Abstract

Ever-closer ties between states have gradually transformed the international legal environment. It is high time that two principle governance methods of regulatory coordination, already widely practiced, are acknowledged and included in the fibre of public international law. This paper scrutinises the timing, mechanisms and the possible range, given legitimacy concerns, of such a change. The author argues that the tangible nature of economic activity renders international economic law as the natural avant-garde for a larger overhaul of the regulatory system. European anti-money laundering efforts are used as an example of this wave of governance, which has been left unnoticed by traditional international law analysis. Denying reality does not make it less real.

Keywords: money laundering, AML, international finance, international economic law, economic governance
1. Introduction

While it is broadly acknowledged that international law is subject to yet another profound change, and scholars should take into account the unprecedented diversity of views and interests,\(^1\) it sometimes seems that despite their willingness to make changes, states tend to return to “business as usual”. To some extent this is a natural result of the conflict between short-term logic in order to emulate patterns of behaviour that have already proved efficient, and long-term motivation to adapt to changing environment, which wanes, together with the reasons to change.\(^2\) If unitary states (acting through traditional diplomatic channels, and international organisations) had still been the sole masters of international law, they could have afforded the luxury of legal conservatism. This is not the case. For several decades international coordination has been achieved, by both public and private actors alike, through a variety of channels, only partly covered under Westphalian international law. These relatively new means of regulatory coordination have acquired an importance comparable to traditional sources of law. Therefore, the refusal to formally acknowledge certain modes of cooperation under public international law may entail the self-exclusion of the actor concerned.

This is where international law doctrine is torn apart. Since the phenomenon of international governance has been analysed in other fields, legal research has had to confront it. Accordingly, legal scholars often refer to the more or less crude definitions that are derived from international relations (the political sciences) and scrutinise, through a normative lens, some peculiar amalgam of actors and procedural and substantive rules, all encapsulated under a single amorphous notion. Eventually though, it becomes unclear whether the notion is superfluous, that is, whether it is only descriptive or, short of implantation into the normative fibre, is approximate at best.

Assuming the latter is true, one needs to inquire about the reasons for the change as well as its timing, mode and scope. Arguably, the easiest and the most advanced example of governance (as applied in international economic law – for it taps into the most tangible benefits of cooperation) would only be an introduction to a larger overhaul of international law.

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Subject to reservations concerning the subjectivism of such an endeavour (part II), this paper offers a conceptual framework for the introduction of governance to international law. First, some general observations concerning the significance of common values as a stabilising factor in international relations are presented (part III); random circumstances, which shaped the results of subsequent EU referenda are recalled as a reflection of the problem. The analysis moves to international economic law (part IV) upon the conclusion that in the globalised economy a de-centralised feature of governance provides a natural point of equilibrium between demand for cooperation and the costs of centralisation. It is argued that the tangible nature of the surplus of cooperation in the economic field, renders it the most likely place to launch a broader discussion on governance as an international law-making method. Here the two principal instruments of governance are analysed: soft law, and interpretative convergence. What may constitute a limitation to this governance method is the legitimacy of the largely technocratic path, as discussed in part V. Subsequently, the recent regulatory activism in the field of anti-money laundering (AML) is considered as an example of a possible rapid transition from conflict to cooperation (part VI). The article ends with concluding remarks.

2. Methodological Disclaimer

An autonomous definition of the subject of this analysis entails the risk of the methodological mistake of subjectivism – of an unintended interference in the study results stemming from a prior assumption. At the same time, no study is possible without a theoretical model, whether adopted explicitly or unconsciously, that would allow choices of the relevant facts and a justification for each choice.3 This has compelled the author to adopt a working assumption of governance as a method of transnational coordination, even though it is acknowledged that this influences the research outcomes.

3 S. Guzzini, “Non cè analisi empirica senza teoria, che sia evidente e consapevole o nascosta. […] Tutte le spiegazioni, che l’osservatore ne sia cosciente o meno, implicano presupposti teorici – ovvero concetti per mezzo dei quali selezionalamo quel che è significativo – e ragion che giustificano questa selezione. […] La soluzione […] di concepire la teoria come ‘saper fare’, cioè abbinarla alla conoscenza pratica […] il riferimento alla storia diventa però il piede d’argilla di questo tipo di teorizzazione che dà per acquisito cioè che occorre provare. […] Così la teoria come sapere pratico rimane prigioniera di un circolo vizioso: afferma che i principi perenni […] derivano dall’esperienza […] e quale interpretazione […] sia da ritenere valida, non può far altro che far riferimento a questi stessi principi. […] Una seconda soluzione […] analitica, partirebbe […] dai concetti teorici chiave, stipulando la loro connessione logica che analisi dopo analisi finirà per specificare” Il realismo nelle Relazioni Internazionali, Vita e Pensiero, Milano 2008, pp. XIII–XV.
3. The Path Towards Governance: from Domination, through Cooperation, to Coordination

One approach to the history of public international law is to focus on its normative rationale. As political regimes tend to maintain their subsistence, international law has also been used to “petrify” the domestic and international order. Yet, subsequent to the failure of hegemonic Pax Romana, the fall of the empire of Charlemagne and the Holy Roman Empire, or the catastrophic ending to the Concert of Europe and Realpolitik, it appears that no matter how much power one obtains, the outcasts will seize the opportunity to revolt. Accordingly, the international community, if not for the greater good then for the sake of self-preservation, gradually accepted the principle of sovereign equality and learned self-restraint, moving from the politics of power towards the power of politics. Whereas the democratic setup for harnessing the power of discontent for regeneration has been attempted internationally (most importantly within the UN), the international “discovery” of decentralised self-governance is relatively recent.

At the national level, Western democracies assume that the principal role of the state is to enable the individual’s pursuit of happiness and, in a welfare state, to provide for those who cannot look after themselves. Because social reality is too complex for central planning, self-governance and the subsidiarity principle, both found in national laws (e.g., the Preamble to the Polish Constitution) and in EU law (Treaty on the European Union, Art. 5), do not undermine the authority of the central government, but complement it. It is not only parties who try to increase their utility, the state also outsources liability for the attainment of these goals.

However, when it comes to international relations, the “public service” mission suddenly gives way to sovereignty angst. For instance, European integration arguably

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4 A. Cassese, Diritto internazionale, il Mulino, Bologna 2006.
6 A. Paulus, International Community, Max Planck Encyclopaedia of Public International Law. One could refer here to diverging narrations of Ferdinand Tönnies and Max Weber concerning the transition from a Gesellschaft (society), used instrumentally by its members, to the Gemeinschaft, a community based on common values that constitutes the aim in itself.
7 The disappointing performance of the UN in safeguarding friendly relations among nations is the most notorious example of limits of cooperation within the Westphalian framework (see for instance Y. Petit, Droit international du maintien de la paix, Presses Universitaires de France, Paris 2000), but institutional shortages are numerous. For instance in international trade (the WTO Doha negotiation round) and finance (managing systemic risks created by financial conglomerates), or environmental protection (attempts of compelling principal polluters to reduce their GHG emission).
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constitutes the most important socio-political achievement of the continent. Citizens from non-member states, including Poland after escaping the Soviet sphere of influence, perceived the EU as a “Promised Land” of opportunity. Yet, despite treaties such as the EU cohesion policy, which entails considerable financial transfers in order to mitigate the differences in development between member states, the public debate that preceded Polish accession to the EU focused on sovereignty. People who do not normally care about international law and who can barely define the notion of sovereignty (including some of the greatest beneficiaries of EU funding, such as farmers), suddenly became concerned about this abstract concept.9 The political campaign before accession had little to do with actual EU membership, and this was not an isolated case. Similarly, secondary reasons led to the rejection of the EU Constitutional Treaty by France and the Netherlands (in 2005), and then of the Lisbon Treaty in an Irish referendum (in 2008).10 Surprisingly, though, despite criticism of the EU’s technocratic nature and democratic deficit,11 Europeans trust EU institutions more than their national counterparts (see: Graph 1).

Graph 1. Public Opinion in the European Union, Standard Eurobarometer 80, Autumn 2013


These examples of the difficulties with European integration are important for two reasons. First, integration, which is supposed to be based upon common principles (Art. 2 TEU), even with the best law, cannot succeed if it lacks social support. Hence, the Preamble of the Treaty on the European Union recalled “the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe”. It also drew inspiration “from the cultural, religious and humanist inheritance of Europe, from which has developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law”. Second, while the EU is often criticised for its excessive law-making zeal, in many areas Europe suffers from insufficient regulatory convergence, and the EU provides what states cannot.

Although international treaties have stabilised international relations, the most ground-breaking norms in the fields of human rights or environmental protection cannot be reduced to the Westphalian rivalry and cooperation between equal sovereigns: once national interests are at odds, the effectiveness of the international system depends upon common values. Such norms express the will of “world society”, derived from human nature and from which they have gained their legitimacy. Non-binding norms, reflecting common beliefs based on mutual trust (which can instantly be revoked), may prove to be more efficient than a legally binding compromise, adopted by a majority vote and subject to a traditional dispute-settlement mechanism.

It is not for legal research to trace the causes and means of social changes, so the brief sketch above does not pretend to explain the reasons for the emergence of governance in international law. It indicates, however, that after attempts at centralisation by singular states, (and subsequently within international organisations), decentralisation matched with coordination appears to be the logical, and yet not inevitable, outcome. If one was to indicate the area in which such a change is most likely to occur, it would most likely be international economic law.

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In observing the coordination efforts among various fields of public international law, economic regulation is particularly interesting as it touches upon tangible interests. This is not to say that national economic interests cannot be in conflict with the achievement of common goals (independent of the actual result of running selfish policies, such as “beggar thy neighbour”). However, the globalised economy has also led to the emergence of global public good such as financial security, the protection of which requires cooperation among the principal actors.\(^{15}\)

Even though classical treaty relations are based on the assumption of a non-zero-sum game, when considering the costs and benefits of loyalty, economic analysis often leads to the conclusion that states should betray their partners.\(^{16}\) Now, the holy grail of a good legislator is to change the legal environment and thus eliminate the dominant strategy of betrayal. That may happen automatically, if the relationship is continuous (a repetitive game).

In the international realm, this does not occur automatically, but globalisation did not lead merely to the emergence of new systemic risks either.\(^{17}\) It changed the legal environment, which in many respects resembles a cooperative game in which even a single betrayal may undermine multilateral efforts.

In accordance with general economic theory, the solutions to the problem of common good – rivalrous and non-excludable – requires the coordination of conduct by the actors involved. In such cases, even setting common goals may prove insufficient. The means of attainment may be equally important, which at the global level is complicated by the lack of central authority. This may be perceived, however, more as a source of hope than as a threat.

From the constructivist point of view, the promotion of the above approach could redefine the international legal environment and under favourable circumstances, the change in the dominant narrative may be as rapid as the collapse of realism in international relations in the face of the unforeseen end to the Cold War. This also explains the different relationship dynamics to which this reasoning applies, where treaty regulation failed or was never adopted. The cooperative scenario assumes


instant payback in the case of betrayal. From this perspective, the states’ regulatory cooperation should happen spontaneously without the formal treaty-making procedure and especially without traditional dispute-settlement mechanisms, which are time consuming. International regulatory convergence occurs now in two principal ways: through central regulation (which is politically improbable), or through a decentralised approach. International decentralised regulatory coordination can be achieved both in horizontal and vertical relations, yet even in the latter scenario it does not stem from formal subordination. In this sense, economic governance – a mode of cooperation between disaggregated states – can be perceived as midway between international and domestic law.

In practical terms, regulatory coordination may be achieved through a variety of means depending on the subject matter and their direct addressee. Since the goal of governance is to increase regulatory convergence, it can be characterised by the legislative toolkit that is applied. To these ends, one can distinguish between, on the one hand, legally binding and non-binding norms, and on the other hand, between general and specific rules of conduct (see Table 1, below). The “normative spectrum” of international cooperation stretches from specific legally binding acts (law sensu stricto) to general and non-binding commitments (political acts). The grey area in-between provides grounds for the application of the governance method.

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<th>Table 1. Governance Methods in International Relations</th>
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<td><strong>Normative effects of international arrangements</strong></td>
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<td>Legal norm sensu stricto</td>
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<td>General rules</td>
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<td>Governance (coordinated interpretation)</td>
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<td>Politics</td>
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Source: own elaboration.

Within the scope of their discretionary powers, government officials (rather than states) who are convinced of the desirability of certain policies may, through informal communication, agree on a particular interpretation of general norms (clauses) in legally binding treaties. Whereas the treaty itself is legally binding, the

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19 According to the disaggregation theory, the participation of states in international relations should not be perceived as a game of interests between politically homogenous blocs, but rather as a resultant force of various stakeholder groups (see Anne-Marie Slaughter, Ibidem). For instance, to understand the origins of EU banking supervision, one should rather try to analyse the common interests of the supervisors from the home states (e.g. Germany and France) as opposed to the host-state supervision (e.g., Poland) and the very transnational financial conglomerates (seated in Paris or Frankfurt) instead of explaining negotiations from the French, German or Polish perspective.
harmonisation of its implementation depends upon goodwill and mutual trust. In economic relations, this appears as a particularly important point in terms of international trade and the protection of foreign direct investments (for instance, the EU practice of FTAs/DCFTA implementation), as the majority of trade treaties contain a large number of vague legal terms and they are frequently criticised for this reason.

Alternatively, the regulators and supervisors of markets (or the market participants themselves), may adopt specific guidelines. As long as such an agreement remains within the discretionary power of the parties concerned and mutual trust is sustained (stemming from compliance with the agreement), the lack of a legally binding force does not have to constitute an obstacle. The most famous examples of this method are the Basel Accords (BCBS). Substantial results have been achieved with securities (IOSCO) and insurance (IAIS). Another test case is the self-regulation by 18 global banks, confirmed by ISDA, on closing derivatives contracts in case of liquidity risks faced by SIBIs.

Obviously, the same logic applies to relations other than economic. Governance can be traced, for instance, in international efforts for the protection of cultural heritage. However, as the inherent nature of economic activity is its pecuniary valuation, (regardless of whether profit does, or should, constitute the principal goal thereof), in the actual scenario of a cooperative game it is relatively easy to demonstrate to policy-makers the gains and losses stemming from the application of governance. Once fully embraced, the method will spill into other fields, but economic relations provide the breeding ground for its adoption, even it also creates some particular difficulties, as discussed below.

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20 For instance, “[EU-Ukraine DCFTA] will imply harmonization of the Ukrainian legislation with the EU Directives. The Agreement doesn’t foresee exact details of legal approximation, but contains references to the respective Directives. It is the task for the Ukrainian government to embed key principles and parameters of the Directives into the national legislation and ensure its proper implementation”. See V. Movchan, V. Shportyuk, *Distributional Effects of the EU-Ukraine DCFTA: a CGE Household Microsimulation Model*, “Fifteenth Annual Conference of the European Trade Study Group” (ETSG), September 12–14, 2013, United Kingdom, http://bit.ly/196pRhe (01.11.2015).

21 “[T]he Commission’s language is very fuzzy, full of expressions such as ‘sufficient progress’, ‘adequate system’, ‘effective and proper implementation’, etc. without defining what sufficient, adequate, effective or proper means exactly. In short, the preconditions are written in an open-ended language that gives the Commission absolute power to decide whether the preconditions are met or not”. P. Messerelin, M. Emerson, G. Jandieri, A. le Vernoy, *An appraisal of the EU’s trade policy towards its Eastern neighbours: The case of Georgia*, “Groupe d’Économie Mondiale”, Sciences Po, Centre for European Policy Studies, Brussels 2011.

5. Range of Governance

Governance is a practical solution to the limitations of the Westphalian heritage of international law. However, as we move towards the uncharted waters of a “disaggregated world”, civil society is confronted with a new reality. One cannot overestimate the fact that the method of (self-) governance meets the requirements for Max Weber’s postulate of system legitimacy, which constitutes a political “reserve asset” in case of crisis (stabilising effect).

As stated above, states rely on governance when treaty regulation is unachievable (mostly for political reasons) or undesirable (states may be unwilling to legally bind themselves to certain policies). In both cases – intentionally in the case of political obstacles, and as a side effect of strategic choices – domestic democratic procedures are sidestepped and this raises legitimacy concerns. But looking at Weber’s rational-legal source of legitimacy, based on procedural and substantive requirements, one notices that democracy is not an indispensable precondition of legitimacy. Not only may majority rule lead to unlawfulness, but also democracy as a category applies to the organisation of equal citizens, which, from the international law and governance standpoint, is not what states are.

One possible alternative to direct participation at the international level, in terms of Weber’s procedural requirements, may be deliberative democracy. In terms of procedure, international governance inherently assumes the participation of major stakeholders, as the implementation of any agreement depends upon their cooperation. Obviously, the problem is that smaller or less organised groups remain excluded from decision-making, but then the same remark often applies domestically. From the substantive point of view (output legitimacy) the very emergence of international governance was a countermeasure to the limited capacity of states to solve economic problems.

Given the importance of this substantial dimension, it is not surprising how often the qualitative factor can be found in documents referring to international

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23 According to Weber, legitimacy is an empirical, social phenomena: acknowledgment of an individual or institutional power to adopt binding decisions and the respective normative (moral) obligation to obey them, irrespective of individual costs or benefits. Weber distinguished three sources of legitimacy: traditional, charismatic and legal. See R. Mayntz, Legitimacy and Compliance in Transnational Governance, Max-Planck-Institut für Gesellschaftsforschung, MPIfG Working Paper no. 10/5.


25 See in particular, Jürgen Habermas’ writings on this topic.

26 See, in particular, K. Wyman, op.cit., discussing whether law-making is rather a trickle-up process or an interplay of political groups of interest.
governance. For example, the UN Commission on Human Rights\(^\text{27}\) identified key attributes of good governance in transparency, responsibility, accountability, participation and responsiveness to the needs of the people. The European Commission adopted a White Paper, containing principles of good governance.\(^\text{28}\) Moreover, the EU Parliament passed a resolution on 14 December 2010 on good governance concerning EU regional policy,\(^\text{29}\) and it constitutes an element of the Millennium Development Goals.\(^\text{30}\) These examples could be multiplied so that one might even speak of a positive obligation for good governance in public international law.\(^\text{31}\)

Although presented from a particular perspective, as the secrecy of technical talks has its own rationale, the importance of transparency and accountability factors of good and effective governance can be fully appreciated by looking at European AML regulatory efforts carried out in 2013.

### 6. Case Study: Anti-Money Laundering and Anti-Tax Evasion

Against the general background of AML legislation, the current regulatory activism is rooted in the consequences of the 2008 crisis and the need for fiscal consolidation and favourable political circumstances that put the AML in the spotlight. All these factors allowed for a sudden change in the common perception that the fight against money laundering was an attempt by certain states to tamper with the fiscal autonomy of the others, into one of cooperation for the sake of curtailing pathologies that touch all states.

Although the phenomena of hiding income can be traced back to 13\(^\text{th}\) century B.C., actual “money laundering” was so named and criminalised only in the 20\(^\text{th}\) century.\(^\text{32}\) The history of AML legislation begins in the U.S. with the adoption of the

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\(^{27}\) Resolution 2000/64.

\(^{28}\) COM(2001) 428 final.


Bank Secrecy Act in 1970 and 21 years later in the EU with the First Directive for combating money laundering.

An important event (especially from the perspective of international governance) was the establishment of the Financial Action Task Force in 1989. It was agreed that FATF would not involve itself in tax evasion matters, as these were considered to require a different methodological approach to money laundering, and this did not raise any negative reactions. Also the often blurred lines between money laundering and banking secrecy justified such a distinction.

Despite these initiatives the feeling (even within the EU) was of helplessness in view of the tax havens, offshore financial centres, and uncooperative jurisdictions, which spread in parallel to the AML legislation’s efforts. Claims that tax evasion matters pertain to national sovereignty did not simplify the situation either. Most importantly, states were incapable, not of condemning abuse of the financial system, but rather of regulatory coordination against subjects that targeted precisely trans-jurisdictional loopholes. At the time, the AML legislation was deemed “not very effective”, and its efficiency “has been damaged by the existence of hidden information related to the ability or willingness of banks to cope with money-laundering prevention”.

Interest in the subject matter was renewed with the 2008 crisis, arguably due to both the necessity of tapping into additional resources in times of fiscal consolidation and for a deepened awareness of the global financial system. The Offshore Leaks investigation and a series of tax-evasion scandals that shook the European political scene (especially France, which was scandalised by numerous accounts, including the Woerth-Bettencourt and Cahuzac cases) added new zeal to the AML. The issue of tax cooperation was raised as early as 2008 at the first G20

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33 Ibidem.
35 T. Blickman, Seminar on Money Laundering, Tax Evasion and Financial Regulation, Amsterdam, Speech, June 12–13, 2007, http://bit.ly/1ekq3qR (01.11.2015). Blickman points out that in the pre-crisis paradox, that the AML field was one of the very few that was not subjected to the general trend of deregulation at that period.
summit. This account does not intend to exhaust the topic of regulatory developments in the AML/CFT fields. Instead, it highlights, within restricted timeframe, the sequential nature of normative developments. Even if they are not necessarily related from a strictly legal point of view, they reveal the winds of change: transnational regulatory coordination.

In February 2013, FATF published the Guidance on National Money Laundering and Terrorist Financing Risk Assessment, which supplemented the FATF recommendations – the International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation. At the same time, the Swiss Federal Council submitted a legislative proposal implementing the revised FATF recommendation and the European Commission adopted two legislative proposals for reinforcing the EU AML regime, taking into account the steps taken by the FATF.

In April, the prime minister of the Duchy of Luxembourg, Jean-Claude Juncker, (the chair of the Eurogroup from 2005 to 2013) announced that from 1 January 2015, Luxembourg would introduce automatic exchange of banking data, thus liberalising one of the two most stringent EU banking secrecy regimes. At the time, the other one, Austria, still insisted on the superiority of bilateral cooperation over the

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39 “Medium-term actions:
– National and regional authorities should implement national and international measures that protect the global financial system from uncooperative and non-transparent jurisdictions that pose risks of illicit financial activity.
– The Financial Action Task Force should continue its important work against money laundering and terrorist financing, and we support the efforts of the World Bank – UN Stolen Asset Recovery (StAR) Initiative.
– Tax authorities, drawing upon the work of relevant bodies such as the Organization for Economic Cooperation and Development (OECD), should continue efforts to promote tax information exchange. Lack of transparency and a failure to exchange tax information should be vigorously addressed,” See: Declaration of the Summit on Financial Markets and the World Economy, Washington DC, November 15, 2008.

40 The list of events is based upon my contributions to AML/CFT for the “Przegląd Prawa Międzynarodowego” (“Review of International Law”), http://przegladpm.blogspot.com/search/label/AML%2FCFT.


European system of automatic data transfer, but for the first time hinted at a possible
modification of that position.\textsuperscript{46}

Still in April, and while continuing to try to erase the bad impression made by
the Cahuzac scandal, the French minister of finance, Pierre Moscovici, called on
his EU counterparts to amend the outdated European norms on banking secrecy
so they were in accordance with the standard adopted in the U.S. Foreign Account
Tax Compliance Act (FATCA). After a five year stalemate in negotiations, the move
was so surprising that the EU tax commissioner, Algirdas Šemeta, unexpectedly
joined the European financial summit.\textsuperscript{47} The UK, France, Germany, Spain, and Italy
announced a G5 pilot project on tax evasion.\textsuperscript{48} By the end of the year, 37 jurisdictions
had expressed their interest in participating in the project.\textsuperscript{49} The growing pressure
on tax havens also compelled the UK's chancellor of the exchequer, George Osborne,
to defend the government's stance in this field.

Also during this period, the Italian government submitted a bilateral tax agreement
with San Marino for ratification, which included automatic transfer of banking data.\textsuperscript{50}

The only opponent against any significant change at the time was Switzerland;
the president of the confederation, Ueli Maurer, declared that there was no reason
for the country to accede to the European system of automatic exchange of banking
data.\textsuperscript{51} Yet, only one month later the Federal Council approved accession to FATCA,
departing from the long-held tradition of Swiss banking secrecy.\textsuperscript{52} The move by
the Council of States (which, despite its support for FATCA, rejected an annual
moratorium on the transfer of banking data to American authorities – called Lex
USA– and stated that it would not submit to U.S. blackmail),\textsuperscript{53} appears somewhat odd
in this context. It was argued that the Federal Council had not sufficiently justified
its legislative motion to parliament. At the same time, the Federal Council called on
the government to present some sort of “Plan B”, despite assertions that there was

\textsuperscript{46} M. Fekter (PAP), "Austria i Luksemburg gotowi do łagodzenia tajemnicy bankowej", [statement]

\textsuperscript{47} Europe to step up tax evasion battle, Financial Times, http://on.ft.com/1d0pvby (01.11.2015).


\textsuperscript{49} Poland was the first country to declare its support for the G5 initiative. See: Six More Countries


\textsuperscript{51} La Suisse n'a aucune raison de changer de stratégie fiscal, Le Matin, http://bit.ly/1d0sNvk (1.11.2015).

\textsuperscript{52} M. Menkes, Szwajcaria zatwierdzała zasady transferu informacji bankowych FATCA, "Przeglądą Prawa

\textsuperscript{53} Murat Julian Alder: La “lex USA”, c'est la négation de l'Etat de droit et de la démocratie, “Tribune
none. Eventually, a “miraculous solution” was found in July, even though it has been suggested that the Swiss banks had already found their own way around the legislative constraints.

In May, the Duchy of Luxembourg announced it would accede to FATCA. Perhaps the greatest surprise came in the same month when the U.S. Crimes Enforcement Network and its Vatican counterpart, Autorità di Informazione Finanziaria, announced the signing of a Memorandum of Understanding for cooperation on AML and Combating the Financing of Terrorism (CFT). The Vatican’s official journal also reported that the Vatican was negotiating similar agreements with 20 other jurisdictions. A couple of days later, in an unprecedented move, the Vatican published its annual financial report. Even though the document was assessed as being very vague, it constituted a step in the right direction. Despite subsequent shameful events that tarnished the Vatican’s reputation – notably the scandal involving “Monsignor 500”, who is suspected of corruption, money laundering and fraud – Pope Francis continued in his efforts to bring order to the banking sector by establishing the Pontifical Commission for Reference on the Institute for Works of Religion. Yet another step was taken in August, when the Pope published a Motu Proprio, thus broadening the application of Vatican law to include all sorts of entities related to the Vatican and the Holy See. As a result, the supervisory and regulatory function of the Financial Information Authority has been strengthened and has established both prudential supervision (in accordance with recommendations by the MONEYVAL Committee of the Council of Europe) and the Financial Security Committee. In October, two major financial organs, the Institute for the Works of Religion and the Financial Intelligence Agency were empowered.
6. Concluding Remarks

The linear nature of history as determined by the progress of the natural sciences (which allows for increases in economic efficiency, and supply and demand, and at the same time requires greater specialisation in work and coordination) justifies the belief in the highest economic efficiency of adequately regulated capitalism.\(^{64}\) Even though democracy does not constitute \textit{conditio sine qua non} of the highest efficiency (or even fluent operation of the free market), it does create favourable conditions in which to tap human capital thanks to, among others, the free circulation of ideas. As both a revolutionary change of the political or economic system, and the global domination by one superpower (or several) appears improbable, a humble lawyer may only hope to enhance the efficiency of the system.

In accordance with Adam Smith's theory of the invisible hand, the individual pursuit of profit may contribute to the common good.\(^{65}\) This, however, requires an adequate institutional framework. In the language of game theory, a legal framework should favour cooperation among players, which allows for the reallocation of resources previously “wasted” on one’s self-defence in order to create a cooperative surplus.

The current economic crisis shows that we already live in a new reality. Just as the regional egoisms of the feudal fragmentation era had to succumb to the unification of states, further technological development that influences business processes makes global coordination necessary. Accordingly, the coordination method discussed in this paper is not new per se. What is new, however, is the current importance of its application. Hence denying the relative normativity of governance could be compared to the stubborn insistence that the Emperor is wearing clothes.

The longer the regulatory convergence is delayed, the higher the social cost. Even the focusing of international treaties on common objects is no longer fully satisfactory, because the most relevant aspect is in the actors’ behaviour. Accordingly, two basic governance methods of regulatory coordination will often prove better than the traditional international law approach.

The adaptation to governance realities of social, political and legal institutions formed in the Westphalian era may constitute a challenge (most importantly in terms of legitimacy), but none of these should prove insurmountable. As the empirical study on AML regulation reveals, transnational regulatory coordination, untraceable through traditional international law analysis, has already occurred.


Now the point is to change the cooperation necessity postulate into a socially recognised duty to cooperate. In international economic law, the task appears easier thanks to the tangible nature of cooperative gain, which alone does not guarantee success. Upon this conceptual basis – the next step should be a critical reassessment of international regulatory methods and the impact of governance on international law.

While some of the arguments on “post-state” international law may appear to be political fiction, one should not forget, how recent the “eternal” notion of *ius gentium* was.

**References**


