

**STREAM READINGS**

**CORPORATIONS IN  
GLOBAL SOCIETY**



**IGLP SCHOLARS WORKSHOP | BANGKOK, THAILAND | JANUARY 6 - 10, 2019**



## Corporations in Global Society

### Faculty

- **Dan Danielsen** (United States) Northeastern University School of Law
- **Sundhya Pahuja** (Australia) Melbourne Law School

### Description

In this Stream, we will look at the evolution of the corporation as an institution and explore some of its complex contributions to the organization and governance of social, economic and political life across the globe from the 16th century to the present. In the first session, we will suggest ways in which a richer understanding of the history of the corporation as a governance institution can illuminate contemporary patterns of global ordering. In the second session, we will turn to contemporary corporate ordering through a case study of focused on the Rana Plaza factory disaster in Bangladesh and global supply (or value) chains.

#### **Session 1:** *Contemporary Corporate Ordering—Global Value Chains and the Rana Plaza Factory Disaster*

Please read the following (provided):

IGLP Law and Global Production Working Group, 'The Role of Law in Global Value Chains: A Research Manifesto' (2016) 4:1 London Review of International Law 57-79.

Dan Danielsen, 'Beyond Corporate Governance: Why A New Approach to the Study of Corporate Law is Needed to Address Global Inequality and Economic Development' in Ugo Mattei and John Haskell (eds) Research Handbook On Political Economy And Law (2015), Available at: [http://works.bepress.com/dan\\_danielsen/13/](http://works.bepress.com/dan_danielsen/13/).

If you are unfamiliar with the Rana Plaza incident, you may wish to watch in advance the award-winning CBC documentary '**Made in Bangladesh**' (2013, Canada, 45 min), which is available at <http://www.cbc.ca/fifth/episodes/2013-2014/made-in-bangladesh>.

#### **Session 2:** *The backstory: From Colonial Company to Global Corporation*

Please read the following (provided):

Philip Stern, 'The Ideology of the Imperial Corporation: "Informal" Empire Revisited' in Emily Erikson (ed) Chartering Capitalism: Organising Markets, States and Publics (2015) 15-43.

John Ruggie, Multinationals as a Global Institution: Power, Authority and Relative Autonomy (2017) Regulation and Governance .

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# The role of law in global value chains: a research manifesto

The IGLP Law and Global Production Working Group\*

Most scholars attribute the development and ubiquity of global value chains to economic forces, treating law as an exogenous factor, if at all. By contrast, we assert the centrality of legal regimes and private ordering mechanisms to the creation, structure, geography, distributive effects and governance of Global Value Chains (GVCs), and thereby seek to establish the study of law and GVCs as rich and important terrain for research in its own right.

Across a growing number of sectors and industries, value production is not just transnational in scope; it is organised and coordinated via global networks that link activities across as well as within firms and nations. These networks are increasingly referred to as 'Global Value Chains', or GVCs. The asserted causes of this phenomenon are multiple, and scholars debate which deserves designation as primary.<sup>1</sup> We

\* In alphabetical order: Grietje Baars, The City Law School, City University London. Email: grietje.baars@city.ac.uk; Jennifer Bair, Department of Sociology, University of Colorado at Boulder. Liam Canning, School of Business and Management, Queen Mary University of London; Dan Danielsen, Northeastern University School of Law; Dennis Davis, Faculty of Law, University of Cape Town; Klaas Hendrik Eller, Faculty of Law, University of Cologne; Dez Farkas, Osgoode Hall Law School, York University; Tomaso Ferrando, Warwick Law School; Jason Jackson, The Wharton School, University of Pennsylvania; David Hansen-Miller, Independent Scholar; Elizabeth Havice, Department of Geography, University of North Carolina; Claire Mummé, Faculty of Law, University of Windsor; Jesse Sahlb Övadia, School of Geography, Politics and Sociology, Newcastle University; David Quentin, City Political Economy Research Centre, City University London; British Rogers, Temple University Beasley School of Law; Jaakko Salminen, Faculty of Law, University of Turku; Alvaro Santos, Georgetown University Law Center; Benjamin Selwyn, Department of International Relations, University of Sussex; Marlese von Broembsen, Institute of Development and Labour Law, University of Cape Town; and Lucie E. White, Harvard Law School. The ideas presented in this paper were developed via conversations among members of this group during a series of workshops at Harvard University, Northeastern University School of Law and City University London organised under the auspices of the Institute for Global Law and Policy (IGLP) at Harvard University School of Law.

1 Among the most frequent causes cited are the dominance of shareholder value theory—W Milberg & D Winkler, *Outsourcing Economics: Global Value Chains in Capitalist Development* (Cambridge UP, 2013)—trade liberalization and new regional and bilateral trade and investment agreements—UNCTAD, *Global Value Chains and Development: Investment and Value Added Trade in the Global Economy*; UN Doc. UNCTAD/DIAE/2013/1 (2013)—and technologies enabling

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begin from the premise that GVCs are not only the product of shifting economic conditions. They also arise as firms engage dynamically with multiple, overlapping and often conflicting local, national, regional and transnational legal regimes, soft-law normative orders and private ordering mechanisms (hereinafter collectively described as 'law').<sup>2</sup>

This article seeks to establish the importance for both scholars and policymakers of investigating some of the complex ways in which the law shapes and is shaped by GVCs. The research agenda articulated here emerged from a series of ongoing conversations among a group of legal scholars, sociologists and political economists that first met in June 2014 under the auspices of the IGLP at Harvard University. For the most part, legal scholarship has only summarily or incidentally analysed GVCs, and similarly, GVCs scholars outside law have not made law a focal point of their theoretical or empirical analyses. We believe that placing law at the centre of the analysis of what have historically been treated as primarily 'economic structures' will not only enrich our understanding of the shape, nature and dynamic character of GVCs, but will also help to illuminate the complex inter-relationship between law and global political economy more broadly.

We begin with a broad description of the question at the heart of our collective inquiry: how does law shape the structure and organisation of production globally and how is law impacted through this process? To make this meta-question more concrete, we articulate three thematic starting points for exploration of the relationship between law and GVCs: law and the geography of GVCs; law and the production and distribution of value and power in GVCs;

cheaper and faster transportation and logistics—D Cowen, *The Deadly Life of Logistics: Mapping Violence in Global Trade* (University of Minnesota Press, 2014).

2 At first blush, the areas of law most implicated in GVCs could include company, contract, employment and tax law, as well as international trade law, commercial and investment law. Yet, when one begins to consider the diverse impacts of GVCs economically, socially, politically, environmentally and so forth, it is hard to think of a field of law that might not be relevant to them, from human rights law to environmental law to laws governing the behaviour of firms in elections or upon the legislative process. In addition, soft law regimes, including guidelines on corporate responsibility, technical standards, fair trade and other ethical certification standards, and customary rules of business practice will also likely be significant to the extent that they shape the behaviour of firms individually or collectively in GVCs. Moreover, the practices of firms as they deal with each other commercially, through trade or industry associations or in influencing behaviour of other firms in the chain—what might be loosely termed 'private ordering mechanisms', will also be important if we are trying to understand how GVCs are coordinated or how risk and reward are distributed through chain structures. We recognise that the boundaries between these diverse normative orders, at least in terms of their effects, is becoming increasingly difficult to maintain, and observation of business practices quickly reveals that a contractual term might be as significant as a public law regulation in shaping the behaviour of actors in global commerce. For these reasons, we use 'law' as a shorthand for hard and soft law regimes and private ordering mechanisms.

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and law and the coordination of GVCs (the latter being a process referred to in the GVC literature as ‘governance’). We focus our research inquiry into the role of law in global structures of production on GVCs both because of their ubiquity in modern capitalism and the rich variety of extant scholarship (largely outside the field of law) exploring GVCs in a variety of industries and contexts. This combination of factors makes GVCs a rich source for research both empirically and theoretically. In an effort to suggest, albeit in a highly preliminary way, what a legal analysis of GVCs might entail, and what insights this line of inquiry might yield, we include brief descriptions of several ongoing research projects initiated by group members. Our goal is to invite scholars in law and related disciplines to begin to view the study of law and global production as an important and worthy field of research in its own right.

## THE CENTRAL RESEARCH QUESTION

We are hardly the first to acknowledge the significance of GVCs as a feature of modern capitalism. Former Director-General of the World Trade Organization (WTO) Pascal Lamy recently observed that GVCs, as the ‘face of the modern global economy’, are creating a ‘new world of trade’.<sup>3</sup> The United Nations Conference on Trade Development (UNCTAD) recently dedicated its annual flagship publication, the *World Investment Report*, to the topic of GVCs. It includes a definition of GVCs and a quantitative estimate of their importance in the world economy:

Global investment and trade are inextricably intertwined through the international production networks of firms investing in productive assets worldwide and trading inputs and outputs in cross-border value chains of various degrees of complexity. Such value chains (intra-firm or inter-firm, regional or global in nature, and commonly referred to as Global Value Chains or GVCs) shaped by TNCs [transnational corporations] account for some 80% of global trade.<sup>4</sup>

While references to GVCs have proliferated rapidly in recent years, in both academic and policy circles, our intervention is motivated by the puzzling fact that there is as yet no well-developed account of the role of law in the structure, operation or governance of GVCs.<sup>5</sup> In fact, we observe that law has, for the most

part, been neglected by the political economists, sociologists, economic geographers and other social scientists that have pioneered GVCs as a field of study. To the extent that law is recognised in the GVC literature, it is generally treated as exogenous rather than an endogenous factor—an institutional backdrop against which the economic and inter-organisational dynamics driving the globalisation of production play out. This lacuna is all the more striking because in recent years the GVC framework has gained considerable reach beyond academic circles to business consultancies, legislators, international organisations, unions and activists.<sup>6</sup>

It seems possible that this externalisation of law and the ‘legal’ from GVC analysis to date may derive from an understanding of capitalism as a process of profit-oriented, mutually beneficial exchange undertaken in (relatively) free markets. In such a vision, the function of law is primarily to provide market-facilitating institutions (such as property, contract and the corporation) and rules to correct informational and other asymmetries in the market rather than as a tool and terrain for struggle over the terms through which value will be generated and distributed or power exercised in global production systems. Most considerations of law in GVCs take the former more minimal conceptualisation of law’s role in capitalism as a given, without interrogating what role law might play in bringing this particular form of GVC capitalism into being. For instance, spurred on by management studies, early business law scholarship addressing GVCs was concerned with the design of supply contracts in order to enhance efficiency and surmount informational asymmetries.<sup>7</sup> In general, the GVC literature continues to treat economic units (or firms) with different national origins and varied sizes, productive capacities and bargaining power as an analytical given, rather than as a product of legal arrangements that could be organised differently.

In our view, law is more than an ‘external’ or contextual factor shaping the strategic decision-making of firms ‘inside’ GVCs.<sup>8</sup> Rather, we argue that

scholarship to the attention of legal scholars, and perhaps more ambitiously, to consider the scholarly value and potential of exploring law and GVCs in relation to one another.

6 For a summary of the various contexts, groups and institutions that make use of the GVC framework, see Global Value Chains Initiative, ‘Institutions’, available at <https://globalvaluechains.org/institutions> (last visited 7 January 2016) and, recently, OECD & World Bank Group, ‘Inclusive Global Value Chains’, Report prepared for submission to G20 Trade Ministers Meeting Istanbul (2015), available at <http://www.oecd.org/trade/OECD-WBG-g20-gvc-report-2015.pdf> (last visited 7 January 2016).

7 For an overview cf. M Hoehn, *Relational Supply Contracts* (Springer 2009) 19–34.

8 Cf. G Gereffi, ‘Global Production Systems and Third World development’, in B Stallings (ed.), *Global Change, Regional Response: The New International Context of Development* (Cambridge UP, 1995) 100 and A Stewart, *Gender, Law and Justice in a Global Market* (Cambridge UP, 2011).

3 P Lamy, ‘Global Value Chains and the New World of Trade’, Keynote address, Duke GVC Global Summit, 20 October 2014, available at <https://globalvaluechains.org/video/duke-global-summit-keynote-address> (last visited 7 January 2016).

4 UNCTAD (2013) iii.

5 One notable exception is Kevin Sobel-Read’s recent article ‘Global Value Chains: A Framework for Analysis’ 5 *Transnational Legal Theory* (2014) 364, which seeks to bring the insights of GVC

law resides at the heart of the GVC phenomenon—it is the vehicle through which value is generated, captured and distributed within and between organisational and jurisdictional domains, and diverse and geographically disparate business operations are coordinated and governed.<sup>9</sup> This recognition of the significance of law is important for a richer understanding of modern capitalism as well as the formulation and critique of policy programmes and interventions. For example, rather than asking how firms can use law to upgrade a particular chain configuration, we aim instead to understand how the possibilities for upgrading are already structured in and through law—that is, how law constitutes the power relations between actors that give rise to particular forms of governance and engender particular distributive effects. This focus on the role that legal frameworks play at different levels of a particular chain, and on the politico-economic power dynamics that operate behind competing legal norms, can help facilitate a critical assessment of the structural and distributional dimensions of GVCs—and the global economy more broadly—that are often taken for granted or normalised. Such an imaginative legal exercise can then help to elucidate alternative and potentially more progressive sites of intervention by scholars, policymakers and civil society groups.

Research on law and GVCs undertaken in this spirit also suggests that the proliferation of GVCs has implications for law and legal scholarship more broadly. Many fields of legal inquiry are organised around distinctions that are blurred or confounded by the global organisation of GVCs. The study of GVCs may aid legal scholars in formulating alternatives to traditionally recognised disciplinary boundaries between local and global, law and non-law, public regulation and private ordering, form and substance, rules and norms, firm and contract and firm and state.<sup>10</sup> In addition, because GVCs frequently traverse legal forms, geographic and jurisdictional boundaries and multiple layers of potentially applicable law, mapping GVCs from a legal perspective also poses complex challenges for basic questions of positive legal analysis, including

<sup>9</sup> ‘Governance’ is a genuinely interdisciplinary concept. In the legal literature, it is generally used as a shorthand for the public (municipal, state, supranational) and private (e.g., through private standard-setting and certification) regulation of, in this case, the GVC. Here, ‘governance’ is used to refer to the shift from traditional towards more sophisticated regulatory techniques which gain traction through knowledge and markets rather than legal sanctions. Cf. for a comparative view P Zumbansen, ‘Governance from an Interdisciplinary Perspective’, in D Levi-Faur (ed.), *Oxford Handbook on Governance* (Oxford UP, 2012). The GVC literature speaks of the ‘governance’ or management/coordination by the lead firm of the chain. Unless reference is made to the multiple normative layers shaping GVCs, this article will use the term in the latter meaning.

<sup>10</sup> Cf. Sobel-Read (2014) 404.

matters of territorial jurisdiction, governing law, private regulation through contract and sovereign authority.<sup>11</sup>

Moreover, just as the boundaries between legal subfields are increasingly hard to draw, so too are the boundaries between what is hard law and what is soft law, or what legal significance is to be given to private ordering mechanisms. We find the study of GVCs is particularly fruitful for forcing a re-examination of these complex questions regarding the boundaries of law itself.<sup>12</sup> For example, GVCs often generate unique inter-firm and cross-border norms of business practice such as chain-wide corporate codes that, albeit of private origin, shape parties’ behaviour as powerfully as legal commands emanating from legislation.<sup>13</sup> Also, both public and private norms surrounding GVCs are entangled with rapidly changing business practice and policies giving rise to novel public/private regulatory arrangements such as the Bangladesh Accord on Building and Fire Safety.<sup>14</sup> As such, GVCs are an important source of norm-creation contributing to global legal pluralism, and this scholarship’s inquiry into the co-existence and collision of different normative orders provides a helpful tool to analyse the complexity of normative assemblages at play.<sup>15</sup>

Our analysis of law and GVCs draws on and aims to contribute to several strands of contemporary legal thought. For instance, Marxist legal scholars have theorised the relationship between capital and law as symbiotic,<sup>16</sup> and the

<sup>11</sup> Cf. David Kennedy, ‘The Mystery of Global Governance’ 34 *Ohio Northern University Law Review* (2008) 827, 832: ‘[A]s the world is re-ordered, law will be there, imagining it, making it, writing it down, consolidating and contesting the new arrangements.’

<sup>12</sup> Cf. D Schneiderman, ‘Power and Production in Global Legal Pluralism: An International Political Economy Approach’, in A Perry-Kessaris (ed.), *Socio-Legal Approaches to International Economic Law* (Routledge, 2013) 98.

<sup>13</sup> Cf. L Cará Backer, ‘Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as Global Legislator’ 37 *University of Connecticut Law Review* (2007) 1739 and A Beckers, *Enforcing Corporate Social Responsibility Codes* (Hart, 2015).

<sup>14</sup> For the text, see Bangladesh Accord on Building and Fire Safety, available at <http://bangladeshaccord.org> (last visited 7 January 2016). For an analysis, cf. M Amner, J Bair & J Biasi, ‘Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks’ 35 *Comparative Labor Law and Policy Journal* (2013) 1 and B ter Haar & M Keane, ‘One Step Forward or More Window-Dressing? A Legal Analysis of Recent CSR Initiatives in the Garment Industry in Bangladesh’ 30 *International Journal of Comparative Labour Law and Industrial Relations* (2014) 5.

<sup>15</sup> Cf. G Teubner, ‘Global Bukovina: Legal Pluralism in the World Society’, in G Teubner (ed.), *Global Law Without a State* (Dartmouth, 1997), 3 and PS Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge UP, 2012). For an illustration from the global toy industry, cf. F Snyder, *The EU, the WTO and China: Legal Pluralism and International Trade Regulation* (Hart, 2010) 44–88.

<sup>16</sup> See, e.g., E Pashukanis, *Law and Marxism: A General Theory* (Inklings, 1978) [1924] 37–45 (arguing that the very form of law follows the commodity form); P Ireland, ‘History, Critical Legal Studies

analysis of the constitutive role of law in GVCs provides the opportunity to deepen our understanding of the complex dynamics of this relationship. While systems theory has been used to describe co-evolutionary processes of law and production regimes,<sup>17</sup> and institutional views explore the reciprocal relation between chain structures and regulatory strategies essentially as a matter of choice,<sup>18</sup> the role of law in GVCs foregrounds questions of power and distribution. At the same time, a comprehensive analysis of law in GVCs would harness tools developed by contemporary socio-legal<sup>19</sup> and pluralist<sup>20</sup> inquiries into law. Our investigation of law and global production shares much with legal work that questions the territorial and statist preoccupations of legal regimes, and the separation of economic activity from political contestation. Hence, the tension between a territorial logic of law and the transnational logic of capital as it is expressed in GVCs becomes productive in nature. Theorising the constitutive role of the present legal landscape in the proliferation of GVCs thus immediately invites reflections on the adequacy of this legal paradigm, both at the conceptual level and at the level of legal reform. It is in this sense that GVCs appear as a salient and highly topical field of research for contemporary critical legal scholarship.

## DEVELOPING A CRITICAL LEGAL APPROACH TO GLOBAL VALUE CHAINS: INITIAL RESEARCH PROJECTS

The research agenda developed by the IGLP Law and Global Production Working Group proceeds from our collective sense that GVCs take a peculiar shape provoked by the incongruity between the apparent territoriality of the law

and the Mysterious Disappearance of Capitalism' 65 *The Modern Law Review* (2002) 120; C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Pluto, 2005); G. Baars, 'Reform or Revolution: Marxian vs Polanyian Approaches to the Regulation of "the Economic"' 17 *Northern Ireland Legal Quarterly* (2011) 415.

17 Cf. G. Teubner, 'Idiosyncratic Production Regimes', in J. Ziman (ed.), *The Evolution of Cultural Entities* (Oxford UP, 2002) 161 (using evolutionary theory to explain institutional divergence in the law of just-in-time manufacturing and leasing).

18 Cf., e.g., F. Cafaggi & P. Iannici, 'Private Regulation and Industrial Organization: Contractual Governance and the Network Approach', in S. Grundmann, F. Möslin & K. Resenhuber (eds), *Contract Governance* (Oxford UP 2015) 343.

19 See, e.g., C. Tan, 'Navigating New Landscapes: Socio-legal Mapping of Plurality and Power in International Economic Law', in Pery-Kessaris (ed.) (2013) 19.

20 Cf. Teubner (1997); Berman (2012); B. de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation*, 2nd ed. (Cambridge UP, 2004); and, recently, H. Dedek & S. van Praagh (eds), *Stateless Law. Evolving Boundaries of a Discipline* (Ashgate, 2015).

and the transnational logic of capital. Through this collective research effort, we hope to better understand how the legal landscape is negotiated and exploited by firms, both in their relationships with the state and with other firms. In short, we aim to heed Dan Danielsen's call to 'study the ways in which this form of [GVC] 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... and to broaden our notions of political economy to encompass the multiplicity of firm/state relations that global value chains entail'.<sup>21</sup>

To study the extent and implications of the mutual dependence and co-evolution of law and GVCs, members of the Law and Global Production Working Group have initiated projects that illuminate some of the ways in which our research questions and methods can be pursued. These projects cluster along three broad themes: the legal geography of GVCs; the relation between law, value and bargaining power in GVCs; and the role of law in GVC governance. In the remainder of this manifesto, we provide an overview of these overarching themes using examples from group members' projects where appropriate to suggest how these themes might begin to be productively explored.

### Legal geography of GVCs

The creation and operation of GVCs involve immense complexity in terms of the legal norms, tools and institutions involved. This complexity is multi-layered, and has both organisational and geographic dimensions. Accordingly, it will be crucial to develop techniques to study these phenomena in ways that illustrate the particularity of diverse legal and GVC structures, while remaining cognisant of the broader complexity of the contexts in which these structures operate. For this reason, we focus here on mapping the legal geography of GVCs as a vital subfield in our broader research field of law and global structures of production.

It is by mapping the legal geography of GVCs that we can show what the traditional division of law into discrete subfields misses or conceals, and how domestic and international hard and soft law and private ordering mechanisms intermingle in ways that challenge efforts to maintain clear distinctions between them. At the same time, mapping can help to make visible the constitutive role of law to non-legal scholars.

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BEYOND CORPORATE GOVERNANCE: WHY A NEW  
APPROACH TO THE STUDY OF CORPORATE LAWS  
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).

Dan Danielson Northeastern University – School of Law

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.<sup>1</sup> 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.<sup>2</sup>

<sup>1</sup> 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 Krakman, et al. *The Anatomy of Corporate Law: A Comparative Functional Approach* (OUP 2009).  
<sup>2</sup> See e.g. 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.

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 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.<sup>3</sup>

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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.<sup>4</sup> Well over a thousand workers, mostly poor women, have been

<sup>3</sup> 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.  
<sup>4</sup> 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](http://www.theguardian.com/world/gallery/2013/apr/24/bangladesh)> accessed 21 September 2014.

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.

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 Walmarks 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 contracts 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 dispersed 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 and loyalty 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.<sup>5</sup> 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),<sup>6</sup> more heterodox development theorists have asserted that successful development states need sufficient autonomy as

<sup>5</sup> See eg. Rodney Bruce Hall and Thomas Biersteker (eds), *The Emergence of Private Authority in Global Governance* (CUP 2002); A Claire Cutler, Virginia Hauffler and Tony Porter (eds), *Private Authority and International Affairs* (State Univ of New York Press 1999).

<sup>6</sup> 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).

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.<sup>7</sup> 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.

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.<sup>8</sup> 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.<sup>9</sup> The final response, he 'Disney' approach, involved large companies like Disney pulling their textile manufacturing business out of Bangladesh.<sup>10</sup>

<sup>7</sup> 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 Economy, Many Recipes: Globalization, Institutions and Economic Growth* (Princeton 2007).

<sup>8</sup> See The Bangladesh Accord <[www.bangladeshaccord.org](http://www.bangladeshaccord.org)> accessed 22 September 2014

<sup>9</sup> See eg. Steven Greenhouse and Stephanie Clifford, 'U.S. Retailers Plan for Safety at Factories' *New York Times* (New York, 11 July 2013) B1

<sup>10</sup> See eg. Steven Greenhouse 'Some Retailers Rethink Role in Bangladesh' *New York Times* (New York, 2 May 2013) A1

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 change the status quo for textile workers in Bangladesh and in some cases made things worse.<sup>11</sup> 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 Bangladesh 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

<sup>11</sup> See eg. Steven Greenhouse, 'Under Pressure, Bangladesh Adopts New Labor Law' *New York Times* (New York, 17 July 2013) A6

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.<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup>

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.

<sup>12</sup> See eg, Jim Yardley, 'Garment Trade Wields Power in Bangladesh' *New York Times* (New York, 25 July 2013) A1

<sup>13</sup> 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](http://www.bostonreview.net/BR38.3/ndf_richard_locke_global_brands_labor_justice.php)> accessed 21 September 2014

<sup>14</sup> 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-72df740e88e12\\_story.html](http://www.washingtonpost.com/business/economy/us-to-suspend-trade-privileges-with-bangladesh/2013/06/27/16171f08-df3d-11e2-963a-72df740e88e12_story.html)> accessed 21 September 2014

<sup>15</sup> See eg, Ian Urbina, 'Buying Overseas Clothing, U.S. Flouts its Own Advice' *New York Times* (New York 23 December 2013) A1

# THE IDEOLOGY OF THE IMPERIAL CORPORATION: “INFORMAL” EMPIRE REVISITED

Philip J. Stern

## ABSTRACT

*Ever since its introduction into the vernacular of imperial historiography over a half century ago, the concept of “informal empire” has had a profound influence on how historians have understood the size and nature of British expansion in the modern world. While offering a crucial corrective to definitions of empire that had focused exclusively on “formal” colonial holdings, such a division has also obscured other frameworks through which we might understand the contours of imperial power, while also underscoring traditional bifurcations between early modern and modern forms of empire. This paper suggests instead an approach that privileges schema that take into account the different institutional and constitutional forms that shaped imperial expansion, and specifically argues that the corporation was one such form, in competition with others including the monarchical and national state. Looking specifically at the early modern East India Company and its modern legacies, particularly George Goldie’s Royal Niger Company, it also suggests that institutional approaches that de-emphasize distinctions between*

*behavioral categories, such as commerce and politics, allow the possibility of excavating deep ideological connections across the history of empire, from its seventeenth-century origins through the era of decolonization.*

**Keywords:** British Empire; East India Company; corporations; George Goldie; Africa

*For then they were one corporation made,  
And bent their vailour 'gainst their enemy  
Gainsford (1610, p. 18)*

In 1953, the Oxbridge historians Robinson and Gallagher made what has undoubtedly become one of the most influential interventions in the history of the historiography of European empires. Insisting the subject of imperial studies had been severely hampered by its attention solely to formal, territorial colonies, they conjured up the notion of “the imperialism of free trade”: that is, the forceful interposition of Victorian free trade globally created “informal empires” around the globe. This not only broadened the geographical reach of the history of the British empire, but its narrative. Rather than seeing a commercial period giving way to a period of rule, Robinson and Gallagher argued for continuity in a policy that *always* preferred informal empire and engaged in formal empire only if necessary, determined by circumstances on the “periphery.” In paying attention only to the places “coloured red on the map,” such as India and Africa, historians had misunderstood both the continuity, impulses, and extent of nineteenth-century empire, which had been, in their evocative and now iconic phrase, “rather like judging the size and character of icebergs from the parts above the water-line” (1953, p. 1).

Though not the first to raise the idea, Robinson and Gallagher certainly “put ‘informal empire’ into the imperial historian’s play phrase book, in which it has since remained” (Thompson, 2008, p. 229). The concept has helped to illuminate British economic and political influence in nominally independent parts of the world, particularly Latin America, but East Asia and the Middle East as well (Brown, 2008a; Mclean, 1995; Miller, 1999; Silverfarb, 1986; Sluglett, 2008; Turnbull, 2008). Its refinements and reformulations over time — in concepts like Cain and Hopkins’s “gentlemanly capitalism” (2002) — opened up a world of research on the links between

political economy and empire, while fueling continued debate on the value and definition of concepts like “center” and “periphery.” Certainly, one way to reappraise the notion of informal empire is to broaden our understanding of those forces that comprised it; if formal imperial expansion was marked by Christ, commerce, and civilization, such a vision of informal empire is one inspired by its own holy trinity of “commerce, capital, and culture” (Brown, 2008b, p. 21). Moreover, in the hands of a range of historians, “informal empire” has become an increasingly large tent, including not simply *homines economici* but varieties of cultural, geopolitical, sub-imperial, scientific and technological, and religious impulses as well (Aguirre, 2005; Fan, 2003; Winks, 1976). It has also been broadened to excavate the wider imperial projects of other European as well as non-European empires beyond the British (Duus, Myers, & Peattie, 1989; Oñate, 2011; Wendt & Friedheim, 1995), and to square the circle especially on how to understand as imperial the expansive projects of avowedly and ostensibly anti-colonial polities, most notably the United States and the Soviet Union (Barton, 2014; Lee, 1995).

Of course, “informal empire” is not without its critics. Certainly, in specific case studies, such as Thompson (1992) has shown for nineteenth-century Argentina, the concept does not necessarily prove to be the most helpful way to understand the influence of Europe’s role regionally.<sup>1</sup> Over the years, many have suggested the concept is too much of a caricature, and leaves little room for taking seriously at least the claims of these promoters of “informal” imperialism that their goals were to restrict rather than expand empire. Conversely, it may give far too much credit to the intentions of colonial designers; as Matthew Brown has noted, “informal empire was part of the imperial project, but one that differed in practice from the policy dreamed up by imperial guardians and colonial officials” (2008, p. 17). Moreover, such a heuristic also often presupposes that informal empire could comprehend and sanction its own alternative: namely, that if commercial and political pressure failed to achieve the proper modes of domination or influence, formal structures of rule would inevitably follow (Platt, 1968). It is also increasingly difficult to see informal empire as a coherent and consistent policy, applied uniformly and globally, rather than the consequence of regional pressures and contextually-derived decision-making. As John Darwin has observed, the use of “informal” influence was often the consequence not of strength but real *limitations* on British power abroad: “the *force majeure* of circumstance [rather] than the triumph of a principle” (1997, pp. 617–620). As Thompson has suggested more recently, informal and formal empire are better understood not as mutually exclusive

“categories” but rather as nodes on a global imperial “continuum,” ideal types that in practice in fact existed in negotiation with one another at different times and different places (2008, pp. 231–234).

Still others, most notably Ann Laura Stoler, have gone further, indicting the notion as complicit with the terms of empire itself: “unhelpful euphemisms, not working concepts” which in using freighted imperial vocabularies ironically serve to re-inscribe the primacy of the territorial and national in our notions of empire (2006, p. 136). In this sense, posing the question itself is misleading. Even a continuum of “informal” or “formal” assumes *territoriality* (or non-territoriality) ought to be the primary criterion on which we analyze and judge empire, rather than, in Stoler’s words, “degrees of sovereignty and disenfranchisement” (2006, p. 139). More generally, critics have observed that “informal empire” is simply ill-defined and imprecise, meaning too many things to as many people, ranging from simply a synonym for “influence” to more specific measures such as unequal credit relationships backed by the threat or use of state-sponsored military force. It has also come in some instances to be a problematic heuristic, attempting to render into concrete classifications what is an essentially an unavoidable ambiguity in the colonial project, similar, for example, to the elusive but ubiquitous nomenclatural distinctions between “settlement” and “rule,” “commerce” and “colonization,” and of course “colonialism” (as a mode of migration and territorial acquisition) and “imperialism” (seen an economic or political force that need not necessarily seize land or even sovereignty for itself) (Steinmetz, 2013, p. 11). Certainly it also occludes other ways of conceptualizing regimes of power, such as Hardt and Negri’s formulation (2000), in which “imperialism” represents the modern inter-national competition among states and “Empire,” the postmodern, post-national order driven by the impersonal and often not immediately visible forces of capital.

This paper is an attempt to engage this debate over imperial heuristics from a different angle entirely, by imagining an alternative “continuum” through which we understand and evaluate colonial rule: namely, the nature and degree of corporate rule. Theorists, especially famously since Hobson (1902) and Lenin (1939 [1917]), have understood that corporate interests were at the core of the imperial enterprise, but have tended to see them as “private” interests, often in collusion with the state or militating against public interest, or both. The concept of “informal” empire, in many ways, picks up that mantle, placing the degree or extent of *state* institutions as the barometer of a schematic of empire. Not mutually exclusive from this, the approach proposed here will be to shift the focus onto both the

structures but more critically the political ideology behind the employment of various of corporate forms in establishing and sustaining British imperial and colonial expansion.

In so doing, it draws two main conclusions. First, where the formal/informal spectrum tends to assume a unique applicability to modern empire, certain core aspects of corporate colonial rule endured across the traditional boundaries of early modern (or “first”) and modern (or “second”) empire. Considering the forms of colonial organization rather than its status as a political or an economic enterprise opens up instead a more continuous story about strategies to resolve political and commercial dilemmas inherent in the colonial project from the seventeenth to the twentieth centuries. In turn, these ideas remained a constituent part of strategies for colonial rule because of the self-referential historiography of empire itself. In other words, selective histories and legacies of early uses of the colonial corporation in the seventeenth century shaped thinking about how and why corporations should serve as a foundation for a “new” imperialism in the late nineteenth century. The case examined here looks in particular at the ways memory of the East India Company shaped particular formulations and intellectual defenses of the uses of companies in British colonial Africa.

Second, and more broadly, this argument suggests that the distinction of formal and informal empire unwittingly and often implicitly elides the ideological and organizational diversity of “private” forms of empire, both diachronically and synchronically. The narrative of informal and formal empire is either chronological or geospatial: that is, that informal rule gave way to formal rule “if necessary,” or that particular zones or regions determined the degree of need for “formal” or “informal” structures. This perspective, of course, is not without merit but is not the only story one could tell. The controversies over the types and nature of company and corporate involvement in empire raised similar issues, both about the relationship of organizational structure to particular imperial and commercial objectives and their historical relationships: that is, when should corporate rule evolve into state rule, and vice versa? Moreover, from the “peripheries” of British power like Latin America to the Indian jewel in its Crown, the distinction between the formal structures of state power and the informal impulses of commerce can be seen instead as an engagement with rival and multiple corporate structures — from the state to religious enterprises, alternative jurisdictional entities, and of course business firms, many of which erected no less *formal* efforts to rule, upending local forms of sovereignty, displacing institutions of power, and annexing and governing over people, places,

and goods. “Formal” power was layered and pluralistic, consistently riddled with forces and modes of rule that the state could not control; likewise, what historians have conceptualized as “informal” rarely felt “informal” to those over whom they ruled, or even to those that did the ruling.

Looking at the ideological debates over corporate rule — and the legacies of the East India Company in those debates particularly — this paper explores the degree to which the very notion of “formal” and “informal” empire might misdirect our attention from a very different sort of continuity across the eighteenth and nineteenth centuries: not the balance between public and private but rather the competition among various different institutional forms of empire, especially corporate and state led visions of colonial expansion. In so doing, it suggests that the concept of “informal” empire obscures distinctions over competing types of colonial venture, and is a particularly misleading way to understand some forms of corporate organization in empire. Corporations offered characteristics — institutional permanence, evolving forms of limited liability, a particular governing structure — that distinguished them from firms, proprietorships, and other forms of colonial “private” enterprise. These differing structural features in turn consistently fueled controversies over what forms such enterprise should take. Such debates intertwined commercial interest with political ideology, questions of economic organization with ideas about proper forms of governance. As such, which form such “private” ventures would take could often be as, if not more, controversial as whether the project would be in state or non-state hands, a question which is often elided by the heuristic of “informal” empire and the notion of an imperialism of “free trade.” To put it another way: was the concept of “corporate empire” a form of informal or formal empire? That such a question resists a simple answer is the starting point of this investigation.

## THE EARLY MODERN CORPORATE EMPIRE: PRACTICE AND THEORY

Born as it was to complicate an historiography of mid-Victorian empire, the concept of “informal” empire has never been a particularly useful or apposite tool for understanding early modern forms of colonialism, despite some exceptions (e.g., Newitt, 2001). Early modern empire was inherently a hybrid affair, blending various forms of state and non-state actors in both

competition and partnership, from proprietorial governments to pirates and privateers. Long branded as “mercantilist,” this period can no longer be seen as one in which empire inherently and unproblematically elided state and commerce into a common interest, or in which it was always clear which one took ultimate primacy (Stern & Wennertind, 2014). Much English enterprise into the extra-European world in the seventeenth century was primarily the business of various forms of uneasy and negotiated partnership between the Crown and various different forms of “private” institution. The two most common of these forms were individual proprietorships, structured like medieval land grants and fiefdoms, and associations of various sorts. As Gerard de Malynes simplified it in his 1622 treatise delineating his vision of the law merchant, there were two ideal types of association: “The one is done by publike authoritie of Princes or States” — that is, the corporation — and “the other Association is done by and betwene Merchants of their owne authoritie” — that is, the firm or partnership (1622a, pp. 210–211).

In one sense, firms and corporations were distinguished by the types of organizational problems they were employed to solve. Corporations offered many features a firm could not: a unique relationship with the Crown, in the form of a charter; fiscal permanence in their capital stock; political permanence in their expectation of perpetual existence; and legal identity, as a singularity or legal “person,” capable of engaging in debts, suing and being sued, and many other perquisites that blurred the lines between individuals and the aggregate corporation. As a legal form, the corporation was not bound to any particular ends; examples ranged from scholarly and educational organizations — such as the Library Company in Philadelphia — to the St. George Bay and Sierra Leone Company, designed to further the humanitarian and abolitionist causes of eliminating the slave-trade and resettling slaves in western Africa. And of course, in practice, there were many structural variations on the corporate theme, such as the distinction between joint stock and regulated companies, various terms and natures of charters, corporations possessed of proprietorships, and so on (Scott, 1912a; Stern, 2013).

The choice between partnership and corporation, however, did not simply reflect objective economic conditions but rather was deeply affected by political ideology. Many who objected to corporations did so because they saw them as inherently tied to monopoly, a near shibboleth in early modern England for corruption and mismanagement (Sacks, 1997). Malynes, for one, suggested however that such objections were far too blunt, and missed the nuances of political context:

Others would have all things at large in the course of *Traffique*, and that there should be no societies or corporations of Merchants for any places of *Trade* (terming them to be *Monopolies*) but that by way of partnership Merchants might associate themselves, according to the manner of some other Countries. These men have no regard that innovations are as dangerous, as to remove the corner stones of a building, neither doe they observe a momentary difference betwixt the Government of a *Monarchy*, and that especially in an Iland: and the government of a *Democracy* which is popular: or of an *Aristocracy*, which is governed by the better sort of the people. (1622b, p. 67)

The question as to whether corporations were appropriate for overseas activity could not be resolved with an absolute answer or any clear-cut legal principle. Rather, it was tied to one’s vision of larger questions of political organization.

Furthermore, even what constituted a “monopoly” seemed to be more ambiguous upon closer examination. There were some, Malynes suggested, who imagined a restriction of trade made by Parliament was not a monopoly, while one made by royal authority could be constituted as such; for others, no restriction by “public authority” was, properly speaking, a monopoly (1622a, pp. 216–217). “Others” he further noted, “make a difference betwene Companies or Associations, dealing in a joynt Stocke, or apart: affirming the negotiation of a joynt Stocke to be within the compass of a Monopoly: Nevertheless they would be contented to tolerate the same, for the employment outwards (1622a, p. 217).” And of course, whether the restriction of trade for a limited period of time constituted a monopoly — and what that time should be — also remained a matter of open debate.

Despite the attempts of a number of early modern political economists to reach a less politicized and more taxonomized vocabulary, the debate over the value of the corporation in colonial contexts consistently elided with the problem of monopoly. Certainly, the ongoing debate across the seventeenth century over one of the most prominent of early modern English “monopoly” corporations — the East India Company — was not simply whether a monopoly was legal or beneficial, but whether it was indeed a *monopoly* in the first place. It is indicative of the confusion the corporation suggests between monopolism and free trade that its very early modern legacy is often historiographically convoluted. To some, the European East India Companies were the first “modern multinationals,” pioneering in their union of “modern” techniques of capitalization and management with long-distance trade, a harbinger of modern capitalism in both Europe and India (Carlos & Nicholas, 1988; Chaudhuri, 1998; Gelderblom, De Jong, & Jonker, 2012; Robins, 2006; Roy, 2012). At the

same time, the East India Companies represent for other economic and political historians — many, though not all, following from the critique made by Adam Smith himself — something either anachronistic and anti-capitalist, marked by its adherence to despotism, monopolism, and in some ways key to many classic and textbook definitions of early modern political economy (e.g. from varying perspectives, Heckscher, 1931/1994; Tollison & Ekelund, 1997; Pincus, 2009; Brown, 2009): “if there was a perfect example of what we today understand as the spirit of mercantilism,” K. N. Chaudhuri wrote in his magisterial study of the early English Company, “the East India Company embodied it in its policy of harnessing political power and privileges to its commercial purpose” (1978, p. 20).

Yet, both ideologically and institutionally, the East India Company — and a number of other corporate agents of European empire in the early modern period — occupied a space neither mercantilist nor capitalist. It represented one of a number of legal and institutional options for organizing empire that reflected different visions of political theory as well as the proper shape and size of empire, its constitution, and of course its ultimate relation to the polity. Certainly, many of the Company’s advocates insisted it was not a monopoly, as the ability to buy stock in the company made it more accessible than the restricted trades of guilds and regulated companies. In this sense, it was also not a “private” body, but rather was as public as any state-sponsored enterprise, and perhaps even more so, as it also provided room for the non-landed, the non-naturalized, and even (as some polemically argued) the disenfranchised, most notably women.

These ideological and rhetorical positions — some reasonable, some quite exaggerated — reflected certain institutional and organizational realities on the ground as well. While the Company pursued so-called interlopers with vigilance, the Company permitted and tolerated manifold forms of private and individual trade within the limits of its jurisdiction — which its charters, from the first in 1600, defined as the trade and traffic between the Cape of Good Hope and the Straits of Magellan. It was hardly a monopoly in Asia, competing and trafficking with various other European and Asian merchants and sovereigns. Seen from the perspective of social and information networks, the theoretically centralized East India Company by some measures never came close to achieving monopolism (Erikson, 2014). Contemporary observers were often less sanguine about the effects of private traders, though also frequently questioned the solidity of the “monopoly,” given the great number of Company officers, freemen, captains, sailors, and private investors (especially ship owners) who also had license to trade in India (Bowen, 2006, pp. 12–13).

Nor was this corporation even, on paper, a permanent monopoly from the very start. Its initial charters had been limited to set periods; while it was made a perpetual body politic in 1607, its capital stock was not made permanent until 1657. Charters and patents were constantly revised and renegotiated, especially at the change of monarch. Finally, the heated debates over the Company in the aftermath of the Glorious Revolution culminated in the creation of a new rival company and their ultimate union — at which point the charters became subject again to periodic review and renewal. It was that need for “renewal” that in turn opened the space for the pivotal debates over “reform” of the Company’s governance at home and abroad following upon its mid-eighteenth century territorial expansion, in 1773, 1784, 1793, 1813, and 1833 (Bowen, 1991).

Thus, despite its deceptive simplicity in the hands of many historians, the extent to which a “monopoly company” was either a monopoly or a private enterprise was an open question, with answers that changed over time and based upon one’s ideological perspective. Nonetheless, while the contexts and nature of its structure changed over the course of its two and a half centuries, certain core arguments the East India Company and its advocates made on its behalf as a corporation remained remarkably consistent over that time. Through the seventeenth-century the defense of the scope of the Company’s authority consisted of a number of familiar arguments, chief of which was that monopolies may have been illegal, but particular circumstances at home and abroad requiring the creation of a joint stock corporation for the East Indies meant that the Company by definition was not one. Defenders of the joint-stock company insisted it provided not only capital liquidity and greater returns, but that it offered a unique form of order and *government* critical for dangerous and distant trades and colonial ventures. As the early seventeenth-century economic writer Edward Misselden put it, “Those that Trade without Order and Government, are like unto men, that make Holes in the bottom of that Ship, wherein themselves are passengers” (1622, p. 84). To their many advocates, monopoly corporations were necessary — and not necessarily monopolies — in places where they were required to assure good government of trade (Stern, 2014).

Moreover, inherent in the early modern debate over the corporation was a distinctly spatial question: did the corporate model support the particular nature of commerce and rule of the place? For a small subset of its opponents, the corporation was universally problematic, but for many the question as far more variable and nuanced. Some trades were hindered by exclusivity, yet in others, in Malynes’s words, “it may be thought

convenient to have joynt Stocks for Remote Places, as the *East Indies* and *Persia*" (1622b, p. 71). Corporations were legitimate for some politics and not others, in some cases and not others, in some parts of the world and not others. How one drew those lines and determined those thresholds was tied to one's vision of the English polity and empire. Charles Molloy maintained that so-called monopoly companies were only good for trade in places such as the East Indies and Ottoman Empire, though France, the Canary Islands, and "any of those Places on this side of the Line" were better organized into voluntary associations and partnerships. "The Standard rule is," he argued, "to know whether the Trade of the Place will bear a Company [*sic*], or not" (Molloy, 1677, p. 434). To this view, there was nothing inherent to the corporate form that made it good or not, efficient or not, legal or not, like a monarchy or republic; it was the goals and nature of the corporate society rather than its means that justified its particular form of organization and incorporation.

If corporate government had ostensible advantages in certain contexts over others, it also was in some cases preferable even to the state and certainly to private trade in its ability to collect and deploy resources. Some insisted it was critical to provide the security of return to encourage innovation and risk, much like a patent. Overseas, it prevented different traders working at cross purposes, undermining negotiating and bargaining position with foreign merchants and states. It also allowed for the stability and liquidity necessary for the particular kinds of expenditures required in trade and colonization in the extra-European world, particularly the building of fortified factories and cities (Scott, 1912a, pp. 452–453, 1912b, p. 9). Corporations offered to overseas trade and settlement a certain kind of institutional and fiscal permanence that partnerships — and even some certain state ventures — could not achieve. As Charles Davenant noted, "How can a Society of Merchants ... expatiate their Thoughts for great and public Undertakings, whose Constitution is subject to such frequent Changes, and who every Year run the risk of their capital?" (1698, p. 421). Why else did man build houses, acquire estates and titles, make laws, or erect politics but to provide for something that endured beyond the moment or of mortality? Such transience was perhaps acceptable for the pursuit of private profit, but "no society of Trading Men can bring about any great Thing for the Common Good, who think themselves but in a precarious and momentary Possession of their Rights and Privileges" (Davenant, 1698, pp. 422–423). Privileges required permanence, and permanence required privileges. In this sense, incorporation not only was an exercise of the state

protecting the merchant, but the merchant protecting itself *from* the state, among others.

After 1709, the United East India Company's charters had Parliamentary as well as Crown sanction; though this should have offered an out from accusations of monopolism, it did not. Such indictments only intensified as the Company took center stage in Adam Smith's *The Wealth of Nations* (1776) as the most egregious example of the relationship between monopoly and despotism. Adam Smith's objections, of course, were not simply to the East India Company but, famously, to joint-stock companies in general. Joint stock companies, he argued, were inevitably far more reckless and less efficient than merchants in a partnership, since its directors would never mind other people's money as well as their own. The East India Company compounded these generic concerns by integrating the prerogatives of sovereignty with its capacity as a merchant. For Smith, this was a "strange absurdity," destined to ruin both trade and the places with whom the Company traded.

Yet, there was a further objection still, one borne of historical evidence rather than logical reasoning. To Smith, the "genius" — he consistently uses the word sarcastically — of the exclusive company was ill-suited to the creation of colonies. Though Asia and Africa were filled with "barbarous nations," these were sedentary agriculturist nations, as opposed to the "hunters" and nomads that characterized the Americas. As such, they posed far greater obstacles than in the Atlantic, ones a corporate company was ill-equipped to overcome. Never quite explaining why this is the case, he pointed only to the lack of evidence: the only colonies worth speaking of, he argued, were Dutch Batavia and the Cape of Good Hope, and their success needed to be credited to their geographical situation not their management. When these companies did come into colonies through conquest, they were bound to mismanage those colonies drastically (Smith, 1776, pp. 512–516).

Though it would be Smith's judgment that would endure, Company advocates did fight back. As late as 1784, Francis Russell, the solicitor for the Board of Control, which oversaw East India Affairs and the Company after 1784, maintained that to call the Company a "chartered Monopoly" was merely rhetoric intended "to excite popular odium," with no basis in law or history (Russell, 1793, p. 17). W. J. Mickle, a clerk in the India House library, took Smith on directly. If Smith echoed the century-old argument that monopolism was (with some very limited exceptions) universally objectionable, Mickle countered with precisely the same answer as had been given by seventeenth-century writers like Molloy and Malynes: it

was the conditions of the place and the ends of the institution that should determine its structure and organization. "It is," he mocked, "according to the Doctor [Smith], as safe to settle in, and trade with India, as to take a counting-house near London-bridge, or to buy a peck of peas at Covent-Garden" (1779, p. 17).

## INFORMAL CORPORATE EMPIRE IN THE NINETEENTH CENTURY

At its core, the challenge posed by thinking about empires as formal or informal is that each colonial and imperial context was defined by its own unique mixture of state and non-state institutions, within which people's political loyalties and ideological commitments overlapped promiscuously. Commerce and politics were never separable, and politics was no less the reserve of state institutions than economics was restricted to so-called private enterprise. Even in British "India," the quintessential example of a formal colony of rule, these categories were deeply problematic and messy. Through its supposed commercial period, from the seventeenth century through to its acquisition of territorial power in the mid-eighteenth century, the Company possessed the institutional characteristics of a government, and generated distinctly political ideologies concerning its rights to rule and sovereign power (Stern, 2011). At the same time, its monopoly on both trade and power was always contested, perhaps even more after the expansion of its territorial dominion. As Webster (2009) has shown, Company India was deeply infiltrated by forms of free and private trade well before the elimination of its monopoly and the removal of political authority in the nineteenth century. The political economy of British rule under both the Company and, after 1858, the Crown was always infused with a hybrid admixture of state, corporate, and firms engaging in various forms of public governance. The absence of formal state structures of rule did not mean the absence of formal structures of rule, particularly in the form of corporate organization; conversely, the theoretical interposition of the state did not obviate — and sometimes enhanced — the institutional and ideological power of non-state bodies politic.

The controversies over joint-stock monopoly endured in British India through the nineteenth century. As in the seventeenth century, one might imagine two categories of colonial company: those that by their nature or careful politics were managed as monopolies, and others that admitted

and sometimes even welcomed competition. As in the previous centuries, the question seemed to turn on the ends and nature of the corporate enterprise, rather than an abstract political economy that determined whether companies were inherently good or bad forms of organization. For example, the spatial particularities of infrastructure-oriented projects — railways, shipping, and the like — seemed to lend themselves to monopoly structures and the arguments used to sustain them, while more diffuse and abstract financial enterprises, like banks, could employ a joint stock organization without requiring monopoly conditions to do so (Jones, 1977, p. 17).

Even during the supposed heyday of the mid-Victorian commitment to liberal free trade, there remained strong and effective voices urging the continued use of formally structured, exclusive corporations in the colonial project. Even more peculiar still, as the Company and its "monopoly" structure was coming under ever greater scrutiny and was eventually dismantled, its legacy became a touchstone for those advocating for a continuing influence of joint-stock corporations in the modern British empire. In some ways, the most active phases of Parliamentary and public critique only enhanced the Company's reputation. Indeed, ironically, as the East India Company was under assault as both a commercial and political anachronism after the 1790s, it somehow also became for many throughout the nineteenth century a model for building government through corporate forms. In 1797, when Jeremy Bentham imagined organizing a joint-stock company that would manage a network of "Industry Houses" to care for, manage, and indenture paupers and their children, the East India company served as his exemplar (Himmelfarb, 1968, p. 74). By the 1820s and 1830s, Company directors far more successfully "cultivated an image of probity," and somewhat successfully sold themselves as servants of public good rather than private gain (Alborn, 1998; Bowen, 2006, p. 125). For some, the Smithian association of monopoly and despotism in the East India Company outlived the Company, even fueling policy critique in post-Company India (Sartori, 2014, p. 52), yet for others, the Company seemed to have rescued itself; when Thomas Corbet excoriated shareholder governance in joint-stock corporations as a system which encourages "fools taking the lead," he noted the East India Company was an exception to the rule (Freeman, Pearson, & Taylor, 2012, p. 172).

Thus, even in an era of free trade liberalism, the example of the East India Company remained a ready one for trying to imagining new imperial enterprises, not simply due to its structure but related directly to a conception of the relationship between corporations and particular spaces of empire. To some, nineteenth-century Africa posed some of the very same

challenges for British commerce and rule as seventeenth-century India. Thus, when James MacQueen imagined a scheme in the 1820s for a chartered West African company, it was to be conceived “after the manner of the East India Company.” Even his self-conscious modifications and improvements on the Company’s constitution were more apposite than he realized; for example, his suggestion that this Company be limited in its charter to fifteen years were in fact the same terms on which the East India Company was possessed of its original charter. He also defended the project in much the same languages as had Company advocates centuries earlier: insisting the enterprise was not a “monopoly,” but an “exclusive privilege in trade ... for a trade yet to be formed” (Lambert, 2013; M’Queen, 1821, pp. 267–268, 269–270). To MacQueen, the question of an exclusive company was one deeply rooted in space (i.e., his understanding of the particular conditions of West Africa) and time: that is, the company as a *stage* of proper colonial development:

Without a chartered company, Great Britain never could have achieved what she has done in India, nor reared such a noble fabric of commerce and civil government as she has there done .... It may be for the greater advantage of Great Britain and of India, that the trade to the latter should now be thrown open, but it never could have been for the interest of either that this should have taken place at an earlier period. The situation of Africa, however, is totally different. There every thing is to do. Regular commerce is to be created. Society is almost altogether to be formed. Security and civilization, law, order, and religion, are each and all yet to be introduced into and planted in Africa. Unity of action and design, therefore, becomes absolutely necessary to accomplish all these desirable objects. Conflicting interests, amidst such a disjointed population, must, and will, indefinitely retard it.

In such a context, he insisted, mercantile company required political power, much like the East India Company did in India:

A charter is clearly and indispensably necessary, in order to conduct mercantile affairs to a prosperous issue ... to negotiate, as an irresistible and stable power, to punish aggression, to rear up gradually an empire in Africa, such as has been done in India, against which no native power shall be able to raise its head. Then, but not till then, the trade may be thrown open, but the territorial power of the charter may, as in India, remain. (1821, pp. 271–272)

If MacQueen’s logic, and his politics, were deliberately counterpoised to the emergent Ricardian and Cobdenite liberal discourse of free trade (Lambert, 2013, pp. 80–81), they also echoed the seventeenth- and eighteenth-century arguments on behalf of the East India Company in its engagement with India: that monopolies were indeed illegal on “this side of the line” but that the distance and danger of trade with “infidels” made

Asia a different story; that such a company could not be a monopoly because it was responsible for making the trade possible in the first place; that a charter, with the forms of capital and consultative government it offered, was absolutely necessary to maintain stability and order in the world beyond Christendom (Stern, 2011, 2014). These also echoed similar, if less successful, arguments mobilized on behalf of the Royal African Company, against the assaults on its monopoly in the late seventeenth century as well (Pettigrew, 2013; Stern, 2014, pp. 182–183).

In some ways, after its removal from government and effective dismantling after 1858, the longing for such a colonial corporate enterprise only intensified. Even the quintessential voice of mid-century liberalism, John Stuart Mill, quite famously reflected with a bit of nostalgia on the Company. Much like seventeenth-century political economists before him, Mill maintained that colonial enterprise depended on the wisdom of disinterested “philosophical legislators,” guided by expertise not politics; in the case of India, this was represented for this former East India Company employee by the bureaucratic system of the Company, not the British state (Bell, 2010, p. 43). Expertise about India, not British public opinion, needed to guide policy in India (*The East India Company’s Charter*, 1990 [1852], pp. 33–34). The worst possible governor for a foreign dependency like India, Mill maintained, would be an “English Cabinet Minister, who is thinking of English not Indian politics,” and whose tenure is often truncated and dependent upon public opinion, but not those over which he rules. “A free country which attempts to govern a distant dependency, inhabited by a dissimilar people, by means of a branch of its own executive, will almost inevitably fail,” he argued

The only mode which has any chance of tolerable success, is to govern through a delegated body, of a comparatively permanent character ... Such a body did exist in the case of India; and I fear that both India and England will pay a severe penalty for the shortsighted policy by which this intermediate instrument of government was done away with. (Mill, 1977 [1861], p. 573)

“It has been the destiny of the government of the East India Company,” Mill opined, “to suggest the true theory of the government of a semibarbarous dependency by a civilised country, and after having done this to perish” (1977 [1861], p. 577).

To a particular liberal colonial imagination, the corporation had served a purpose: liberated by legal fiction from individual or national identity, it had the particular power and capacity to arbitrate the thorny path through civilization and barbarism inevitably raised by the imperial enterprise. It

managed to insulate the British constitution from the dilatory effects of becoming an imperial power, while simultaneously protecting the colonies themselves; Mill even went so far as to suggest that all the Crown colonies would benefit from a form of “double government,” and especially “having some body analogous to the Court of Directors as a Council to assist the Colonial Minister” where representative government was not deemed to be possible (The East India Company’s Charter, 1990 [1852], p. 44). While Mill quite clearly insisted on the power of the national state to regulate “private” concerns, it was dangerous for it to assume all of its responsibilities. Were government to assume the power of corporations, from joint-stock companies to banks to municipalities, as Mill famously put it, “not all the freedom of the press and popular constitution of the legislature would make this or any other country free otherwise than in name.” (1977 [1859], p. 306)

This notion that corporate power was not only economically but indeed politically valuable and effective was mirrored in various continued schemes for conceptualizing colonial rule. Some became quite powerful colonial enterprises, while many more remained mere proposals and fleeting ambitions. Yet, the notion of corporate empire was available in every colonial theater, from India to Latin America. One of the most vibrant examples of such schemes came from the late 1840s in the West Indies. Frustrated by the continued subject status of the West Indies in the British empire by mid-century, one proposal out of Jamaica suggested a joint-stock company to replace direct control from the colonial office. “All they want now is a *voice and active part in the supreme government of themselves*. Let some scheme of such self-government, under slight parental control now be established, and these Colonies will *at once* rise into independence, brighten into hope, and emerge from prostration and poverty, into progressive but certain wealth” (Anonymous, 1849, p. 12). Here the suggestion was for a United West India Company, modeled quite explicitly on the East India Company, not a decade before it was itself removed entirely from government. The company was to be governed by twenty-four directors, with the same “powers of management and direction ... under the control of some limited supervision and check, as are vested in the Directors of the ‘East India Company.’” The directors in turn would appoint governors for each of the colonies, while the Crown appoints a Governor-General, subject to the approval of the Directors, or, absent such an appointment, the Governor of Jamaica was to be the Governor-General *ex officio*, not unlike the Governor-General in Calcutta. Unlike in India, in this scheme, however, the directors were to be elected out of

shareholders in the company as well as property owners in the colonies themselves, and proportioned among the different West Indian colonies. This proposed company would also have had representation in Parliament. In such a scheme, the colonial office would cease to direct government in the West Indies, but would instead be rendered “a mere office or *Board of Control*, acting, to any necessary extent, as a check on the *Board of Directors*” (Anonymous, 1849, p. 18). Such a company, the author argued, “will be a mighty engine in working out the interests of the whole Colonial Proprietary Government ... the pecuniary interests and advancement of the whole West-India Government, and West-India territories, would be the leading object in all its operations” (Anonymous, 1849, p. 30).

### “FORMAL” CORPORATE EMPIRE: THE CASE OF GEORGE GOLDIE

Thus, even in the East India Company’s waning days, and amid all the criticism of government-by-company, the corporation lingered, and in some cases remained quite alive, in the colonial imagination. In this (admittedly ill-fated) proposal, the joint-stock corporation served a dual purpose: to develop a form of particular representation for a “mature” colony that had outgrown living with its colonial parents while also providing the insulation for the public for the continuing maturation of the “native peasantry” into full economic and political subjects. This was no clearer than in West Africa, as the sorts of schemes proposed by MacQueen evolved in the late century into iconic and pervasive models of the corporation as the form that could combine the stability of commerce with effective government that could lead to colonial empire. Thinking about chartered corporations as a particular constitutional form — rather than simply one subset of larger commercial enterprises — creates complications for the usual categories through which we understand colonial rule. Cain and Hopkins suggest that the reliance on chartered companies in sub-Saharan Africa was a last resort, the result of the absence of a strong interest in investment from the London financial sector — a “dilute form” of gentlemanly capitalism that was unusual in its accommodations with manufacturers, shipping, and missionaries (2002, p. 338).

Yet, chartered companies seem far less “diluted” (and perhaps deluded) as a form of imperial enterprise — which is to say, less exceptional — when one does not assume that state and company officials overlapped in their

interest or objectives. While certain political languages and attitudes remained common, again, the modern imperial corporation as a structure of empire defies easy categorization as an “informal” or “formal” structure exerting economic influence yet amidst quite apparent attempts to establish very clear institutions of territorial and infrastructural rule. In many ways, the modern colonial corporation, while enabled by the legal and fiscal transformations of corporate structure in the nineteenth century, was born ideologically of a far longer history of corporate forms of empire.

This becomes a bit clearer if one focuses on the particular example of George Goldie, perhaps the most famous — and arguably successful — in this series of colonial entrepreneurs, who spent great energy and effort defending not only his various African ventures, culminating in the chartered Royal Niger Company in 1886, but also backing other similar enterprises, from Cecil Rhodes’s British South Africa Company to the North Borneo Company. Such companies, Goldie argued, possessed “internal and perennial sources of energy” which were “independent of Parliamentary crises and party necessities” (1978 [1891], p. 66). Commerce could not be distinguished from politics, especially in colonial environments; the United African Company, Goldie reflected in 1911, was designed precisely to make this point, “for it held, as an axiom, that in uncivilised countries there can be no permanence for commerce or industry without political power” (1978 [1911], p. 287). According to their supporters, companies were *more* consistent and enduring, and less likely to commit the sins of “intermittent or spasmodic policy” (Goldie, 1978 [1891], p. 68). The fact that corporate shareholders and profits, rather than taxpayers, were responsible for the expenditures “tends to encourage self-reliance and energy, just as the hardest children are those who have been allowed to run loose in all weathers” even though some enterprises necessarily fail, especially those funded by private capital when faced with competition from public and state funding (Goldie, 1978 [1894], p. 81).

Goldie’s United African Company self-consciously imitated a somewhat perverted idea of the East India Company’s history, one which sought to extend “political influence over the tribes and states bordering the whole Lower Niger” to the point that the British state would be compelled to offer a royal charter (1978 [1897a], p. 96). Towards the end of its life, as had happened gradually to the East India Company up to 1833 — as well as a variety of other African companies which primarily engaged in land development rather than trade — Goldie imagined his Royal Niger Company abandoning its trading functions and acting as a government

alone; failing that, echoing the words of Josiah Child from two centuries earlier, he suggested Nigeria

should continue to be administered as heretofore by a permanent council, untrammelled by bureaucratic formulae, experienced in African questions, corresponding somewhat with the Council of the Governor-General of India, controlled as are both Chartered Companies and Governors of Crown Colonies, by a Secretary of State, but no more subject than British India is to constant Parliamentary interference, and above all administering, not locally, like Crown Colonies, but from home, as the Council of the Niger Company has always done. (1978 [1897b], p. 109)

A corporate—colonial ideology did not, therefore, see companies as an “informal” solution but rather a formal and deeply institutional resolution to the financial, geographical, and political conditions inherent in particular forms of empire. What differentiated companies were their singularity of purpose (and thus not liable to be distracted or interposed upon by “extraneous” trade-offs in policy or changes in government), their “rough-and-ready” form of rule (as opposed to more ossified forms of imperial administration), and an administrative apparatus that did not shift or promote officials around from place-to-place, as was quite common in the British empire (Goldie, 1892, p. 10). As Goldie suggested in 1888, well into the supposedly formal phase of late Victorian empire, the “British colonial system” was ill-equipped to open the interior of Africa. There was a “radical vice in the system of government,” namely its reliance on force rather than the investment of the “commerce-loving majority” that such government was in their own best interests.

They yield a ready obedience to those who, like a commercial and industrial company, bring them material prosperity as an equivalent for the surrender of their previous tribal independence; but many years must elapse before they become sufficiently civilized to understand the advantages, or even the justification, of an Administration which does nothing but govern. (Goldie, 1888, p. 14)

Thus, a company was not only key to profit and efficiency; it was more likely to earn the tacit or explicit consent from the governed. Sir James Fergusson, the undersecretary of state for foreign affairs, defended the bill for chartering the Niger Company by noting that the natives of Africa had engaged in 237 treaties, many granting exclusive rights and privileges to the Company and its predecessors (Hansard, 1887a, 1887b).<sup>2</sup>

Here one sees perhaps the core of a corporate philosophy of governance: that in certain circumstances — ones premised primarily on the assumptions of the civilizational immaturity of colonial populations, that is in “undeveloped and barbarous regions” — the modern, liberal notion that

governments *only* governed was imagined to be counterproductive to effective colonial rule (Goldie, 1892, p. 10). Defending the Niger Company's interest in extending their jurisdiction to the Oil Rivers district, Goldie argued:

The peaceful settlement of the interior of Africa at the back of these rivers, corresponding to that which has, so far, been successfully carried on in the company's territories, would have a most beneficial political effect on the latter. These now have contiguous to their long and straggling frontier barbarous countries given over to incessant intertribal wars, slave raids, and cannibalism, as were formerly, and still are, to some extent, the tribes in the company's territories. With the introduction of commerce, and, later on, of agriculture, those neighbouring regions would gradually become peaceful and cease to be source of danger to the territories. Moreover, the council of the company have — incredible as it may seem to *les esprits forts* — a strong and disinterested ambition, as they had when they founded the company, to see these regions, with which they are so closely connected, grow under their auspices from barbarism to civilization, from anarchy to order, from slavery to freedom, and from universal poverty to a source of wealth both to the natives of the country and to the overcrowded working classes of Great Britain. (1889, p. 4)

As Goldie put it elsewhere,

The important principle that a chartered flag does not involve the national flag is, I admit, somewhat illogical; but nations are largely governed by sentiment. Great empires of the past have owed much of their extension to vicarious wars, while themselves remaining at peace. Even in more modern days in Europe England and Spain were often able to avert hostilities in Europe while their adventurers were contending for empire in the Spanish Main. A chartered company has no national dignity to humiliate, no national flag to avenge. It can stoop to conquer and can redeem defeat by diplomacy and money where the prestige of great Power would compel a crushing display of force. In the early days of the Niger Company its small army suffered defeat, its flag was trodden under foot by an infuriated Muslim Prince, its officials were detained in captivity without arousing any serious emotion at home. Such incidents must be expected to occur at times in the slow and laborious development of a barbarous continent; but, were they to happen under a direct Imperial administration, no Government could resist the outcry to avenge the national honour. (1892, p. 10)

Again, company rule was opposed to Crown rule as a legitimately preferable option; if there was a transition imagined from one to the other, it was a matter not of the state's intervention on the “turbulent frontier” but rather — at least in theory — about the progression of colonial *rulers* from a commercial to a political orientation. Goldie and others, like Cecil Rhodes and William Mackinnon, at least in part, considered (or maintained they considered) their projects *not* as free and private enterprise — acting in a unrestricted and unrestrained market “beyond the borders of the empire” — but rather as extending the British empire beyond the

borders of “Greater Britain,” through an entirely independent and self-governing corporate agent (Goldie, 1902, p. 6).

## CONCLUSION: CORPORATE EMPIRES

Of course, in other corners of the empire, the joint-stock model served different purposes. If for African projectors, from MacQueen to Goldie, the corporation was the ideal incubator for colonial projects in the “immature” and “barbarous” parts of the world, for some it served as the ultimate stage in colonial development. Thus to the Livingstone's holy trinity — Christ, commerce, and civilization — one had to add one more: the corporation. In some cases, it quite literally and explicitly served the project of “civilization,” as in the Mandingo Association, incorporated in New York in 1917 to organize missionary work in the western Sudan. The Mandingo Association was explicitly paired with a Mandingo Development Corporation — all the common stock of which were owned by the Association — to afford “a suitable [economic] foundation for the social, medical, educational, and religious activities of this Association” (The Mandingo Association, Inc., 1917, p. 41).

It is near impossible, nor particularly worthwhile, to try to figure out whether the ultimate power for colonial rule lay in the corporation or the state. The examples of companies exerting determinative influence on policy are of course legion. Despite his own reservations and doubts, Lord Salisbury, the British Prime Minister, admitted privately that the British state had only exerted diplomatic pressure on Germany to maintain power in Uganda at the urging of the Imperial British East Africa Company (Darwin, 1997, pp. 635–638). Yet, the state certainly capitalized and even colonized companies, from the demands from the Ordnance in the seventeenth and eighteenth century for below-cost saltpeter from the East India Company to the contractual obligations P&O steamships had to maintain below-cost berths for military officers and government officials in the nineteenth (Harcourt, 2006, p. 70).

Adam Smith, and other eighteenth-century critics, contended that the joint-stock company was inherently inefficient and untrustworthy — managers of other people's money, not of their own, they would inherently tend towards unnecessary risk and corruption. Through the eighteenth and nineteenth centuries, however, the defenders of the incorporated company maintained it was a far more reliable and “public” form of organization,

in every sense of the word. More transparent, by design and law, than the partnership and more insulated from extraneous influences than politicians, the corporation was to its advocates the ideal way to govern capital and in many cases people (Freeman et al., 2012, pp. 211–212).

Thinking of empire in this way — not solely as a spectrum of private to public but as a more composite and corporate enterprise, of which “Britain” (in the sense of the national state) was one among a number of aspiring participants for sovereignty and power — reveals a more continuous and uneasy alliance between business and politics, company and state, corporation and empire. It also resists the conflation of distinct sorts of both formal and informal economic and political structures. Rule by company or rule by state was a deliberate and ideological choice, and one that proceeded in stages of development that sometimes proceeded from formal to informal, and sometimes followed the reverse trajectory. Moreover, not all forms of “private” enterprise were the same: corporations engaged in overseas rule often had far more affinity with the “public” state than they did with other forms of economic enterprise, such as firms and partnerships. The collective choice to operate as one sort of body as opposed to another abroad was often deliberate, ideological, and politically fraught. When operating in the extra-European world, such decisions determined the sorts of empires and in some cases postcolonial nations that emerged as a consequence. Taking seriously imperial corporations and companies as principals rather than products of empire also recasts the very chronologies and narratives of empire, linking the very first stirrings of colonial expansion with its more modern manifestations. It also inevitably forces us to revisit the idea of a transition from informal to formal empire not as a continuous enterprise but as indicative of the struggle and tension between various forms of aggregate power in the colonial world, including the British state. Although practical limitations have rendered the subject beyond the scope of this particular paper, a history of empire that focuses on its varied and competing forms of institutional organization as well as the specific histories of their ideological development offers fruitful avenues to complicate our understanding of the nature of state and empire, such as “the relationship between multiple forms of authority ... that subsist in any one field of power” represented in the dynamic between bureaucratic forms and patrimonial power (Charrad & Adams, 2011, p. 10).

Consigning figures from Josiah Child to Cecil Rhodes or George Goldie, as they so often have been, to positions as “sub-imperialist” may fundamentally misread their relationship to the imperial enterprise, even

as we recognize those figures and their corporate power as fundamentally “in tension” with metropolitan and state “officials” (Darwin, 1997, p. 629). But more importantly, falling back on the heroic or anti-heroic (like Goldie and Rhodes) in our models of business and financial history may miss the fundamental and critical role of the corporation as a morally ambiguous institution in shaping the history of empire. Echoing a critique of corporations that dated back centuries, the Rev. Washington Gladden noted in 1895 that “The corporation has no soul.

That is to say it has no conscience ....Men are constantly performing acts, or consenting to acts, as members of corporations, that they would not do or allow if they stood alone. Thus their moral perceptions are dulled, and their moral stamina weakened. This schooling in corporation morality prepares them for doubtful practices in individual transactions” (1895, pp. 613–614). In this sense, it could be argued — if only polemically and halfheartedly — that the critical technology developed in the modern world that made empire possible was not the steamship, the machine gun, or quinine. It was instead the legal fiction of the corporation. The particular and peculiar nature of an artificial person, possessed of an individual’s rights but unencumbered by its mortal limitations, created both a fiscal and moral potential that was conducive to colonial plantation and both suborned but also exceeded the capacity of the national state to foment something as contradictory to its nature as a polyglot, multiethnic, and legally pluralistic venture such as empire. In the historiography of empire, then, it is perhaps not only the less-visible economic and political pressures of free trade that represent the great mass below the waterline, but also those institutions and intermediaries that colored the map red while pursuing their own distinct and particular strategies of rule. It is only by tending to these multiple permutations of structures of power that can truly get us beyond the tip of the imperial iceberg.

## NOTES

1. For a response and defense of the concept, see Hopkins (1994).
2. It is worth noting, of course, that not everyone saw things this way; the *Times*, drawing on reports from the Liverpool Africa merchants who were likely the Company’s strongest opponents, noted in January 1887 that in its first few months operating under the charter, the Company had met “very serious resistance on the part of the natives ... who decline to recognize the sovereign rights of persons, who they view only as monopolist traders” (*The Times*, 1887, p. 10).

## ACKNOWLEDGMENTS

I would like to thank Emily Erikson, the anonymous reviewer, and all of the participants in “The Companies: Continuities, Transition or Disjuncture” workshop at Yale University in May 2013 for all of their helpful comments; special thanks also go to Corinna Zeltsman, who provided invaluable last-minute research assistance in preparing the paper for press.

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## Multinationals as global institution: Power, authority and relative autonomy

John Gerard Ruggie 

*Kennedy School of Government, Harvard University, Cambridge, MA, USA*

### Abstract

This article aims to inform the long-standing and unresolved debate between voluntary corporate social responsibility and initiatives to impose binding legal obligations on multinational enterprises. The two approaches share a common feature: neither can fully specify its own scope conditions. That is, how much of the people and planet agenda either can expect to deliver. The reason they share this feature is also the same: neither is based on a foundational political analysis of the multinational enterprise in the context of global governance. Such an analysis is essential for providing background to and perspective on what either approach can hope to achieve, and how. This article begins to bridge the gap by illustrating aspects of the political power, authority, and relative autonomy of the contemporary multinational enterprise. The conclusion spells out some implications for the debate itself, and for further research.

**Keywords:** corporate social responsibility, global governance, globalization, international treaties, multinational enterprises

### 1. Introduction

According to a leading handbook, the “phenomenal rise” of corporate social responsibility (CSR) reflects a journey “that is almost unique in the pantheon of ideas in the management literature” (Crane *et al.* 2008, p. 3). Precise definitional issues are still debated if not contested. But in a lengthy etymological and philosophical discussion Sheehy (2015, p. 625) concludes that CSR is best understood as “international private business self-regulation,” where private may include a role for non-governmental organizations (NGOs). In short, Sheehy affirms, CSR falls onto the voluntary side of the regulatory scale.

There is also broad consensus that “global CSR” differs from its counterpart at national levels. As Scherer and Palazzo note, national-level CSR is “based on the assumption that responsible firms operate within a more or less properly working political framework of rules and regulations which are defined by governmental authorities” (2008, p. 414). This condition, however, does not hold globally: “The global framework of rules is fragile and incomplete” (Scherer & Palazzo 2008, p. 414). Globally, there is no central regulator and national laws where multinationals operate may be weak, poorly enforced, or simply do not exist. Therefore, they propose a new paradigm, one in which the firm is drawn into greater political roles, performing tasks that we traditionally associate with the state. These include elements of regulatory functions and the production of public goods (also Scherer & Palazzo 2011; Scherer *et al.* 2016).

However, with the belief that voluntary CSR measures, especially at the global level, are an inadequate regulatory response to the adverse social and environmental externalities multinationals generate, advocacy for legally binding rules together with official attempts to create such rules have accompanied the “CSR journey” at every step. Critics claim that CSR creates “white-washing” opportunities for companies, or blue-washing where it involves the United Nations (UN) Global Compact, the world’s largest corporate citizenship initiative with more than 8,000 participating firms ([www.compact.org](http://www.compact.org)). CSR represents tactical moves by business to avoid or undermine the prospects of robust public regulations (Deva 2006), carries the risk of “subverting” public purpose altogether (Nolan 2005), poses threats to prosperity in poor and rich countries alike (Henderson 2001), helps sustain corporate impunity (Treaty Alliance 2014), and simply that it is unable to move the needle sufficiently (Vogel 2006, 2008).

Correspondence: John Gerard Ruggie, Kennedy School of Government, Harvard University, 79 JFK Street, Cambridge, MA 02138, USA. Email: [john\\_ruggie@harvard.edu](mailto:john_ruggie@harvard.edu)

Accepted for publication 12 February 2017.

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Electronic copy available at: <https://ssrn.com/abstract=2984082>

At the official level, attempts to devise a comprehensive and legally binding international instrument to govern multinational enterprises go back to the UN Code of Conduct negotiations, which began in the 1970s and continued for more than a decade before they were abandoned (Sagafi-nejad 2008). They also include the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (United Nations [UN] 2003), produced by an expert subsidiary body of the (then) UN Commission on Human Rights, which the Commission itself declined to adopt (UN 2004), and most recently, the proposal by Beaudor and South Africa to establish an intergovernmental Working Group within the UN Human Rights Council “to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises” (UN 2014). The proposal to establish such a group was endorsed by a small plurality of states and is supported by an NGO “treaty alliance.” Thus far, the Working Group has held two annual informal sessions.

In short, the voluntary/mandatory debate has been a constant feature of corporate responsibility discussions for decades. However, what is missing from that discussion is a current and systematic political analysis of the multinational enterprise in the context of global governance. Such a portrayal seems essential for providing perspective and guidance to what both voluntarism and binding treaty advocates can hope to achieve, and how. This article helps to bridge that gap by illustrating aspects of the political power, authority, and relative autonomy of today’s multinational enterprise. The implication, which I elaborate briefly in the conclusion, is that there is no silver bullet that would fully achieve the objectives of either the voluntary and mandatory side in the global CSR debate as it is currently conceived and practiced. A paradigmatic shift is required.

The discussion proceeds as follows. The first section describes core features of today’s multinational enterprise in terms relevant to the corporate responsibility debate. The sections that follow address the multinational’s power, authority, and relative autonomy in that order.

### 2. The multinational enterprise

Surprisingly, there is no legally precise and universally accepted definition of the multinational enterprise. The Organisation for Economic Co-operation (OECD) Guidelines for Multinational Enterprises, the oldest such international instrument dating back to 1976, even now employ only a minimalist conception:

They [MNEs] usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another.” (Organisation for Economic Co-operation [OECD] 2011, p. 17)

As a first step before delving more deeply into the status of the multinational enterprise as a global institution, I briefly describe it first as an economic and then as a legal entity.

The multinational as economic entity broadly speaking takes one of two forms: one is actor-based, the other network-based. To illustrate the actor-based view, consider Total, the French oil and gas company whose global headquarters is just a short taxi ride from the OECD in Paris, and whose organization illustrates the conventional integrated multinational. By market capitalization, Total ranks as the fourth largest publicly traded integrated oil and gas company in the world (Total 2016). It operates in 130 countries and has 100,000 direct employees. Its business segments cover every aspect of the oil and gas industry, from exploration, development, production, refining, and petrochemicals to marketing, trading, and shipping. It is also active in specialty chemicals and aims to become a global leader in new energies.

The Total “group” comprises nearly 900 subsidiaries and equity affiliates.<sup>2</sup> But the reach of the enterprise doesn’t stop there. As part of its marketing business, Total’s service station network includes more than 16,000 outlets in 110 countries, all carrying the Total brand. Reflecting local circumstances and sometimes requirements, they fall into three categories: owned and operated by an in-country subsidiary, owned by a subsidiary but operated by independent dealers, and dealer owned and operated. Beyond that set of relationships are countless suppliers of products and services, as well as distributors other than service stations that are contractually connected to individual corporate entities within the Total group.

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Things become more complex when we look at multinationals through the lens of the contractual ecosystems they continue to generate. These are variously called transnational production networks, supply chains, or global value chains.<sup>3</sup> Take Starbucks as an example of a buyer-led supply chain.<sup>4</sup> It lies at the simple end of that spectrum.

[Starbucks] directly employs 150,000 people: sources coffee from thousands of traders, agents and contract farmers across the developing world; manufactures coffee in over 30 countries, mostly in alliance with partner firms, usually close to final markets; distributes coffee to retail outlets through over 50 major central and regional warehouses and distribution centres; and operates some 17,000 retail stores in over 50 countries across the globe. (United Nations Conference on Trade and Development [UNCTAD] 2013, p. 142)

The Apple iPhone 6 illustrates a producer-led production network. As of 2014, its components were produced by 785 suppliers in 31 countries (comparecamp.com 2014). The product is designed in the United States (US) and assembled in China, which also had the largest number of suppliers in 2014 at 349, nearly half the total. Some 60 suppliers were US-based, several themselves multinationals, some headquartered in other countries. Many US suppliers also outsourced fabrication of components to companies in Japan, South Korea, and Taiwan, which in turn are sourced from yet other (and lower cost) locations in South East Asia.

Other forms exist, but these two examples suffice for the present purposes. They illustrate a fundamental transformation that has taken place in the production process of many if not most sectors. Multinational enterprises “are increasingly able to fine-slice activities and operations in their value chains and place them in the most cost-effective location, domestically and globally” (UNCTAD, 2013, p. 135). The electronics and automobile industries led the way, largely because components can be broken down into so many discrete parts and are easy to transport. But garments and footwear were also early movers, and the list today includes food and beverages, chemicals, mining, furniture, and a host of others. In view of the complexity of managing these transactions, the role of services looms large (logistics, telecommunications, legal services, data processing, accounting, and human resources management, among others). Although a single product emerges at the end, production networks are inherently multi-sectoral, drawing upon inputs from several sectors simultaneously. In a word, these are mini – and in many cases not-so-mini – transnational economic systems. Product and process standards are set by the lead firm and then cascade across its network and down the supply chains. The links among the various parties can take a variety of legal forms: they can be among subsidiaries or affiliates of the same corporate group, joint ventures, different types of non-equity relationships (contract manufacturing, licensing, franchising), and arms-length purchases – or any combination thereof.

One striking consequence is that “about 80% of global trade (in terms of gross exports) has become linked to international production networks of TNCs [transnational corporations]” (UNCTAD, 2013, p. 135). This is because of the multiple times intermediate goods are imported, a step or two is taken in their processing, and then they are exported again as an intermediate product to the next step, where the cycle is repeated until the final product is assembled. World trade in intermediate goods is now greater than all other non-oil traded goods combined (International Labour Organization [ILO] 2016, p. 18).

Another striking consequence reported in an International Labour Organization study is that perhaps as many as one out of seven jobs in the world is supply-chain related (ILO 2015). The report goes on to stress that this estimate does not capture informal or “non-standard” forms of work. Informal work may include specific tasks outsourced by a subcontractor that end up being performed in the home, typically by women and often children; stitching embroidery onto garments is an oft-cited example. Non-standard work also includes the entire range from casual and temporary employment to bonded and forced labor. If the ILO figures are correct and we make a rough guess about non-standard work, then global supply chain-related jobs may involve more than half a billion people. The world’s total labor force in 2013 was estimated at 3.3 billion (indexmundi.com). And if we assume that many of those workers have families, the number of directly-affected people easily exceeds 1 billion. Intense cost pressures and tightly synchronized delivery schedules throughout these networks and various layers of subcontractors can lead to violations of workplace standards and pose environmental hazards.

These, then, are two snapshots of the 21st century multinational seen in terms of the organization of their transnational economic activity. But importantly, this is not how the law conceives of them – far from it. When we think of a multinational we think of the likes of Exxon, GE, Unilever, Singapore, Google, Coca-Cola, Toyota, Novartis, and so on down the list of well-known names as one company, with unity of command, operating under a single global vision and strategy, optimizing worldwide operations for efficiencies, market share, and profits. We

are not wrong to think this. Those organizations do exist in the everyday world of economic activity. But they don’t exist as entities in the law.

Where no equity nexus exists, as in the Starbucks and iPhone examples, relations between producers/buyers and their suppliers are governed by the private law of contracts. In the case of an integrated firm like Total, each of its 900 subsidiaries and affiliates is a *separate* legal entity, subject to the laws of the particular jurisdiction in which it is incorporated. Through equity relations they are ultimately linked to a “corporate parent,” which is itself a *separate* legal entity. Hence, Robé (2016, p. 14) insists that the first step in fully understanding the multinational in relation to governance issues is to grasp this fundamental disjunction between economic reality and legal form. The multinational as *economic* organization orchestrates and controls the entirety of its global operations. The group of firms or enterprises that make up the multinational as an economic organization is structured *using* the corporate form; but legally the group itself is *not* a corporation. Why is this distinction so crucial? Because national law for the most part governs the separate legal entities, not the single economic enterprise.

The “parent company” enjoys limited liability even if it wholly owns all of its subsidiaries. This means that the corporate parent is generally not liable for risks incurred by a subsidiary, or monetary damages imposed on a subsidiary, beyond the extent of its investment in it. Moreover, a subsidiary or affiliate may have subsidiaries and affiliates of its own, based on the same principle of limited liability. Some subsidiaries may be listed on stock exchanges in their own right, with the corporate parent retaining the majority or controlling shareholder. In all such cases, the parent company is not liable for harm caused by subsidiaries, other than in exceptional situations such as demonstrable negligence, fraud, or other illicit conduct that the corporate parent directed or of which it had knowledge and did nothing to stop. That would provide grounds for what is known as “piercing the corporate veil.” But it remains the exception domestically and even more so across national borders. As one widely quoted criticism – and witticism – has it: “Piercing seems to happen freakishly. Like lightning it is rare, severe, and unprincipled” (Easterbrook & Fischel 1985, p.89).

The main body of national law governing corporations is domestic corporate law and securities regulation, plus whatever civil and criminal provisions in other areas of substantive law and regulations may be applicable to corporations. But domestic law is only able to reach beyond its national borders in limited circumstances (Zerk 2006, 2010). One such exception is the US Foreign Corrupt Practices Act, the scope of which includes the overseas conduct of US firms, as well as foreign firms, if their furtherance of a corrupt act takes place in or through the US. Anti-trust law is another exception in the US and the European Union (EU).

For nearly two decades, the US Alien Tort Statute (ATS) was also an exception, providing a means for foreign plaintiffs to bring suit in federal courts for egregious human rights abuses committed abroad.<sup>5</sup> A California district court first agreed to extend it to corporations in 1997 (Joseph 2004). More than 150 such cases were subsequently brought. The net result? The only case to go to a jury trial was won by the corporation. Two were settled for modest sums (the ATS is a civil statute, resulting in payment for damages if successful). The rest were dismissed on various procedural grounds, primarily the *forum non conveniens* doctrine (that US courts are not the appropriate jurisdiction) or with the judiciary deferring to executive branch claims that foreign policy interests would be adversely affected. One case, *Kiobel v. Royal Dutch Petroleum*, made it all the way to the Supreme Court. Nigerian plaintiffs charged that the Anglo-Dutch parent companies and the Nigerian subsidiary aided and abetted the Nigerian military in its suppression of widespread protests against Shell, which led to egregious human rights violations, including extrajudicial killings of protest leaders. In a divided 2013 ruling, the Court held that a presumption against the extraterritorial application of US laws applies unless Congress has specified otherwise, a test the Court said the ATS did not meet (Kiobel v. Royal Dutch Petroleum Co 2013). The Court left open the possibility that some claims might “touch upon and concern” US territory, but they would have to “do so with sufficient force” to displace the presumption against extraterritorial application.<sup>6</sup> Uncertainty currently exists about precisely where the “sufficient force” threshold might lie, and also because the Supreme Court did not address the Second Circuit Court *Kiobel* ruling that had triggered the appeal, which held that international law does not recognize corporate liability in the first place (Kiobel v. Royal Dutch Petroleum Co 2010). However this plays out, as a general rule, unilateral extraterritorial jurisdiction is typically also contested and resisted by the other states into whose jurisdiction it reaches.

Finally, the multinational enterprise barely exists under international law; indeed, some scholars have gone so far as to describe it as “invisible” (Johns 1994; May 2006). For its part, international human rights and humanitarian law generally applies to states, and the latter has been expanded to include natural persons accused of war crimes and certain

crimes against humanity (Ruggie 2007). International human rights law may “contemplate” multinational corporations, as Knox (2008) has put it, and in some instances even “specify” appropriate conduct, as ILO labor conventions, for example, clearly do. But it imposes the correlative duties on states, not on companies directly. States then have to ratify the relevant instrument, enact it within their individual jurisdictions, and enforce it as a matter of domestic law. States face considerable collective action problems, however, being economic actors themselves, whether in promoting or attracting foreign investment, which goes a long way toward explaining the relative weakness of public international law in this domain.

Thus, Larry Catá Backer concludes, in a masterful understatement: “From a public law perspective, the framework for the regulation of multinational enterprises can be viewed most charitably as in flux” (2007, p. 507). The fact that public law (national and international) does not generally encompass the economic unity of the multinational firm is the single most important contextual factor shaping its power, authority, and relative autonomy. Twenty-first century corporate globalization is built on foundational principles of corporate law that date back to the 19th century when they were intended to facilitate capital formation among natural persons attributing legal personhood to corporations, investors’ limited liability, and permitting one corporation to own another while still constraining them to be separate legal entities.

I turn next to the matter of power.

### 3. Power

In political science, power is not treated as a “thing”; it is inherently relational, typically defined as the ability of A to get B to do something that B otherwise would not do (Dahl 1956). This can occur even when A does not undertake specific actions to achieve that outcome in any particular circumstance. To illustrate the political power of multinational enterprises, I draw on a typology developed by Doris Fuchs (2007).<sup>6</sup> The first is “instrumental power,” the most traditional form of which is business lobbying. The second is referred to as “structural power,” which may include companies’ locational choice sets, the ability to transfer risks to suppliers, and generally the ways in which business gets things onto or keeps them off the policy agenda. The third has come to be called “discursive power,” which refers to the ability by business and business associations to frame and define public interest issues in their favor – that is, to shape ideas that then come to be taken for granted as the way things should be done, even for non-business entities like governments. I briefly illustrate each in turn.

#### 3.1. Instrumental power

Among the most commonly discussed forms of businesses deploying instrumental power are political campaign contributions; the asymmetry in knowledge and privileged access to decisionmaking that business may have, particularly where standards are set by private bodies or “clubs” of state representatives (Buthe & Mattli 2011); and lobbying. In short, instrumental power involves the employment of specific resources to achieve one’s aims. I focus here on lobbying because its evolution closely tracks corporate globalization itself.

Lobbying is undoubtedly as old as politics itself. Its particular forms have varied over time, for example, as pure patronage politics by political bosses was reformed out of existence, while today large-scale fundraising needs of politicians coupled with the revolving door from government institutions to corporate lobbyist occupy center stage. Certain key industries, led by financial institutions, were at the vanguard in advocating the deconstruction and reconfiguration of the international economic architecture that enabled the current wave of corporate globalization to take root and expand since the 1980s, the phenomenon widely depicted as neoliberalism (Crotchet 2011). Here I want to draw attention to three current features of business lobbying that relate to global governance issues. The first two may be peculiarly prevalent in the US, but they may also involve foreign corporations listed in the US as well as having other international spillover effects. The third is a direct result of corporate globalization everywhere.

The first feature is the sheer magnitude of corporate lobbying in the US, both direct and indirect (through business associations, which may have foreign corporations as members, and through political action committees). The *Washington Post* cites data from the Center for Responsive Politics indicating that publicly reported corporate lobbying in the US was \$3.24 billion in 2013, more than double the \$1.57 billion in 2000 (Becker 2014). Yet the *Post* also reports that this undoubtedly understates the total because “a good chunk” of lobbying activity “has gone dark, which leaves

expenditures invisible to the public or to regulators” (Becker 2014). According to Drueman (2015), business lobbying expenditures are more than 30 times the total lobbying spending for all labor unions and groups representing public interests combined.

A second feature involves asymmetries in whose views get heard in the policy process, and who wins in court when regulators are challenged. Two political scientists have addressed the first question in the US context, using a data set of 1,779 policy issues between 1981 and 2002. They differentiate among four types of political constituencies, one being business groups that typically include foreign firms listed or operating in the US. Their conclusion is sobering: “Multivariate analysis indicates that economic elites and organized groups representing business interests have substantial independent impacts on US government policy, while average citizens and mass-based interest groups have little or no independent influence” (Gillins & Page 2014, p. 564). That long-standing staple of American politics, the “median voter,” today appears to have “only a miniscule, near-zero, statistically non-significant impact upon public policy.” By all accounts, the center is not holding in many European countries either.<sup>7</sup>

Moreover, it seems that litigation may have become simply an extension of lobbying – and of course law firms are involved in both. Lose in Congress when legislation is written, then pressure the agency drafting the regulations, and finally, sue the regulator for issuing regulations that are depicted as being too “intrusive,” too “costly,” or violate some constitutional right that the same Supreme Court has attributed to corporations as legal persons. This, too, can have significant international consequences. For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act was aimed at repairing the US financial sector. But it included other provisions as well. Its Section 1504 requires US corporations in the oil, gas, and minerals industry to report their payments to foreign governments at the level of the individual project, in an effort to stem official corruption and the so-called resource curse. The American Petroleum Institute (API), the US Chamber of Commerce, and others brought suit against the Securities and Exchange Commission on some of the grounds enumerated above. The only API member to publicly dissociate itself from the lawsuit was Norway’s Statoil, still partially state-owned (German 2013).

The most direct change in corporate lobbying that globalization has brought about is, of course, to expand its locus to the international level. Brussels has become a major magnet for corporate lobbying, given the regulatory scope of the EU. Fuchs references a German study that found: “75% of all associations represented in Brussels are business associations (to which one has to add all of the representatives of individual corporations...), while unions make up less than 5%” (2013, p. 83). Microsoft reportedly spends more money on lobbying in Brussels, the EU’s capital, than any European company – although apparently primarily to promote grievances against its competitor, Google, on anti-trust grounds rather than to undermine specific public interests (Hakim 2015). Geneva has also become a magnet thanks to the presence of the World Trade Organization (WTO) and the World Health Organization (WHO). For example, pharmaceutical companies lobby to get their products onto the WHO Model List of Essential Medicines because they are then adopted as “must have” by more than 130 countries.

Among the businesses at the egregious end of the lobbying spectrum in Geneva in the past few years have been tobacco companies. With sales in the industrialized world plummeting, the major tobacco companies turned their attention to developing countries. WHO led a successful effort to negotiate a Framework Convention on Tobacco Control (FCTC), its first treaty ever, in order to create a level playing field in combating what the FCTC describes as “the globalization of the tobacco epidemic” (World Health Organization [WHO] 2003). Opened for signature in 2003, the FCTC has now been ratified by some 170 countries. In essence, it asks signatories to develop adequate domestic regulatory frameworks. It lays out two types of recommended measures to reduce demand: price and tax measures, and such non-price measures as regulating the content of tobacco products, packaging, and labeling tobacco advertising and sponsorship of events, and awareness raising and education. No specific content is provided for any of these recommendations so as to provide states with flexibility as how to best implement these measures given their particular circumstances. Furthermore, issues of liability are also left to individual signatory states to decide.

The major tobacco companies (British American, Philip Morris, RJ Reynolds, and Brown and Williamson) responded aggressively to this effort, and its very comprehensiveness attracted attention as a possible sign of things to come in other controversial global policy areas. Thanks to exhaustive research by a group of academic public health specialists who reviewed thousands of pages of documents and conducted numerous interviews, a public record exists of the lobbying strategies the companies used (Weishaar *et al.* 2008). Only a brief summary of findings is possible here. WHO’s right to convene a treaty negotiation was challenged. Claims were made that the FCTC would conflict with other international treaties. Developing countries were warned that the treaty would undermine national sovereignty,

good governance, and prospects for economic development. Even some of the scientific evidence of the adverse effects of tobacco was questioned – and some scientists willingly enlisted for this purpose. Specific national delegations were targeted for pressure in Geneva and national capitals. Alliances were sought with unrelated business associations that might have an interest in resisting the potential contagion effects of this instance of international regulation. Joint ventures with governments were proposed, weak national policies were encouraged, CSR initiatives were promoted as an alternative, and freedom of expression in labeling invoked. Needless to say, such an effort required sophisticated professional coordination. Multinational firms specializing in such services were enlisted. Essentially, those same services were provided by public relations and crisis management firms advocating climate change denial on behalf of their clients.

The tobacco multinationals at first had sought to prevent the treaty negotiations from taking place at all, then to undermine them, and failing that, to weaken the final product. They did not succeed in their first aim, and more research is needed to determine how “well” they did on the other two dimensions. At the end of the day, there now is a widely ratified treaty that leaves implementation measures to national discretion. But the story doesn’t end with the FCTC. As individual countries began to act on its provisions they faced lawsuits by those same companies under bilateral investment treaties (BITs): for trademark infringements and regulatory takings if the required packaging turned out to be particularly gruesome, as indeed some are, or if plain packaging was required. Several suits are still ongoing but Philip Morris lost cases against Australia (Hurst 2015) and Uruguay (Mander 2016).

In sum, lobbying is a standard form by means of which business exercises instrumental power. There is more of it in major centers of governance with international influence, be it Washington or Brussels: it has gone global, as in the case of the FCTC; and if business loses at the legislative level, legal actions against regulators (national, regional, and global), has become a routine extension of lobbying.

### 3.2. Structural power

Structural power exists but it is easy to defy. James Carville, a long-time advisor to President Clinton, is reported to have said that if there is reincarnation “I would like to come back as the bond market. You can intimidate everybody” (*The Economist* 1992). However, except in special cases, bond markets haven’t done much intimidating of late. The Institute for Policy Studies in Washington, a left-of-center think tank, appears to have come up with the idea of measuring the relative structural power of multinationals and states by comparing their annual turnover with states’ gross domestic product, concluding that, in 2000, 51 of the world’s 100 biggest economies were enterprises (Anderson & Canavanagh 2000). Economists and others have pointed out ever since that this is an apples and oranges comparison that overstates the economic “size” of multinationals vis-à-vis states by perhaps as much as four-fold. The reason is simply that gross domestic product measures value added, whereas annual turnover measures final sales without subtracting the intermediate costs that went into producing the ultimate good or service. Measuring the latter is not easy, but a United Nations Conference on Trade and Development (UNCTAD) study estimated that conducting roughly comparable calculations left only two multinationals on the list of the top 50 “economies” (UNCTAD, 2002) – and questioned how much substantive sense such a comparison makes in the first place. However, this has not deterred the continued use of this comparison to “demonstrate” how much more powerful multinational firms are than many of the world’s states.

In general terms, structural power refers to the ability of “business” or a specific business entity to affect outcomes in its favor without having to exercise instrumental power to achieve it (Fuchs 2007, 2013). Multinationals enjoy a number of intrinsic sources of structural power. Above all, states are territorially fixed entities competing for investments while multinationals typically have locational options, in some measure even in the extractive sectors. As an UNCTAD report puts it: “For many GVC [global value chain] segments, tasks and activities, there are relatively few “make-or-break” locational determinants that act as preconditions for countries’ access to GVCs” (2013, p. 144). In addition, the justification of private international commercial relations has expanded immensely through the so-called *new lex mercatoria* or merchant law, which has the effect of “delocalizing” not only commercial transactions but also related lawmaking and enforceable dispute settlement (Cutler 2003; Sassen 2006; Calles & Zunbansen 2010; Ruggie & Sherman 2015; Robé 2016). Particular outcomes, of course, are determined by a host of additional factors. In the following, I provide several illustrative forms of multinationals’ structural power in relation to state-based governance.

The first concerns the right of foreign investors to sue governments under binding international arbitration, included in BITs and investment chapters of free trade agreements. This is a right not granted to states. Arbitrators are

required to apply “the law applicable,” which is the investment agreement, and not concern themselves with broader public interest concerns. Unlike in the WTO, no appellate procedure exists to challenge rulings. The awards for violating an agreement and losing the case can be steep, and they are legally enforceable.<sup>8</sup> The largest award in the history of the International Center for the Settlement of Investment Disputes, the most widely used venue, is \$2.3 billion handed down in 2012 in a case brought by Occidental Petroleum Corp. against Ecuador (Chen & Bento 2012). A standard view is that states win at least as many cases as multinationals, which could suggest that no structural power is in play (Frank 2009). But as Mann (2015) notes, investors win over 70 percent of jurisdictional determinations – whether the treaty preconditions for arbitration have been met, which could be interpreted as a low bar to entry for investors. Moreover, once jurisdictional decisions against them are subtracted, investors go on to win some 60 percent of cases on the merits.

The combination of low bars to entry and high win rates... is perfect for motivating investors, counsel and third-party funders to initiate cases. Importantly, it also increases the effectiveness of threats by investors against states in response to potential measures states may be considering adopting—the regulatory chill impact of the investor-state arbitration system.

In any event, Mann concludes, “states never win; they only do not lose,” in which case at best they may receive an award of some of their legal costs. It is worth noting that China, whose outward foreign investment is on the verge of exceeding inward flows, has broadened the scope of issues it has agreed to subject to international arbitration in its most recent BITs (Zhang 2016).

A second illustration concerns transfer pricing through related-party trade (Rugman & Eden 1985; Grubert & Mutti 1991). This may enable firms to administer or negotiate prices that differ from market prices. Fine-slicing production by multinationals and the resulting increase in intermediate goods trade increases the opportunities for cross-border transfer pricing and also makes it more difficult to combat. The result can be “leaking” of fiscal revenues from some of the countries involved (Christian Aid 2009; UNCTAD 2013, p. 156). Official statistics are of only limited use; most countries collect few, some none. But here are two things we do know. First, how closely transfer pricing tracks arms-length market prices varies depending on whether comparable market prices exist. Where they don’t – for example, where some form of intellectual property is involved, or where the service component in transactions is high – multinationals have considerable pricing discretion (UNCTAD 2013). Second, studies across different industries using US government data show that intra-firm prices deviate significantly from arms-length prices if major tax and tariff considerations are in play. Transfer prices tend to be higher for goods sent to countries with low corporate tax rates and high tariff rates (Lanz & Mironudet 2011). Unless and until tax and tariff rates are harmonized, this remains a source of structural power for multinationals.

Third, multinationals’ structural power is greatly augmented by the existence of tax havens. These have increased rapidly in number and magnitude since the 1970s. Their number now may exceed 50 (Palan *et al.* 2010). According to President Obama’s Chairman of the Council of Economic Advisers, American-controlled corporate profits retained in the Cayman Islands alone amount to 1,430 percent of the island’s gross domestic product (Cohen 2014). Tax havens are not simply a place to park profits, however. They are also a vehicle for companies to book investments to third countries, making the tax haven the investors’ “home country,” and the profits from the investments can then be returned to the low/no tax haven, continuing the cycle. That is why, for example, much of the money that flows into the British Virgin Islands as foreign investments flows out again to third countries (UNCTAD 2015, p. 188). A nominal presence in tax havens for the purposes of tax avoidance is not limited to any particular sector. For example, in the extractive and infrastructure industries a shell company registered in a tax haven may sell or lease capital equipment to an affiliate belonging to the same corporate group and operating in a third country, offering transfer pricing opportunities. Or instead of the parent company repatriating its overseas profits, its shell company affiliate in the tax haven can issue loans to the parent company, which then permits the parent company to deduct the interest payments from its home country tax obligations. The OECD and G20 refer to such practices as “base erosion and profit shifting,” and have been developing guidelines to reduce it (OECD 2015), while the European Commission has found that Ireland’s tax breaks for Apple constitute illegal state aid and has demanded that Ireland claw back 13 billion euros in taxes plus interest from Apple (Kamer & Scott 2016). That case is under appeal. But the ability of multinationals to augment their structural power through tax havens is unlikely to disappear anytime soon.

A fourth source of structural power stems from how little is known about trade flows at the firm level, and what impact this may have on official trade policy. Since the very first General Agreement on Tariffs and Trade round a half

century ago, the prevailing trade discourse has been about “free trade.” Of course trade is far freer today in the sense that tariff barriers are lower, markets are more open, and more goods and services are exchanged than ever before. But at the same time, a rapidly shrinking portion of trade takes place internationally as traditionally understood: among nations, at arms-length, and at prices determined by demand and supply in the marketplace. What we call “international” trade today, as we saw earlier, is increasingly “internal” trade within multinationals and with parties related to them contractually. But no public institution anywhere has the mandate or capacity to collect systematic and universal data on such trade. That this raises potentially serious questions about the efficacy of trade policy did not escape then WTO Director General Pascal Lamy in a plea to corporate leaders:

It no longer suffices that you trade while relying on governments to craft the regulatory framework for you in the WTO through which your trade relations take place. You must provide the “evidence” through your trade experience, of what is actually happening on the ground, and must guide us in how to make things better. (Lamy 2011; also see Maurer & Degan 2010)

A strong case can be made that the WTO itself, not knowing “what is actually happening on the ground” when it comes to firm-level trade activities, constitutes a significant source of multinationals’ structural power.

### 3.3. Discursive power

Discursive power is the ability to influence outcomes through promoting ideas, setting social norms and expectations, and even shaping identities. Its exercise involves persuasion and emulation, not coercion. “Empirical analyses of the discursive power of global companies are difficult, due to the subtle nature of this power...” writes Fuchs, a leading exponent of the subject (2013, p. 86). Her references range from companies conducting focus groups and sponsoring TV advertisements to promoting the idea of free markets and limited government. For the purposes of the present discussion, I offer three broader observations.

The first is that corporate globalization has benefited from a massive shift in discursive power that favored business even if it was not always directly driven by business itself. This is the story the neoliberalism narrative tells (Crouch 2011). It involved displacing prevailing ideas, norms, and identities. Ideas, for example, in the intellectual assault on Keynesianism; norms in promoting the shareholder primacy norm; and identities in Thatcher’s dismissal of the “nanny state” together with Reagan’s powerful reframing in his first inaugural address: “Government is not the solution to our problem; government is the problem (Reagan 1981).” This shift had the result of normatively privileging the market and market actors, accompanied by deregulation, privatization, and outsourcing. The subsequent “third way” efforts by Clinton, the “New Democrat,” and Blair, leader of “New Labour,” struggled mightily to reposition their political parties and policies in alignment with this shift. By then, globalization had attained a near transcendent status. “Change is upon us. We can do nothing about that,” President Clinton conceded in a speech. “[A] new global economy of constant innovation and instant communication is cutting through our world like a new river, providing both power and disruption to the people and nations who live along its course” (Clinton 2016, as quoted in Frank 2016, p. 85). Both Blair and Clinton became ardent promoters of CSR initiatives so as to “put a human face on the global economy,” in President Clinton’s words (Clinton 1999). Corporate globalization benefited from this shift, and in turn reinforced it.

My second observation is that certain ideational elements of this broader shift can be closely related to the power of business. For instance, Teles’ book, *The Rise of the Conservative Legal Movement*, takes us some way toward understanding the origins of key ideas concerning regulation in the US. It is a detailed scholarly analysis of deliberate intellectual institution building, beginning with the new field of Law and Economics. This sought nothing less, according to Teles, than “to undermine the intellectual foundations on which [legal liberal] arguments, and its claim to represent the public interest, were based” (2008, p. 90). Over time, the effort fundamentally altered dominant conceptions about when regulation was called for, how regulations were to be designed, and how regulatory agencies were expected to calculate the costs and benefits of proposed actions. The creation of that movement was followed by the founding of the Federalist Society, now the most important organization of conservative legal professionals in the US, of which a significant number have found their way into the upper reaches of US courts. Moreover, conservative think tanks were established, including the American Enterprise Institute, the Heritage Foundation, and the libertarian Cato Institute and Competitive Enterprise Institute. Their active research agenda promotes limited government, lower taxes, fewer regulations, and it seeks to cast doubt on global challenges, such as climate change, which might require policies at

variance with their preferences. Beyond the think tanks lie such entities as the American Legislative Exchange Council, which among other things drafts model legislation for individual state legislatures to undermine and reverse progressive laws on the books. Initially, this investment in generating new content for corporate discursive power and driving it into the policy and judicial process was the brainchild of conservative and libertarian owners of large and typically family-owned companies, but it soon began to enjoy broader corporate financial support (Mayer 2016). Some of this thinking inevitably spilled over into the international realm.

My third observation is of a “dog-not-barking” kind. Raymond Vernon, a pioneer in the study of multinational enterprises going back to the 1970s, published a book in 1998 entitled *In the Hurricane’s Eye: The Troubled Prospects of Multinational Enterprises*. His decision to write the book, he states in the preface:

...grew out of a sense that the world was slipping into a period in which the inescapable clashes between multinational enterprises and nation-states might be growing in frequency and intensity, evoking responses from both the public and the private sectors that would substantially impair their performance. (Vernon 1998, pp. vii–viii)

Yet today, the multinational enterprise is the standard mode of organizing economic activities across countries. Of course there exist different national variants of multinational firms, as well as different types of ownership and governance structures. But the convergence around the multinational corporate form is universal. Perhaps nowhere is it more remarkable than in the case of China. As Wilks puts it:

Multinational corporations are now welcome in China and Chinese corporations have become the dominant domestic economic organization and have established power in global markets... Indeed a revolutionary change, but not quite the one that Marxist-Leninist-Maoist theory anticipated. (2013, p. 58)

Not have the “inescapable clashes” between multinationals and nation states that Vernon foresaw occurred. Among policymakers, the multinational has been normalized. This may simply reflect their greater efficiency in providing access to investments and markets, thereby creating economic opportunities and stimulating growth. The economic transformation in emerging market countries and many developing countries lends strong support to that view. But that the convergence has occurred so rapidly and so thoroughly suggests that mimetic and normative factors have also been in play. “Mimetic pressures take the form of copying or contagion, of borrowing models that appear effective and offer convenient solutions” (Wilks 2013, p. 58). The normative dimension comes into play when such consequentialist considerations are supplemented or even yield to the logic of appropriateness – that *this, not that*, is the appropriate and expected form of conduct. Whatever combination of factors best explains the outcome, it endows the multinational with a reservoir of discursive power that it can draw upon in pursuing its interests.

In sum, the institution of the multinational has considerable transnational instrumental, structural, and discursive power – and of course the three are dynamically related. Contrary to early theorizations of these developments, however, this does not necessarily come at the expense of the territorial state as a political institution (Strange 1996); the two are too closely interwoven to support that argument. Examining multinationals’ source and exercise of authority sheds further light on this relationship.

## 4. Authority

The boundary between power and authority is blurry. The key difference between them lies in the voluntary suspension of individual judgment based on a widely accepted and institutionalized belief that the authoritative entity is entitled or has the right to prescribe. Weber’s (1978) classic categorization of the sources of authority differentiated between charismatic, traditional, and legal sources. He had the long-term evolution of domestic western society in mind. Leaving charisma aside, it seems clear that multinational enterprises today draw upon and embody a combination of traditional and legal authority. The “traditional” sources of multinationals’ authority are the principles of private property rights and freedom of contract – sacrosanct and codified in the liberal societies in which they first emerged as constitutional prerogatives of autonomous natural persons. Today they form the foundational authoritative basis for the agglomeration of worldwide multinational enterprises (Robé 2009). Crucially, even states that lack political liberal institutions domestically, such as China, adhere to this transnational authority structure so as to be in a position to participate in and benefit from the global economic system. Core elements of this traditional source of authority are

enshrined in, elaborated by, and enforced through public and private law, including obligations under the WTO and international investment agreements.

Let me not be misunderstood. The host state is the public authority in any particular country. It has the right to determine certain parameters of the operations of a multinational's local subsidiaries, affiliates, and contractual parties. Compliance with applicable laws is a formal requirement, although it is not always rigorously enforced or elements may be waived altogether, as in export processing zones. The state can require the multinational to take on local joint venture partners. It can require permits the company needs in order to operate. It negotiates the taxes and royalties the company must pay. It can refuse access to particular sites. Competition authorities can regulate mergers and acquisitions. A number of states have gone so far as to demand that multinationals share encryption keys of their communication systems with local authorities, or use Internet servers located in the host country. But this isn't the whole story of the relationship between the public authority of the state and the private authority of the multinational.

To take a specific example, Disney had to share the keys to the Magic Kingdom to seal its deal with the Chinese government for the new \$5.5 billion Shanghai Disney Resort. According to a *New York Times* report (Qin 2016), Disney had to dial back on several demands, including a TV channel it was eager to have for cross-branding purposes, and it had to give the government a majority stake in the resort, as well as a minority share in the Disney management company that runs the property. Disney's CEO Robert A. Iger notably describes the arrangement as "authentically Disney and distinctly Chinese." For good measure, when Disney's blockbuster musical "The Lion King" opened at the resort, it included a new character, the Monkey King. This is a figure of Chinese legend recently popularized in a Hong Kong fantasy film, but based on a classic 16th century novel by Wu Cheng'en entitled *Journey to the West*. The Chinese government, in turn, committed to providing Disney special protection from intellectual property piracy, which remains common in China.

These examples illustrate the obvious point that states possess authority in their dealings with multinationals. Specific outcomes will vary depending on the balance of interests and power: not every country is China, and not every company Disney. But they also illustrate a fundamental institutional fact: a dynamic interplay between two different centers of power, each with its own basis of authority. One is transnational and rests on private property rights, and the other is territorial and rests on sovereignty. The power of each in some measure is constrained by the authority of the other. Neither supplants the other: They co-exist: "authentically Disney and distinctly Chinese."

To elaborate on the scope and scale of multinationals' authority, I address two further questions: over what or whom do they have authority? And in the next section I ask: in whose name or on whose behalf do they exercise that authority?

Multinationals have authority over themselves. This is not as trite as it may sound when we consider the number of multinationals in the world today; the number of countries in which many operate; the range of activities they encompass; the already vast and still expanding private transnational legal order they have generated; and their capacity to affect workplace conditions, the welfare of communities, and even national economic prospects around the world. The difference between the multinational as a single *economic* organization and the group of separate entities recognized under the *law* is critical to understanding the scope of multinationals' authority over "themselves."

The economic organization, acting through one legal "self" (often called the corporate "parent"), has the authority to create and structure the other legal "selves" (which of course are integral parts of the single economic organization) in such a way as to optimize the entire group's interests throughout its transnational sphere of operation, as well as to limit its liabilities. The economic organization sets the strategic objectives for the entire enterprise. It decides where and how to allocate its assets, which is based not only on such factors as market size, labor costs, or promising natural resource deposits, but also on selecting or constructing favorable regulatory environments through the global market for legal norms. For some purposes, this now includes the possibility of combining the most favorable regulations of different countries within in a single contract (Eidemüller 2011). The economic organization sets terms of employment. It sets product and performance standards. It institutes codes of conduct. In doing so, multinationals have authority that states lack. For example, through their codes of conduct they can require suppliers in host states to adhere to social and environmental standards that, if imposed by the country importing those products, the host state could challenge as a non-tariff barrier under the

have transnationally, in a global system that lacks a central regulator, and in some cases across more than 200 national jurisdictions.

Clearly, directors and management of a publicly traded firm need to keep investors sufficiently happy to avoid having them sell off their shares, causing a drop in the company's market value (and in executive compensation). The owners of shares thereby constitute a *market force* that constrains directors' and management decisions. Moreover, holders of large blocks of shares, such as institutional investors, can exercise influence through board elections and more informal means. But neither of these situations makes them owners of the firm.

Thus, there appear to be two possible answers to the question of who owns publicly traded firms: they own themselves, or no one does – and in effect they amount to the same thing. There appears to be only one answer to the question on whose behalf multinationals exercise their authority: their own. In sum, the institution of the multinational has come to constitute not only a significant center of global power but with the exception of state-owned enterprises, also a relatively autonomous transnational authority structure.

## 6. Conclusion

This article set out to elucidate the multinational enterprise as a global institution in terms of its power, authority, and relative autonomy. To better understand the status of the multinational in these terms, it is critical to differentiate between the *economic* organization that is able to act under unity of command across its entire spheres of operations, and the *separate legal entities* within the multinational corporate group. With only limited exceptions, law governs the separate entities, not the enterprise as a whole. This disjuncture between economic reality and legal convention is the single most important contextual factor shaping the global institutional status of multinationals. And it creates a global governance gap that defies standard and simple solutions. This is true both of CSR as a voluntary form of self-regulation or co-regulation, and attempts to devise a mandatory treaty-based regime to govern the conduct of multinationals.

The scope conditions of CSR have never been adequately defined: just how far can we expect it to reach, even under ideal circumstances? How much can it help to constrain the excesses of lobbying, and litigation as its extension? Is tax evasion and transfer pricing within its scope? What about the asymmetrical investor/state dispute settlement system, which may have a chilling effect on progressive legislation? Or equating financial clout with which to influence elections with constitutionally protected free speech? And so on. All of these have significant consequences for the people and planet agenda that CSR seeks to address.

At the same time, creating an overarching legal regime, whether within human rights law as the current Ecuador and South Africa led initiative has framed it, or some other framing, seems highly implausible, not only on political but also on sheer logical grounds. It would involve harmonizing aspects of often vastly different bodies of national, sub-national and international law – for starters, investment law, trade law, corporate law and securities regulation, tax laws, consumer protection law, labor law, anti-discrimination law, other areas of human rights law, and criminal law, and impinge on underlying conceptions of property rights and private contracts. The point is not that these are unrelated, but that they embody such extensive problem diversity, institutional variations, and conflicting interests, not only across states but even within them, that any attempt to aggregate them into a general treaty, a global constitutional order of sorts, would have to be pitched at such a high level of abstraction that it would be without practical meaning.

This leads to two implications for future work in this area. The first is that scholarship and practice should strive to better understand the limits of both CSR and the pursuit of international treaties governing multinational enterprises. As measured against multinationals' power, authority, and relative autonomy, the former currently underperforms while the latter overreaches. CSR by itself is highly unlikely to take us far enough, and the repeated pursuit of an overarching constitutionalizing treaty is doomed to repeated failure. The second implication is that much greater attention should be paid to the dynamic interplay between the two spheres, and its potential cumulative effects. Under what conditions can CSR satisfactorily substitute for mandatory regulation? What public regulatory measures can generate cascading effects in the CSR sphere? When can soft-law standards lead to legal hardening through issue-specific focused justification at national and international levels? Scholars are only beginning to address these questions.<sup>9</sup> One conclusion seems inescapable: in light of the multinational's power, authority, and relative autonomy, the time-worn

mandatory/voluntary dichotomy inhibits rather than advances our coming to grips with the challenges posed by corporate globalization.

## Acknowledgments

The author is grateful to Jonathan Drimmer, Rebecca Henderson, and Jean-Philippe Robé for their helpful comments on an earlier draft. A sabbatical leave from the Kennedy School made the research for this article possible.

## Notes

- 1 The vote in the Human Rights Council was 20 in favor, 14 against, and 13 abstentions (UN 2014).
- 2 A subsidiary is a company that may be wholly owned by the parent company or in which it is the majority shareholder, whereas in an affiliate it is a minority shareholder.
- 3 These terms mean slightly different things but without material consequences for the purposes of the present discussion. Therefore, I use them interchangeably except when a particular source I quote uses one or another.
- 4 The distinction between producer and buyer-led commodity (value) chains goes back to Gerdt (1996).
- 5 28 U.S.C. § 1350. The statute reads in full: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." It was part of the original Judicial Act of 1789 but lay dormant for nearly two centuries.
- 6 The prodigy builds on the pioneering conceptual work by Bachrach and Baratz (1962) and Lukes (2004). Also see Barnett and Duvall (2005).
- 7 Economist (2016) 'The New Nationalism [cover story]', November 19.
- 8 Enforcement is provided for by the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards", also known as the New York Convention, which has been ratified by more than 150 states.
- 9 A number of scholars have explored these dynamics in relation to the UN Guiding Principles on Business and Human Rights (Mutchinski 2012; Buhmann 2016; Mares 2016). These are a soft law instrument, comprising 31 principles each with detailed commentary, based on three "pillars": the state duty to protect human rights, including against abuse by third parties; the corporate responsibility to respect human rights throughout their operations and relationships; and the right of victims to effective state and non-state remedy. I developed the UN Guiding Principles on Business and Human Rights over the course of a six-year mandate as the UN Secretary-General's Special Representative for Business and Human Rights. The UN Human Rights Council endorsed them unanimously in 2011 (UN 2011); Ruggie 2013). They have been widely drawn upon in standard setting by other international organizations, governments, businesses, law societies, and even the International Federation of Football Associations (Ruggie 2014, 2016; International Bar Association 2016).

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