STREAM READINGS

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Distribution and Regulation in the Transnational Economy

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Distribution and Regulation in the Transnational Economy

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Description

When considering problems of unequal distribution in the global economy we often assume it is the state's role to regulate economic actors so as to resolve them. In reality, however, the economy is regulated, or governed, by a variety of actors – including the states, corporations, international NGOs and labor unions and many others. In this stream we will examine the complex, dynamic and sometimes competitive ways in which these various rule-makers or "normative agents" operate, with a South Asian case study focus.

Stream Session

Distribution and Regulation in the Transnational Economy

Danielsen, D. (2016). Beyond Corporate Governance: Why a New Approach to the Study of Corporate Law is Need to Address Inequality and Economic Development. In U. Mattei & J. Haskell, Research Handbook on Political Economy and Law (1st ed., p. (excerpts). Pages 1-7

Danielsen, D. (2015). Corporate Power and Instrumental States: Toward a Critical Reassessment of the Role of Firms, States and Regulation in Global Governance. In B. Stark, International Law and Its Discontents: Confronting Crises (1st ed., pp. 171-193). New York, NY: Cambridge University Press. Pages 8-19

Fransen, L., & Burgoon, B. (2012). A market for worker rights: Explaining business support for international private labour regulation. Review of International Political Economy, 19(2), 236-266. Pages 20-32

Model Text for the Indian Bilateral Investment Treaty, Chap. III, Investor, Investment and Home State Obligations Pages 33-38

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BEYOND CORPORATE GOVERNANCE: WHY A NEW APPROACH TO THE STUDY OF CORPORATE LAW IS NEEDED TO ADDRESS GLOBAL INEQUALITY AND ECONOMIC DEVELOPMENT

Chapter in RESEARCH HANDBOOK ON POLITICAL ECONOMY AND LAW, U. Mattei and J. Haskell, eds. (Edward Elgar 2015).

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For 40 years or more, corporate law scholars the world over have focused on issues of 'corporate governance' understood as the study of the rules concerning the internal allocation of power and decision-making authority among shareholders and managers in a single firm, and its global corollary 'comparative corporate governance' focused on the impact of domestic corporate governance rules on share ownership patterns in different countries.[1] Scholars of corporate law and development, in turn, have focused on whether there are 'best practice' corporate governance rules that are more conducive to the promotion of national champions, or the proliferation of small and medium sized businesses, or the attraction of foreign direct investment, or the promotion of the productive efficiency of individual domestic firms or that increase the efficiency of domestic capital markets.[2]

While these issues are important ones, additional areas of inquiry are required to understand the relationships among firms, corporate law and development under current conditions of capitalist production. In particular, we will need to move beyond the study of the internal governance of individual firms and the impact of different corporate law rules on share ownership patterns in two ways. First, will need to study the institutions and practices that govern relations between firms engaged in geographically dispersed and legally disaggregated networks of value generation, production and distribution, often referred to as 'global commodity chains' or 'global value chains'. Second, we will need to study the ways in which this form of capitalism impacts relations among firms and states as individual firms and the chain as a whole navigate and transform the multiple states, regulators and legal regimes with which they interact in the pursuit of their business objectives. In other words, if corporate law and development scholars are to contribute meaningfully to theoretical and policy debates about the role of corporate law in fostering economic growth or reducing income inequality, we must take up

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[1] For a representative example of this tradition of corporate governance scholarship, see Frank Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* (Harvard 1991). For a representative example of the comparative corporate governance tradition, see Ranier Kraakman, et al, *The Anatomy of Corporate Law: A Comparative Functional Approach* (OUP 2009).

[2] See eg, Peter Gourevitch, 'Corporate Governance: Global Markets, National Politics' in Miles Kahler and David Lake (eds), *Governance in a Global Economy: Political Authority in Transition* (Princeton 2003) 305-31; Ajit Singh, 'The New International Financial Architecture, Corporate Governance and Competition in Emerging Markets: Empirical Anomalies and Policy Issues' in Ha-Joon Chang (ed), *Rethinking Development Economics* (Anthem 2003) 377-402.

systemic governance among firms in value chains and broaden our notions of political economy to encompass the multiplicity of firm/state relations that global value chains entail.[3]

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To explore how a focus on systemic governance among firms and firm/state relations might be brought to bear in a contemporary context, I consider the recent spate of catastrophic incidents in textile factories in Bangladesh.[4] Well over a thousand workers, mostly poor women, have been killed and many more have been injured working in textile factories linked to the global economy through mostly contractual networks of legally independent firms. While the development policy, corporate law and economic circumstances of the Bangladeshi textile industry are in some sense unique, the legal arrangements and institutional forms that link Bangladeshi textile manufacturers to global markets are not. For this reason, I use the events in Bangladesh not as a case study but rather as a conceptual hypothetical for thinking about how the methodological shifts I advocate here might enrich corporate law scholarship in general and corporate law and development scholarship in particular.

One reason the traditional corporate law focus on 'best practice' domestic corporate governance rules for domestic firms is problematic is that for many firms in many countries the most important corporate law and business regulation shaping business practice and growth in those countries may not be domestic law.

Let us imagine that most textile factories in Bangladesh are domestically incorporated firms owned by families or family groups or wholly-owned subsidiaries of foreign multinational firms. In the case of domestic family businesses, local corporate governance rules would apply to corporate decision-making and shareholder protections. With regard to foreign parent companies and their local subsidiaries, decision making with regard to important questions of economic policy, risk management and business conduct would be taken at or directed from the foreign parent level. In such circumstances, the corporate governance rules of the parent's home country would be most important for determining the business practices of the local Bangladeshi subsidiary.

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[3] The study of the relation within and among firms and between the firm and state has been a focus of study among scholars of political economy for some time. For a brief history of this tradition, see Robert Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton 2001) 278-300. For a brief history of the development of scholarship focused on the relations among firms in 'global commodity chains', see Jennifer Bair, 'Global Capitalism and Commodity Chains: Looking Back, Going Forward' (2005) 9 Competition & Change 153. For an effort to articulate models of systemic governance in global chains without reference to corporate law or corporate governance structures, see Gary Gereffi, John Humphrey and Timothy Sturgeon, 'The Governance of Global Value Chains' (2005) 12 Rev Intl Pol Econ 78.

[4] For a general discussion of some of these events, see Jim Yardley, 'Justice Elusive in a Bangladesh Factory Disaster' *New York Times* (New York, 30 June 2013) A1; see also, 'Bangladesh Building Collapse: In Pictures' The Guardian (London, 24 April 2013) <www.theguardian.com/world/gallery/2013/apr/24/bangladesh> accessed 21 September 2014.

While textile firms in Bangladesh (whether owned domestically or by foreign firms) are subject to Bangladeshi labor law, building codes and workplace safety regulations, competitive counter-pressures from foreign multinational purchasers of Bangladeshi textiles and Bangladeshi development policy favoring domestic textile manufacturers have encouraged aggressive and dangerous business practices by Bangladeshi factory owners and a culture of bribery and lax enforcement of labor rights and factory building codes by Bangladeshi regulators. These competitive pressures are created in part by major wholesale purchasers of Bangladeshi textiles (the H&Ms and the Walmarts and the Gaps and the Carrefours) all firms governed by the corporate law and business regulation of their home jurisdictions and connected to Bangladeshi suppliers via supply contracts, often through multiple subcontractors and intermediaries. To the extent these foreign purchaser firms are concerned with economic or brand risk generated by the business practices of their Bangladeshi suppliers, they may seek to shape those business practices in part through their supply contracts with Bangladeshi firms, with intermediate subcontractor firms or both. In practical terms, this network of contracts may have more impact on the business behavior and practices of Bangladeshi textile firms than the corporate law and the business regulation by the Bangladeshi state. Moreover, the regulatory and enforcement behavior of Bangladeshi public officials may itself be shaped by the business terms set by foreign buyers in supply contacts on the one hand, and anticipation of the behavior of regulators in competing textile producing states and its effect on the competitive advantage of Bangladeshi suppliers on the other.

Thus, even if it were possible to link Bangladeshi corporate governance rules and business regulations to worthy development goals such as enhanced small and medium-sized business development, family entrepreneurship and individual firm profitability through, among other things, wage suppression and low cost production in the domestic textile industry, the business practices and behavior of Bangladeshi textile firms are also a product of foreign corporate law rules and business practices that even 'best practice' domestic corporate law rules would be unlikely to change. For example, even imagining that local Bangladeshi corporate law was an important influence on the operation of some Bangladeshi textile firms, 'best practice' fiduciary duty protection for shareholders to police management malfeasance by Bangladeshi managers would be unlikely to induce management to pay greater attention to plant safety or worker protection because the family shareholder beneficiaries of the rules would likely also be the ones setting company policy concerning the working and building conditions in the textile plants. Wage and hour rules or workplace safety standards set in supply contracts may have more effect on Bangladeshi textile firms than national labor or building regulation if the economic risk of losing access to the supply chain of a global purchaser is greater than the cost of non-compliance with Bangladeshi rules.

In sum, business practice, both locally and globally, is to a large extent a function of relations between firms that are themselves subject to the corporate law and business regulation of multiple jurisdictions—conditions that the study of the domestic corporate governance rules and their impact on management and capital structure of individual firms does not begin to capture.

This leads to a second point. Under current conditions of widely geographically disbursed and disaggregated production through loosely, usually contractually-related networks of firms, the traditional focus in corporate law and development studies on individual firm governance, domestic firm efficiency and forward and backward linkages among domestic firms may be insufficient to guide the formulation of effective development policy. To the extent that the production and distribution of goods and services globally is organized through global production networks or value chains and the goal of national development policy is to secure and sustain development gains for the national economy, development policy would seem to require at least three considerations in addition to the classical challenges of building the capacity to produce commodities, goods and/or services that can be sold outside the domestic market. First, there is a need to find ways for domestic firms to gain access to relevant global value chains, preferably relatively stable and economically significant ones. Second, policies might be geared to developing legal and institutional mechanisms to manage 'systemic chain governance' and 'systemic efficiency' rather than or in addition to mechanisms that increase efficiency of individual firms. Third, innovation is required to develop strategies for local firms to capture more of the economic surplus from the value chains in which they participate by securing control or dominance over some important aspect of the chain, either through governance techniques or upgrading the role of domestic firms in value creation in chain systems. In such circumstances, the corporate governance issues in question are not, or not only, the legal arrangements for best organizing individual firm governance, but what legal arrangements might be structuring the systemic governance of value chains and whether different legal arrangements might lead to better outcomes with respect to more equitable distribution of gains among firms in the chain, as well as governance tools that might better ameliorate some of the adverse effects of chain production systems—effects such as the dangerous and often deadly conditions for workers in Bangladeshi textile firms.

Looking again to the Bangladesh example, we can see the importance of the study of 'systemic' governance of value chains both for business firms and for development policy planners. Assuming that most Bangladeshi textile firms focused on low cost production are highly substitutable with one another (and with competitor firms from other low cost jurisdictions), their bargaining power in relation to the rest of the value chain is likely to be weak. With prices and business terms driven by large foreign buyers, strong competition between Bangladeshi firms for ever-shrinking margins would further weaken the bargaining position of Bangladeshi textile firms. Moreover, to the extent these firms depend on foreign inputs and foreign design as well as foreign branding and foreign marketing, their ability to capture more lucrative parts of the textile/retail chains in which they work and sell would be further limited. Thus, while Bangladeshi textile firms have been able to capture a very large global market share in textile production, the combined business and development strategy of maintaining the market position of low or lowest cost producer leaves them with little clout either from a governance perspective or a production perspective to extract more surplus from other players in the global value chains in which they are embedded. In such circumstances, wage suppression, long working hours and poor or unsafe working conditions may be among the few mechanisms through which Bangladeshi textile firms or the Bangladeshi state itself can effect profit margins.

For Bangladesh to enhance its ability to extract surplus from its market share in textiles, Bangladeshi firms would need to find ways of taking on more lucrative roles in the value chains systems in which they participate. This goal might be achieved through strategies such as assuming higher value and higher skill roles in textile production (design, pattern-making, piece production as well as assembly), or attempting to create stronger product differentiation and loyalty among buyers to shift bargaining power in their direction through consolidation with other textile firms in Bangladesh or elsewhere, or asserting some governance or coordinating function, such as certifying compliance by Bangladeshi firms with purchaser codes of conduct and/or international labor standards. All of these strategies would require strengthening connections between firm partners in the chain (which likely won't be Bangladeshi firms) rather than creating forward and backward linkages with Bangladeshi firms and suppliers as more traditional development theory might suggest. While the techniques and strategies for obtaining more control over systemic governance of chains and more differentiation and upgrading of the roles for domestic firms in the global value chains will vary from industry to industry and value chain to value chain, it remains the case that all these strategies require a much more sophisticated understanding of the systemic governance mechanisms and business strategies among firms in global production networks - once again, areas of exploration that traditional corporate law and development approaches to corporate governance do not generally study or address.

In addition to inter-firm relations and systemic governance among firms, corporate law and development scholars need a more nuanced account of relations between firms and states. In some sense, this subject has received more attention than the other two I have mentioned, though mainly within a framework of state autonomy and state capture.[5] While neo-liberal development theorists have argued for decades the virtues of a 'market' economy driven by private investment, export-led growth and limited state participation (whether through ownership or regulatory action),[6] more heterodox development theorists have asserted that successful development states need sufficient autonomy as regulators to be able to steer private power in the service of national development goals or at least, in the tradition of the Cardoso School of dependent development, to be sufficiently adept at using the limited autonomy they have to secure mutually beneficial bargains with corporate interests.[7] Once again, the Bangladesh example suggests why an approach to governance focused on theorizing the complex relations among states and firms is a necessary component for analyzing the role of firms in development under conditions of modern capitalism.

I have already hinted at a broad range of diverse regimes of corporate governance and business regulation at play in Bangladesh. The tragedy of the collapse of the Rana Plaza factory building killing over 1,100 workers and responses of various corporate actors and industry groups to the tragedy provides a window on some of the complexity of firm/state relations, as well as why corporate law and development scholars need to engage with this complexity if they are to understand or impact the role of firms in development and inequality.

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[5] See eg, Rodney Bruce Hall and Thomas Biersteker (eds), *The Emergence of Private Authority in Global Governance* (CUP 2002); A Claire Cutler, Virginia Haufler and Tony Porter (eds), *Private Authority and International Affairs* (State Univ of New York Press 1999).
[6] See eg, Anne Krueger, *Political Economy of Policy Reform in Developing Countries* (MIT 1993); Rhys Jenkins, 'Theoretical Perspectives' in Tom Hewitt, Hazel Johnson and David Wield (eds), *Industrialization and Development* (OUP 1993).
[7] See eg, Alice Amsden, *The Rise of the 'Rest': Challenges to the West from Late-Industrializing Economies* (OUP 2001); Peter Evans, *Embedded Autonomy: States and Industrial Transformation* (Princeton 1995); Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions and Economic Growth* (Princeton 2007).

Among large global retailers who were customers of the Bangladeshi factories in Rana Plaza, three main self-regulatory or 'corporate social responsibility' responses to the tragedy emerged. Organized by global labor federations and mostly European retailers, the 'H&M' (or European) response advocated for providing money to the Bangladeshi factory owners to help fund increased factory safety and to compensate families of injured workers.[8] The Walmart (or American) approach, which rejected the H&M strategy on the grounds that it compensated greedy and unscrupulous factory owners who should bear the costs of factory upgrades, instead proposed using a combination of contract conditionality--requiring suppliers to meet certain labor and safety standards-- and inspections conducted or supervised by the big retail partners to enforce the contractual obligations.[9] The final response, he 'Disney' approach, involved large companies like Disney pulling their textile manufacturing business out of Bangladesh.[10]

It is worth noting that these diverse responses to the tragic incidents in Bangladeshi textile firms by multinational retailer were not legally required. In fact, the organization of the textile value chain - contractually among legally independent firms rather than through vertically integrated ownership structures of subsidiaries - might have been motivated by an attempt to avoid the very brand risk, oversight responsibility and liability costs undertaken by the lead firm retailers in the aftermath of the tragedies. Rather than legal responsibility, these actions would seem to be the result of market pressure from consumers outraged by the deaths and horrible working conditions of Bangladeshi workers and labor pressure, at least in those European states where more corporatist labor regimes are in operation. At the same time, it was also consumer pressure brought to bear on these same multinational retailers that led them to demand ever higher production quality and quantity at ever lower cost from their Bangladeshi suppliers. That pressure in turn led to the lack of labor law and building code enforcement by the Bangladeshi state and the price competition among Bangladeshi factories and other potential low cost suppliers that, in turn, may have led to unscrupulous business practices of the owners of the textile factories in Bangladesh. In other words, consumer outrage over unconscionable wages and working conditions pushed in the direction of a corporate social responsibility agenda while consumer demand for constantly new fashions at bargain basement prices undermined efforts to achieve higher wages and better working conditions in the factories. The point is not to shift responsibility for working conditions in Bangladesh from firms to consumers, but rather to suggest that the dynamics and pressures among and within firms and among consumers who are not all able or willing to make purchasing decisions on ethical as opposed to price grounds are much more complex than they might at first appear.

The Bangladeshi state reacted to the private initiatives by large retailers with promises of increased enforcement of its building codes and revisions to its labor laws, in principle to facilitate worker organizing and collective bargaining, though many NGOs and labor organizations analysing the reforms have suggested that the regulatory revisions did very little to

[8] See The Bangladesh Accord <www.bangladeshaccord.org> accessed 22 September 2014
[9] See eg, Steven Greenhouse and Stephanie Clifford, 'U.S. Retailers Plan for Safety at Factories' *New York Times* (New York, 11 July 2013) B1
[10] See eg, Steven Greenhouse 'Some Retailers Rethink Role in Bangladesh' *New York Times* (New York, 2 May 2013) A1

change the status quo for textile workers in Bangladesh and in some cases made things worse.[11] One challenge for Bangladesh with respect to labor reform is the fact that improving labor conditions through increased safety and building regulations would seem to work at cross-purposes with Bangladeshi development policy of retaining low cost producer advantage in textiles. Add to that market pressure from other states competing for business from large foreign buyers of low cost textiles in part through suppression of labor rights and costs. Finally, Bangladesh faces political challenge of resisting the power of the now entrenched textile factory owner elites created in part through the success of Bangladesh's industrialization strategy focused on textile production.[12] In a certain sense then, the cross-cutting pressures on the Bangladeshi state that might undermine its will or ability to improve labor conditions in textile factories are similar to the bidirectional forces of consumer pressure on firms both toward and away from corporate responsibility for labor conditions in global textile value chains.[13]

To complicate matters further, at the transnational level, the United States suspended its special tariff treatment of Bangladeshi textiles under the Generalized System of Preferences due to Bangladesh's failure to enforce internationally recognized labor rights and protections and the EU threatened to follow suit.[14] Meanwhile, US government procurement policy requires 'lowest cost suppliers' resulting in significant price pressure on and purchases from the very same Bangladeshi textile suppliers, even as the US government chastises the Bangladeshi state for its labor practices.[15]

In such complex circumstances, the paradigm of state capture and state autonomy is simply inadequate to the task of either describing or resolving the play of forces or actors responsible for working conditions in Bangladeshi textile factories. Moreover, even if the deadly working conditions are conceived as some type of regulatory failure, it is very difficult to tell whose failure. Who is being regulated by whom and how? What is public and what is private regulation, or what is local and what is global regulation? It might be comforting to assume that the circumstances at work in Bangladesh are unique, but my argument is that the complexity and ambiguity evidenced by the multiple regimes and political and economic forces shaping production, consumption and distribution of Bangladeshi textiles is not exceptional. Rather, the Bangladesh I am narrating here provides a window for seeing what we face in understanding and theorizing the structure and operation of the global economic and regulatory order in general.

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[11] See eg, Steven Greenhouse, 'Under Pressure, Bangladesh Adopts New Labor Law' *New York Times* (New York, 17 July 2013) A6

[12] See eg, Jim Yardley, 'Garment Trade Wields Power in Bangladesh' *New York Times* (New York, 25 July 2013) A1

[13] For a discussion of similar dynamics in the consumer electronics value chain, see Richard Locke, 'Can Global Brands Create Just Supply Chains? A Forum on Corporate Responsibility for Factory Workers' (2013) *Boston Review* <www.bostonreview.net/BR38.3/ndf_richard_locke_global_brands_labor_justice.php> accessed 21 September 2014

[14] Katrina Sokou and Howard Schneider, 'U.S. Suspends Bangladesh's Trade Privileges Due to Labor Concerns' *Washington Post* (Washington, DC, 27 June 2013) <www.washingtonpost.com/business/economy/us-to-suspend-trade-privileges-with-bangladesh/2013/06/27/16171f08-df3d-11e2-963a-72d740e88c12_story.html> accessed 21 September 2014

[15] See eg, Ian Urbina, 'Buying Oversees Clothing, U.S. Flouts its Own Advice' *New York Times* (New York 23 December 2013) A1

International Law and Its Discontents

CONFRONTING CRISES

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5 CORPORATE POWER AND INSTRUMENTAL STATES: TOWARD A CRITICAL REASSESSMENT OF THE ROLE OF FIRMS, STATES, AND REGULATION IN GLOBAL GOVERNANCE

Dan Danielsen

I FIRMS, STATES, AND MODERN POLITICAL ECONOMY: IDEOLOGICAL STRUGGLE FROM WITHIN A COMMON CONCEPTION

Since the global financial crisis began in 2008, a commonly proffered view among political progressives and conservatives alike is that the central issue for achieving economic stability and growth in the global economy is finding the appropriate level of public oversight of the economy. Progressives suggest that the level of regulatory oversight is too little and too deferential to the influence of "the regulated," while conservatives assert that, on balance, there is too much regulatory interference with markets, distorting the efficiency of private transactions and disrupting the tendency of markets to self-correct through private reallocation of resources when imbalances occur. While these two perspectives might seem oppositional or contradictory, a shared conception in both accounts is that the nation-state is the primary institutional mechanism for setting the background conditions for the smooth operation of the economy. From this perspective, whether the global economy functions well or badly depends on whether the nation-state, and by extension the global regulatory institutions by and large created by nation-states, create an appropriate legal architecture to facilitate private economic transactions while maintaining an appropriate level of regulatory oversight to reduce the likelihood of either regulatory capture by firms or regulatory over-reach by states. The ideological struggle, to the extent there is one on this score, turns on what is "appropriate" both with respect to the content of the background rules that structure markets and the scope and implementation of the regulatory oversight functions.

Juxtaposed to this vision of the proper role for the "public" regulator is a conception of the "private" economic actor and its proper role in the system. While private economic actors are expected to abide by the rules of the game set by the public regulatory system, they are also expected, if not encouraged like Adam Smith's self-interested individuals, to follow their (natural?) proclivity to seek their own advantage. Doing so is expected to be accomplished in large part through risk-taking, including regulatory risk-taking that might challenge regulatory limits. If the "rules of the game" are too constraining on private choice, then some transactions that by definition would be welfare-enhancing for the parties to them (because, the story goes, they would otherwise not enter into them) will be discouraged or precluded by the over-zealous rules. Moreover, by reducing the welfare-gains the parties would otherwise have generated had they been permitted to transact, total output is also reduced, thereby reducing total social welfare. If, on the other hand, the rules are too loose, private transactional gains might come at the expense of general welfare by creating adverse effects (or externalities) on third parties that exceed the welfare gains of the parties by transacting.

In a sense, this conception of the global public "regulator" evokes something akin to a mechanical system (not so much in terms of actual function as aspiration) – a largely public regulatory system that if properly calibrated could ensure the smooth operation of a largely private market system. From this perspective, it follows that private economic actors are and should remain "self-interested," leaving public regulators to provide for the general welfare by endeavoring to achieve the proper regulatory balance for structuring markets – allowing the productive dynamism of private economic autonomy to flourish while ameliorating externalities and spillover affects to the extent they reduce aggregate welfare and providing "public goods" where private actors are insufficiently incentivized to do so. Thus, from this vantage point, maintaining the private, "self-interested" orientation of economic actors is important both for inducing welfare-increasing private transactions and for signaling when the public regulatory system might be misaligned with the enhancement of general welfare.

Despite the air of natural inevitability that seems to pervade this familiar description of (prescription for?) the global political and economic order, the system, even by its own account, seems quite fragile. The proper calibration of the regulatory state and by extension, the global public regulatory order, seems more wish than reality – rarely if ever achieved or achievable. This seems particularly true at the global level where national interests and global welfare may often conflict and the challenges to and costs of productive coordination (as well as competition) among states and other public regulatory institutions can be quite high. Of course, despite the apparent fragility of the system on the one hand, and the difficulty of achieving the appropriate regulatory balance on the other, proponents of this view of political economy treat the consequences of "state" or "regulatory failure" as significant – when the regulatory system comes too misaligned, regulating too much or too little – one foreseeable result is crisis (economic, political, or both).

Moreover, since in this conception, the public *acts* and the private *reacts*, it is perhaps better, on balance, if the public acts less in the global arena. For conservatives, this means shifting the balance of global regulatory governance in the direction of facilitating and supporting private ordering mechanisms and self-regulatory systems. For political liberals and progressives, this means focusing regulatory attention on correcting "market failures." Some types of "market failures" treated as justifying regulatory oversight include situations where economic activity produces more adverse effects on third parties than benefits to the parties engaged in the activity; or where asymmetric access to market information may lead some parties to gain advantage over or others or to enter into welfare-reducing transactions; or where collective action problems or other conditions producing high transaction costs may discourage welfare-enhancing transactions; or where private incentives are insufficient to lead to an adequate supply of "public goods," such as education or transport or public safety or market information. In any case, whether viewed from the conservative or the liberal perspective, economic crises seem an inevitable, if regrettable, part of the operation of this system even if better calibration of the regulatory system and levels of public oversight were able to reduce the frequency and severity of the crises.

The view of the global economic and regulatory order I've described could be seen as a mélange of contemporary ideological positions loosely reflective of the struggle between Washington Consensus neo-liberals on the one hand, and post-Washington consensus (political) liberals on the other.[1] Yet the genealogy of these general (if sometimes contradictory) notions of a proper relation between state and economy – a limited public regulatory state whose primary function is the creation and preservation of a private economic order – has a history that extends well beyond contemporary debates over the merits of neo-liberal political and economic reforms of the past 30 years. It is perhaps because these conceptions of "state," "economy," and their proper relations are so deeply embedded in the development of modern political economy since the Enlightenment that they continue to exert so much influence on contemporary understandings of the functioning, problems, possibilities, and limits of the global economic and regulatory order across the political spectrum.[2]

[1] For a short introduction to these debates, see Joseph E. Stiglitz, "Is there a Post-Washington Consensus Consensus," in Narcis Serra and Joseph E. Stiglitz (eds.) *The Washington Consensus Reconsidered: Towards a New Global Governance* (2008), pp. 41–60, 46–7 (associating Washington Consensus neo-liberals with "market fundamentalism" and Post-Washington Consensus liberals with "a balanced role for markets and government").

[2] See, for example John Locke, *The Second Treatise on Government* (Thomas P. Peardon (ed.), The Bobs–Merrill Company, 1952; 1690), pp.70–3 (asserting that the justification for and appropriate limits of government is the protection of individual liberty and property for the public good); John Stuart Mill, *Principles of Political Economy* (Sir William Ashley (ed.), Augustus M. Kelley Publishers, 1987; 1848), pp. 881–8 (treating all government action as interference, the basis for governmental action as the protection of person and property and the legitimacy of government action as a function of the economic effects of carrying it out); Karl Marx, "On the Jewish Question," in *Karl Marx Early Writings* (Rodney Livingstone and Gregor Benton (trans.), Penguin Classics, 1992; 1843), pp. 229–30 (arguing that the purpose of the state after the political emancipation of the French and American Revolutions was protecting the "Rights of Man" which he defines as "liberty," "property," "equality," and "security" about which he states: "[N]ot one of the so-called rights of man goes beyond egoistic man . . . The only bond which holds [individuals] together is natural necessity, need and private interest, the conservation of property and their egoistic persons."); Michel Foucault, *The Birth of Biopolitics, Lectures at the Collége de France* 1978–1979 *(Graham Burchell (trans.), Michel Senellart (ed.), Picadore, 2008; 1979), pp. 3–25 (arguing that in the middle of the eighteenth century the main conception of government shifted from* raison d'État *constrained only by external limits imposed by divine and natural law to the notion of the self-limiting state governed and constrained by the rationality of political economy).*

II AN ALTERNATIVE VISION: WHY IT IS NEEDED AND WHAT IT MIGHT LOOK LIKE

Despite its historical provenance and contemporary pervasiveness, the conception of a (mostly public) regulatory system charged with and responsible for securing the (mostly smooth) functioning of a global economy driven by (mostly private) self-interested economic actors, is neither helpful as a means of describing the actual operation of the global economic and regulatory order as it currently exists, nor useful in explaining why a public global order intended to promote general welfare is leading to increasing asymmetries in power and resources both among states and within states. Moreover, framing the central issue of political economy to be the creation/preservation of a proper (natural?) relation between public state and private economy, regulator and regulated, general welfare and individual gain through the careful avoidance of the Scylla of regulatory capture of public authorities by private firms on the one hand and the Charybdis of over- or under-regulation by states that may reduce public welfare and precipitate crises on the other, makes it more difficult to recognize or address significant aspects of and issues with the global order.

In particular, two problems with this pervasive conception stand out. First, the conception is premised on a sharp divide between "public" and "private" that makes it difficult to engage the diverse, complex, highly entangled, and interdependent relations among states, regulatory institutions and firms we see all around us or to explain the impact of those relations on the structure, content, and operation of the governance system and the economy locally and globally. Second, the notion that each nation-state bears the sovereign responsibility for balancing the gains and excesses of self-interested private economic actors within its jurisdiction obscures the radical asymmetries in power, capacity, and resources among states, regulatory institutions and firms that are significant to regulatory and distributional outcomes both in individual states and across the global system as a whole.

We need only look out at the world to recognize that there are significant asymmetries in the bargaining power, resources, and capacities of states and of firms that affect their relative abilities to advance or protect their interests in the global economy. When we bring together the complex, multiple, and inter-penetrated relations between "public" and "private" entities as traditionally conceived with the pervasive inequalities and power asymmetries among and between states and firms, it becomes quite difficult if not impossible to generalize about either the ability of firms to capture public regulatory power and advantage or the ability of states (or other public regulatory institutions) to secure the success or control the excesses of self-interested firms either at home or globally. A conception of global governance able to incorporate these two ubiquitous aspects of the contemporary global order would seem to require much more nuanced, particularized, and messy accounts of the structure and operation of the global economic and regulatory system, including accounts of the legal, institutional, and other mechanisms that shape the current and future distribution of power and resources in the system.

We might begin by theorizing the global economic and regulatory order we see in operation rather than one premised on counterfactual notions of a "public" regulatory order and a "private" economy. Such an order would reflect a dynamic, continuous, and cumulative co-production of states and firms with different baseline allocations of power, resources and capacities, bargaining over, making, adapting, and resisting the rules of the game on the one hand and anticipating, making and reacting to each other's assertions of power on the other.[3]

[3] For an alternative account of state sovereignty and corporate power as mutually constitutive, see Joshua Barkan, *Corporate Sovereignty: Law and Government under Capitalism* (2013), pp. 1–9.

Such a conception of continuous bargaining, assertion, and adaptation to constantly changing legal, economic, cultural, and political conditions is not consistent with the hypothetical steady state equilibrium premised by mainstream economics or a single optimally efficient allocation of power or resources as is often suggested in the law and economics literature on bargaining. Such a conception would nevertheless be useful in helping to explain the production of relatively stable configurations of power and advantage that could reinforce inequalities and shape future bargaining among players in the system.[4]

Michel Foucault captures the flavor of the dynamic processes I have in mind, albeit describing a somewhat different context. He states:

> Inasmuch as the government of men is a practice which is not imposed by those who govern on those who are governed, but a practice that fixes the definition and respective positions of the governed and the governors facing each other in relation to each other, "internal regulation" means that limitation is not exactly imposed by one side or the other, or at any rate not globally, definitely and totally, but by, I would say, transaction, in the very broad sense of the word, that is to say, "action between," that is to say, by a series of conflicts, agreements, discussions, and reciprocal concessions: all episodes whose effect is finally to establish de facto, general, rational division between what is to be done and what is not to be done in the practice of governing.[5]

Seeing the global order as a dynamic system emerging from the actual practice of states and firms and perpetually defining and redefining the boundaries among public and private, governors and governed, and legitimate and illegitimate assertions of authority, invites us to rethink the central questions that have dominated the study of political economy since the Enlightenment. More specifically, it invites us

[4] For a fascinating discussion of the ways in which asymmetries in resource endowments can lead through processes of cumulative causation to vicious cycles of increasing inequality, see Gunnar Myrdal, *Economic Theory and Under-Developed Regions* (Harper Torchbooks, 1971; 1957), pp. 11–38.

[5] Michel Foucault, *The Birth of Biopolitics* , p.12.

to shift the focus of study from how to produce and maintain an appropriate (if not always optimal) balance between "public" order and "private" initiative to consider the practical meaning and implications of regulation, intervention, public welfare, and crisis in circumstances where state and firm, rule and transaction, public and private, governor and governed blur and blend in ways that challenge simple conceptions of agency, control, and domination.

Perhaps more importantly, moving from a conception of the global order premised on the authority and efficacy of public regulatory power to limit the excesses of private economic activity without diminishing its tremendous productive capacity to a conception of global economic governance as a complex co-production of states and firms invites us to consider the "firm" as more than a convenient institutional form for carrying out private initiative. It becomes among the most significant institutions in modern life. From this new vantage point, exploring the significance of the "firm" requires looking beyond the processes by which corporate power shapes state power, to consider much more broadly the social, psychological, political, and economic significance of the firm as an allocator of resources, a form of group life, an aggregator of resources, a coordinator of collective projects, a creator of social relations, and a significant influence on the structure of work, family, community, and identity.[6]

Foucault once again captures something of what I'm suggesting, though in talking about the state. As you read the following quotation, imagine substituting "the firm" for "the state." Foucault says:

> The state[/firm] is not a cold monster: it is the correlative of a particular way of governing. The problem is how this way of governing develops, what its history is, how it expands, how it contacts, how it is extended to a particular domain, and how it invents, forms and develops practices.[7]

In short, I'm suggesting that we need to investigate the firm with every bit as much ingenuity, rigor, and tenacity as lawyers, social scientists, philosophers and humanists have applied to the study of the state. While undertaking such an investigation of "the firm" is beyond the scope of this essay, it is to the firm and its complex role in the global order that we now turn.

A Firms "Govern" but Do They "Rule"?

While the pervasiveness and significance of the firm in the structure and operation of the global regulatory and economic order might be subject to debate, that firms are not only subject to public regulation but also produce it at both the national and the transnational levels seems an indisputable fact of modern life.[8] I have argued elsewhere that firms "govern" in a variety of ways including through their interpretations, reactions and challenges to extant legal rules, through their business practices and structures, through direct political or economic pressure on regulators from lobbying to bribes, through supplying de facto rules where none exist, through evading rules by doing business elsewhere or threatening to do so, through industry organizations and coordinated standard setting, through public relations and marketing campaigns, sponsored research studies and other forms of public knowledge production, through playing regulatory institutions against each other, through arbitrage of conflicts and ambiguities in often complex, overlapping and sometimes contradictory regulatory regimes to which they may be subject locally, nationally and/or globally.[9] Through these diverse mechanisms, and many others, firms contribute to the global regulatory and economic order, shaping both its substantive content and its distributional effects.

6 For some diverse examples of work exploring the social and cultural implications of "the firm" as well as its economic and political ones, see Thorstein Veblen, *The Theory of Business Enterprise* (1904); Paul A. Baran and Paul M. Sweezy, *Monopoly Capital: An Essay on the American Economic and Social Order* (1966); Herbert Marcuse, *One-Dimensional Man* (1964); William M. Dugger, *Corporate Hegemony* (1989); John L. Comaroff and Jean Comaroff, *Ethnicity, Inc.* (2009); and Joshua Barkan, *Corporate Sovereignty*.

7 Michel Foucault, *The Birth of Biopolitics* , p. 6.

8 See for example Joshua Barkan, *Corporate Sovereignty*, pp. 1–4.

9 See Dan Danielsen, "How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance," *Harv. Intl L. Rev.*, 46 (2005), p. 412.

In their book *Empire* Hardt and Negri describe the impact of the transnational firm on global governance as follows:

> The huge transnational corporations construct the fundamental connective fabric of the biopolitical world in certain important respects. Capital has indeed always been organized with a view toward the entire global sphere, but only in the second half of the twentieth century did multinational and transnational industrial and financial corporations really begin to structure global territories biopolitically. Some claim that these corporations have merely come to occupy the place that was held by the various national colonialist and imperialist systems in earlier phases of capitalist development, from nineteenth-century European imperialism to the Fordist phase of development of the twentieth century. This is in part true, but that place itself has been substantially transformed by the new reality of capitalism. The activities of corporations are no longer defined by the imposition of abstract command and the organization of simple theft and unequal exchange. Rather, they directly structure and articulate territories and populations. They tend to make the nation-states merely instruments to record the flows of the commodities, monies and populations that they set in motion.[10]

From this perspective, one might conclude that the state is a mere instrumentality of corporate power, and as such, has been transcended as the main institutional form for global governance. To a certain extent, one might see this passage as an extreme version of the conception of political economy with which I began this essay – the struggle to retain public control over the private economy lost, perhaps entirely, to corporate capture. Yet, to recognize that corporate actors shape, participate in and sometimes engage directly in making the global order does not necessarily lead to the conclusion that they control it, at least not in any coordinated, hegemonic sense.

Like governments and quasi-governmental institutions, corporate actors are diverse – in terms of size, power, interests, business needs and regulatory goals. They can be large or small. They can be local, regional or global in terms of production systems or markets. They can be highly mobile or geographically bound. They can be narrow in business focus or quite diversified in their business activities. They can be monopolists, oligarchs, or major or minor players in highly competitive industries or markets. They can be vertically integrated or highly disaggregated in complex supply chains. They may focus on short-term gain or long-term profit. They may rely on constant technological innovation and intellectual property investment or efficient exploitation of well-established technologies through sophisticated global strategies of sourcing and production cost management. Even from this brief and incomplete catalog of diversity among firms as to business type, strategy and perspective, it would be difficult to credibly suggest that a single or overarching business interest could be articulated or advanced that could direct the activities of regulators to the benefit of business generally without adversely affecting the interests of at least some powerful business and social actors elsewhere in the system. The "logic of capitalism" is not sufficiently determinate to overcome the fact that regulation rarely creates only winners.

For example, consider a domestic environmental regulation designed to promote cleaner energy through the reduction of greenhouse emissions from power producers. Such a regulation may benefit solar, wind, hydroelectric, and nuclear power producers; engineers, designers, and manufacturers of equipment used by those producers locally and globally; workers in those industries; areas and regions where such power production is most feasible; areas, regions, or nations where the technological capacity to develop and/or produce the equipment and knowhow necessary for this form of power production is most advanced and perhaps that portion of the public that values better air quality or worries about the consequences of global warming or that supports environmental regulation even if it increases energy prices in the short term or imposes economic hardship on some groups. At the same time, such a regulation may harm traditional power producers based on fossil fuels, extractors, and refiners of coal and oil locally and globally; engineers, designers, and manufacturers of equipment and technology used in these industries locally and globally, workers in all these industries, areas, or regions where alternatives to fossil fuel energy production are less feasible; areas, regions, or nations where the technological capacity to develop and/or produce the equipment and knowhow necessary to produce alternative

[10] Michael Hardt and Antonio Negri, *Empire* (2000), p. 31.

energy is less advanced or nonexistent, as well as that portion of the public that due to economic hardship or otherwise would trade cleaner air for cheaper energy or that believes concerns about global warming to be overblown or that opposes environmental regulation that may lead to an increase in energy prices in the short term or that imposes economic hardship on some groups.

Generalizing from this example, we can see that a regulatory change in one jurisdiction that may lead to an economic advantage for a particular firm or group of firms may not similarly advantage, or may actually disadvantage, competitor firms in that jurisdiction. We can also see that a regulatory change may not affect only competitors – it might produce spillover effects that advantage or disadvantage other firms locally or globally, as well as diverse nonfirm constituencies. To the extent that regulatory changes such as the hypothetical environmental rule described result from influence or capture by a firm or group of firms, one would expect that firms would most often pursue regulatory advantage when it conferred just that – a disproportionate gain for them relative to their competitors nationally or globally, regardless of its impact on third-party firms and other constituencies. In other words, the struggle among firms or industry groups for advantage *over other firms* even within the same jurisdiction or industry may work at cross-purposes with or undermine efforts to coordinate activities among firms for shared advantage vis-à-vis public regulators both locally and globally.

Moreover, even if one or more firms were able to capture some states or regulators for some purposes, we could not easily conclude that business advantage achieved in one regulatory context would translate into consistent business advantage across the global economy as a whole. As a consequence, one might reasonably expect that many firms would need to employ different regulatory and business strategies in different jurisdictions if the goal were securing economic advantage in global operations. But deploying different business or regulatory strategies would likely lead to new complexities even if it also produced the potential for new sources of economic gain. For example, such different strategies might produce different effects on competitors and different spillover effects on third party firms and other constituencies both within and outside each jurisdiction, resulting in different configurations of bargaining, influence, resistance, and counter-strategy among both firms and regulators locally and globally.

For all these reasons, it seems likely that efforts by firms or industry groups to capture some relevant segment of regulatory authority, whether within or among nation-states, would be but one among many available strategies for seeking advantage in the complex global economic order. And, it would not be easy with so many rival firms and groups seeking regulatory control for their own purposes. Moreover, even if firms exert significant influence and occasionally even capture public regulatory institutions to promote their advantage, and even if some firms predictably win more regulatory advantages and a larger share of the global economic surplus than others, this does not mean that there is a generalizable "firm" or common business perspective on global regulatory authority. To put this point differently, without imagining some shared and consistent business interest that could both trump the drive for particular firm advantage and steer corporate power toward particular forms of public institutions and regulatory structures, asserting that "firms rule" would seem to tell us little more about the particularities or distributional consequences of the current global order than asserting, as has historically been the case, that "states rule."

While all "states" may be formally equal in some international law definition kind of way, different states with different interests, structures, resources, and goals rule differently, with different effects, to the benefit of different constituencies. We might expect the same of firms, and looking at the behavior of firms, we can see a great diversity of business strategies, goals, and governance practices. More fruitful inquiries might explore questions such as which states? Which firms? How rule? For whose benefit? With what constraints? Through what concrete practices? My point here is that shifting our focus from a theory *public rule* to *corporate rule* seems only to shift our gaze from one illusory conception of political economy to another. If we remain focused on the behaviors of states and firms we see manifesting all around us, it becomes harder to conclude that firms "rule" – in the sense of consistently control or dominate nation-states or the global regulatory order – except perhaps in ad hoc, disaggregated, incoherent, and incomplete ways similar to those frequently attributed to states by many scholars and policymakers narrating the decline of national sovereign power.[11]

B. States "Govern" but Do They "Rule"?

Turning now to the "public" side of the story, one reason it seems unconvincing to treat "the firm" as the "new global sovereign" is in part because of the undeniable fact that regulation promulgated by nation-states both at the domestic level, and at the global level through bi-lateral or multi-lateral institutions comprised of nation-states, undeniably has a significant impact on the behavior firms both domestically and globally. Yet, to suggest that public regulation

[11] Narratives of the decline of state sovereignty and claims of the emergence of a new world order of limited state power and policy autonomy abound in public international law discourse. Seefor example Louis Henkin, *International Law Politics and Values* (1995), p. 10 ("For legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era."); Boutros Bourtros-Ghali, *Empowering the United Nations* (1992), pp. 71, 89, 98–9 ("While respect for the fundamental sovereignty and integrity of the state remains crucial, it is undeniable that the centuries-old doctrine of absolute and exclusive sovereignty no longer stands . . . Related to this is the widening recognition that states and their governments cannot face or solve today's problems on their alone."); Secretary-General Kofi Annan, *Annual Speech to the General Assembly*, UN Doc SG/SM/7136, GA/9596 (September 20, 1999) ("State sovereignty, in its most basic sense, is being redefined by the forces of globalization and international cooperation . . . In short, it is not the deficiencies in the [UN] Charter which have brought us to this juncture, but our difficulties in applying its principles to a new era: an era when strictly traditional notions of sovereignty can no longer do justice to the aspirations of peoples everywhere to attain their fundamental freedoms."; John H. Jackson et al., *Legal Problems in Economic Relations: Cases, Materials and Text* (5th ed., 2008), p. 1. ("Despite all the talk about sovereignty and independence, these concepts can mislead when applied in today's world economy. How 'sovereign' is a country with an economy so dependent on trade that its government cannot readily affect the real domestic interest rate, implement its preferred tax policy, or establish an effective program of incentives for business or talented individuals? Many governments face such constraints today including, increasingly and inevitably, the United States.")

affects firm behavior is not necessarily to suggest that states control or manage firms or the economy effectively, coherently or in the service of a "public interest" that reflects an aggregation of the collective interests of their constituents. This may in part be a function of the fact that, as public choice theorists so frequently remind us, states are themselves made up of diverse interests, institutions and constituencies engaged in struggle over the present and future distribution of power, prestige, votes and/or resources in their own regulatory jurisdictions and institutions.[12] Moreover, sometimes portions of the regulatory apparatus get captured for particular purposes by well-organized interests (including, as we've already seen, firms or groups of firms) as well as by political or institutional constituents within the governance institutions themselves. Such capture may lead states or institutions to take or refrain from taking action that benefits some powerful interests or players at the expense of others or that results in a reduction of aggregate general welfare.

Multiply the diverse interests and divisions within each nation-state and each transnational regulatory institution comprised of states by the number of countries and transnational regulatory institutions that make up the "public" global regulatory order and add to that the diverse interests trying to capture institutional power and special advantage from these states and institutions and it becomes quite

[12] For a general overview of public choice theory, see Gordon Tullock, "Public Choice," in Steven N. Durlauf and Lawrence E. Blume (eds.), *The New Palgrave Dictionary of Economics* (2nd ed., 2008), available at www.dictionaryofeconomics.com/articleid=pde2008_P000240doi:10.1057/9780230226203.1361. For some classics examples of public choice analysis, see Duncan Black, "The Unity of Political and Economic Science," *The Econ. J.*, 60 (1950), p. 506; Anthony Downs, *An Economic Theory of Democracy* (1957); Anne O. Krueger, "The Political Economy of the Rent Seeking Society," *Am. Econ. Rev.*, 64 (1974), p. 291; William C. Mitchell and Michael C. Munger, "Economic Models of Interest Groups: An Introductory Survey," *Am. J. Pol. Sci.*, 35 (1991), p. 512. For representative examples of public choice analysis in international law and regulation, see Paul B. Stephan, "Barbarians Inside the Gate: Public Choice Theory and International Economic Law," *Am. U. J. Int'l L. & Pol'y*, 10 (1995), p. 745; Paul B. Stephan, "Accountability and International Lawmaking: Rules, Rents, and Legitimacy," *Nw. J. Int'l L. & Bus.*, 17(1996–7), p. 470.

difficult to have any confidence that the regulatory activity of states or international institutions reflects an effective aggregation of the collective interests of their respective constituencies or an increase in aggregate global welfare.[13] Without some reasonable assurance that the global "public" regulatory system deploys its regulatory power to manage the economy in a way that leads to increased global welfare most of the time? usually? not infrequently?, it would be difficult to justify continued fealty to a conception of global governance that relies on a "public" regulatory regime to manage the "private" economy in the public interest on the hope that it can overcome interest-group capture and achieve something like a proper balance between laissez-faire and regulatory oversight of economic activity.

At the same time, it is becoming increasingly difficult under current global conditions for states to secure domestic or global economic advantage through assertions of sovereign regulatory power. Looking first to powerful states, while it would be hard to deny that the domestic legal rules of jurisdictions like China or the United States produce local and global effects, the effects may not be the ones intended, and they may not result from conscious assertions of sovereign will over the global economy. For example, China's domestic wage regulations shape wage rates around the globe putting

[13] See for example Eric A. Posner, *The Perils of Global Legalism* (2009), pp. 94–9 (arguing that the proliferation of international legal norms reflects efforts by the most powerful states to maintain power in the face of increasing fragmentation of the sovereign order); Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004) (arguing that since its inception international law has consistently reflected the imperial power and ambitions of colonizer [later the developed world] by the colonized [later the developing world]); Ha-Joon Chang, *Bad Samaritans: The Myth of Free Trade and the Secret History of Capitalism* (2008), p. 19–39 (arguing that the developed world uses trade agreements and international institutional arrangements to extract higher levels of growth and prosperity at the expense of the developing world); but see Joel Trachtman, *The Economic Structure of International Law* (2008), pp. 9, 10, and 37 (asserting that "[t]he state acts as agent of its citizens[,]" public welfare maximization reflects the maximization of the regulatory concerns of states, and that "for analytical purposes, [he] assume[s] national laws to be perfect expressions of constituent preferences").

pressure on higher wage jurisdictions to lower domestic wages while simultaneously calling into being lower wage strategies in other jurisdictions that undercut China's economic advantage. Or consider the fact that while U.S. mortgage rules and home ownership promotion policies during the 2000s produced an economic boom for a time at home they also brought down the global financial system when the real estate bubble burst, resulting in sustained hardship both at home and abroad.

Adding to these complex challenges is that fact that sometimes the rules of relatively weak jurisdictions, at least in terms of political power or economic clout, can affect the economic sovereignty of even the most powerful states. For example, Delaware corporate law shapes business practice globally, though not by institutional design or sovereign hegemony, but through the decisions and ordinary business practices of Delaware-incorporated firms which make up a significant percentage of the world's largest firms. Similarly, the bank secrecy laws of countries like the Bahamas, Guernsey, Luxembourg, Lichtenstein all challenge the fiscal sovereignty of the world's most economically powerful states – again not by assertions of sovereign power or even global economic clout outside their territories but by the magnetic force their domestic rules enact on global capital flows.

Domestic rules such as the ones just described seem important to understand precisely because their economic effects do not result from extraterritorial sovereign application. Rather, the effects of these rules are transnationalized through often ordinary economic activity of firms sometimes undertaken in reaction or in relation to the rules.[14] Moreover, the magnitude of the transnational economic effects of these rules often do not easily correlate with traditional sources of international sovereign authority such as political or military power or market size. Some of the sovereign rulemakers in the examples just described are, by international economic and political standards, weak players in the global system. Nevertheless, in some circumstances, their rule-making produces significant economic effects that

[14] For a discussion of the transnationalization of domestic rules through private economic activity, see Dan Danielsen, "Local Rules and a Global Economy: An Economic Policy Perspective," *Transnat'l Legal Theory*, 1 (2010), pp. 52–7.

even the world's most powerful states have difficulty combating or containing. Finally, from a political perspective, these rules evidence a disjuncture between the political constituencies responsible for the adoption or implementation of the rules and the economic constituencies affected by them. This disjuncture between economic effects and the political and institutional mechanisms for addressing them poses complex challenges for the legitimacy and functioning of the global order that cannot easily be addressed through traditional conceptions of territorial sovereignty or consensual sovereign deference to international norms or institutions.[15] This disjuncture seems particularly important in circumstances where the economic benefits of the global order are so inequitably distributed and when the presumption of formal sovereign equality is belied by significant differences in the abilities of states to shape their economic destinies through regulation.

In such circumstances it is perhaps not surprising to look to the nation-state and to sovereign consent-based efforts by nation-states working through international institutions to manage the "private" economy for the "public" good. Yet, even if we set aside the concern about interest group or firm capture and assume states effectively aggregate the interests of their constituents, there seems to be no reason to conclude that the promotion by grossly unequal individual states of their respective national interests in the global order is likely to lead to an increase aggregate global welfare rather than further increasing the power and resources of the most powerful states. Moreover, if national rules domestically applied can lead through the pursuit of ordinary business activity to widespread and diverse global consequences even in the absence of sovereign intent, it seems unlikely that even powerful states could exercise effective regulatory control over economic welfare within their geographic territories,

[15] For a concise and interesting perspective on this problem, see Dani Rodrick, *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth* (2007), pp. 195–6 (arguing that economic globalization and its benefits come at the cost of undermining the strength and effectiveness of nation-state institutions, perhaps leading, in the long run, to a global politics to match a global economy).

let alone effectively shape the behavior of economic actors in the global economy in their national interest.

It could be that imperialist dreams of economic domination by sovereigns lives on and continues to shape the behavior of states, perhaps as a kind of institutional or cultural path dependence harkening back to the days when empire meant economic power secured through the assertions of sovereign authority, military power and economic clout, yet in the current global order the ability of even the most powerful states to secure consistent economic advantage abroad while securing welfare gains for citizens at home seems to be significantly diminished, even if some states frequently capture disproportionate economic spoils while others seem to lose almost systematically. Thus, while states can affect economic behavior locally and globally, some states more effectively or more consistently than others, to suggest that states "rule" in the sense of control or dominate private economic activity would seem to overstate both their role and their capacity in the contemporary global order.

III IF NOT STATES OR FIRMS, BUT STATES AND FIRMS, THEN WHAT?

V.I. Lenin argued in 1916 that world capitalism would mature into regimes of monopolist firms and great power states dividing and dominating the world for economic exploitation.[16] Perhaps, this is where we have come to. Or perhaps, as Hardt and Negri suggest in the passage quoted earlier, the proliferation of business power and what Thorstein Veblen calls pecuniary "business principles"[17] into every state, legal order, and culture across the globe suggests that business has already triumphed – the age of imperialism of states has

[16] V.I. Lenin, *Imperialism The Highest Stage of Capitalism A Popular Outline* (Martino Publishing, 2011; English trans. 1939), pp. 88–89

[17] For a discussion of the evolution of pecuniary norms into the governing principles of business enterprise, see Thorstein Veblen, *The Theory of Business Enterprise* , pp. 66–91. See also Thorstein Veblen, *The Theory of the Leisure Class* (1899).

studies we should include an investigation of whether and if so how these processes are affected by the relative distribution of power, resources, capacities and other endowments of the players and the relative impact of these processes on the players themselves and the broader global system. Such new, if partial, accounts should help to illuminate particular inflection points of mutual advantage, interdependence, vulnerability and resilience among the players studied as well as whether particular institutional configurations seem more likely to create or exacerbate advantages among some players or more equitable distributions of power and well-being. This information might lend support to state-focused regulatory strategies or mechanisms for ordering led by firms or may suggest previously unexamined sites or modes of intervention based on new institutional formations to bring about more equitable distributions of power, resources, and advantage both in present conditions and in future economic and governance relations. Of course, there is no way of knowing what the ramifications or potential of this more dynamic institutional approach to political economy and global governance might be until we give it a try.

At least one thing seems certain. What I'm proposing will take us a long way from the conception political economy comprised of public states, private firms and the creation of appropriately limited public regulatory structures that has dominated political and economic philosophy and theory for some three hundred years. There is comfort in familiar concepts and institutional expectations even when they seem to take us quite far from the world we see around us. But, as we have seen, these familiar and comfortable conceptions of global political economy neither reflect the hybridity, multiplicity and complexity of contemporary relations between states and firms they purport to describe nor help to explain why a system premised on public oversight of private power in the interest of general welfare persists in producing ever-increasing asymmetries in power and resources both between states and between firms and states.

There are good reasons to suspect that an alternative conception of global political economy that better reflects the complex, dynamic and inter-connected activities of states and firms we observe as they pursue their interests locally and globally should also better enable us to imagine the institutional mechanisms necessary to bring about the more equitable order we hope to create. Moreover, we are no means alone in traveling this complex institutionalist path. Excellent examples of some of the analytic strengths and policy insights that can be derived from dynamic institutional analyses of economic and social phenomena can be found in the work of more historic forebears such as Thorstein Veblen and Gunnar Myrdal or more contemporary scholars such as Joshua Barken and Neil Fligstein.[20]

Doubtless as we endeavor to capture more complexity, variety, and particularity in our accounts of the diverse arrangements of power, institutions and resources that comprise the contemporary global order, we will find ourselves in a messier, more uncertain and less coherent world than the one premised on public order and private initiative with which I began this essay. Perhaps critics will claim, as they often have with institutionalists past, that complexity and particularity are inconsistent with generalizable theory and that simplifying models are better able to guide us in what to do. Of course, the value of theoretical insights based on simplifying models can only be measured against the relative merits of alternative accounts in capturing the phenomena they seek to understand or explain and policy prescriptions based on models that, by virtue of their underlying assumptions, bear little resemblance to the concrete practice of social actors may do more harm than good. What seems undeniable is that the dominant conceptions of the political economy of the global order do not reflect the observable phenomena either at the level of description or prescription. We can and must do better. In the spirit of Foucault and the very best of our institutionalist forebears, my hope is that by beginning to explore the concrete practices of the governance regime we observe all around us, in the gaps and conflicts in the logics of the regime's self-articulation, we will invent new ways of seeing, modes of understanding, strategies of resistance and mechanisms for progressive transformation.

[20] See Thorstein Veblen, *The Theory of Business Enterprise*; Gunnar Myrdal, *Economic Theory and Under-Developed Regions*; Joshua Barkan, *Corporate Sovereignty: Law and Government under Capitalism*; Neil Fligstein, *The Architecture of Markets: An Economic Sociology of Twenty-First-Century Capitalist Societies* (2001).

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A market for worker rights: Explaining business support for international private labour regulation

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ABSTRACT

Why do companies choose the private labour regulations that they do? Scholars know plenty about why companies might accept private regulators to oversee and protect labour standards. But they know very little about why companies choose one rather than another private regulatory approach when several are available, differing in terms of stringency. This paper explores the conditions under which companies in the clothing industry choose private labour-standards regulation with more rather than less stringent regulation. It does so based on qualitative and quantitative analysis of clothing companies in Europe. It argues that business preference for more stringent private labour regulation is positively affected by societal pressure, and that this societal pressure is predominantly orchestrated by activist groups. This not only entails campaigns, but also can be a combination of public and informal efforts to influence companies, together with pressures from consumers and media. This research also shows that national and industrial factors play a role. In particular, the position of the firm in the value chain and its distance to consumers and manufacturers affect preference for more or less stringent private regulation. Societal pressure is therefore important but not the only source of business preferences for private regulation.

KEYWORDS

Labour standards; globalization; corporate social responsibility; private regulation; clothing industry.

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PRIVATE LABOUR REGULATION IN THE GLOBAL ECONOMY

Private regulation: institutional supply, demand and regulatory outcome

In the absence of world government, global economic regulation traditionally relies on voluntary participation of relevant parties and non-coercive enforcement mechanisms (Abbott and Snidal, 2000). While more production is being organized across borders, most states lack the capacity to regulate beyond the domestic realm and do not succeed in collectively agreeing upon enforceable rules in international organizations. Moreover, some states (especially in the Global South) lack the capacity to regulate at home. While demand for fairly produced goods increases in the Global North, voluntary regulation to deal with social and environmental injustices related to global production is encouraged by both international organizations and the pressure of non-governmental activist campaigns (Graham and Woods, 2007: 6–9).

To analyse the effectiveness of these private regulatory activities to deal with social conditions of production, many studies have focused either on specific qualities of rules and regulatory procedures (O'Rourke, 2006; Esbenshade, 2004) or on the question of whether there is a business case for voluntary engagement with such regulation (Vogel, 2005). We concur with Mattli and Woods (2009: 12–17) that it is preferable to combine both lines of investigation in gauging the significance of regulation. High-quality regulation, after all, is of little significance to the issue it seeks to address if it is hardly applied. Similarly, widely adopted regulation that lacks significant quality may not be effective either. Focusing on both institutional supply of *and* demand for global rules produces an overall 'regulatory outcome', depicting both the quality of available regulation and the extent of its uptake and application. This outcome can first be described using appropriate yardsticks of particular regulatory qualities of dominant regulatory organizations, such as degree of standards, organization of governance, specificity of implementation and transparency of enforcement procedures (cf. MacDonald and Marshall, 2010; Kolk *et al.*, 1999). Second, it is possible to explain regulatory outcomes by analysing private-party (i.e. business) choices for specific regulatory organizations that lead to overall demand for regulation. Before doing so, we briefly introduce the regulatory organizations focused on working conditions in clothing production.

Private labour regulation in clothing production chains

The characteristics of production and trade in the clothing sector have been the subject of extensive study by scholars of global value chains (Bair, 2005). The clothing industry is highly dependent on seasonal and fashion change, creating constant pressure for brands and retailers to adapt their offers. This stimulates lead firms to rely on differentiated suppliers who regularly receive large orders with tight deadlines. These suppliers are often run by a handful of managers overseeing a large group of low-skilled manufacturing workers, often females and migrants working long hours and overtime to meet deadlines. Studies emphasize that these specific industrial characteristics often stimulate excessive overtime, abuse and suppression of labour representation (Ross, 2004). Labour abuse has for instance been identified at the bottom of the clothing chain in informal workplaces in India and in large Chinese factories that are managed using quasi-military techniques (Auret and Barrientos, 2001; Chen *et al.*, 1999). Purposeful neglect and/or incapacity hinder enforced public regulation of labour standards by export-focused national governments (Merk, 2007).

At the time of writing, six private regulatory organizations compete for support of European clothing firms. Activists were involved in the development and governance of a first generation of organizations: the Fair Wear Foundation (FWF), Fair Labor Association (FLA), Social Accountability International (SAI) and the Ethical Trading Initiative (ETI). Accordingly, these organizations are called *multi-stakeholder initiatives*. A second generation of organizations – Initiative Clause Sociale (ICS) and Business Social Compliance Initiative (BSCI) – were developed and governed by corporations only. Table 1 describes the general characteristics of these organizations.[3]

The six organizations all align groups of businesses and their buying power towards a common approach to regulatory standards thought by their participants and many stakeholders to produce effective implementation of the labour standards on which member firms and their affiliates have agreed. In doing so, the organizations also facilitate implementation and review of compliance by external parties. But the organizations substantially differ in their specific policies. Early accounts of these organizations expressed hope that their approaches might converge towards a best-practice regulation (Elliott and Freeman, 2003: 62–9; Sabel *et al.*, 2000). This convergence has so far failed to take place, however, leaving significant differences in the regulations to which participants adhere.

Private labour regulation and stringency

We consider these differences in the institutional supply of private labour regulation by looking at the stringency of the regulatory approaches, following previous accounts of private labour regulation (Rodriguez-Garavito, 2005). We assess stringency as a combination of the degree of labour standards adopted (cf. O'Rourke, 2006; JO-IN, 2006); the specificity of prescribed implementation and enforcement procedures (cf. Kolk *et al.*,

Table 1 Six private regulatory organizations for labour standards in clothing production

Initiatives	Start date	Developed by ...	Initial focus	Examples of members	Labour standards	Implementation specificity	Control
ICS	1998	Industry	France	Carrefour; Casino	ILO conventions, unspecific about content	Less specific: audit and report	Business controlled
BSCI	2003	Industry	Continental Europe	Karstadt; Migros	ILO conventions, discretion on living wage	More specific: management implementation; audit; complaints; remediation	Business controlled
ETI	1996	Industry, NGOs, unions	Great Britain	Marks & Spencer; GAP	ILO conventions, including living wage issue	Less specific: complaints; experimental on monitor; verification; remediation	Business > societal
FLA	1996	Industry and NGOs	USA	Nike; Adidas	ILO conventions, excluding living wage issue	More specific: management implementation; monitor; verification; complaints; remediation	Business > societal
SAI	1996	Industry, NGOs, Unions	USA and Continental Europe	Eileen Fisher; OTTO	ILO conventions, including living wage issue	More specific: management implementation; auditing; complaints	Business > societal
FWF	1995	Industry, NGOs, Unions	Continental Europe	O'Neill; McGregor	ILO conventions, including living wage issue	More specific: management implementation; monitor; verification; complaint; remediation	Business – societal

Sources: Author, Utting (2001) and O'Rourke (2006).

1999; McDermott and Cashore, 2008); and the degree to which organizations allow for review by key stakeholder groups (cf. Esbenshade, 2004; Rodriguez-Garavito, 2005). All three are judged in light of policy conditions at the time the analysed firms started to support these organizations, after 2001. By doing so, we are sensitive to how labour regulation is an intervention characterized by power asymmetries (between workers and employers), and to how private regulation can mean rule-takers are rule-makers. The implication is that a private regulatory set-up can enhance or counter power asymmetries between actors being regulated, not only by the standards set but also by awarding or denying specific groups a role in regulation (Auret and Barrientos, 2001). Leaving regulation largely to business actors can spell a danger of self-regulation. Conversely, awarding regulatory roles to societal groups means that both a watchdog and an empowerment element are built into the regulatory system.

For degree of labour standards, our measure includes four components: the *comprehensiveness* of the standard (narrow to broad), the degree to which a standard's requirements are formulated in discretionary terms (lax to stringent), the *specificity* of the content of the standard (unspecific to specific), and the *reference* to codification of labour standards. Comprehensiveness is measured by how much the standard covers worker rights in five categories: employment, training, working conditions, industrial relations and force (following Kolk *et al.*, 1999). For references to other labour standards, we score from no specific reference (low) to referencing International Labour Organization (ILO) core conventions (high). In the overall measurement, proportionally extra emphasis is laid on levels of standards, specificity and worker organization, with scores possible from zero to 33.

Specificity of implementation is assessed through four categories: appearance of ten categories of policy tools guiding implementation (including amongst others a standing organization with governance structure, a procedure for evaluation of membership company performance and a system for remediation and corrective action); the scope of requirements (applicable to factory level, a specific supplier or the whole supply chain); the degree to which implementation requirements are discretionary; and the specificity of implementation policies.

The measurement of these four indicators charts degree of implementation specificity, with proportional weight for elaboration of implementation policy tools, with scores ranging from zero to 21. This weighing reflects expectations that more institutionalized and codified implementation policies shape behaviour of regulated actors more than do less specific policies.

Finally, the degree of control of regulation exercised by business or societal parties is measured on four dimensions: decision-making and governance within the organization; monitoring of performance at factory sites;

review and revision; and information dissemination (in particular of performance at factory and corporate level). Combining these four indicators gauges degree of control, weighing all four indicators for the role of societal actors with a similar proportional emphasis for inclusion of societal actors. Possible scores range from 4 to 40. The primacy of societal-actor engagement in this operationalization, as elaborated above, reflects how regulation can mitigate power asymmetry and how stakeholders critically review regulated actors.

The three mentioned degrees of labour standards, implementation specificity and control are added to form the overall stringency of the private regulatory organizations (Figure 1).[4] In this measurement, differences between multi-stakeholder-governed organizations (FWF, FLA, SAI, ETI) versus business-governed organizations (ICS, BSCI) arise because of differences in labour standards and control. Differences among multi-stakeholder-governed organizations reflect different degrees of implementation specificity (for lower scores of ETI) and the different control regarding monitoring (see the difference between, for instance, SAI and FWF).

The assessment of stringency also relates to so-called *supply-chain responsibility* (cf. Ethical Corporation Institute (ECI), 2009). This refers to the scope of requirements for firms participating in private organizations, regarding the extent to which firms are responsible for improvements in their supply chain and to which buying or supplier firms have financial responsibility for implementation. Companies involved in so-called

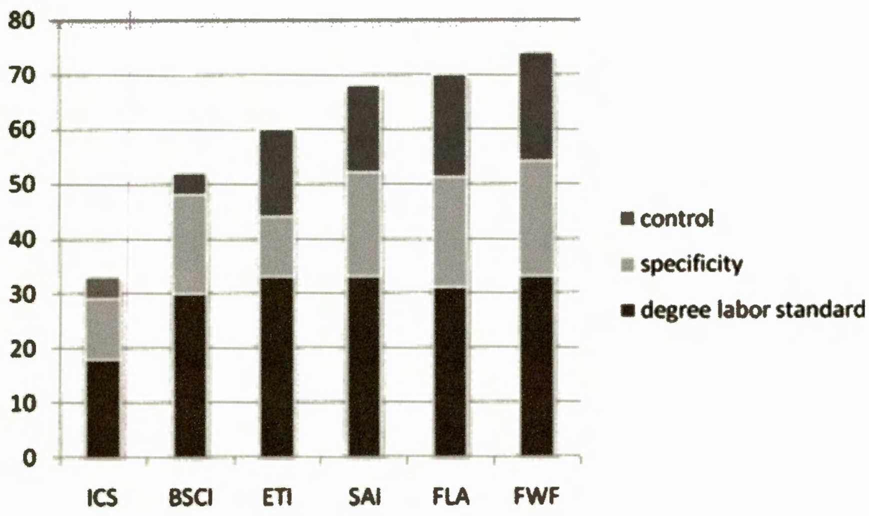

Figure 1 Stringency scores of private labour regulation.

buying firm certification schemes, like FLA and FWF, are responsible for monitoring costs and reviewing progress through audits and/or verification by societal groups and commit to sharing results with stakeholder groups. Meanwhile companies involved in supplier-certification schemes like SAI and BSCI are not required to monitor suppliers. Instead, they let audit firms monitor suppliers. The set-up of these schemes is adapted from certification of, for instance, technical and environmental industry standards. These buying companies then leave the cost for external professional audits and compliance programmes to the suppliers themselves. This means that in buying-firm certification schemes, outsourcing companies hold the key responsibility. Stakeholder group members in these initiatives check performance through their reviewing processes. Supplier-certification schemes push costs and responsibility for compliance down the supply chain, keeping control over implementation and information in the hands of accredited auditors, buying companies and supplier companies. This type of regulation is then less stringent than buying firm certification schemes that build in more supply-chain responsibility.

Case study research on factory-level implementation of labour standards suggests that differences in stringency could have a decisive impact on how beneficial regulatory efforts may be for workers. Such has been found in a number of studies focused on downstream implications for both labour standards and governance of different private regulatory programmes (Rodriguez-Garavito, 2005; Kocer and Fransen, 2009). Meanwhile, a different strand of research emphasizes that, next to regulatory qualities, other aspects of organizing manufacturing may also affect the implementation of labour standards (Locke *et al.*, 2008; Locke and Romis, 2010; Oracle, 2009).

Four multi-stakeholder initiatives provide for more stringent private regulation than the two business-governed organizations (ICS and BSCI), mostly because their systems adhere to higher labour standards and include review from societal interest groups. Within the multi-stakeholder initiatives we also note different degrees of inclusion of stakeholder groups in monitoring and of specificity of implementation programmes. FWF has a more stringent system than FLA, while FLA's is more stringent than SAI's. Of all the multi-stakeholder initiatives, ETI has the least stringent system, scarcely addressing implementation.

Figure 2 summarizes the European clothing business membership of the mentioned private regulatory organizations.[5] Note that this survey only counts European members involved in clothing production, given the focus of this study. ETI, SAI and FLA are also supported by Northern American companies involved in clothing sales and production. Additionally, these numbers say little about the impact of this membership, since small firms that implement labour standards at only a few suppliers count for the same as large firms with a sizable supplier base. Figure 2, therefore,

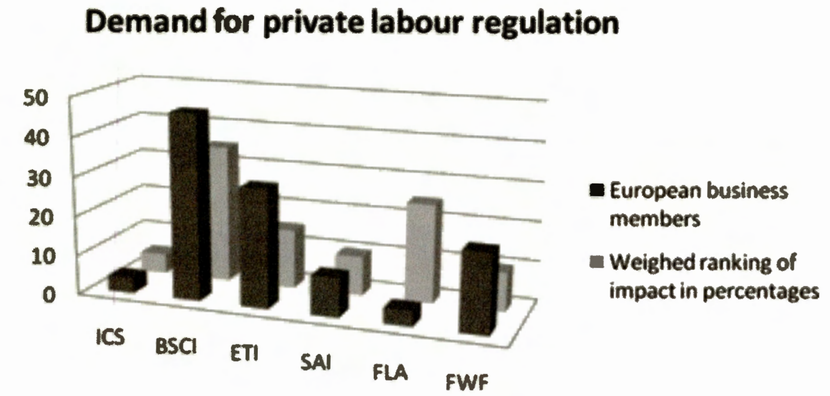

Figure 2 Business demand for less or more stringent private labour regulation.

by way of an educated guess, also ranks the organization by its perceived percentage of private regulatory impact in clothing chains. This rough ranking is based on publicly available data regarding non-European business members, size of firms, clothing sales and, where possible, supply-chain size.

From Figure 2 we can conclude that both in Europe and beyond, less stringent approaches to private labour regulation are most popular with clothing firms and are likely currently to have the largest impact on clothing supply chains. The support for more stringent approaches, although not insignificant, is considerably less sizable. This result will be explained in the next sections.

THE ARGUMENT: INSTITUTIONS AND COMPANY PREFERENCES FOR PRIVATE REGULATION

The political science and management literature emphasizes institutional pressures as underlying corporate CSR strategy (Campbell, 2006; Cashore *et al.*, 2004). Here, we focus on how the social relations firms face and the economic and local context they inhabit can explain company strategies towards private labour regulation. In line with the existing literature on CSR, we expect that regulatory choices are strongly rooted in firms' industrial–economic and national regulatory context (Delmas and Toffel, 2004; Wright and Rwabizambuga, 2006).[6] But we also expect corporate strategy towards CSR to be fundamentally shaped by a force partly independent of such economic–institutional context: societal pressure on firms with regard to ethical labour practices, which may manifest itself through different avenues (cf. Ruggie, 2007; Vogel, 2005). To clarify these explanatory conditions, we develop three categories of hypotheses on why firms pursue more or less stringent private regulatory approaches: societal pressure; national institutional context and industrial–economic position of firms. Through induction we arrive at a set of hypotheses that build on expectations in the literature concerning these three categories.

Societal pressure

In the European Union, networks of activists, critical consumer groups, trade unions and journalists frequently have called attention to labour conditions. Key players are the pan-European Clean Clothes Campaign, Oxfam and the union federations, most prominently the International Textile, Garments and Leather Workers' Federation (ITGLWF). Despite their organizational and ideological differences these organizations discuss and organize common approaches to pressuring companies. They demand application of ILO core conventions for labour standards inside the supply chains of companies, including the rights to freedom of association and collective bargaining, plus provisions on wages, health and safety, and benefits. With respect to private-regulatory organizations, they push to apply these standards through organizations that are multi-stakeholder governed and include trade union representatives. Moreover, these groups prefer that worker and societal groups be involved in verification, complaints procedures and redeeming cases.[7]

We can identify frequently used pressure tactics among these groups. First and most visible are public campaigns targeting companies. These campaigns can emerge as part of longer-term planning, or evolve *ad hoc* amidst crises at a supplier factory. A second category of activism involves direct engagement with company representatives through meetings or interaction at public events. This interaction is facilitated by (inter-)governmental institutions that finance workshops encouraging debate and dialogue between 'stakeholders'. In these situations, activists and managers discuss respective policy preferences, collaboration and urgent causes of advocacy, such as crises in factories. The third category of leverage is development of private regulation that monitors company policies on labour standards.[8]

Previous literature shows that firms targeted by public campaigns are more likely to support more stringent private regulation because they develop a preference for multi-stakeholder-governed private regulatory organizations (Marx, 2008; Wetterberg, 2007). This perspective is corroborated by our own interview evidence: out of fear for their reputation, company managers seek to address activist demands. Beyond such general patterns, multi-stakeholder initiatives in the CSR field are believed to have the moral higher ground over business-governed organizations. In the literature they are also expected to yield more positive results in the supply chain (Utting, 2001). For companies, being in an organization with possible adversaries may have strategic benefits. In our sample, for instance, Puma holds that 'We wanted to join a multi-stakeholder programme only. Any other set-up would not have made much sense to us. We wanted to deal with these issues together with these groups, including our critics.'[9] Since multi-stakeholder governance positively affects the stringency of regulation, we hypothesize that:

> *(H1) Public-activist attacks or pressure on companies with respect to labour standards leads companies to support more stringent private regulation.*

Discussions with company representatives reveal many other ways in which activists influence corporate preferences, where activists speak to firms on labour issues, both formally and informally, publicly and privately. In our interviews we encountered varying company attitudes on interacting with stakeholder groups. As one Dutch retailer put it:

> They always uncritically repeat what local groups in developing countries say, whether it is in line with the facts or not. It is a typical protest organization. They are not interested in the truth. I don't want to be in that initiative with them.[10]

Compare it with this account of a respondent talking about the exact same group: 'They have a lot of expertise, good contacts, good insights. It is important to continue dialogue with them and work with them.'[11] And some firm managers have a dismissive but tolerant attitude to stakeholder interaction: '[W]e already got our share of stakeholder dialogue outside regulatory organizations. ... Stakeholders should be involved in some way, yes, but we have no time to quarrel. So it is better to talk to stakeholders somewhere else' (cf. ECI, 2009).[12] As a generalization, we expect that firm managers facing more activist contact get socialized into accepting the involvement of activists in the protection and monitoring of labour standards (cf. Ruggie, 2007).[13] Hence, variation in contact with activists and in activist pressure on their supply-chain policies likely affects corporate preferences for private regulation. This leads us to hypothesize that:

> *(H2) A higher frequency of contact with activists prior to choice of private regulation leads, all else equal, to support for more stringent private regulation.*

Apart from activists, societal pressure can also come from other actors. Chief among these are consumers who might care about the conditions under which products are made, and media reporting that gives negative attention to firm policies. Both could stimulate more progressive action in CSR (van Tulder and van der Zwart, 2006; Wetterberg, 2007). Moreover, we hypothesize that firms targeted in this way see collaboration with activists in a multi-stakeholder setting as the way to manage future risks to reputation. Again bearing in mind the relationship between multi-stakeholder governance and stringency, we hypothesize that:

(H3) More requests from consumers yield support for more stringent private regulation.

(H4) Negative media attention for the company leads to support for more stringent private regulation.

We expect these hypothesized societal pressures to vary across firms within a given national or industrial–economic context. Hence, they are the beginning of our inquiry. But such economic and local contexts should also significantly influence the choice of private regulation by directly shaping firm strategies and by influencing the nature of societal pressures.

National institutional context

Both interviews and the existing literature reveal wide variation in business demand for types of private regulation across countries that form the core market for firms – in most cases country of origin. We hypothesize that these countries form institutional environments more or less supportive of stringent private regulation (Christopherson and Lillie, 2005).

The literature on CSR identifies differences in institutional environments on a systemic level: American society, European societies and Asian societies form different ensembles of formal and informal rules influencing corporate CSR strategy, roughly coinciding with oft-studied distinctions between coordinated and liberal 'varieties of capitalism' (Matten and Moon, 2008; van Tulder and van der Zwart, 2006). Differences across national contexts can also be identified with regard to consumer sensitivity, government policies and national discourses (Albareda *et al.*, 2007). Recent work on CSR salience in Western European economies establishes 'forerunning' (the United Kingdom, Switzerland, the Netherlands, the Nordic region), 'following' (the other continental economies) and 'lagging' (Mediterranean economies) regions (Albareda *et al.*, 2007; cf. Gjolberg, 2009). The literature identifies differences between countries in, first, the degree and scope of government efforts to promote CSR and, second, the maturity of a national public sustainability debate promoting voluntary business activity. For our purposes these form elements of national institutional environments conducive to more or less extensive CSR activities.[14]

(H5) Firms from countries with institutional environments more supportive of CSR prefer more stringent private regulation.

Industrial–economic variables

A firm's positioning towards other economic actors may also affect support for private regulatory approaches. The previous literature suggests the importance of whether a firm is publicly or privately owned. Stock-listed firms are considered more sensitive to CSR demands for fear of reputation damage through public campaigns (Marx, 2008; Wetterberg, 2007).

(H6) Public, that is stock-listed, firms prefer stringent private regulation.

Second, related but not reducible to stock listing is a more general economic condition affecting sensitivity to societal pressure: market share. Since larger firms may be more visible to an audience of critical consumers, whether or not they are stock-listed, they may also more likely be targets of negative media attention and activist campaigns. Among interview respondents we also note a difference between larger and smaller firms in their more extensive experience of and sensitivity to societal demand for CSR policies.[15] We thus expect the following:

(H7) Firms with a larger market share prefer more stringent private regulation.

Third, support for more stringent regulation may be influenced by the firm's position in the clothing market. Gereffi and Memedovic (2004) and Dicken (2006) hold that the concentration of market power in the hands of large retail chains in the United States and the European Union is rising and more retailers are developing strong ties with producers overseas, in order to secure constant supply in stores. Moreover, many retailers have developed private label or brand-store clothing lines which they source directly from manufacturing suppliers in developing countries.

The market for clothing in the European Union consists of business forms emphasizing different functions in the value chain: buying, marketing, designing and retailing. McCormick and Schmitz (2001: 24–9) distinguish different types of lead firms in clothing production, ordering from 'high street' to 'low street' products: fashion-oriented companies (e.g. Prada, Armani), department stores/branded merchandisers/specialty chains (Marks & Spencer), mass merchandisers (C&A) and discount stores (Asda, Scapino). Clothing is often also sold by companies originally in other lines of commerce (for example sporting shoes and multi-product retailing).

Fashion-oriented companies, specialty chains, mass merchandisers and discount stores face different consumer audiences who may care more or less about sustainability issues. The more a firm competes on cost (as with 'low street-profiled products'), the less sensitive its consumer base is towards production circumstances. One firm representative we interviewed corroborates this logic by noting that

> We hardly receive questions about sustainability of our clothing in our shops. ... Our customers are mostly older ladies, with, how do I put that, a lower budget. They want as much quality they can get for the lowest price. No, that is not really an audience that asks about labour conditions. ... [16]

Less interest among particular kinds of consumers in CSR might affect not only preference for stringent regulation directly, but also a firm's likelihood of wanting to work with activist groups in regulation, since these activists have less of a constituency among the firm's stakeholders. Interviewees note that firms focused on lower consumer-market segments have larger, more unstable supplier bases, where sourcing practices are heavily informed by cutting costs.[17] Hence, we hypothesize that:

> *(H8) Firms focusing on lower consumer market segments prefer less stringent private regulation.*

The interviews suggest that companies relying more on a retail strategy are less interested in stringent regulation. A representative of a retailing company explained that, unlike brands, 'we actually have common problems as retailers with different suppliers and products and the like, also given the size of our supplier base and our distance to some of them'.[18] Activists and representatives of stringent organizations recognize this and admit the challenge of pushing retailer firms.[19] And, related, many statements denouncing multi-stakeholder governance of regulation come from retailing-focused firms.

Business strategy towards the supply chain may also affect preferences on the stringency of private regulation. Our interviews unearthed different opinions on whether buying firms should take supply-chain responsibility (SCR) or leave it with suppliers, as in less stringent regulatory approaches.

All companies involved in private regulatory organizations source clothes predominantly from outside Western Europe. The *make or buy* question in a basic sense, thus, has been answered. Yet companies still have particular operations that qualify them as *makers*, and others predominantly as buyers. Fashion-oriented and brand clothing companies like Expresso and Gsus and big brands like Adidas are involved in research, testing, quality control and production technology to profile their brands. This requires more contact with the supply chain and the productive process. Other companies like Tesco and Metro order clothes or choose from preset products to be offered in their stores, dealing mainly with full-package suppliers from Asia or with trade agents. They are removed from the production process, their interaction with suppliers limited to contracting with intermediary actors. This distinction finds clear expression in one trade association spokesman's assessment:

Model Text for the Indian Bilateral Investment Treaty

BILATERAL INVESTMENT TREATY

BETWEEN

THE GOVERNMENT OF THE REPUBLIC OF

INDIA

AND

Table of Contents

ii. compliance with judicial, arbitral or administrative decisions and awards;
iii. compliance with labour obligations;
iv. financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
v. issuing, trading or dealing in securities, futures, options, or derivatives;
vi. compliance with Laws on taxation;
vii. criminal or penal offences and the recovery of the proceeds of crime;
viii. social security, public retirement, or compulsorysavings schemes, including provident funds, retirement gratuity programmes and employees insurance programmes;
ix. severance entitlements of employees;
x. requirement to register and satisfy other formalities imposed by the Central Bank and other relevant authorities of a Party; and
xi. in the case of India, requirements to lock-in initial capital investments, as provided in India's Foreign Direct Investment (FDI) Policy, where applicable, provided that, any new Measure which would require a lock-in period for Investments should not apply to existing Investments.

6.4 The Parties share the understanding that, notwithstanding anything in Article 6.1 and 6.2 to the contrary, the Parties may temporarily restrict transfers in the event of serious balance-of-payments difficulties or threat thereof, or in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.

Article 7: Entry and Sojourn of Personnel

7.1 Each Party shall, subject to its Law relating to the entry and sojourn of non-citizens and on the basis of reciprocity, permit natural persons of the other Party and personnel employed by the Investor or Investmentto enter and remain in its territory for the purpose of engaging in activities connected with Investments.

Chapter III – Investor, Investment and Home State Obligations

Article 8: Scope of this Chapter

8.1 The objective of this Chapter is to ensure that the conduct, management and operations of Investors and their Investments are consistent with the Law of the Host State, and enhance the contribution of Investments to inclusive growth and sustainable development of the Host State.

8.2 The Parties agree that this Chapter prescribes the minimum obligations for Investors and their Investments for responsible businessconduct.

8.3 The Parties further agree that compliance with Articles 9, 10, 11 and 12 of this Chapter is compulsory and is fundamental to the operation of this Treaty. Investors and their Investments must comply with the obligations in Articles 9, 10, 11, and 12 to benefit from the provisions of this Treaty.

8.4 A breach by Investors and their Investments of the obligations set forth in Articles 9, 10, 11 and 12 shall entitle the Party, at its sole discretion and in accordance with its Law and Article 14 to seek suitable enforcement, regulatory or other legal action in response to that breach.

Article 9: Obligation against Corruption

9.1 Investors and their Investments in the Host State shall not, either prior to or after the establishment of an Investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of the Host State as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage.

9.2 Except as otherwise allowed under the Law of the Host State, Investors and their Investments shall not engage any individual or firm to intercede, facilitate or in any way recommend to any public servant or official of the Host State, whether officially or unofficially, the award of a contract or a particular right under the Law of the Host State to such Investors and their Investments by mechanisms such as payment of any amount or promise of payment of any amount to any such individual or firm in respect of any such intercession, facilitation or recommendation.

9.3 Investors and their Investments shall not make illegal contributions to candidates for public office or to political parties or to other political organisations. Any political contributions and disclosures of those contributions must fully comply with the Host State's Law.

9.4 Investors and their Investments shall not be complicit in any actdescribed in this Article, including inciting, aiding, abetting, conspiring to commit, or authorizing such acts.

Article 10: Disclosures

10.1 Investors and Investments must timely comply with the requirements of the Law of the Host State to disclose true and complete information regarding their activities, structure, financial situation, performance, relationships with affiliates, ownership, governance, or other matters.

10.2 Where required, Investors must also disclose the source and channel of their funds in the Home State or Host State by submitting appropriate documentary evidence establishing the legitimacy of such funds. This disclosure, if requested, shall include any changes in the form or ownership of the enterprise or other entity located in the Home State and the Host State.

10.3 The Investment shall maintain true and complete copies of the records, books of account and current financial statements for the Investment that may be necessary to compute and substantiate compensation for any alleged breach of this Treaty or Host and Home State Laws, including:

(i) Governance structures;
(ii) records documenting the Investment, its shareholders, directors and employees;

(iii) remuneration of directors and key managerial personnel;
(iv) annual balance sheets;
(v) annual statements of income, retained earnings, cash flow, changes in financial position, and related footnotes; and
(vi) pro-forma financial statements.

10.4 Accounting records shall be maintained and financial statements prepared in currency of the Host State in accordance with principles of accounting generally accepted in the Host State.

10.5 The Investment shall retain accounting records for 10 years; provided that, if an Investment Dispute arises, it must retain those records for 3 years after the termination of any arbitration under Article 14.

10.6 Without prejudice to any other disclosures required by Law of the Host State, the disclosures required under this Article shall be made to the Designated Representative of each Party on demand until otherwise notified by a Party. Even where not required to do so by Law of the Host State, Investors and Investments should develop and comply with policies to ensure timely and accurate disclosure of material information relating, but not limited to, the following matters:
(i) the financial and operating results of the Investment;
(ii) objectives of the Investment;
(iii) major share ownership and voting rights, including the structure of a group of Enterprises and intra-group relations, as well as control enhancing mechanisms;
(iv) governance structures and policies, in particular, the content of any corporate governance code or policy and its implementation process;
(v) remuneration policy for members of the board and key executives, and information about board members, including qualifications, the selection process, other corporate directorships and whether each board member is regarded as independent by the board;
(vi) related party transactions;
(vii) foreseeable risk factors;
(viii) issues regarding employees and other stakeholders;
(ix) environmental impacts and management systems;
(x) policies and other codes of conduct to which the Investment subscribes, their date of adoption and the countries and entities to which such statements apply;
(xi) its performance in relation to these statements and codes; and
(xii) information on internal audit, risk management and legal compliance systems.

Article 11: Taxation

11.1 Investors and their Investments must comply with the provisions of Host State's Law on taxation including timely payment of their tax liabilities in accordance with the Law of the Host State.

Article 12: Compliance with Law of Host State

12.1 Investors and their Investments shall be subject to and comply with the Law of the Host State. This includes, but is not limited to, the following:

(i) Law concerning payment of wages and minimum wages, employment of contract labour, prohibition on child labour, special conditions of work, social security and benefit and insurance schemes applicable to employees;

(ii) information sharing requirements of the Host State concerning the Investment in question and the corporate history and practices of the Investment or Investor, for purposes of decision making in relation to that Investment or for other purposes;

(iii) environmental Law applicable to the Investment and its business operations;

(iv) Law relating to conservation of natural resources;

(v) Law relating to human rights;

(vi) Law of consumer protection and fair competition; and

(vii) relevant national and internationally accepted standards of corporate governance and accounting practices.

12.2 Investors and their Investments shall strive, through their management policies and practices, to contribute to the development objectives of the Host State. In particular, Investors and their Investments should recognise the rights, traditions and customs of local communities and indigenous peoples of the Host State and carry out their operations with respect and regard for such rights, traditions and customs.

Article 13: Home State Obligations

13.1 Without prejudice to the jurisdiction of the Courts located in the Host State, Investors and its Investments shall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State.

13.2 The Home State shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before their domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investments or Investors in relation to their Investments in the territory of the Host State.