

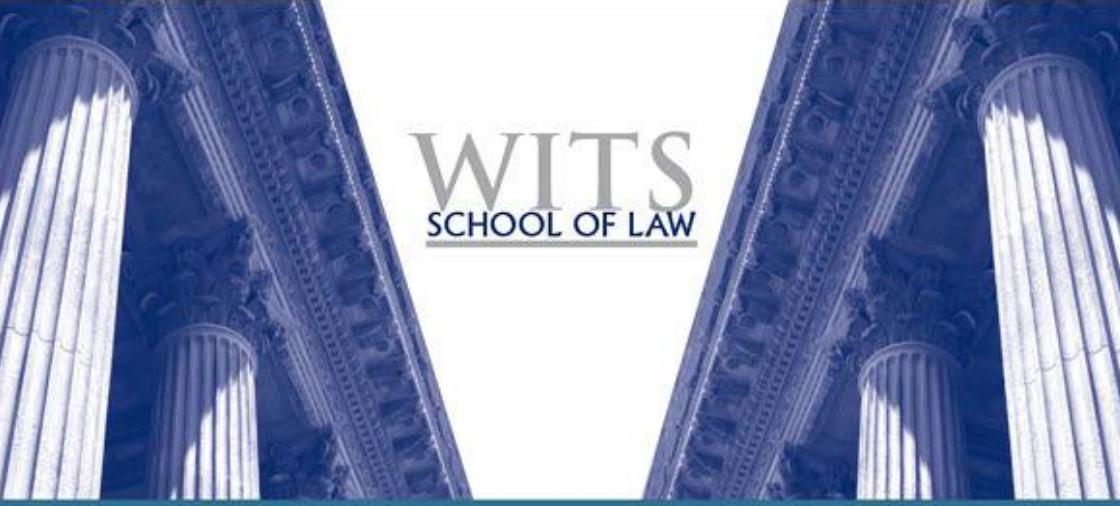
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Swaying to the rhythms of the global beat: state, corporate and individual under economic globalisation

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Swaying to the Rhythms of the Global Beat
State, Corporation and Individual under Economic Globalisation

by

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Swaying to the Rhythms of the Global Beat
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1. Introduction

The Mandela Institute in the School of Law was established to develop knowledge and skills for participation in the competitive global economy. Knowledge about the global political economy is part of a grand narrative but its subject is confusing, contradictory and restless. As regards the skills aspect a world-beating constitution and sophisticated legislation in South Africa require skills, techniques and building of capacity for government to implement policy -and ensure compliance by state and non-state actors. This is a less grand narrative of bureaucracy, administration and completing forms for licenses. The presentation deals with the grand narrative, though modestly, and you will not enjoy any building of your capacity. In fact after painting with a broad brush I shall take up an even broader one and continue painting, or at least brushing.

In so far as the presentation delves into matters of economics views are expressed with great diffidence and reservation by a lawyer, and one trained in a place other than Wits. In relation to economics I feel as a teacher said in my school Latin report which advised my parents that there were many gaps in their child's ignorance.

As explained in the marketing this presentation examines some features of globalization and its implications for the state, the corporation and citizen, and for their relationships with one another. It also boasted of pointing out 'key paradoxes' in the globalization project and how law and the legal process might be dealing with them. I have since discovered many paradoxes that have become tails wagging dogs. In other words the subject-matter is complex, uncertain and without neat conclusions.

1.1 Globalization and Discourse

A brief word is needed on language and terminology. Jeoffery Whian, in *How Mumbo Jumbo Conquered the World*, spoke about the deterioration of language and meaning under conditions of globalization. He had clearly attended one inaugural too many. However he noted that in politics, marketing and the media there has been a serious adulteration of language through spin, clichés and hyperbole.

Of course everyday language has changed in the wake of the global financial crisis (GFC). Please indicate how many of you still use the following expressions in the same sense did a few years ago – be honest now:

- As safe as houses
- You can bank on that
- It's too big to fail
- The luck of the Irish
- The markets will decide
- A Greek tragedy

The only winner is the last on Greek tragedy – if Sophocles were alive he would be focusing on the financial drama of sovereign debt instead of the psychological drama of Oedipus and Elektra.

So the language we use in discussing globalization frames a dominant view of reality and affects perceptions and behaviors. Discourse contributes to the reality we experience. Here are some examples of the framing effect in globalization talk.

First is the notion of free trade, a central concept in globalization speak. This is usually taken to mean the absence of government regulation in the movement of goods and services across national borders. The concept would have a different complexion if we meant by free trade voluntary, consensual and negotiated exchanges over goods and services and their prices.[1] True free trade would have these attributes at the level of private exchanges between corporations and institutionally in trade treaties. In reality much trade and commerce in economic history has been a result of notoriously oppressive treaties or coercive and exploitative encounters. It has been free in only one sense of the word.

Secondly we speak of trade as though it has one obvious meaning. But what really constitutes international trade? In reality more than 40%, and increasing, of what we call world trade takes place among the constituent parts of transnational corporations. When we talk about globalization increasing international trade we are dealing in part with increased trade within corporate structures which happen to flow across political boundaries. We speak about cross border trade but practice in part intra-corporation movements.

Thirdly are other phrases which have particular connotations in the globalization debate: protectionism is a word of great vulgarity in international economic law, whereas it could denote promotion of local employment, economic refugee has a more negative connotation than migrant labour, and so on. All discourse has value assumptions which narrow debate and sometimes new language is required to broaden the conversation. In short the language we use about trade, globalization, the corporation and so on has significant impacts on our attitudes towards and evaluation of these forces.

Finally there is paradox in the discourse used in measuring globalization. The system implies reductions in the significance of the nation state in a global market of goods and services, finance and shopping. However the measurement of globalization's successes and failures is predominantly made in terms of nation states and much less in terms of corporations, industries or employees. South Africa as a trading entity is evaluated in terms of cross-border flows of investment capital and goods, balance of trade figures and the like, and much less in terms of their domestic impacts within the country. In reality in early 2010 South Africa surpassed Brazil to top the global Gini-coefficient table which measures discrepancies of wealth within countries. This is as real, although less visible, a measure of globalization to what crosses the country's borders.

1.2 The law perspective

[1] See Frank Garcia, ''Is Free Trade "Free"? Is it Even "Trade"? Oppression and Consent in Hemispherice Trade Agreements' (2007) 5 *Seattle Journal for Social Justice* 505.

My perspective is a legal and not an economic one, and sadly also not a musical one. It assumes the significance of law's normative ordering of social and economic systems in providing standards for the evaluation of institutions, processes and practices. All social discourse takes place in the shadow of law's norms and standards of legal rationality enjoying a privileged societal status. The jurist Joseph Raz says that legal systems are distinguished by their comprehensiveness – 'they claim authority to regulate any kind of behavior' – and they claim supremacy over other normative systems in society.[2] Law thus holds influence as a force for social change and if it takes up a particular position on an issue it can be expected to influence to some extent the shape of other forms of social discourse and resultant behavior, whether political or economic, social or cultural.

Law's rights emphasis makes it is less utilitarian than economics or politics and is associated with rule-based governance and the Rule of Law. It is also concerned with the composition of governing authorities, the distribution of powers among them, their decision-making procedures, rights and duties of those subject to their rules, and rationality, reasons and accountability. All these have potential influence on the global economy.

However in reality law's practical province is a limited one. It not only concedes areas of activity to market behavior but is silent, inconsistent or impossible of implementation in many respects. It is concerned more with means, in the form of reasonable and rational procedures, and less with ends, on which it is inclined to defer to political and economic outcomes. Law in fact delegates to markets extensive areas of autonomous operation and itself sometimes mimics economic reasoning, without the mathematics. But the law-economics tension is ever present: some aspects of the World Trade Organization, such as the anti-dumping agreement, have a real legal foundation but are viewed with skepticism by economists.

In the current context the question to be addressed is the extent to which law brings its three R's, rights, remedies and rationality, into the discourse and practice of economic globalization and the state, the corporation and the citizen.

Now the present legal regulation of globalization is a complex spaghetti bowl of rules and principles emerging from many sources. At the global level law comes in two varieties: positive rules which provide specific directives on rights, duties and procedures, so-called 'hard law'; and principles which express more abstract and flexible values or required conduct and their consequences, so-called 'soft law'. Hard law has a juridical quality and can be enforced, while soft law is more in the nature of non-binding guidelines or codes of conduct. At the global level legal regulation is largely soft law – it has no teeth though it can gum you to death

1.3 The Globalisation Beat

The globalization project is part of the grand narrative and provides the dominant beat for all things subject to it.

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[2] Joseph Raz, *Practical Reason and Norms* (OUP, 1999, 150)

Globalization means different things to different people and has legal, economic, social and cultural dimensions. Here the focus is on the economic dimensions of globalization, despite the Latin point, and not on the social or cultural aspects. Nor shall I be considering where or not globalization is a good thing. This is a faulty question, like asking if the wind is a good thing. For sailing a boat or developing a wind farm it is, for a game of tennis or a beach wedding it is not. Globalization, of course, has only tenuous connections with tennis or beach weddings.

Economically globalization is an extension of market economics in nation states to the international level. In the 'Washington consensus' sense it involves removing or reducing barriers to goods, services and capital flowing across political borders. It is a mixture of elements such as the lowering of tariffs on imported textiles, the removal of exchange controls on for foreign investors, the privatization of formerly state-run enterprises as being considered for SA ports, and reduction of state subsidies across the board, including tertiary education. There are of course big exceptions to the global musical score, such as the extensive agricultural subsidies in the United States and European Union. However it is too soon to introduce discordant notes into the globalization melody.

Neoclassical economics lays claim to a scientific basis as regards its theories and practices. It is about rationality and choice, the maximization of individual self-interest, and competition among market actors – all these make up a model, or did until recently, that maximizes efficiency, individual welfare and the common good. This model of economic thinking involves ethical minimalism, though moral hazard does find a place in economic texts. In fact mainstream economics is imperialistic in nature and asserts its policies in areas where culture, religion, ethical codes and politics formerly ruled. This is easier at the global level where culture and ethics are fragmented and inconsistent. However law's normative claims can conflict with economics' imperialistic ambitions.

Needless to say recent economic turbulence has challenged the dogmas preached by bishops and cardinals in the church of fundamentalist economics. Some have defended their doctrine but are not secure in the face of new articles of faith emanating from protestants and revivalists, apostates and various mad monks in the church of latter day economists.

Other traditions in economics assume models of human behavior based on the unhelpful premise that humans do not always pursue self-interest, they are prone to illogical reasoning and behavior, and that supply and demand are manipulated by powerful economic actors. Traditions such as behavioral economics challenge many basic principles of economic thinking, such as price elasticity of demand and comparative advantage.

We shall leave those debates for the more pressing question of who is responsible for the governance of economic globalization. There is no shortage of governance institutions as globalization has an extensive legal architecture. It is a complicated one designed, like the camel, by many proverbial committees, but without the efficiency of the Gautrain.

Nonetheless we have in the trade arena the World Trade Organization as a pre-eminent global institution and on the economic development side the World Bank and various UN organizations. The latest G-club, the G-20 group of nations, rose from obscurity to prominence during the crisis and anointed the Financial Stability Board and the International Monetary Fund as key institutions for future financial stability. These were the same bodies that failed in the financial stability stakes on the last occasion, but one does not want to be

negative. The FSB has connections with the World Bank for International Settlements and many other emerging international financial institutions, greatly increasing employment opportunities in exotic locations.

Nation states concede parts of their sovereignty to the international institutions for the sake of conformity and consistency, or because they have no choice. The institutions in turn make some concessions to national sovereignty, particularly in relation to developing country needs and during times of economic turbulence. The concessions can be highly contentious and there is suspicion that national economies will act in protectionist ways, in the vulgar sense of that word, where they can get away with it.

The international institutions promote two key economic and legal principles. The first prevents a country from providing benefits to another country with whom it has a treaty relationship and not to others in the same treaty system. South Africa cannot lower tariffs on sarongs imported from Thailand and fail to do so on those from Indonesia. This is the most-favoured nation (MFN) principle which prohibits a country discriminating among its trading partners. The second prevents a country from discriminating between locally produced goods and services and those imported or introduced from abroad. South Africa cannot impose more stringent environmental standards on Australian miners than it does on South African miners, even if the former are encroaching on Mapungubwe. This is the national treatment principle.

The two principles create substantive rights in international law. However critics of the world trading system argue that they privilege cross-border trade over domestic matters such as health, the environment and local culture. Where a country claims health and environmental exceptions they not only have to satisfy a necessity test, which is onerous in itself in requiring proper means to an end, but it also has to be applied and impact in a non-arbitrary and non-discriminatory manner. There are other principles in the global political economy such as transparency, proportionality and reciprocity, and separate and differential treatment for developing countries, but these will not be on this evening's exam.

While there are institutions and principles of governance in globalization, there is no government in the conventional sense of the term. There is also in the existing institutions a major democratic deficit. For example there are structural shortcoming in the composition of these bodies and their lack of electoral mandates. At a deeper level the democratic deficit is a product of difficulties in having citizen preferences reflected in their representatives' roles in international bodies. Rather it involves the distortion of popular sentiment as it is dissipated en route to the highest decision-making levels of foreign affairs.[3]

This then is the global beat, and the question arises as to its implications for the state, the corporation and the citizen. What discretions do they have to swing to a different rhythm?

2. The State under globalisation

The globalization project has had significant implications for nation states, although as with most of contemporary life these are contradictory in nature. There are also competing notions of the modern state as between liberal democracies and social market democracies, as there are between market capitalism and state capitalism. However there are four consistent themes

[3] See M Chinen and Lana Ellis, 'Matters of Preferecne: Tracing the Line Between Citizens, Democratic States and International Law' (2010) 19 *Transnational Law and Contemporary Problems* 419.

in relation to the state under globalization. They are reciprocity, subordination, reliance and resilience. They show that globalization is not really that different to raising a family. As Oliver Mtukudzu has expressed it [[Mtukudzu]]:

2.1 Reciprocity

Traditional international law involved a surrender of jurisdiction by individual states to collective international institutions and laws in terms of a reciprocal social contract concept. This occurred mainly though international treaties and conventions in everything from customs and investment to refugees and cheese. For example South Africa is a member of the World Trade Organization and party to nearly 100 bilateral investment treaties and many other treaties in agriculture, aviation and maritime law. In each case there is mutual relinquishment of policy-making and enforcement powers to supra-national bodies.

The state, as opposed to the corporation or individual, has traditionally been the subject of international law, as well as the bearer of rights and obligations. The reciprocity aspect is found in the joint involvement of nations, nominally as equals, pursuing through consensus decision-making joint interests and policies. This is like five-day cricket between well-balanced teams where the lack of a result is less important that the spirit of the game. However this approach has been turned on it head by the development of economic globalization where the reciprocity and gentle surrender of sovereignty are replaced by a more forceful global order. This is T-20 cricket where there will be a result, quickly and effectively, then on to the next one.

2.2 Subordination

The market system and globalization have limited the power of the state well beyond that of traditional international law and without the genteel implied consent of yesteryear. This is part of the imperialism of macro-economics. Both the non-discriminatory MFN and national treatment principles restrict domestic policy space in relation to trade preferences, local businesses practices and social policy.

Moreover the market system effectively reduces the state's control over monetary policy as independent central banks and financial institutions, and not governments, determine the supply of credit and money. The economist Mankiw refers the 'financial trilemma' (yes there is such a word, going back to 18th century discourse) which faces countries when dealing with apparently sovereign choices among three options, each having some inevitable problems. For example a country may wish to (i) open its economy to international flows of capital, (ii) use monetary policy to stabilize the economy, and (iii) maintain stability in the currency exchange rate.

However the trilemma is that once a country selects two of these options the logic of economic forces compels it to forgo the third. South Africa has selected the first two, being relatively open to international capital flows and having the Reserve Bank adjust interest rates to regulate monetary aspects of the economy. However it has difficulties with the value of the rand which is currently rising beyond its most appropriate value for domestic economic purposes and to which Minister Trevor Manuel referred at the NGC last week as a naughty schoolchild. At least I think the reference was to the currency.

China, by contrast, controls monetary policy and the value of its currency, but has to restrict the cross-border flow of capital because liberalized capital flows would jeopardize the other two. European countries such as Greece have foregone control of monetary policy in relation to the euro, again in favour of the other two options. Other trilemmas involve South African demands to increase meaningful employment, attract investment and make the labour market more flexible. Again not everyone can be a winner and the IMF reported last week, in its dry form discourse, 'Noting the sharp increase in unemployment resulting from the economic slowdown, Directors encouraged the authorities to reexamine labor market institutions, in particular with a view to reduce any policy distortions...' This is IMF mumbo... code for wage reductions, easier retrenchments and lower work conditions. The trilemmas involve difficult political choices for any government as is apparent in the Western Cape where 15000 textiles jobs are at imminent risk, partly a result of tariff reductions.

Globalization also imposes constraints on fiscal policy as countries outbid one another in lowering tax rates to attract foreign investment. A book on the subject [S] has found that if corporate tax rates continue to decline as they have over the last two decades companies will soon pay no tax at all. South Africa has experienced this pressure from Mauritius in recent years as the island state attempts to attract the headquartering of foreign investors intent on moving into African markets.

In short the big G hollows out not only the policy space formerly inhabited by domestic institutions but also reduces the nation state's levers of economic manipulation. Although causation is difficult to prove, there is a correlation between these realities and political trends in developed countries: low voter turnouts, the rise of independent and single-issue parties, converging tendencies in political ideology and destabilization of governments through hung parliaments. There is much less actual politics in many developed countries and elections are contested over who is the best economic manager, or has been involved in fewer scandals.

The low-point in state subordination is found in countries in the Americas, the Pacific and Africa which are referred to as 'failed' or 'failing' states. This means these state systems are simply unable to perform necessary activities in law enforcement, revenue collection or service provision. Even in developed economies national debt is having profound implications for the roles of the state in traditional government functions. These are all manifestations of the subordination of state systems under conditions of globalization.

2.3 Reliance

For all its grand narrative pretensions, economic globalization relies intimately on the nation state. To push the metaphor a bit, many of its musical instruments are played by domestic musicians.

The reliance factor occurs for two reasons. First there are functions which in terms of current institutions cannot be dealt with at the global level; and secondly there is need for the state legal infrastructure to support the edifice of globalization. In practice many aspects of the globalization project are supported through the laws, procedures and courts of nation states, in particular competition law, securities regulation and corporate governance where there are no global institutions with enforceable powers to deal with these matters. Most of the post-crisis re-regulatory legal events have been a function of state and not international legal

actions. Social security, unemployment insurance and superannuation schemes can also only operate at state levels.

Even where there are global norms, as in intellectual property law, reliance is placed on states for monitoring, investigative and enforcement purposes. Here the state is more a vehicle for enforcing global norms than an autonomous actor, regardless of the formal nature of its treaty obligations. It plays another instrumental role in globalization in relation to citizenship and labour, referred to again later. The state is also important at the level of symbol interaction. It is, or is perceived to be, a source of democratic participation, which is absent at the global level. The state is the place where politics is played out, where rules of inclusion and exclusion are determined, where social policy is made when there is space for this in the margins of globalised norms. This engagement has a symbolic value which indirectly supports the globalization project. It is reinforced by the role of representative governments in legitimizing globalization, which again reinforces its survival and continuance.

2.4 Resilience

The reliance factor contributes to the resilience of state systems and their continued significance under conditions of globalization. Here it is necessary, as there is no other place, to mention the emergence of new nation states in the global political economy. The BRICs countries, soon perhaps the BRICSA, have asserted a new collection of interests into the global political economy. Where responsive to their own economic constituencies these states have challenged and changed international policy agendas and might yet modify actual policy. While always susceptible to co-option by more powerful forces they have created some space to rethink aspects of trade policy, the nature of investment treaties and the role of the state in economic systems.

State resilience has forced changes in dominant patterns of economic globalization and its harmonizing tendencies. These include accommodating sovereign wealth funds and state-owned enterprises, coming to terms with the reality that global finance comes increasingly from emerging states, making space for Islamic banking and finance, as well as for FIFA, and accepting that authentic multilateralism requires concessions to developing states. Two economies currently in full throttle, manufacturing rich China and services rich Singapore, have extensive state involvement in most economic sectors. While these points should not be over-stated, Brazil, with state-owned Petrobas just achieving the largest share offering in financial history, and Russia, through its state champions, have similar features in their economic systems.

In short the globalization score sometimes allows the contemporary state to play its own tunes, and even embark on the occasional impromptu of its own.

3. THE Corporation under globalisation

There are again four themes to the place of the corporation under conditions of economic globalization.

3.1 The corporation as beneficiary

From modest beginnings as the limited liability company, modern corporations bestride the global stage, full of sound and fury, signifying everything. Corporations generate wealth, provide employment and contribute taxation revenue. They also pursue profit, operate competitively and avoid responsibility where they can. We love their innovation, sponsorship and the consumer goods they produce, and deprecate their environmental, labour and call centre policies.

The transnational corporation has been a major beneficiary of many aspects of the globalization project. The reductions of cross-border legal barriers for movements of goods and services, as well as in finance and investment, have operated to the benefit of many transnationals. The restrictions of comparable liberties for individuals, referred to later, have also worked to their benefit. There are many illustrations of these tendencies.

One is found in the global supply chains which many large corporations operate. These might procure components in Ireland, assemble in Korea, market in India, customer care in the Philippines and head office in the Netherlands. Wherever there are no binding international laws the differences in local regulatory standards provide scope for transnational companies to choose from legal regimes which are most beneficial to their profitability. This is known as regulatory arbitrage and extends to incorporation itself. In the European Union German companies began incorporating in the United Kingdom to take advantage of lower capital requirements in that jurisdiction. Arbitrage also benefits transnationals in relation to tax obligations, conditions of employment, environmental standards and corporate governance requirements.

As indicated above the traditional unit of international law has been the nation state, but in some areas the corporation now sits at the table as an equal with global institutions in international activities. For example corporations now have places in formal institutions such as the Bank for International Settlements in Basel, Switzerland, and the World Intellectual Property Organisation in Geneva, Switzerland This is quite apart from the corporate influence in non-official but powerful bodies such as the Davos forum in, err, Switzerland.

A local example of corporations assuming rights and remedies in terms of international law is in relation to investment disputes between foreign investors and host countries. Here Bilateral Investment Treaties (BITs) allow investing corporations to bring proceedings for compensation against host states. These are international law disputes in which corporations sue sovereign states. While this capability preceded the globalization project its practice has escalated extensively in recent years.

South Africa has experienced this unobliging irritant recently with a damages claim brought by Italian and Luxembourg investors against the state. Foresti, the foreign investor, alleged that state interventions in the form of the Mining and Petroleum Resources Development Act amounted to expropriation of their investments by imposing BEE policies in the mining sector. The BEE obligations were imposed on a non-discriminatory basis on all mining companies, domestic and foreign, and required them to transform 'old order' mining rights into 'new order' rights. This was subject to compliance with share divestitures, transformative employment policies and equity procurement commitments. After costs of about €5 000 000, or a lot more rand, on each side, for the attention of shareholders on one

and taxpayers on the other, the investors abandoned their claim. South Africa recovered about € 500 000 of its costs. This showed the potential leverage which corporations have against sovereign states, although the withdrawal of the claim spoiled the party and the arbitration did not get to adjudicate on the compatibility of BEE with South Africa's international obligations. This is a potentially momentous issue for the industry which awaits resolution.

In the World Trading Organisation, by contrast, only nation states as members of the organization can bring and defend claims relating to trade matters. It's difficult to give a South African example from the system because the country has never been involved in a trade dispute on the banks of Lake Geneva. So let's assume a fictitious dispute, involving South Africa's wine exports to China. China imposes higher tariffs on SA merlot than that from another WTO member, New Zealand.

However appearance and reality do not entirely coincide in this context. Where South Africa brings a complaint that China's laws or practices on wine imports are in breach of its treaty obligations, the nominal parties are the two states. In reality they are proxies for businesses or industries which lose or gain from the disputed measures, for example wine manufacturers in each country. In a famous WTO case involving bananas exported to Europe the complaint was brought by the United States which is not even a banana exporter. However it acted on behalf of its corporations operating in Central America which claimed to be affected by Europe's discriminatory import policies. This case was commenced in 1996 and an agreement was announced in June this year, requiring constant adjustments in the fruit's use-by dates.

The examples suggest that globalization increased the authority and power of transnational companies on the international economic stage. This is amplified by the ability of corporates to influence state policy, lobby politicians and fund political parties, and to control regulatory processes, referred to in the literature as regulatory capture. There are valuable prizes for large corporations in regulatory capture, at least in the short term, particularly if there is truth in the view that the Mobil corporation captured US regulatory policies in relation to deep-water off-shore drilling. The literature also provides examples of transnational corporations acting as private law-makers, for example in a case study on Wal-Mart activities in Germany. As this transnational company, currently the largest in the world, establishes in different countries it includes in its business model its own laws for employees, unions, suppliers and other entities, including mechanisms for the administration and enforcement of these rules. Until law according to Wal-Mart is challenged in domestic courts it is as effective as law emanating from parliamentary institutions.

Thus the combined corporate report card, unlike the Latin report, indicates that they are doing well – of the 100 largest economic entities in the world 45 are corporations and 55 nation states. The largest is the same Wal-Mart, about to become larger by swallowing Game and all its subsidiaries in Africa.

In the light of these factors the celebrated economist J K Galbraith in his last book, tellingly titled the *Politics of Innocent Fraud*, suggested that contemporary economic systems should not be referred to as the market system but as the corporate system. We could correspondingly refer to the nation-state as the market state. As shown later citizens and workers do not enjoy arbitrage, regulatory capture and law-making opportunities which avail some transnational corporations.

3.2 The corporation as casualty

Globalization has not only put transnational corporations in the driving seat, it has also subjected them to the pot-holes and Jozi taxis of international competition. The competitive forces unleashed by globalization have impacted on the viability and autonomy of many companies. During normal times competitive forces make companies susceptible to hostile take-overs, loss of market share, regulatory intervention and protectionist tendencies by foreign states. During the global financial crisis banks, insurers, car manufacturers and other global operators went to the wall or were fundamentally reshaped through state intervention.

While regulatory arbitrage is a beneficial side of the coin, there is another burdensome side for even the best-governed company. Some of it is technical and legal: transnational corporations have to comply with different competition laws in countries in which they operate. Some of it shows how advantages are not all they seem to be: despite corporations being able to hold nation-states to account in investment arbitrations, in reality they succeed in fewer than 50% of these cases. Moreover the enhanced options for corporations generally entails inevitably that some will go to the wall, the consequence of competition made more intense through its global dimensions. Not everyone can be a winner, expect in Bidinvest commercials. The Minister of Trade and Industry referred in 2010 to the need for the SA government to assist the prospects of local textile companies, delicately not using the protection word in his discourse. International harmonization of standards in banking, the environment or health can also disadvantage small corporate players for whom the standards are too burdensome and expensive.

3.3 The corporation as subject

Reference has been made to some of the legal and economic rights accruing to corporations under globalization conditions. There is generally an asymmetry between contemporary corporations' rights and duties. Economic globalization is not without some obligations on transnational corporations in pursuit of various models of corporate social responsibility. These tend to be of the 'soft law' variety, such as the OECD's principles for multinational companies or the International Chamber of Commerce's guidelines on investment. In the absence of mechanisms of enforceability, transparency and accountability in relation to the obligations their effectiveness is dependent on self-regulation, consistent with market assumptions and the invisible hand, which in post-crisis conditions might better be called the amputated hand.

There are, however, limits to these 'good global citizen' projects. CSR has plenty of critics, particularly from developing countries. Some argue that it detracts from the true functions of corporations in economic systems. Others contend that it allows governments off the hook in terms of their social responsibilities. There are also arguments that it is more cosmetic than real. Some accountability was anticipated for US corporations under the Alien Torts Act for activities in Nigeria, the DRC and Ghana, but a judgment last week involving Chevron has undermined these expectations. Generally international criminal has had difficulties in subjective corporations to criminal justice systems in the same way as it has citizens.

4. The Citizen under globalization

How is the citizen swinging to the global beat? The literature refers to us as now living in the' risk society'. This means people are confronted with innumerable decisions and choices which did not face our counterparts a generation ago. Some of these are a result of globalization in goods and services. For those with the ching ching choices are available in relation to fashions and fads, and also in deeper structural issues relating to life-style. The market society presents choices in relation to financial products, pet foods, vacations and cosmetic surgery, and shortly in the genetic make-up of children. All choices bring responsibilities and risks for the individual.

Risk is accentuated by businesses forcing consumers to perform more of the functions previously provided for them. This started in supermarkets where fetching and carrying became customers' responsibility and followed in the fast food industry where table service and waste disposal were performed by customers. It now extends to online booking services, airline check-ins and innumerable other consumer activities. The shift of functions also involves the shift of risk to consumers and customers engaging in these services – errors, misunderstandings and faulty technology rebound on the consumer and not the service-provider. Even in the provision of state services we have become consumers in the market of services.

Individuals' relationships with the nation state are traditionally captured in the notion of citizenship. This denotes a package of legal, political and social rights and responsibilities. Citizenship is also about inclusion or exclusion from the body politic, the economic system and social belonging. It can have drastic consequences for those without it. Currently non-citizen Zimbabweans in South Africa are being required to apply for documentation or face deportation.

While citizenship involves a relationship with the nation state, in international law natural persons have not traditionally been bearers of rights and responsibilities. This is despite international law's strong focus on human rights in the last half century. International conventions on different forms of rights are aimed predominantly at nation states which assume duties and obligations in terms of the various treaties. Rights and remedies only accrue to individuals when states incorporate treaty provisions into domestic law or where courts apply norms of customary international law in their judgments.

Economic globalization does not significantly modify these principles. It provides no supra-national citizenship, however much people who attended the World Cup might regard themselves as citizens of the world. There have been some exceptions to the pattern. The international law of the European Union allows individuals direct access to the European Court of Justice whose decisions are binding on member states. In the event of a cross-border investor being an individual and not a corporation they too could bring claims against host nation states. Global criminal justice applied through the International Criminal Court also adjudicates on the liability of individuals, including heads of state. In these respects natural persons have attained some degree of rights and responsibilities in the international domain.

However there is no emerging concept of citizenship at the global level, other than in terms of increased market choices flow across political boundaries in what is sometimes referred to economic democracy, or credit card democracy. In some respects economic globalization has

left citizens in a mid-20th century world while bringing goods, services and capital (GSC) into a 21st century environment. While globalization reduces the significance of political boundaries for the movements of GSC, for natural persons these kinds of liberalization have not ensued.

While globalization has involved the deterritorialisation of economic and political space it has in some cases reinforced the territorialisation of citizenship. Movements of people are still subject to political, legal and physical controls that have been removed in relation to the GSC factors. Where manufacturing industry relocates in terms of a transnational company's global supply chain, labour cannot follow in its wake. Mobile capital + immobile labour = corporate arbitrage. The globalization project while not explicitly based on restrictions on people movement benefits from it.

The European Union again has exceptions in allowing free movement, residence and employment of citizens of one member state in the jurisdiction of another. However while there is increased internal mobility it is currently more difficult for those outside Europe to gain entry, as you have experienced queuing for your schengen visa. The boundaries are not only legal but also physical: in recent years about 7500 kilometers of physical barriers, much with floodlighting, have been built to prevent movement of people across borders. This is one manifestation of tightening migration laws and policies in the last decade, which has become even more stringent recently in many OECD countries. From France to Australia the strident rhetoric of 'border control' has echoed coldly through political hallways. In South Africa, by contrast, migrants have experienced a relatively more open door, or at least open fences. However recently Tanzania, one of Africa's poorest countries, more deliberatively conferred full citizenship rights on 160 000 Burundi nationals within its borders. This might be the spirit of Ubuntu. It deserves at least a shout of Ayoba.

For skilled professionals migration is less problematic and can amount to a vast subsidy by developing countries to the developed world. The brain drain is a particular problem in the health sector, with evidence of more Malawian doctors in Manchester than in Malawi. Although Africans migrate less than inhabitants of other continents, and do so mainly within Africa, the same cross-subsidisation operates within countries and regions of the continent. For these reasons SADC has been working on anti-brain drain protocols among members.

In this context law provides not only a normative order but also a positivist order that has real consequences. Legal labels such as 'illegal resident', 'alien', 'refugee' and 'asylum seeker' have significance, nationally and internationally, in relation to the movement, residence and rights of people. They denote insiders and outsiders and for the latter lead to criminalization, punishment and deportation, even for those making the same rational economic choices as corporations. The principles of most-favoured nation status and national treatment which apply to goods, services and investments do not generally avail individuals, unless they are excellent soccer players. While globalization is based on non-discrimination and inclusion in some respects, it discriminates decisively between insiders and outsiders in others.

There is some beneficial international regulation of movement, for example in relation to human trafficking, child labour and the rights of refugees. However breaches of these treaties do not afford much in the way of realizable rights and remedies for individuals. Moreover there is no international governance in this area, such as a WTO-like body with mandatory jurisdiction, and this aspect of the global political economy is predominantly within the sovereign domain of states.

In short the citizen as consumer has benefitted from globalization's expanded market choices. As holders of rights and remedies he and she have been swaying, but less rhythmically and more drunkenly, to the globalization beat.

4.1 Practical law under Globalization – The Paradox of the Fishing Commons

The story thus far is that globalization has fragmented international law and subordinated national law, benefitting some and disadvantaging others. At the same time it has aggregated many contemporary social challenges which can only be dealt with at an international level: carbon emissions, public health, species preservation and international crime. Fragmented law facing aggregated problems means that interaction among relevant legal regimes is a necessity or collective problems will remain unaddressed .

Let's see how this might operate in relation to the humble fish. Last year I saw a coelacanth for the first time at Wits but Google had nothing on the coelacanth and globalization so it has no further part in the presentation.

Market economics concedes the need for regulatory intervention in the provision or preservation of public goods. Public goods are those in which supply and demand forces do not operate because the goods are either available or they are not and it's not possible to particularise who is benefitting from or should pay for them. The theory of public goods concedes limitations in invisible hand theory, the notion that the markets auto-regulate without need for state intervention.

Societal security and public health are examples of public goods in that avian flu and foreign invasions affect all without consumers being able to pick and choose according to brand. They are appropriate for state intervention and individuals have an expectation of them as attributes of citizenship. Public goods are either directly provided by the state, as in relation to water and the army, or delegated to private enterprise for provision under close state regulation, such as prisons and toll roads. In an interconnected world there are more global public goods than even before, so if regulatory intervention is needed it will require the combined interaction of different legal regimes.

The oceans and marine biodiversity are an example of a public good. A documentary called End of the Line,[4] soon to be released in South Africa, contends that the abundance of large fish globally has declined by about 90 per cent. While the collapse of Atlantic cod stocks in the mid-1990s is well know-known, other species such as blue fin tuna and kingklip are in danger of extinction while stingrays and jellyfish are exploding in numbers, providing a different meaning to fish and chips discourse. In simple terms too many fishers are going after too few fish. As bumper stickers should say, 'Save a blue tuna, eat a vegetarian.'

This conundrum is sometimes referred to as the Tragedy of the Commons, a term first used by Garret Hardin in 1968. This was a parable about the logic of individual farmers having a self-interest in grazing an extra cow on the commons, until the commons was over-grazed to every farmer's detriment. Aristotle had much earlier noted that 'what is common to the greatest number has the least care bestowed upon it'. Common resources are disproportionally ruined by some individuals guided by human greed in pursuit of their

[4] Based on a book by Charles Clover.

interests, and with no awareness of how harmful their acts are to the entire society.[5] The trick is that the entire collectivity finally shares the burden of negative consequences while individuals have reaped the benefit and left for Auckland.

Preserving fish stocks and marine diversity is a global problem and the question arises as to the appropriate political, economic and legal responses to it. Fishing intersects national, regional and international levels and involves trade, the environment and economic development. As usual there are different interests and views on the subject.

Market economists contend that one of the contributors to the problem is global fishing subsidies which amount to $ 25 billion a year, constituting about 25% of the value of the fishing industry.[6],[7],[8] The subsidies allows fishers to fish further, deeper and longer than if they were not subsidised. Economists argue that this is an inefficient system as it involves the subsidization of externalities and over-capacity of fishing boats. The resultant over-fishing distorts supply-demand curves. The subsidies, the argument goes, involve net economic losses despite short-term benefits for some fishers, consumers and economies.

Environmentalists contend that problem requires extensive fishing prohibitions without which diversity and sustainability will not be possible. This needs to operate on a coordinated basis among national, regional and global authorities.

Emerging states argue for differentiation between developing and developing countries[9] and between local off-shore fishing which should be subsidized and commercial and industrial fishing on the high seas which should not be supported.

Fishers contend that this is a matter of subsistence, livelihood or business, depending on how big their boats are. How do these considerations come together in the development of a good policy? The answer is that under current globalization conditions they don't. In some respects there are too many agencies involved with too little activity.

Some of the bodies involved in fishing policy at the international level are the WTO, the World Wildlife Federation, an NGO called Friends of Fish and the UN Committee on Trade and Development. Numerous bodies are involved in fishing policy at the regional, bilateral and national levels. They range from commercial fishing groups demanding, and state governments supporting, fishing subsidies, to Jamie Oliver removing endangered fish species from his recipes.

The activities of these many bodies are inconsistent and uncoordinated. At the global level the WTO's interest is in the subsidy aspect and its potential breach of treaty obligations. Until the Doha Round subsidies were covered by the Subsidies and Countervailing Measures Agreement (SCM) which not lacks any sense of rhythm, but has been weak in terms of policy

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[5] What is a common resource? http://www.wisegeek.com/what-is-a-common-resource.htm

[6] Global Fisheries Research Finds Promise and Peril: While Industry Contributes $240B Annually, Overfishing Takes Toll on People and Revenue. http://www.sciencedaily.com/releases/2010/09/100914115246.htm

[7] See the Beacon. Oceana holds WTO Forum on fishing subsidies. http://na.oceana.org/en/blog/2010/09/oceana-hosts-wto-forum-on-fishing-subsidies

[8] Historically the biggest OECD subsidizing countries were the US and Japan with respectively 30 and 28% of overall OECD transfers.[8]However not all government interventions account for actual subsidies, some being allocated to conservation.WTO Report 2010: trade in Natural Resources. p 123

[9] In terms of an accepted norm of separate and differential treatment,

for fisheries subsidies.[10] Members are continuing to negotiate, slowly, rules on fisheries subsidies and preservation as part of the continuing Doha Round. [11] Even as it approaches agreement on some prohibitions, developing countries attempt to secure complete exemptions from them. Many species too will have passed their use-by date by the time the negotiations are completed. Moreover the WTO has no expertise in either the economic or environmental factors in over fishing.

At the national level there is great variation in the regulatory policies and practices in fishing. It is at this level that the subsidy problem is maintained for political and short-term employment reasons. However even the best domestic regulation cannot address a global problem of species preservation.

As regards corporations they are rent-seeking bodies in this area, using influence and political favours to maintain and increase subsidies and operating without effective global supervision.

As for citizens as political actors they have very remote input into the matter. And for the citizen as consumer individual action seems insignificant, though collectivity has some potential. Last week the Southern African Sustainable Seaford Initiative (Sassi) released an updated pocket guide indicating which species are okay to eat. If you're at a fish dinner without the book you can SMS the name of the fish, or if you don't know its name, then the species of the fish, to Sassi for an instance response (079 499 8795).

In short fragmented law and the absence of global government is a major problem in responding to a predicament partly attributable to economic globalization.

5. Synthesis

The challenge in the final few minutes is to bring together the state and corporation, bananas and tuna, laws and economics, beach weddings and wind farms into a grand musical number.

In terms of the relationships among the state, corporation and citizen we have seen that the state has been subordinated by a proliferation of international institutions and the imperialism of economics, both of which have pushed back the borders of state power. However there are limits to this subordination because of globalisation's reliance on state systems, and the resilience of those systems themselves.

The corporation has new territories to roam under globalization but requires the state as a source of law enforcement in relation to property and contract rights, key factors in the market system. It also has an interest in limits to state power in relation to revenue collection, competition policy and various forms of regulation.

Citizenship finds expression at the national and not the global level, but its package of rights is diminished by the reductions in state power, and it is finding alternative expression through NGOs, single-issue movements and consumer activisim. In frustration at the impotence of states citizens express what is called the politics of identity with ethnic, religious and linguistic affiliations becoming chosen bases for political mobilisation.

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[10] Kemi Lewis. Fisheries subsidies and the WTO: An EU perspective.
[11] WTO report 2010: Trade in Natural resources. P 15

Failed states, economic trilemmas and worrying Gini-coefficients are some of the consequences of the interaction of these forces. What are the more positive indicators?

The first is that despite its shortcomings the law and legal systems do have capacity to contribute process values in the future evolution of the global political economy. Legal procedures can require inclusiveness, information, rationality, transparency and accountability for decisions, regardless of the nature of outcomes. In this respect it can provide some discipline to the utilitarianism of market economics.

Secondly are the potential benefits of technology, about the only factor not mentioned so far in the lecture. In combination with state policy and market innovation the engineers, chemists and microbiologists have immense contributions to make in everything from sealed potholes to cleaner energy.

The third is the increased appreciation of discourse, the significance of the language we use in relation to matters of trade and investment. Glib editorials, political sound-bites and corporate public relations frame the world in partisan and self-serving ways which imply inevitable outcomes. A new world of discourse, we must insist, is dawning.

Finally the rebalancing of globalization dynamics through the rise of emerging economies, individually and collectively, must require rethinking of hallowed economic and governance issues. As a member the G-20 South Africa can contribute at least to the setting of new global agendas to meet contemporary challenges. In collaboration with other emerging economies it can move beyond agenda setting to important policy deliberations.

6. Tribute

Finally I should like to pay tribute to my predecessor, Marylyn Christianson. By strange irony, I taught her at then University of Natal in Durban. Marylyn was so successful that the apprentice surpassed the master and she reached the position first. She did an outstanding job and extended significantly the certificate courses, the continuing professional development programmes, the conferences and public lectures. She also developed the partnership arrangement the MI is signing next month with the World Trade Institute in Berne, Switzerland. Given that she was a brief acting Director it is worth paying tribute to other navigators of the MI ship who have since assumed higher commands. Jonathan Klaaren is now Acting Head of School and supporter of the Institute and David Unterhalter plies forensic skills in Johannesburg and London and judicial skills in WTO's Appellate Body in Geneva. Appreciation goes to all three for their contributions to an Institute which attracts over 500 registrants a year to its certificate courses and continuing professional development programs. Hopefully some of these students will join the crew and contribute to the global beat.

And finally, on a personal note, many families are now globalised and in my case, with children in Europe, Africa and Australia and partner in Asia, I'm now looking to the Origins Centre to discover relations in Antarctica. However I'm delighted to have a son, brother and sister-in-law in one place at the same time, swinging, if only temporarily, to the Jozi beat.