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Contested or competitive multilateralism? A reply to Julia C. Morse and Robert O. Keohane

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In their thoughtful analysis of a dimension of global governance which has in recent years attracted a good deal of scholarly attention – namely the growing plurality and diversity of international institutions and regimes to address similar or overlapping global issues – Julia Morse and Robert Keohane identify and distinguish a specific feature of this dimension which they term contested multilateralism.[1]

Given a scholarly literature already rich with varying accounts of pluralist global governance; including those which emphasise the multiplicity of competing regimes (e.g. Nico Krisch,[2] Paul Berman[3]), those which highlight the fragmented nature of an international legal order composed of conflicting or uncoordinated international regimes (e.g. Martti Koskenniemi[4]), those which introduce the idea of regime complexity to underscore the unintegrated but overlapping and connected nature of many sets of global institutional arrangements (e.g. Larry Helfer,[5] Kal Raustiala and David Victor,[6] Karen Alter and Sophie Meunier[7]), and the nuanced accounts of global and transnational legal ordering which emphasise the multiplicity of normative

[1] J Morse and RO Keohane, 'Contested Multilateralism' (2014) 9 *Review of International Organizations* 385.

[2] N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, Oxford, 2010).

[3] P Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Law Review* 1155.

[4] Martti Koskenniemi led and finalised the report of the Study Group of the UN International Law Commission, entitled *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* A/CN.4/L.682 13 April 2006. See also J Trachtman 'Fragmentation, Coherence and Synergy in International Law' (2011) 2 *Transnational Legal Theory* 505.

[5] L Helfer, 'Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 *Yale Journal of International Law* 1.

[6] K Raustiala and D Victor, 'The Regime Complex for Genetic Plant Resources' (2004) 58 *International Organization* 277.

[7] K Alter and S Meunier, 'The Politics of Regime Complexity' (2009) 7 *Perspectives on Politics* 13.

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orders beyond the state (e.g. Terence Halliday and Gregory Shaffer,[8] Neil Walker[9]) what additional insight does the analytical frame of 'contested multilateralism' introduced by Morse and Keohane offer us?

The authors define the specific object of their interest to be the conscious decision by a group of states, or some combination of states, international institutions and non-state actors, to challenge the rules, practices or mandate of an existing multilateral institution by shifting to or establishing a different multilateral institution whose rules, practices or mandate conflict in some way with the initial multilateral institution. Their interest, in other words, is in the political decision to establish or shift towards an alternative multilateral institution to address a given issue or problem in circumstances in which there is dissatisfaction with how it is being addressed by a prior multilateral institution, where that second institution then competes and conflicts with the practice or rules of the first.

Lawyers are used to thinking about 'forum shopping' as a practice involving private litigants who choose amongst existing legal possibilities to find the venue most favourable to their interests when litigating or bringing proceedings. Morse and Keohane are interested in a similar kind of strategic choice amongst possible decision-making forums, where the choice is being made not by an individual or single actor but by a collection of political actors (including states) who seek to find or establish a multilateral venue more favourable to their interests and goals than an existing institution for dealing with an issue of common concern.

They offer a number of reasons for highlighting this particular aspect of the otherwise familiar issue of global institutional pluralism. In the first place, they suggest that it challenges assumptions that powerful states who are dissatisfied with existing international arrangements will generally act unilaterally or bilaterally to challenge those arrangements, rather than resorting to another multilateral arrangement. A second reason they offer is that the idea of 'contested multilateralism' provides a more coherent and helpful explanation for some of the processes which are leading to increased fragmentation and complexity in the domain of global governance. In other words, they seek by their analysis to provide an explanatory account – or at least a partial explanatory account – of the co-existence of a plurality of multilateral institutions governing similar issues. Rather than merely describing the multiplicity of institutional settings and the conflicting or competing nature of their processes or output, their account of contested multilateralism aims to highlight some of the reasons which seem to drive

[8] T Halliday and G Shaffer, *Transnational Legal Orders* (Cambridge University Press, New York, NY, 2016).

[9] N Walker, *Intimations of Global Law* (Cambridge University Press, Cambridge, 2014).

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states and other institutions or groups of actors to set up or to move towards an alternative regime to one in which they previously participated (and often continue to participate).

There is much in their analysis that is thought-provoking and illuminating. In drawing attention to the deliberate nature of the decision to create competing multilateral institutions, and to the dimension of conflict – namely that the new institutions are established *in order to* challenge the status quo institutions and that their rules or practices conflict with those of the latter – Morse and Keohane emphasise an aspect of pluralist global governance that is not always to the forefront in other parts of the literature. However, while I agree with and appreciate much of their analysis, I will use this brief reply to question a number of the premises or claims of their article, and to suggest a somewhat different reading of some of the scenarios they depict.

A first question I want to raise concerns the importance they give to the dimension of conflict within the definition of contested multilateralism. On their explanation, contested multilateralism comes into being when a coalition of actors is dissatisfied with an existing institution and shifts the focus of activity to another multilateral institution (whether new or existing) whose rules and practices conflict with or significantly change those of the status quo institution. Yet while the idea of focusing on contestation and conflict may be a productive one in many respects, it seems to me that some of the cases they cite in their analysis are not best characterised as forms of multilateralism which produce conflicting rules or practices in a given field. To be sure, in all of the examples they provide, a collection of actors is moved by dissatisfaction with the constraints (whether the mandate, rules or practices) of an existing institution to create or move to an alternative institutional forum. However, in several of the cases they present, the alternative institution is one that in my view is better characterised as advancing the goals and practices of the first institution, or supplementing and enhancing them, rather than necessarily challenging or undermining them.

If the gist of contested multilateralism is deliberate challenge and conflict between different institutional settings, one might expect the new institution to disrupt or undermine what the former institution is trying to do. Yet in several of the examples provided in their analysis, it seems that what the dissatisfied actors sought was either a more specialised or heightened focus on some particular dimension or aspect of the broader issue area treated by the status quo institution. For example, the establishment of a new institution with a specific focus on renewable energy (IRENA) rather than having renewable energy dealt with by the broader International Energy Agency (IEA) which deals also with fossil fuels, does not necessarily mean

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that the rules and practices of IRENA will undermine those of the IEA, as opposed to creating a new and more intensive field of activity in the area of renewables. Similarly, the creation of a new institution in the shape of the Proliferation Security Initiative (PSI), which was created to work towards establishing a stronger basis for the interception of vessels suspected of transporting illegal weapons, seems like a move to promote more effective enforcement of a goal which is fully compatible with the goals of the status quo institution, which was the United Nations Convention on the Law of the Sea (UNCLOS). The UNCLOS regime focuses on a wide range of maritime issues, and includes some rules governing the boarding of vessels where there is a suspicion of criminal activity, but the establishment of the PSI with its aim of strengthening the possibility for intercepting vehicles suspected of transporting illegal weapons does not necessarily undermine or challenge the rules of UNCLOS. Rather, the PSI focused on creating more targeted ways of establishing the consent (through ship-boarding agreements with flag-of-convenience states) required by UNCLOS rules.

Similarly, both the WHO as an existing, status quo institution with a very broad remit and mandate, and UNAIDS as a specialised body set up subsequently, share the goal of tackling the problem of AIDS, but differed as to their preferred approach and as to the most effective means for addressing it. The establishment of UNAIDS did not undermine the WHO's goal of addressing AIDS, even if it pursued the same goal more effectively in a different institutional setting through a different approach, and subsequently led to adaptation in the WHO's approach and its willingness to work alongside a range of other actors. A similar analysis could be applied to the establishment of the Global Alliance on Vaccines Initiative (GAVI) as a response to the inadequacy of the WHO's vaccine development programme The two institutions did not pursue different or competing goals, but the WHO was felt by many not to have established a sufficiently well-functioning vaccine development programme, while GAVI was formed as an innovative arrangement in partnership between public and private actors including civil society bodies, states, international organisations and other actors to pursue the same goal in a more effective and collaborative way.

In my view, the example provided by the authors which best exemplifies the kind of conflict suggested in their initial definition of contested multilateralism is one of the instances of regime-shifting they describe: the move by developed countries from the World Intellectual Property Organization (WIPO) to the World Trade Organization (WTO) agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to pursue a stronger level of intellectual property protection for their industries. In this case different groups of states from developed and developing

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countries respectively sought to pursue genuinely opposing and conflicting goals: developing countries were concerned at the impact on their populations (e.g. due to the lack of access to vital medicines) of the kind of intellectual property protections sought by developed countries for their industries. The WTO/TRIPs setting provided developed countries with a more favourable forum in which to secure stronger intellectual property protection while developing counties enjoyed a more favourable institutional environment within WIPO, in part due to the agreement between WIPO and the UN in 1974 which integrated the work of WIPO within the UN's development-related objectives.[10]

A second question I want to raise concerns the authors' presentation of the challenge brought against UN Security Council sanctions in the *Kadi* litigation before the European Court of Justice as an instance of contested multilateralism (and indeed the authors acknowledge in their footnote 24 that the *Kadi* example is somewhat different from others). It seems odd that this case study is presented as an example of an organisation or a group of states growing dissatisfied with the mandate, rules or practices of an existing multilateral institution, and seeking to move to or create a new one in which they can better pursue their goals. The explanation given by the authors for presenting this as an instance of contested multilateralism is that it shows an attempted move towards a new institutional arrangement, albeit a move led not by a group of states and others, but by another international institution itself, namely the European Court of Justice. Yet this seems to be a rather strained way of understanding the *Kadi* litigation, its causes and its consequences. The multilateral institution which was challenged in the *Kadi* situation was the UN Security Council and its sanctions regime. Yet no group of states or states and others actors is seriously challenging the role of the UNSC sanctions regime by suggesting that another multilateral institution – whether new or existing – should be made responsible for deciding on targeted anti-terrorist sanctions. While several states (the group of so-called 'like-minded states' including Austria, Sweden, Norway, Switzerland and Denmark) sought to bring procedural reform to bear on the Security Council's sanctions regime over a number of years,[11] it was neither states nor an international organisation that initiated the challenge to the Security Council's procedures in the *Kadi* context. Rather it was individual actors who had been affected by targeted

[10] Agreement between the United Nations and the World Intellectual Property Organization of 27 September 1974, available at <http://www.wipo.int/treaties/en/text.jsp?file_id=305623>.

[11] See for discussion S Eckert and T Biersteker, 'Due Process and Targeted Sanctions: An Update of the "Watson Report"' (Watson Institute for International Studies, Brown University and The Graduate Institute, Geneva, 2012).

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sanctions, together with the support of lawyers and others concerned with civil liberties, who brought proceedings before the European Court of Justice and other domestic and regional courts with a view (amongst other goals, the main one of which was to recover access to frozen assets) to introducing due process reforms into the regime. They were successful, to some extent, in that the rash of litigation eventually led to the establishment of the office of the Ombudsperson for the UN Resolution 1267 sanctions regime, even though this reform did not go as far as the Court of Justice's ruling seemed to require. Yet the European Court of Justice's insistence on the availability of judicial review of Security Council imposition of smart sanctions seems a long way from the triggering, creation or shift by a group of actors to an alternative forum for the pursuit of their goals when those goals are not being adequately met by an existing institution. None of the actors involved – including the group of like-minded states – suggested an alternative multilateral institution to the UN Security Council and its sanctions committee for the determination and imposition of international counterterrorist smart sanctions. Rather the European Court, prompted by litigation brought by private actors and their legal advisors against some of these sanctions, went somewhat further in its insistence on due process than states and other reform-minded actors did. The focus of the European Court's ruling, however, was on reform of an existing multilateral institution rather than on the establishment of or shift to an alternative one.

This leads on to a third and final observation on the article, which is that the authors' analysis of contested multilateralism is focused substantially on states and international institutions. While the role and activities of non-state actors are mentioned at times, the latter are not central to the arguments about contested multilateralism. Without having engaged in empirical study of the matter, it is difficult to prove, but it certainly seems today as though the activities of varying coalitions of non-state actors and groups may explain much of the institutional pluralism and the push towards regime shifting or alternative regime creation that can be observed.

In conclusion, the most distinctive feature of the perspective the authors introduce into the plural global governance literature with their analysis of contested multilateralism is the emphasis on contestation and conflict: how groups of states and actors who are dissatisfied with one institutional forum deliberately shift to or create another multilateral institutional forum to achieve their goals, in a way which conflicts with or challenges the first institution. However, I have suggested that several of the examples provided do not entail the element of conflict and challenge that their focus on contestation and conflict suggests. In particular, the instances of 'new regime creation' that they cite seem to be more about alternative or specialised multilateral institutions established to achieve or pursue more

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effectively the goals that earlier institutions were established to pursue but failed adequately to achieve. The most compelling example of contested multilateralism based on and leading to sharp conflict between the rules and goals of the two institutions is the case of regime-shifting from WIPO to the WTO TRIPS agreement.

Let me conclude with a suggestion as to the title of the phenomenon which interests Morse and Keohane. On the one hand the term contested multilateralism might be read to imply that it is the *multilateralism* that is being contested, when in fact multilateralism is being reaffirmed and strengthened, albeit through the vehicle of a new multilateral initiative. On the other hand it seems that what is taking place in the examples they describe is often less a conflict between regimes than a *competition* between regimes engaged in the same or similar activity. The cold war years had dissuaded any such attempts and had frozen the institutional options open to states to pursue global or international goals to those that had been established in the post-WWII period. But since the early 1990s, opportunities have gradually opened up for competition in the true sense of the word, enabling disaffected states to express their discontent with the way an institution was being run not through either exit or voice, but through fostering alternative and competing institutions. Often the support for these competitors did not signal any fundamental challenge to, or contestation of, the principal mission of the main institutional actor, but rather a wish to catalyse or even force change through competition. A more appropriate term to convey what they are interested in exploring might thus perhaps be *competitive multilateralism*.

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