2006, 15. <sup>30</sup> Storli 2014, 450–451.

<sup>31</sup> Fitzgerald 2015, 299. <sup>32</sup> Fear 2006, 13. <sup>33</sup> Fitzgerald 2015, 229.



For example, the Achnacarry Agreement among oil majors could not apply to the United States because of US antitrust prohibitions. Alcoa could participate in the international aluminum cartel only through its Canadian subsidiary, Alcan. The 1918 Webb–Pomerene Act in the United States, on the other hand, granted antitrust immunity to export cartels. The Great Depression and the early New Deal brought an even more positive attitude toward cartels by the US government, which viewed them as a means to spur economic recovery. A domestic oil cartel, created and enforced by the National Recovery Administration (NRA) Oil Code, was later replaced by the 1935 Interstate Oil Compact, which persisted until 1972. By creating and enforcing a steel industry cartel, the NRA also “taught the steel producers how to collude.”<sup>34</sup> Throughout the 1930s and 1940s warfare or political conflict between governments disrupted international cartels, as corporations were mobilized to support the national military effort.

At the end of the Second World War, one might have predicted that international cartels and their variant of private governance in international markets would play a prominent role in the postwar order, since “most of the world thought that cartels could bring widespread benefits and that cooperation between producers was a way to avoid the ravages of cut-throat competition.”<sup>35</sup> Even before the Great Depression, the official attitude toward cartels recognized their benefits in regulating markets. The final report of the 1927 World Economic Conference concluded that international cartels “must be considered good or bad according to the spirit which rules the constitution and operation of the agreements.” That evaluation depended on whether those directing the cartel were “actuated by a sense of the general interest.”<sup>36</sup> International cartels might have been viewed as a foundation for international cooperation through self-regulation of industry and as important constituents of the postwar order. Instead an ideational turn coupled with US extraterritorial power would create a second Bretton Woods moment that eventually led to the slow demise of most international cartels and the private governance that they embodied.

### **International Commercial Arbitration: Private Governance and Its Limits**

Few forms of international governance have a longer history than ICA. The medieval law merchants created a “reputation-based system of

<sup>34</sup> Baker 1989, S72.      <sup>35</sup> Storli 2014, 448.      <sup>36</sup> Cited in Koch 1945, 133.

enforcement” to govern disputes that arose from long-distance trade at a time when domestic commercial law was rudimentary and intergovernmental means of dispute resolution did not exist.<sup>37</sup> As national legal systems developed, together with modern banking and insurance, states asserted jurisdiction over transnational commercial activity and national courts developed the techniques of conflict of laws to deal with disputes arising from cross-border economic exchange. At the same time, the industrial revolution had produced an explosion of domestic private governance in the form of commercial arbitration in England. Trade associations and exchanges provided template contracts and arbitration for their members. Through the 1889 Arbitration Act, these arbitration clauses were made enforceable under British law in British courts. In the United States, arbitration also flourished, although it remained “outside the law” until states (New York in 1920) and finally the federal government (1925) provided for enforcement of arbitration awards in the courts.<sup>38</sup> Arbitration represented a form of private authority and governance. As in the case of international cartels, however, private governance was reinforced by the hierarchy of national governments in the form of enforcement in national courts.

The first era of globalization produced heightened demand for the resolution of cross-border commercial disputes. Because of earlier domestic development of commercial arbitration, two alternative paths seemed possible. ICA could “borrow” the arbitration capabilities that existed in the major commercial centers of London and New York. Because of the central position of London and Britain in the world trading system, the London Court of Arbitration provided a practical, functioning, “low-cost option, based on a large inflow of domestic legal know-how, social legitimacy and geopolitical power.”<sup>39</sup> Another alternative, New York, provided what Jérôme Sgard labels a second “neo-imperial” project, as economic power shifted from London to New York before and after the First World War. However, traders from other European countries and the United States found London discriminatory and inflexible; smaller-scale arbitration platforms were established as alternatives in Europe.<sup>40</sup> Even though New York was promoted as a “novel, broad-based, generic model of dispute resolution,” it did not become the dominant center and model for ICA outside the United States.<sup>41</sup> A second alternative to either London or New York, an international court for private disputes at the Hague, proved too ambitious for

<sup>37</sup> Stone Sweet and Grisel 2017, 38–39.

<sup>38</sup> Macassey 1938, 190; Sgard 2016. On the history of ICA, also Hale 2015a.

<sup>39</sup> Sgard 2016, 169. <sup>40</sup> Sgard 2016. <sup>41</sup> Sgard 2016, 167.

the times, despite support from the powerful transnational movement linking arbitration and international peace.

The center for ICA that was most successful before the Second World War was situated in an unlikely location: at the headquarters of the International Chamber of Commerce (ICC) in Paris. Although initially supported by a transatlantic network of chambers of commerce and notable private diplomats, such as Owen D. Young, American business soon lost interest in the ICC arbitration services, regarding its ICA as “catering to European continental needs.”<sup>42</sup> The lack of connection to an international economic center (and its legal infrastructure) ultimately became a strength of the ICC, however, since it became identified as a more neutral, extraterritorial arbitration court. By limiting its work to international disputes, it was able, during the interwar years, to take the first steps toward developing a set of transnational legal principles to govern ICA. The organization of the ICC Arbitration Court was also multilateral and multinational: its most prominent practitioners were not those who carried high status from their national legal positions; instead, they displayed “multiple legal identities and cultures.”<sup>43</sup>

Despite efforts to disentangle the ICC’s International Court of Arbitration from national legal impediments, the number of arbitration settlements overseen by the court was disappointing during the 1920s and 1930s: in its first eighteen years, only seventy-seven cases were settled by award, and 120 by “conciliation.” Its efforts at outreach to other arbitration commissions and services were “conspicuous failures.”<sup>44</sup> The closure of the international economy, which reduced business demand as well as heightened interstate conflict, provides one explanation for the failure of ICA to expand rapidly during the 1930s.

Equally important was the inability of ICA to provide guaranteed enforcement of arbitration decisions through national legal systems, guarantees that had been crucial in the success of domestic arbitration. During the 1920s, international business pressed for multilateral conventions that would provide a set of “coordinating rules” to insure enforcement of arbitration awards across national boundaries.<sup>45</sup> Two such agreements were negotiated under the auspices of the Economic Committee of the League of Nations in 1923 and 1927, perhaps “the foremost original contribution of the League to international legislation.”<sup>46</sup> Several important economies, including the United States, were

<sup>42</sup> Sgard 2016, 172.      <sup>43</sup> Grisel 2017, 801.      <sup>44</sup> Nussbaum 1942, 219.

<sup>45</sup> Sgard 2016, 156.

<sup>46</sup> Nussbaum 1942, 22. These were the Geneva Protocol on Arbitration Clauses (1923) and the Geneva Convention on the Execution of Foreign Arbitral Awards (1927).

not parties to these agreements, however.<sup>47</sup> The relationship of the ICA regime to national hierarchies during the interwar decades was complicated: it could not succeed if it were closely tied to the national legal system of one of the major economies, and it could not succeed if it were less attached to means of enforcement through national judiciaries and relied on a purely reputational system of sanctions. The resolution of this dilemma was only achieved in the post-1945 decades when growing economic integration once again increased demand for ICA from international business and national judiciaries provided support for enforcement of its awards.

### **Hierarchies, Networks, and Markets before 1945**

The balance among hierarchies, networks, and markets in global governance during the 1920s and 1930s can be explained by three features of the global and national environments: a level of global economic openness that produced demand from business constituencies for governance arrangements; national governments that had a limited role in domestic regulation of business; and a scarcity of global intergovernmental instruments. A demand-based, functionalist explanation for this equilibrium is supported by the statements and activities of business representatives and their political allies. The restoration of the gold standard after the First World War was viewed by those elites as essential to the restoration of an open international economy and cross-border capital flows, which was essential for the reconstruction of European economies and the development of economies outside the industrialized core. Cartels could also be explained by demand for cooperation that could solve problems of coordinating international production and marketing through “the initiative, flexibility, and adaptability of trade associations rather than state direction.”<sup>48</sup> Markets regulated by private governance were viewed as instruments for market stability and corporate security. ICA was also based on demand from international business: national courts, often unversed in the intricacies of trade in manufactures and services, could not meet the demand for “speed, expert knowledge, and smooth and inexpensive methods in the settlement of disputes.”<sup>49</sup> Demands for international cooperation and peace, fulfilled neither by national nor intergovernmental action, led to increased support for these private and public-private alternatives. In the case of ICA, the peaceful resolution of commercial disputes was regarded as both a model for interstate

<sup>47</sup> Macassey 1938, 196.

<sup>48</sup> Koch 1945, 138.

<sup>49</sup> Nussbaum 1942, 219.

dispute resolution and a contribution to the reduction of a major cause of armed conflict.<sup>50</sup>

Demand-based explanations, driven by international markets and reticent national hierarchies, however, must confront the question of *whose* demand was satisfied. International business and finance, made more powerful by the partial revival of global business in the 1920s, enjoyed unmatched political influence until the Great Depression. The configuration of global governance in these economic domains reflects a particular constellation of power in domestic political economies, a configuration that was reflected in international organization. That political constellation in turn produced ideational and cognitive biases that reinforced this institutional mix of private governance and networks; the menu of plausible governance alternatives was limited by ideological presuppositions. Although challenged by brilliant gadflies such as John Maynard Keynes, the gold standard retained its hegemony in elite beliefs, viewed as an irreplaceable barrier to economic chaos. Self-regulation by cartels, sometimes with government support, was viewed as a superior means of managing international market shares and commodity markets. An international court of commercial arbitration had been quickly dismissed as an alternative to private governance through ICA. Although corporate power and self-governance persisted into the 1930s, a turn toward hierarchy as the dominant mode of global economic governance would follow the retreat from globalization and this expansion of the national regulatory state.

### **The Bretton Woods Moment in Monetary Affairs: Constraining Hierarchies and Regulating Markets**

The Bretton Woods agreements that created the IMF and the World Bank were striking innovations in international monetary governance and a departure on all important institutional dimensions from the preceding pattern of monetary and financial governance. Bretton Woods created a legalized, multilateral arrangement among national hierarchies – contracting governments – that was not dependent on a transnational network of central banks and private finance for its operation. Alternative institutional arrangements – ad hoc bargaining among the largest economies or a return to the gold standard – remained appealing to some wartime constituencies. The choice of Bretton Woods and the eclipse of the gold standard's hybrid governance can be

<sup>50</sup> Szalai 2007, 370.

explained in part by the preferences of the American and British negotiators who dominated the negotiations that created the IMF and the World Bank. The two teams were in broad agreement on an intergovernmental institution that would permit the pursuit of national economic goals within rules that would prevent competitive depreciation of exchange rates. The constraints placed on governments were not those of international financial markets, which had disappeared during the economic depression and world war. The new system was constructed by governments, for governments, and it would be managed by national governments. Rather than a return to bargaining among the great economic powers, however, Bretton Woods endorsed multilateralism in the form of IGOs that aspired to universal membership.

The design of the Bretton Woods institutions, like the governance configuration of the interwar gold standard, reflected a changed domestic balance of power. The political cleavages revealed during the Bretton Woods ratification debates in the United States and Britain demonstrated that the political underpinnings for the gold standard had eroded as a result of depression and war. The disintegration of international capital markets and the imposition of capital controls, which were countenanced by Bretton Woods, reduced the trade-off between national policy autonomy and stable exchange rates. As a result, the Roosevelt administration was able to build a new political coalition in support of the modified internationalism represented by Bretton Woods.

Resistance centered on the weakened financial internationalists of Wall Street and their representatives at the New York Federal Reserve. Institutionally, the independence of central banks, so important to the governance of the gold standard, had been reduced across the industrialized world: public ownership, viewed with great skepticism in the 1920s, had now become the norm.<sup>51</sup> Opposition to the IMF from the financial internationalists did not center on fixed versus flexible exchange rates, however, but rather on the question of *whose* system of fixed exchange rates: one managed by a network of central bankers and private finance or one managed by the finance ministries of member governments. In contrast to internationally oriented banks, export industries supported a new system that promised gains from stable exchange rates and the gradual end to foreign exchange restrictions that closed markets and distorted trade. Most surprisingly, labor, a core constituency that had been critical of the adjustment costs imposed by the gold standard,

<sup>51</sup> In the early 1930s, only ten central banks were owned by their governments (including the Soviet Union). By 1951, forty-nine out of seventy-five central banks were entirely government-owned (Gregory 1955).

supported the Bretton Woods agreements. The institutional design of Bretton Woods solved the international policy dilemmas of left-wing, labor-based coalitions through its combination of capital controls, adjustable exchange rate parities, and financial support that was not dependent on the whims of bankers. Paradoxically, given its later reputation as a proponent of economic orthodoxy, the creation of the IMF represented a political moment when two labor-based coalitions, both dedicated to policies of full employment, had achieved a position of influence in the world's two leading financial powers.

Bretton Woods also reflected the emergence of a newly confident regulatory state. Rather than accepting the orthodoxy of unrestricted capital flows, capital controls were accepted as a pragmatic necessity. Governments were confident of their ability to negotiate and manage exchange rates using new instruments, such as the US Exchange Stabilization Fund. Intergovernmental agreements would extend the regulatory state to new domains, although in certain cases, such as the International Trade Organization (ITO), those initiatives would fail. The central bank network and the BIS, threatened with extinction at Bretton Woods, would persist, but their role was sharply reduced until a new era of capital mobility and a retrenchment of the regulatory state introduced a reversion to governance that awarded a larger role to networks and financial markets.

### **International Cartels and the Postwar Reach of the American Regulatory State**

The influence of national hierarchies – particularly the United States government – on international cartels had been longstanding. US anti-trust laws had shaped cartel behavior, even though the US Congress had legislated exemptions for American firms and their participation in cartels. During both world wars, the US government had also found cartels to be useful tools of wartime mobilization. Unease with international cartels had grown in the 1930s, however, when US cartel members in the chemical and petroleum industries were discovered to have agreements with German industrial giants such as I.G. Farben.<sup>52</sup> In part because of their involvement with the Nazi regime, international cartels came to be seen not as a form of regulated competition but rather as an expression of corporatist or totalitarian power.<sup>53</sup> As the demands of

<sup>52</sup> Wells 2002.      <sup>53</sup> Fear 2006, 15; Hillman 2010, 338.

wartime mobilization eased, international cartels were targeted, including previously exempted Webb–Pomerene associations.<sup>54</sup>

The renewed assault on international cartels by the United States government was given legal foundation in the 1945 *Alcoa* case.<sup>55</sup> As Kal Raustiala describes, the strict territoriality view of American legal jurisdiction, particularly in antitrust, had eroded over time.<sup>56</sup> *Alcoa* was a Bretton Woods moment for international cartels, one in which a clash of national regulatory hierarchies was resolved in favor of an effects-based interpretation of US jurisdiction. Effects-based thinking on the part of the judiciary was encouraged by a growing awareness of international interdependence and the expanding international range of American corporations. Of equal importance was the fact that the newly expanded regulatory scope of the state increased its sensitivity to actions by private actors in foreign regulatory environments.<sup>57</sup> The redefinition of extraterritoriality provided a useful instrument for the US government to expand its regulatory reach in domains where negotiated intergovernmental harmonization of regulations was absent or ineffective. This new and more aggressive American stance against international cartels may also have reflected the availability after 1945 of alternative public instruments for exercising American power – from foreign aid to IGOs. Cartels were no longer necessary for the pursuit of public and private economic diplomacy.

Despite the US turn toward extraterritorial pursuit of international cartels, these widespread modes of private governance did not disappear from international economic governance. Debate over the charter of the ITO, which included commodity agreements and private cartels as targets of regulation, revealed a divide between the United States and American business on the one hand, and the rest of the world on the other. US business criticized the ITO's endorsement of international commodity agreements and worried that strict US antitrust enforcement would place them at a disadvantage against private cartels elsewhere.<sup>58</sup>

In contrast to their support for the turn to intergovernmental solutions in monetary affairs, European governments were less enthusiastic about the new anti-cartel line of the United States. The European Coal and Steel Community, the precursor to the European Economic Community, was an intergovernmental descendant of interwar cartels. Although private cartels in sectors such as aluminum were not reestablished in the postwar

<sup>54</sup> Wells 2002, chapter 4.

<sup>55</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945).

<sup>56</sup> Raustiala 2009, 101–103. <sup>57</sup> Raustiala 2009, 117–119.

<sup>58</sup> Diebold 1952, 17–18.



period, many commodity agreements, supported by government protection, continued as less formal networks of producers under new labels, “the direct heirs of pre-war organizations.”<sup>59</sup> The interwar tin cartel was transformed into the International Tin Council (ITC), founded in 1956, which brought together producer and consumer interests.<sup>60</sup> In the aluminum sector, private governance was supplemented by collaboration at an IGO, the Organisation for Economic Co-operation and Development (OECD).<sup>61</sup>

Informal, networked private governance in aluminum, tin, and other sectors was undermined by both national policies and markets in the 1960s and 1970s. US strategic stockpiling, which had both stabilized and destabilized efforts to manage the market in strategic minerals, ended.<sup>62</sup> New market entrants, such as the Soviet Union in aluminum and zinc and Japan in lead, as well as exchange rate fluctuations in the new monetary order, thwarted producer power to manage international prices.<sup>63</sup> The European Community (EC) reinforced the turn to the market with its more active competition policy.<sup>64</sup> Corporations in commodity sectors also had new, market-based instruments to deal with an uncertain environment in the form of contracts on the London Metals Exchange, an option encouraged by the EC.<sup>65</sup> Hierarchies (national governments and the EC) viewed “an institutional market with the key guarantees of transparency and publicity [as] the best way to fight concentration and collusive attitudes.”<sup>66</sup> Elsewhere, cartels lingered with selective support from national governments. In Japan, cartels reached their peak during the boom years of the 1960s, and some cartels were exempted from competition policy into the 1990s.<sup>67</sup> In other sectors, such as shipping, American legislation continued to exempt international cartels from antitrust action.

In the developing world, government-organized cartels, often incorporating intergovernmental agreements and organizations, became part of the demand for a New International Economic Order in the 1970s. Rather than serving private corporate interests in managing markets over the long run, the new efforts at cartelization, backed by the United Nations Conference on Trade and Development (UNCTAD), aimed to transfer resources from consumers to Southern producers in the interests of development. In earlier commodity pacts, producer and

<sup>59</sup> Bertilorenzi 2016, 258.      <sup>60</sup> Hillman 2010, 356.      <sup>61</sup> Bertilorenzi 2016, 324–325.

<sup>62</sup> Bertilorenzi 2016, 305; Hillman 2010, 356, 363.

<sup>63</sup> Bertilorenzi 2016, 323; Tsokhas 2000, 268, 275; Hillman 2010, 364.

<sup>64</sup> Bertilorenzi 2016, 305, 323.      <sup>65</sup> Bertilorenzi 2016, 338–339.

<sup>66</sup> Bertilorenzi 2016, 339.      <sup>67</sup> Fear 2006.

consumer governments negotiated intergovernmental agreements, with private participation, to manage fluctuations in supply and price. Despite its ideological opposition to international cartels, the United States during the Cold War engaged in stockpiling strategic materials, which often supported private efforts to regulate market competition.<sup>68</sup> The International Coffee Organization (ICO), perhaps the most successful major commodity agreement, was supported by the US government because of a different Cold War logic: aligning the United States with major producing governments in the developing world. Also important to the agreement were the large corporations in the United States that dominated coffee roasting (and purchase of coffee imports) and viewed the ICO as a means of reducing competition. As Robert Bates argues, although the ICO was formally an intergovernmental agreement, it was more properly viewed as an example of complex or hybrid governance, “a coalition among bureaucrats, politicians, and firms that used the power of states to restructure markets.”<sup>69</sup> In similar fashion and for similar reasons, the US government joined the ITC, which was supported by another international agreement that included both producers and consumers. These agreements dissolved with the end of the Cold War, the deepening of anti-cartel, pro-market ideology, and new entrants outside the agreement.<sup>70</sup>

Those commodity cartels based solely on producer governments, in sectors such as oil, bauxite, and copper, were less successful. As their private counterparts discovered, international markets were increasingly difficult to control as the second era of globalization accelerated. A more surprising cause for the failure of commodity cartels was the inability of producer governments to create, through intergovernmental agreement, a hierarchy that could sustain market-regulating rules. The Intergovernmental Council of Copper Exporting Countries was not governed by robust institutions or binding rules; it was unable to overcome divergent positions on copper prices among its members.<sup>71</sup> The most famous and long-lived of these organizations, the Organization of the Petroleum Exporting Countries (OPEC) was not, despite its reputation, a cartel.<sup>72</sup> Control of world oil prices resided at times with Saudi Arabia and its Gulf allies, but Saudi price leadership was not exercised as a result of collective agreement by OPEC’s members. OPEC was not able to reconstruct the “supra-sovereign constraints” or “private treaties” devised by the corporate oil cartel; the “oligopoly of nation-states has not

<sup>68</sup> Bertilorenzi 2016, 269.      <sup>69</sup> Bates et al. 1998, 216.

<sup>70</sup> Bates et al. 1998, 227; Hillman 2010, 363.      <sup>71</sup> Mingst 1976, 273–275.

<sup>72</sup> Alhaji and Huettner 2000; Colgan 2014.

been able to duplicate those state-like efforts.”<sup>73</sup> Market pressures introduced by oil producers that were not part of OPEC were similar to those faced periodically by earlier corporate cartels. A more significant obstacle to a cartel of government producers rather than multinational corporations were the political incentives against taking a long-term view of the industry’s interests. Many OPEC member states were dependent on oil revenues for economic performance and, ultimately, political survival. As a result, their domestic interests often diverged, and they failed to regulate supply if such steps would produce short-term political costs. For some observers, OPEC was best defined not as a cartel, but as a “political club,” generating domestic credit and diplomatic influence for its members.<sup>74</sup>

### **International Commercial Arbitration: Evolution beyond the Reach of the Regulatory State**

If the international rise of formal intergovernmental institutions and the domestic expansion of the regulatory state subordinated or eliminated certain forms of private governance, ICA appeared to be an exception. As the global economy gradually liberalized in the 1950s and 1960s, the newly expanded regulatory state created more demand for ICA from those who had to negotiate this complicated environment. During the Bretton Woods moment, ICA had evolved in two directions that would make it more attractive as a site for commercial dispute settlement. In contrast to the ICC model of the interwar decades, which was often implemented by businessmen rather than lawyers, ICA after 1945 was increasingly legalized and professionalized.<sup>75</sup> As a result, ICA was better able to meet international business demand for the arbitration services required in a more complex regulatory environment.

The shadow of hierarchy was also important: national governments provided important support for ICA through formal and informal intergovernmental initiatives. The 1958 New York Convention,<sup>76</sup> negotiated and ratified after intensive lobbying by the American Arbitration Association and the ICC, replaced the two Geneva conventions negotiated in the 1920s. The New York Convention insured that private arbitration decisions would be enforced in the domestic courts of its signatories. Soft law intergovernmental institutions – UNCITRAL and

<sup>73</sup> Moran 1987, 606.    <sup>74</sup> Colgan 2014, 616.    <sup>75</sup> Grisel 2017, 808.

<sup>76</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

UNIDROIT<sup>77</sup> – provided technical support for ICA by offering voluntary guidelines for tribunals and model arbitration laws for states.<sup>78</sup> ICA had finally discovered its necessary and symbiotic relationship with national legal systems and judiciaries as its own professional cadre developed a body of transnational rules for arbitration, rules that were not dependent on the national law of any one country or group of countries. The process of professionalization worked in tandem with the New York Convention to spread ICA beyond its Atlantic core. As Hale demonstrates, ratification of the New York Convention was promoted not by national governments or domestic lobbies, but by “transnational communities of legal practice,” those professionals who identified with the ICA legal order and its institutions.<sup>79</sup> The shadow of hierarchy in ICA – national enforcement and intergovernmental agreements – was one element in a landscape of complex governance that included both networks and hierarchies. The demand for governance was, in turn, driven by the expansion of cross-border international exchange during the Bretton Woods moment.

### **Networks and Markets in a New Era of Globalization**

As first the Atlantic and then the global economy liberalized after the 1960s, a second era of globalization set the conditions for a reemergence of networks and markets as central constituents of global economic governance. The need to protect domestic financial systems from the consequences of cross-border lending as well as the management of international financial crises awarded renewed importance to the network of central banks with their close links to the private financial sector. Rapid growth in international trade led to an explosion in demand for ICA. The opening of international markets destabilized international cartels, however, and a hardening of pro-market ideology completed their transformation from instruments of international cooperation to symbols of abusive private collusion. A convergence among the major industrialized countries on competition policy and a deepening commitment to market-based policy solutions led to a final assault on a form of private economic governance that had once been pervasive and accepted.

<sup>77</sup> The United Nations Commission on International Trade Law and International Institute for the Unification of Private Law.

<sup>78</sup> Hale 2015b, 487–488. <sup>79</sup> Hale 2015b, 484.

### **Central Banks, Private Finance, and Global Financial Governance**

As cross-border financial flows grew, and new offshore markets attracted banks from the major financial centers, the regulatory role of central banks – enhanced during the Great Depression and after – led to the creation of a formal regulatory network, the Basel Committee on Banking Supervision (BCBS), headquartered at the BIS. Through its initial Concordat and subsequent revisions, the BCBS aimed to prevent financial institutions from escaping supervision in their international lending operations. Central bank coordination in banking regulation and supervision is not highly legalized, however. Apart from an agreement on capital adequacy standards (Basel I), early understandings reached in the BCBS were designed to extend national banking supervision in an agreed fashion to offshore and international financial markets. After a move toward more self-regulation by the largest international banks in Basel II, the global financial crisis of 2008–2009 produced a return to more regulatory supervision by central banks and other national regulatory authorities (Basel III).

Increased capital mobility also increased the likelihood of financial crises. The major central banks, individually and collectively, played a role in the management of those episodes of financial instability. In the largest financial crises to affect the developing world – the Latin American debt crisis of the 1980s and the Asian financial crisis of 1997–1998 – central banks were able to provide a limited amount of finance more rapidly than the IMF. Given their mandates, however, such lending was directed to preserving the stability of their domestic financial systems and the soundness of their national financial institutions. Although they might take a systemic view of the spillover effects from financial crises in the emerging economies, the major central banks bore no obligations, informal or formal, to assist the recovery of debtor economies. Far more important has been cooperation among the central bank network in managing crises in global financial markets: October 1987 (stock market crash), September–October 1998 (Long Term Capital Management's collapse), and, most importantly, the global financial crisis of 2008–2009. In these cases, central banks coordinated the provision of liquidity to the financial system at a time when confidence appeared to be collapsing.

In these domains of financial regulation and crisis management, a network of central banks and private financial actors did not supplant IGOs, particularly the IMF. In recent financial crisis management – such as the successive Greek programs during the eurozone crisis – the troika

that oversaw Greece's adjustment program included the IMF, the European Central Bank, and the European Commission. The G20, an IIGO, played a central role in encouraging policy coordination during the global financial crisis. Global coordination of financial regulation is now centered on the Financial Stability Board, a TGN that includes representatives from the governments of major national economies, international financial institutions, and international standard-setting bodies.

In the new era of financial globalization, the central bank–private finance network of the 1920s has been revived and embedded in a larger system of governance that includes governments, IGOs, and representatives of private finance, such as the Institute for International Finance. As in the earlier period, independent central banks worked under economic requirements, often incorporated in their statutes, that were imposed by their domestic principals. These goals, whether inflation targets or full employment, created tension with the system-stabilizing role of central banks. In contrast to the pre-Bretton Woods years, however, the principals of central banks are never in question. No matter how independent their institutional status, central banks ultimately respond to politicians and their publics.<sup>80</sup> Close ties to the private financial sector remain, particularly in the case of those central banks with regulatory oversight. Private finance, however, does not act as a co-equal in governance of the international monetary and financial system, as it often did before the Great Depression. Networks have supplemented hierarchies in an era of expanded financial markets, but they have not displaced them.

### **International Cartels: Beleaguered but Persistent Private Governance**

Few forms of governance have experienced changes in public perception and official acceptance as radical as those of international cartels. This once pervasive form of private governance has, in the words of Jeffrey Fear, witnessed “rise, boom, collapse, revitalization, gradual decline, and then criminalization.”<sup>81</sup> American power and US willingness to extend its antitrust legislation extraterritorially signaled a more hostile international environment for international cartels after 1945. Corporate cartels continued to be created, but their members had significant incentives to conceal their existence. Only when US agencies used a new enforcement tactic and played on incentives to defect from cartels did

<sup>80</sup> On the political limits on Federal Reserve independence, Binder and Spindel 2017.

<sup>81</sup> Fear 2006, 18.

enforcement accelerate and gain what appeared to be a sharp uptick in success.<sup>82</sup> Data from these prosecutions demonstrate that international cartels continue to exist and that, counter to the beliefs of many economists, they are not “fundamentally unstable.” As was the case with interwar cartels, successful cartels have displayed institutionalization: “new rules, including governance and compensation systems that raise the quality and credibility of information and better align individual firms’ incentives with those of the group.”<sup>83</sup>

The end of the Cold War and the rise of market ideology in the industrialized world led to a withdrawal of support from intergovernmental commodity agreements by consumer governments. The Reagan administration left the ITC. The International Coffee Agreement, which ceased setting export quotas in 1989, has witnessed repeated departures and reentries on the part of the United States government. Anti-cartel ideas and networks have also spread from North to South. Competition policy diffused to the developing world, targeting a resilient population of private international cartels. By 2017, nearly 140 jurisdictions had competition laws and institutions. Cooperation grew among national competition authorities, through support from the OECD and UNCTAD as well as the International Competition Network.<sup>84</sup> Preferential trade agreements, which proliferated in the era of globalization that began in the 1990s, also served as a means of strengthening commitments to competition policy, particularly at the regional level.<sup>85</sup>

The private governance of cartels has become identified in prevailing pro-market ideology with negative effects on a wider group of stakeholders. The recent history of De Beers, a central player in the long-running diamond cartel, demonstrates both the obstacles to maintaining a contemporary cartel and the ways in which new actors can change the normative complexion of a cartel. As the 1970s had for the aluminum cartel, the 1990s introduced a number of challenges to the diamond cartel: political change in South Africa; the collapse of the Soviet Union, a major diamond supplier that had supported the cartel; new entrants such as Angola; and, an antitrust case, brought by the US Justice Department, alleging price fixing in the market for industrial diamonds.

<sup>82</sup> Storli 2014; Levenstein and Suslow 2011. The new tactic was a 1993 leniency program that offered exemption from fines in exchange for cooperation by firms that were cartel members. The EU and other major economies soon followed the more aggressive US stance toward the prosecution of international cartels. The case that marked a turning point in enforcement strategy was the lysine cartel, which had Archer Daniels Midland at its center.

<sup>83</sup> Levenstein and Suslow 2011, 456.

<sup>84</sup> Horna 2017; Aydin and Büthe 2016.

<sup>85</sup> Horna 2017, 87.

Allegations that De Beers and others were trafficking in “conflict diamonds” and sustaining violent civil wars in Africa appeared to deliver a final blow.

The launch of the Kimberley Process in 2002, however, demonstrated that a canny cartel could use control of supply to its advantage, while at the same time burnishing its image. This “extraordinary enterprise” created a “complex certification system for all diamonds and a commitment by all participants to adhere to the rules embedded in the system.” Since it provided an internationally recognized reason for maintaining oversight (and restriction) of the supply of diamonds, placed De Beers in a central role, and rewarded those who could certify their supply chain (i.e., De Beers), the Kimberley Process was a positive development for the diamond cartel.<sup>86</sup> This alliance of “Baptists and bootleggers” also suggested a new role for international cartels if their self-interested cooperation could also be portrayed as supporting other, valued international ends.

### **International Commercial Arbitration in a New Era of Globalization**

The new era of globalization produced increased demand for the private, networked governance of ICA. The rapid expansion of international commerce since the late 1950s has been the principal catalyst for a parallel explosion in the number of ICA centers and caseloads: a recent estimate has found 207 established international arbitration centers in 102 countries; with few exceptions, all are private entities.<sup>87</sup> For some observers, this archipelago of arbitration signifies a “networked set of institutions and organizations” that constitutes a “transnational system of governance for transnational business.”<sup>88</sup> For internationally active corporations, this system of governance has usurped the dominance of national courts and legal regimes. Those who espouse this transnational view of the ICA regime accept a central, constitutional role for the 1958 New York Convention and its requirement for acquiescence and collaboration on the part of national judiciaries. They argue, however, that the content of the New York Convention largely matched the preferences of the ICC, not national governments, and that the convention was the “first treaty of global scope to make decisions issuing from private, transnational legal process directly effective within national legal orders.”<sup>89</sup>

<sup>86</sup> Spar 2006, 205; 1994, 39–87.

<sup>87</sup> Mattli and Dietz, 2014, 2–3, figures 1.1 and 1.2; Stone Sweet and Grisel 2017, 45–58.

<sup>88</sup> Stone Sweet and Grisel 2017, 35. <sup>89</sup> Stone Sweet and Grisel 2017, 61.



Those who emphasize the continued anchoring of ICA in national legal hierarchies point to the failure to develop transnational contract law. Most transnational contracts incorporate a choice of national law, one which typically reflects the preferences of the most powerful participants.<sup>90</sup> The ICA universe is also far from universal: islands of resistance remain, particularly among the emerging economies.<sup>91</sup>

The spread and acceptance of ICA, its institutions, and its legal framework, which does not distinguish sharply between hard and soft law, is owed in part to a growing professional community of those specializing in arbitral law. These arbitrators set the stage for the rapid growth of ICA during the decades of globalization through their judicialization of arbitration and their role as brokers between different systems of national law.<sup>92</sup> The expansion and acceptance of the system, with its necessary compromises of national legal sovereignty, was also owed to its highly competitive structure: hosting an arbitration center attracts valuable business. The system also reflects the power of a constituency, major multinational corporations and their home governments in North America, Europe, and Japan. Whatever its residual dependence on national legal hierarchies and their judiciaries for enforcement, ICA represents a variant of networked economic governance – a network of ICA centers supported by a network of transnational legal expertise – that has flourished because of the acceptance of major economic powers and the demand from international business for its services during an era of globalization.

### **Global Economic Governance in the Long Twentieth Century**

Although most accounts of global governance begin with the appearance of intergovernmental economic organizations in the late nineteenth century, governance of cross-border exchange, in which private actors operating under informal rules play a central role, has an even longer history. The mix of national hierarchies and their IGO creations, networks of public and private actors, and markets has varied with the growth of international trade and capital flows during two eras of globalization and the recession of cross-border economic exchange during the middle

<sup>90</sup> Mattli and Dietz 2014, 13.

<sup>91</sup> Among them: China, Argentina, Indonesia, South Africa, and the Persian Gulf states (Mattli and Dietz 2014, 65).

<sup>92</sup> Grisel 2017, 793–794.

decades of the last century. In recent decades, that exchange itself has become more complex. The growing significance of intellectual property, services, and global value chains has contributed to heightened demand for governance that could not be supplied easily or efficiently by national governments in the form of international agreements, rules, or institutions.

A second driver of change also influenced the balance among governance formats over the course of the century. The democratization of economic governance within the industrialized states led to the inclusion of newly organized interests and stakeholders beyond those private interests engaged in cross-border exchange. The demands from these new actors produced an expansion of the scope of domestic governance in the form of the regulatory state. These changes brought the downfall of the gold standard, which had also displayed structural weaknesses, and produced the Bretton Woods moment, in which national hierarchies asserted themselves through intergovernmental regulation of domestic and international markets. The same changes began a shift in public policy toward private international cartels. Their effect on the evolving ICA regime was less profound, although the assertion of national regulatory authority probably speeded efforts to ground ICA in an international convention. Following the Bretton Woods moment, new intergovernmental agreements and organizations produced a substitution effect, supplanting earlier governance by private or hybrid networks in a world in which trade and investment had reached a low ebb.

Networked and private governance survived the Bretton Woods moment and enjoyed a revival as economic globalization accelerated in the 1980s and 1990s. In contrast to the interwar decades, however, renewed demand had to be accommodated within parameters set by national legislation and regulation. What has emerged is not a displacement of hierarchy and intergovernmentalism by markets and networked private governance, but a more complex combination of hierarchy, market, and networks. Building on longstanding links to the financial sector, the network of central banks acquired a new role coordinating banking regulation and supervision across national borders. As other regulators became engaged in regulatory coordination, central banks were embedded in a larger network centered on the Financial Stability Board, a new institution that was proclaimed, the fourth pillar of global economic governance. In the face of financial and banking crises, which grew more frequent with the increase in cross-border capital flows, central banks also retained an essential role as lenders of last resort.

Based on recent evidence, international cartels also became more widespread during the second era of globalization. Apart from those that

could evade the extraterritorial reach of American antitrust law, however, cartels had to operate in the shadow of illegality, a stark contrast to their acceptance before the Bretton Woods moment. Rather than choosing to regulate cartels, as some had proposed at the end of the Second World War, the United States and other major economies chose to destroy them, assisted by the pressure of expanding international markets. For most cartels, a strategy of accommodation with the new regulatory reality was not possible. Finally, ICA managed a successful disengagement from national oversight by providing services that were highly valued by international business. By creating a species of private governance that did not collide with or adopt the legal order of any of the major economies, ICA could proclaim a transnational identity.

Although they represent networked and private governance rather than the institutionalized and legalized governance of IGOs, each of these modes of governance relied upon and was strengthened by hierarchy: the support of governments, intergovernmental agreements, and IGOs. The cooperation of central banks alone was unable to halt the Great Depression, and, despite their critical role during the recent global financial crisis, leading central bankers were insistent in asking for governments to provide fiscal expansion to support their provision of liquidity to the financial system. The transgovernmental network of central banks and other national financial regulators ultimately rested on authority delegated by national governments. Successful international cartels had relied on explicit government support or regulatory forbearance during the 1920s and 1930s; the withdrawal of that support after 1945 and its replacement with legal sanctions and policies to promote competition transformed the incentives for participation in this form of governance. The fate of intergovernmental commodity agreements underscored the requirement of support from both producer and consumer governments. Finally, during the interwar decades, ICA lacked a guarantee that the judiciaries of major economies would enforce arbitral decisions, a shortcoming that reduced its appeal and its expansion. The New York Convention added that important and essential ingredient, enabling the expansion of ICA during a new era of transnational business activity. Even when governments and IGOs were not evident in governance, hierarchy cast a long shadow.

International markets, both promoted and regulated by global economic governance, have also served as instruments of governance, deployed by governments, individually and collectively, for their individual and collective ends. Like the regulatory state, the expansion of international markets could be both an ally and a foe of other forms of governance. The conditionality of the IMF was strengthened when

private financial markets supported its policy recommendations to governments (and often they did not); cross-border financial flows disrupted fixed exchange rate systems under both the gold standard and Bretton Woods. International markets disrupted carefully crafted cartels, which aimed at market regulation in the interests of their members, and later supported efforts by competition authorities to discipline private collusion. Divergent national efforts to regulate markets provided a major stimulus for the growth of ICA.

Two drivers were central in the variation of global economic governance over the long twentieth century: globalization – the ebb and flow of cross-border exchange – and the rise and evolution of the regulatory state. The United States and its public and private sectors reflected and deepened these drivers. The respective, divergent fates of these forms of complex governance depended on the mobilization of interests that lay outside their core constituencies – international finance and business – and the power wielded by those interests. Before and after the Bretton Woods moment, global economic governance often embodied the power of private business and its favored representatives. In the case of central banks, their nationalization and subordination to national economic authorities rendered their role less contentious and more secure. Nevertheless, their regulatory role and their position as guarantors of financial system stability meant that they had to maintain close ties to the financial sector and, at the same time, avoid any appearance of collusion with private finance. International cartels finally lost the contest for acceptance to a belief that their self-interested cooperation, manifest in price fixing and market sharing, operated against the public interest, whatever the other benefits provided by their cooperative arrangements. ICA remained largely outside public controversy, since its services were limited to major corporations and their private dispute settlement was not read as imposing costs on those outside the arbitration chamber. When arbitration was advanced in other domains, however, the asymmetry between large corporations and their opponents quickly sparked political conflict, whether in the widespread inclusion of arbitration clauses in consumer purchase contracts or the introduction of investor–state dispute settlement into trade agreements. In those cases, arbitration seemed weighted toward powerful economic interests and opposed to those of the wider public.

Although private power has often seemed unlimited in global governance, it is far more circumscribed today than it was in the early decades of the last century. What has disappeared with that private hegemony is the normative aura that once surrounded private or semi-private governance and, to a lesser degree, the authority of markets. Central bankers, the

lords of finance, were the guardians of the gold standard, which symbolized for many a stable and unshakable international economic order. International cartels were viewed as possible building blocks for wider international cooperation. Commercial arbitration was part of a much larger movement that saw the peaceful resolution of disputes as transferable from the private domain to interstate conflict.

That normative environment is long past: governance is now viewed instrumentally, by both its proponents and its critics. The legitimacy of all forms of global governance are increasingly challenged by stakeholders whose interests have been ignored and publics that demand more accountability. Those normative challenges are likely to increase variation and experimentation in governance. The reaction to the global financial crisis of 2008–2009, the uncertain response to the 2020 global pandemic, and the rise of economies such as China, which endorse hierarchies over markets, may suggest another move away from networks and markets toward more reliance on intergovernmental or purely national hierarchies in governance design. Rather than regarding the dominance of hierarchies as the norm and other formats as novelties or sideshows, however, this account suggests that the search for alternative forms of governance is persistent, and that for some actors those alternatives are the main event.

## References

- Abbott, Kenneth W., Jessica F. Green, and Robert O. Keohane. 2016. Organizational Ecology and Institutional Change in Global Governance. *International Organization* 70 (2): 247–277.
- Alhajji, A. F. and David Huettner. 2000. OPEC and Other Commodity Cartels: A Comparison. *Energy Policy* 28 (15): 1151–1164.
- Auboin, Roger. 1955. *The Bank for International Settlements, 1930–1955*. Essays in International Finance 22. Princeton: Princeton University, International Finance Section.
- Aydin, Umut and Tim Büthe. 2016. Competition Law and Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits. *Law and Contemporary Problems* 79: 1–36.
- Baker, Jonathan B. 1989. Identifying Cartel Policing under Uncertainty: The U.S. Steel Industry, 1933–1939. *The Journal of Law and Economics* 32 (2, part 2): S47–76.
- Bates, Robert H., Avner Greif, Margaret Levi, Jean-Laurent Rosenthal, and Barry R. Weingast. 1998. *Analytic Narratives*. Princeton: Princeton University Press.
- Bertilorenzi, Marco. 2016. *The International Aluminium Cartel, 1886–1978: The Business and Politics of a Cooperative Industrial Institution*. New York: Routledge.

- Binder, Sarah A. and Mark Spindel. 2017. *The Myth of Independence: How Congress Governs the Federal Reserve*. Princeton: Princeton University Press.
- Broz, J. Lawrence. 1997. *The International Origins of the Federal Reserve System*. Ithaca, NY: Cornell University Press.
- Clarke, Stephen V. O. 1967. *Central Bank Cooperation: 1924–31*. New York: Federal Reserve Bank of New York.
- Colgan, Jeff D. 2014. The Emperor Has No Clothes: The Limits of OPEC in the Global Oil Market. *International Organization* 68 (3): 599–632.
- Diebold, Jr., William. 1952. *The End of the I.T.O.* Essays in International Finance 16. Princeton: Princeton University, International Finance Section.
- Drake, Paul W. 1989. *The Money Doctor in the Andes: The Kemmerer Missions, 1923–1933*. Durham, NC: Duke University Press.
- Eichengreen, Barry. 1990. *Elusive Stability: Essays in the History of International Finance, 1919–1939*. Cambridge and New York: Cambridge University Press.
1992. *Golden Fetters: The Gold Standard and the Great Depression, 1919–1939*. New York: Oxford University Press.
- Farrell, Henry and Abraham L. Newman. 2014. Domestic Institutions beyond the Nation-State: Charting the New Interdependence Approach. *World Politics* 66 (2): 331–363.
- Fear, Jeffrey. 2006. Cartels and Competition: Neither Markets Nor Hierarchies. Harvard Business School (Working Paper 07-011).
- Fitzgerald, Robert. 2015. *The Rise of the Global Company: Multinationals and the Making of the Modern World*. Cambridge: Cambridge University Press.
- Gallarotti, Giulio M. 1995. *The Anatomy of an International Monetary Regime: The Classical Gold Standard, 1880–1914*. New York: Oxford University Press.
- Green, Jessica F. 2013. *Rethinking Private Authority: Agents and Entrepreneurs in Global Environmental Governance*. Princeton: Princeton University Press.
- Gregory, Sir Theodore. 1955. *The Present Position of Central Banks*. London: Athlone Press.
- Grisel, Florian. 2017. Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession. *Law and Society Review* 51 (4): 790–824.
- Hale, Thomas. 2015a. *Between Interests and Law: The Politics of Transnational Commercial Disputes*. Cambridge and New York: Cambridge University Press.
- 2015b. The Rule of Law in the Global Economy: Explaining Intergovernmental Backing for Private Commercial Tribunals. *European Journal of International Relations* 21 (3): 483–512.
- Hillman, John. 2010. *The International Tin Cartel*. London: Routledge.
- Horna, Pierre M. 2017. Cartels in Latin America: A Cross-Border Competition Assessment. PhD dissertation. Geneva, Switzerland: Graduate Institute of International and Development Studies.
- Jacobsson, Erin E. 1979. *A Life for Sound Money: Per Jacobsson, His Biography*. Oxford: Clarendon Press.
- Koch, F.E. 1945. Cartels as Instruments of International Economic Organization: Public and Private Legal Aspects of International Cartels. *The Modern Law Review* 8 (3): 130–148.

- Levenstein, Margaret C. and Valerie Y. Suslow. 2011. Breaking Up Is Hard to Do: Determinants of Cartel Duration. *The Journal of Law and Economics* 54 (2): 455–492.
- Macassey, Lynden. 1938. International Commercial Arbitration: Its Origin, Development and Importance. *Transactions of the Grotius Society* 24 (Problems of Peace and War): 179–202.
- Mattli, Walter and Thomas Dietz. 2014. Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction. In *International Arbitration and Global Governance: Contending Theories and Evidence*, edited by Walter Mattli and Thomas Dietz, 1–24. New York: Oxford University Press.
- Mingst, Karen A. 1976. Cooperation or Illusion: An Examination of the Intergovernmental Council of Copper Exporting Countries. *International Organization* 30 (2): 263–287.
- Moran, Theodore H. 1987. Managing an Oligopoly of Would-Be Sovereigns: The Dynamics of Joint Control and Self-Control in the International Oil Industry Past, Present, and Future. *International Organization* 41 (4): 576–607.
- Nussbaum, Arthur. 1942. Treaties on Commercial Arbitration: A Test of International Private-Law Legislation. *Harvard Law Review* 56 (2): 219–244.
- Pak, Susie. 2013. *Gentlemen Bankers: The World of J.P. Morgan*. Harvard Studies in Business History 51. Cambridge, MA: Harvard University Press.
- Pauly, Louis. 1997. *Who Elected the Bankers? Surveillance and Control in the World Economy*. Ithaca, NY: Cornell University Press.
- Pauwelyn, Joost, Ramses A. Wessel, and Jan Wouters, eds. 2012. *Informal International Lawmaking*. New York: Oxford University Press.
- Raustiala, Kal. 2009. *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law*. New York: Oxford University Press.
- Sgard, Jérôme. 2016. A Tale of Three Cities: The Construction of International Commercial Arbitration. In *Contractual Knowledge: One Hundred Years of Legal Experimentation in Global Markets*, 153–184. Cambridge: Cambridge University Press.
- Simmons, Beth A. 1993. Why Innovate? Founding the Bank for International Settlements. *World Politics* 45 (3): 361–405.
1994. *Who Adjusts? Domestic Sources of Foreign Economic Policy during the Interwar Years*. Princeton: Princeton University Press.
1996. Rulers of the Game: Central Bank Independence during the Interwar Years. *International Organization* 50 (3): 407–443.
- Spar, Debora L. 1994. *The Cooperative Edge: The Internal Politics of International Cartels*. Ithaca, NY and London: Cornell University Press.
2006. Continuity and Change in the International Diamond Market. *Journal of Economic Perspectives* 20 (3): 195–208.
- Stone Sweet, Alec and Florian Grisel. 2017. *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy*. New York: Oxford University Press.

- Storli, Espen. 2014. Cartel Theory and Cartel Practice: The Case of the International Aluminum Cartels, 1901–1940. *Business History Review* 88 (3): 445–467.
- Szalai, Imre S. 2007. Modern Arbitration Values and the First World War. *American Journal of Legal History* 49 (4): 359–391.
- Taylor, Jason E. 2007. Cartel Code Attributes and Cartel Performance: An Industry-Level Analysis of the National Industrial Recovery Act. *The Journal of Law and Economics* 50 (3): 597–624.
- Temin, Peter. 1989. *Lessons from the Great Depression: The Lionel Robbins Lectures for 1989*. Cambridge, MA: MIT Press.
- Toniolo, Gianni and Piet Clement. 2005. *Central Bank Cooperation at the Bank for International Settlements, 1930–1973*. New York: Cambridge University Press.
- Tsokhas, Kosmas. 2000. The Rise and Decline of an International Zinc and Lead Cartel, 1945–1975. *Australian Economic History Review* 40 (3): 263–286.
- Wells, Wyatt. 2002. *Antitrust and the Formation of the Postwar World*. New York: Columbia University Press.