

2013

Constraining Global Corporate Power: A Short Introduction

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Recommended Citation

Peter J. Spiro, Constraining Global Corporate Power: A Short Introduction, 46 *Vanderbilt Law Review* 1101 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol46/iss4/5>

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Constraining Global Corporate Power: A Short Introduction

*Peter J. Spiro**

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The rise of non-state actors is among the most important facets of globalization. It is also among the most challenging, both with respect to theory and empirics. International law in its traditional articulation allowed little discrete space for non-state actors. Making more room for them risks destabilizing the theoretical project. On the empirical side, although the fact of increasing non-state actor power is now difficult to reject in the face of mounting anecdotal evidence, it is almost impossible systematically to document. Non-state power is sprawling, diverse, bottom-up, and nonisomorphic. Scholars have yet to develop the metrics by which to prove the rise of non-state power.

In the meantime, however, it seems appropriate to follow intuition and the institutional logics which point to the reality of that power. It seems particularly appropriate for researchers to follow the perception of power. Academics are better positioned than policymakers to undertake early mapping of developing phenomena. Free of operational responsibilities, academics can take greater intellectual risks because the stakes are so much lower. Out of the trenches and unburdened by vested material interests, academics can add broad perspectives and test new approaches. If non-state power turns out to be a chimera, little is lost beyond a few professorial person-hours. If it turns out that the global system is being transformed, then academics will have laid the groundwork for assimilating the place of non-state actors into the institutions of the new order. It may be true, as Jean d'Aspremont suggests, that by turning their sights on non-state actors scholars open up new

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channels to expand their intellectual turf.¹ But academics cannot manufacture and sustain an alternate reality. Either there is real change on the ground, which warrants attention over the long haul, or we are stuck in a Westphalian rut and all the talk about non-state power does not amount to much.

I count myself among those who believe that non-state power is on an inevitable upward trajectory in the wake of material changes in human interaction.² This is emphatically not to celebrate the shift as grounding some sort of utopian postnational system. There are aspects of non-state power that facilitate accountability and representation, but, as with any form of human association (including in the form of the nation-state), there will be pathologies. It is only by acknowledging and anticipating the migration of power that scholars can better address the dark sides of non-state power. To the extent that non-state power is no longer accountable to states, rejecting its existence will compound the difficulty. Institutions are always playing catch-up to material developments. The first phase in the response is the acknowledgement of power. Only then can instruments of constraint be devised and refined.

Non-state actors comprise a broad range of entities. Nongovernmental organizations (NGOs) tend to attract favorable treatment in the social science literature. NGOs have been strongly correlated to progressive causes, at least in the public's mind.³ However, conservative NGOs are mobilizing in international institutions as they come to understand the need to advance their interests in international fora.⁴ Religious organizations, often conservative in orientation, are among the most powerful non-state

1. See Jean d'Aspremont, *International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective*, in *NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW* 171, 180–85 (Math Noortmann & Cedric Ryngaert eds., 2010) (highlighting that the rise of NGOs may be an “invention” of legal scholars intent on expanding academic turf).

2. For prior elaborations on the subject, see, e.g., Peter J. Spiro, *Nongovernmental Organizations in International Relations (Theory)*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART* 223, 223–43 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012); Peter J. Spiro, *The Democratic Accountability of Non-Governmental Organizations: Accounting for NGOs*, 3 *CHI. J. INT'L L.* 161, 161–62 (2002); Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations in the “Unregulated” Marketplace*, 18 *CARDOZO L. REV.* 957, 960–69 (1996).

3. See NICOLAS GUILHOT, *THE DEMOCRACY MAKERS: HUMAN RIGHTS AND INTERNATIONAL ORDER* 166–76 (2005) (noting that scholars contribute to the perception of NGOs as “moral actors”). See generally “THE CONSCIENCE OF THE WORLD”: *THE INFLUENCE OF NON-GOVERNMENTAL ORGANISATIONS IN THE U.N. SYSTEM* (Peter Willetts ed., 1996) (vaunting the role of NGOs as advocates of environmental and human rights causes within the UN).

4. See, e.g., CLIFFORD BOB, *THE GLOBAL RIGHT WING AND THE CLASH OF POLITICS* 16–33 (2012) (analyzing the strategy employed by conservative NGOs to influence international policy making).

actors.⁵ Also counted among global non-state actors are transnational criminal organizations.⁶

Most powerful among non-state actors are multinational corporations.⁷ Globalization has empowered multinational corporations vis-à-vis states insofar as it has facilitated the mobility of capital. As capital grows more mobile, firms exploit regulatory competition to lower production costs. States must balance the risk of capital flight against the desirability of higher regulatory standards. Even where capital is not mobile, as is typically the case with respect to the exploitation of natural resources, states often lack regulatory capacity or regulatory will.⁸ Developed countries are no longer well positioned to regulate multinational concerns either.⁹ Corporations have offshored production facilities. Attempts to regulate such extraterritorial activities can result in a corporate shell-game among developed states, who are themselves not immune to regulatory competition.¹⁰ The international trade regime also constrains the capacity of states to incentivize good corporate conduct.¹¹

To the extent that states are less able to regulate them, then, globalization empowers multinational corporations. They are subject

5. See, e.g., Julia Berger, *Religious Nongovernmental Organizations: An Exploratory Analysis*, 14 VOLUNTAS: INT'L J. VOLUNTARY & NONPROFIT ORGS. 15, 15–17 (2003) (asserting that religious NGOs are active participants in international discourse and decision making).

6. See, e.g., PETER ANDREAS & ETHAN NADELMANN, POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS 247 (2008) (“[T]he forces of globalization are empowering nonstate transnational actors (both licit and illicit) and making borders and state controls increasingly antiquated, with the rapid spread of transnational criminal organizations viewed as a particularly extreme challenge to the state.”).

7. See, e.g., David Antony Detomasi, *The Multinational Corporation and Global Governance: Modelling Global Public Networks*, 71 J. BUS. ETHICS 321, 321 (2007) (“Of [non-state actors], the modern multinational corporation (MNC) is perhaps the most powerful.”).

8. See, e.g., DAVID M. DRIESEN, THE ECONOMIC DYNAMICS OF ENVIRONMENTAL LAW 124 (2003) (“Developing countries often lack sophisticated environmental bureaucracies capable of regulating pollution and exploitation of natural resources.”).

9. See, e.g., Dara O'Rourke, *Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring*, 31 POL'Y STUD. J. 1, 4 (2003) (“Much of the existing literature on ‘privatized’ regulation explains non-governmental regulation as a response to two connected trends: the weakening of national governments (due to globalization, neoliberal movements to shrink the state, or simply the failure of state bureaucracies) and the strengthening of multinational corporations.”); David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. 261, 266–67 (2008) (noting that economic globalization made it more difficult for national governments to hold corporations accountable).

10. See generally SUSAN STRANGE, STATES AND MARKETS (1988) (discussing the various structures at play in the global economy).

11. See Vogel, *supra* note 9, at 264–65 (“[T]he World Trade Organization (WTO) typically does not permit market access to be linked to domestic labor or environmental standards. . . . WTO rules have created an important incentive for using voluntary, private standards rather than public ones, since the latter can be more readily challenged as non-tariff trade barriers.”).

to fewer constraints in the pursuit of reduced production costs. Traditional state-based efforts are unlikely to reverse this trend. The response has been to undertake initiatives at the global level.¹² Global regulation minimizes problems of regulatory competition. Because these initiatives are in their infancy, they are characterized by experimentation and competition in regulatory design. What form works for the new world?

This Essay sets out three models of institutional constraint of global corporate power. First is private lawmaking, in which the non-state power of firms is countered by the non-state power of civil society organizations. Second are nonlegalized processes under public institutional umbrellas, in which public entities host standards-setting mechanisms. Finally, there is the prospect of fully legalized regimes, the equivalent of global regulation. These models have been emerging bottom-up rather than as part of a grand scheme. After describing the three models, this Essay considers the future of global regimes aimed at constraining corporate conduct. Distinct institutional approaches could persist. Alternatively, there may be a progression toward more robust public regulation at the global level. Power may migrate to something approximating global government, directly regulating corporations and other entities.

I. PRIVATE LAWMAKING

At the advent of globalization, nongovernmental activists looked to harness consumer power to the end of disciplining corporate behavior. These initiatives took the form of codes of conduct and certification schemes. Business has also moved to self-regulate through standard-setting regimes. These approaches are private in the sense that they are not subject to government supervision.

In a wave beginning in the 1990s, multinational corporations adopted codes of conduct with respect to labor and environmental practices, in which contexts they remain prominent.¹³ They are particularly effective where branded goods are implicated.¹⁴ Firms

12. See Mathias Koenig-Archibugi, *Transnational Corporations and Public Accountability*, 39 *GOV'T & OPPOSITION* 234, 245-57 (2004) (detailing the efforts to regulate corporations globally by states, international organizations, NGOs, and corporations themselves).

13. See, e.g., Rhys Jenkins, *Corporate Codes of Conduct: Self-Regulation in the Global Economy*, U.N. RES. INST. FOR SOC. DEV. 1 (Apr. 2001) (describing the historic development of corporate codes); Sean D. Murphy, *Taking Multinational Codes of Conduct to the Next Level*, 43 *COLUM. J. TRANSNAT'L L.* 4-5 (2005) (explaining the emergence of corporate codes of conduct as a means of addressing the social effects of MNC activity).

14. See, e.g., Doreen McBarnet, *Corporate Social Responsibility Beyond Law, Through Law, For Law*, in *CORPORATE CITIZENSHIP: INTRODUCING BUSINESS AS AN*

need to protect brands from political tarnishment, as this may affect bottom-line sales. This is most obviously the case in the face of potential boycotts. But tarnishment can occur even in the absence of boycotts, which will be called only in extreme cases—hence the normalization of “naming and shaming” as a mobilization tool. The brand phenomenon explains the success of codes of conduct in the apparel industry.¹⁵ The recent episode involving Foxconn, Apple’s production facility in China, presents another example.¹⁶ Claims relating to work conditions there motivated Apple to join the Fair Labor Association in January 2012, which subsequently undertook an audit of Apple’s compliance with its workplace code of conduct.¹⁷

Certification and labeling schemes directly mobilize consumer sentiment by certifying goods as produced or harvested in conformity with codes of conduct.¹⁸ Examples include certification schemes sponsored by the Forest Stewardship Council (FSC) and the Marine Stewardship Council (MSC) for tropical woods and endangered fish stocks, respectively.¹⁹ Similarly, Fairtrade International aims to ensure that producers in the developing world are adequately compensated.²⁰ These schemes leverage consumer sentiment by affixing compliance badges rather than through targeted opprobrium. Consumers are willing to spend a premium on goods produced in socially responsible processes.²¹

ACTOR IN POLITICAL GOVERNANCE (D. Matten & J. Moon eds., forthcoming 2013) (noting that “brand vulnerability” is on the increase).

15. See, e.g., Rebecca deWinter-Schmitt, *Human Rights and Self-Regulation in the Apparel Industry*, in PRIVATE SECURITY, PUBLIC ORDER: THE OUTSOURCING OF PUBLIC SERVICES AND ITS LIMITS 133, 141 (Simon Chesterman & Angelina Fisher eds., 2009) (“As occurred in the apparel industry, when governments are incapable or unwilling to exercise their regulatory responsibilities, the industry, especially if faced with bad press, finds means to self-regulate.”).

16. See, e.g., Charles Duhigg & David Barboza, *In China, the Human Costs that are Built into an iPad*, N.Y. TIMES, Jan. 26, 2012, at A1 (describing unsafe working conditions in Apple’s Chinese manufacturing facilities).

17. See *Work Conditions Said to Improve at Apple Supplier*, N.Y. TIMES, Aug. 22, 2012, at B7 (illustrating steps taken in response to safety audits in Apple’s Chinese factories); *Apple Joins FLA*, FAIR LABOR ASS’N (Jan. 13, 2012), <http://www.fairlabor.org/blog/entry/apple-joins-fla> (announcing and describing the process of Apple joining the Fair Labor Association).

18. See, e.g., Axel Marx, *Global Governance and the Certification Revolution: Types, Trends and Challenges*, in HANDBOOK ON THE POLITICS OF REGULATION 590, 594–96 (David Levi-Faur ed., 2011) (explaining the rise in the use of certification schemes as a mode of reputation management).

19. See generally Errol Meidinger, *Multi-Interest Self-Governance Through Global Certification Schemes*, in RESPONSIBLE BUSINESS: SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS 259, 260–70, 272–73 (Olaf Dilling et al. eds., 2008) (illustrating the development of forest and marine certification programs).

20. See FAIRTRADE INTERNATIONAL, <http://www.fairtrade.net> (last visited Sept. 24, 2013) (stating that the organization’s goal is to secure better deals for farmers and workers in developing countries).

21. See, e.g., Kimberly Ann Elliott & Richard Freeman, *White Hats or Don Quixotes? Human Rights Vigilantes in the Global Economy* 2–3 (Nat’l Bureau of Econ.

Both the codes and related certification schemes have matured into refined standards resembling legal regulatory constructs. They are now also subject to monitoring and dispute resolution by third parties.²² Indeed, a complex has emerged around the private lawmaking regimes.²³ The International Social and Environmental Accreditation and Labelling Alliance has issued a code for the codes—a set of best practices for “sustainability standards systems.”²⁴ A number of third-party monitoring firms are substantial enough to be publicly traded corporations.²⁵ Some schemes include adjudicatory-type procedures for resolving complaints and other disputes.²⁶ Established codes have arguably been internalized by corporate actors, so that conformity with codes of conduct is driven as much by the “logic of appropriateness” as by the “logic of consequences.”²⁷

Nonetheless, voluntary initiatives have come under fire for a lack of enforcement architecture.²⁸ For example, a series of workplace tragedies in Bangladesh have highlighted the shortcomings of

Research, Working Paper No. 8102, 2001) (reporting the results of a survey showing that 85 percent of respondents “would pay \$1 more for a \$20 item if they could be assured that it was made under good conditions”); Jens Hainmueller, Michael J. Hiscox & Sandra Sequeira, *Consumer Demand for the Fair Trade Label: Evidence from a Field Experiment* (Mass. Inst. of Tech. Pol. Sci. Dep’t, Working Paper No. 2011-9B, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1801942 (“A majority of surveyed consumers claim to prefer ethically certified products over non-certified alternatives, and to be willing to pay a price premium for such products.”); see also Dara O’Rourke, *Citizen Consumer*, BOS. REV. (Nov. 1, 2011), <https://bostonreview.net/forum/citizen-consumer> (exploring conditions under which consumers will pay a premium for ethically sourced products).

22. See, e.g., JILL ESBENSHADE, *MONITORING SWEATSHOPS: WORKERS, CONSUMERS, AND THE GLOBAL APPAREL INDUSTRY*, 119–64 (2004).

23. See McBarnet, *supra* note 14, at 20 (describing the emergence of a “CSR industry” that has created vested interests in private regulation regimes).

24. See ISEAL ALLIANCE, www.isealalliance.org (last visited Sept. 24, 2013) (providing information on the ISEAL sustainability standards).

25. For example, see SOCIETE GENERALE DE SURVEILLANCE, www.sgs.com (last visited Sept. 24, 2013).

26. The Fair Labor Association, for example, posts “reports” in response to third-party complaints respecting noncompliance with its labor standards. *Complaints and Investigations*, FAIR LABOR ASS’N (July 3, 2013), <http://www.fairlabor.org/transparency/complaints-investigations>.

27. Steven Bernstein & Benjamin Cashore, *Can Non-State Global Governance Be Legitimate? An Analytical Framework*, 1 REG. & GOVERNANCE 347, 354–55 (2007); cf. Harold Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603 (1997) (describing how states internalize international norms to iterative institutional interactions).

28. See, e.g., AM. FED’N OF LABOR & CONG. OF INDUS. ORG., *RESPONSIBILITY OUTSOURCED: SOCIAL AUDITS, WORKPLACE CERTIFICATION, AND TWENTY YEARS OF FAILURE TO PROTECT WORKERS’ RIGHTS 25–30* (2013) [hereinafter *RESPONSIBILITY OUTSOURCED*], available at <https://documents.law.vanderbilt.edu/departments/Law%20Journal/Transnational%20Sharepoint/2013-2014%20Cycles/October/Spiro/Spiro/AFL%20Responsibility%20Outsourced.pdf> (detailing emerging problems with voluntary corporate social responsibility initiatives).

apparel industry standards.²⁹ In some cases, codes may be vulnerable to co-optation by their corporate targets.³⁰ Insofar as codes of conduct are not subject to regulatory supervision, they may suffer accountability deficits. NGOs appear to be playing a policing function, however, even against each other. For example, the MSC has come under fire in recent years for being overly lenient in its certification of sustainable fisheries.³¹ If it fails adequately to respond, it risks the tarnishment of its own brand, creating opportunities for competitor schemes. Where industry has attempted to establish its own more relaxed standards, as Steven Bernstein and Benjamin Cashore demonstrate, they tend to take on the features of NGO-driven standards, including stakeholder participation, in a process of convergence.³²

Skeptics have also underlined the voluntariness of codes of conduct and certification schemes.³³ While this is formally true, in some sectors, the schemes are effectively mandatory, for major concerns at least.³⁴ After the Rainforest Action Network persuaded Home Depot to adopt the FSC code relating to retail lumber (through a campaign that included deploying blimp-like inflated chain saws in Home Depot parking lots), for example, competitor Lowe's quickly fell into line.³⁵

More cloistered within the business community is the International Organization for Standardization (ISO), which has

29. See *Death Toll in Bangladesh Passes 1,100*, N.Y. TIMES, May 12, 2013, at A11; see also Richard M. Locke, *Can Global Brands Create Just Supply Chains?*, BOS. REV. (May–June 2013), www.bostonreview.net/forum/can-global-brands-create-just-supply-chains-richard-locke (concluding that private regulation has had a “limited impact” on improving global labor standards).

30. Hence the debate on the accountability of NGOs. See generally NGO ACCOUNTABILITY: POLITICS, PRINCIPLES AND INNOVATIONS 22–24 (Lisa Jordan & Peter van Tuijl eds., 2006).

31. See, e.g., Jennifer Jacquet et al., *Seafood Stewardship in Crisis*, 467 NATURE 28–29 (2010) (criticizing the MSC for certifying fisheries whose data demonstrate high levels of fish-population depletion and similar oversights).

32. See Bernstein & Cashore, *supra* note 27, at 360–61 (“This strategy is at once an attempt to buttress legitimacy by conforming to established models or standards and a signal that reinforces the legitimacy of the organizations mimicked, as it recognizes those entities as the accepted standard.”); Steven Greenhouse, *U.S. Retailers Announce New Factory Safety Plan*, N.Y. TIMES, May 31, 2013, at B6 (describing how a Bangladesh factory collapse prompted competitive voluntary regimes, dividing garment manufacturers into U.S. and European camps).

33. See, e.g., RESPONSIBILITY OUTSOURCED, *supra* note 28 (labor union-funded report critical of voluntary codes).

34. See, e.g., Sarah H. Cleveland, *Why International Labor Standards?*, in INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE AND PUBLIC POLICY 129, 135 (Robert J. Flanagan & William B. Gould IV eds., 2003) (noting that “[m]ost U.S. Fortune 500 companies, including Nike, LeviStrauss, the Gap, and Toys-R-Us, have adopted codes of conduct or internal guidelines addressing labor standards”).

35. See Meidinger, *supra* note 19, at 262–63 (describing protest activities on the part of forestry activists to secure Home Depot’s accession to a sustainability code).

entered the field with its ISO 26000 standards.³⁶ The ISO 26000 sets forth social responsibility standards, including contributions to sustainable development, respect for international norms of behavior, and respect for human rights.³⁷ By its terms, ISO 26000 is intended to complement other voluntary initiatives and public regulations.³⁸ The ISO has entered into memoranda of understanding with the International Labor Organization and the UN Global Compact to ensure consistency among the regimes.³⁹ The ISO 14001 standards set forth environmental management standards.⁴⁰ Although the ISO 14001 standards map out a procedural management system rather than substantive standards, it is subject to certification by third parties.⁴¹ The ISO has moved to include stakeholder participation in composing its standards.⁴²

The examples above are hardly exhaustive. Advocates are able to use shareholder activism as an entry point from which to leverage other channels of influence on corporate conduct.⁴³ Accounting audits now assimilate social responsibility standards.⁴⁴ The Global Reporting Initiative has innovated a “reporting framework” with guidelines for measuring corporate impacts along economic, environmental, social, and governance dimensions.⁴⁵ To some extent, it is a fiction to

36. *ISO 26000 Social Responsibility*, INT’L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/home/standards/iso26000.htm> (last visited Sept. 24, 2013).

37. *Id.*

38. *Id.*

39. See Halina Ward, *Mapping the Hard Law/Soft Law Terrain: Labor Rights and Environmental Protection: The ISO 26000 International Guidance Standard on Social Responsibility: Implications for Public Policy and Transnational Democracy*, 12 THEORETICAL INQ. L. 665, 689–92 (2011) (detailing the development and content of the memoranda of understanding between the ISO, the International Labor Organization, and the UN Global Compact).

40. *ISO 14000 Environmental Management*, INT’L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/home/standards/management-standards/iso14000.htm> (last visited Sept. 24, 2013). See Matthew Potoski & Aseem Prakash, *Green Clubs and Voluntary Governance: ISO 14001 and Firms’ Regulatory Compliance*, 49 AM. J. POL. SCI. 235 (2005) (“ISO 14001 is perhaps the most important and visible voluntary environmental program with over 36,000 registered facilities worldwide as of 2001, including 1,645 in the United States, and a 50% per year growth rate since 1996.”).

41. *ISO 14000 Environmental Management*, *supra* note 40.

42. See Ward, *supra* note 39, at 673–74 (noting that “ISO’s Technical Management Board (TMB) appointed a multi-stakeholder Strategic Advisory Group (SAG) on CSR to advise ISO’s Council on whether ISO should proceed with the development of ISO deliverables in the field of corporate social responsibility”).

43. See, e.g., Emma Sjöström, *Shareholders as Norm Entrepreneurs for Corporate Social Responsibility*, 94 J. BUS. ETHICS 177, 181–86 (2010) (discussing activism by shareholders to influence norms of corporate social responsibility).

44. See, e.g., Carol A. Tilt, *Corporate Responsibility, Accounting and Accountants, in PROFESSIONALS’ PERSPECTIVES OF CORPORATE SOCIAL RESPONSIBILITY* 11, 24 (Samuel O. Idowu & Walter L. Filho eds., 2010) (“[A]n important role of the accounting profession in CSR is to prepare audit or assurance statements to CSR or sustainability reports.”).

45. GLOBAL REPORTING INITIATIVE [GRI], *SUSTAINABILITY REPORTING GUIDELINES 3* (2011), available at <https://www.globalreporting.org/resourcelibrary/>

characterize these schemes as private. As they mature, there is almost inevitably some level of interpenetration with public law regimes. For instance, governments have in some cases required FSC certification in product procurement.⁴⁶ To the extent that they have traction, codes of conduct and certification programs are likely to impact public regulation.⁴⁷ However, these schemes remain private in the sense that neither governments nor multilateral institutions participate in any formal supervisory capacity.⁴⁸

II. MIXED PUBLIC-PRIVATE REGIMES

Mixed public-private regimes share characteristics with voluntary codes of conduct and certification schemes but include an intergovernmental element. Public participation ranges from light hosting responsibilities to more robust interventions. Mixed regimes tend to have a tripartite structure, formal or not, with governmental, corporate, and NGO constituencies. The public participation notwithstanding, these regimes are nonlegalized. Some resemble sector-specific private codes of conduct with some level of governmental participation. Others are more capacious framed to bring firms into the orbit of international norms through the vehicle of supranational entities.

Examples of governmentally facilitated codes of conduct include the Kimberley Process Certification Scheme (KPCS), the Voluntary Principles on Security and Human Rights (Voluntary Principles), and the Extractive Industry Transparency Initiative (EITI).⁴⁹ All three implicate industries that are brand insensitive. Under the KPCS, participant states (more than seventy) agree to require certification of

G3.1-Guidelines-Incl-Technical-Protocol.pdf. See Kevin E. Davis, Benedict Kingsbury & Sally Engle Merry, *Indicators as a Technology of Global Governance*, 46 *LAW & SOC'Y REV.* 71 (2012) (analyzing the increased usage of indicators and resulting impact on global governance); Galit A. Sarfaty, *Regulating Through Numbers: A Case Study of Corporate Sustainability Reporting*, 53 *VA. J. INT'L L.* 575 (2013) (same).

46. See Friederike Mechel et al., *Public Procurement and Forest Certification: Assessing the Implications for Policy, Law and International Trade*, *ECOLOGIC INSTITUTE* 1, 42–46 (May 29, 2006), available at http://www.ecologic.eu/download/projekte/900-949/933/933_final_report.pdf (describing FSC's comparatively significant global support and the widespread application of FSC's standards).

47. See Meidinger, *supra* note 19, at 17–26 (describing how nongovernmental certification schemes influence state legal systems and different areas of the law).

48. See Bernstein & Cashore, *supra* note 27, at 349 (noting that codes and other “non-state market-driven systems do not derive policy-making ability from states’ sovereign authority”).

49. THE KIMBERLEY PROCESS, <http://www.kimberleyprocess.com> (last visited Sept. 24, 2013); VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS, <http://www.voluntaryprinciples.org> (last visited Sept. 24, 2013); EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <http://www.eiti.org> (last visited Sept. 24, 2013).

imported diamonds as conflict free;⁵⁰ a system of certification warranties itself is undertaken by non-state entities, including the World Diamond Council.⁵¹ Under the Voluntary Principles, an array of states, NGOs, and extractive and energy-related companies have subscribed to a framework for reconciling security and human rights, including through the execution of risk assessments by corporate members.⁵² EITI, which aims to improve transparency in revenue flows from natural resources, is governed by a mixed-state, non-state board.⁵³ Countries are subject to “validation” for compliance with EITI principles through a multistakeholder consultative process.⁵⁴

These regimes have had a mixed track record. As recounted by Ian Smillie, the KPCS has been wounded by weak links among participant states (e.g., Venezuela) and the acceptance of diamonds from Zimbabwe.⁵⁵ These and other issues prompted Global Witness, a major NGO observer entity, to withdraw from the KPCS.⁵⁶ As shortcomings in the KPCS became evident, NGOs and diamond industry representatives (with the support of some governments) established the Diamond Development Initiative International to address issues relating to diamond mining more holistically.⁵⁷

50. See THE KIMBERLEY PROCESS, <http://www.kimberleyprocess.com/en/about> (last visited Sept. 24, 2013) (“The KP has 54 participants, representing 81 countries . . . The Kimberley Process Certification Scheme (KPCS) imposes extensive requirements on its members to enable them to certify shipments of rough diamonds as ‘conflict-free.’”).

51. See *About WDC Mission Statement*, WORLD DIAMOND COUNCIL, <http://www.worlddiamondcouncil.org/index.php/about-wdc/mission-statement> (last visited Sept. 24, 2013) (“The WDC has established the System of Warranties which extends the effectiveness of the Kimberley Process beyond the export and import of rough diamonds . . .”).

52. See *What Are the Voluntary Principles?*, VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS, <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/> (last visited Sept. 24, 2013) (describing the actors engaged in the Voluntary Principles and the factors that companies should consider when making risk assessments).

53. See *What Is the EITI?*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <http://www.eiti.org/eiti> (last visited Sept. 24, 2013) (“The EITI is a global standard that promotes revenue transparency and accountability in the extractive sector. . . This process is overseen by a multi-stakeholder group of governments, companies and civil society.”).

54. See *EITI Validation*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <http://www.eiti.org/validation> (last visited Sept. 24, 2013) (“The multi-stakeholder group plays a central role in ensuring that the Validation process is thorough and comprehensive.”).

55. See Ian Smillie, *Diamonds and Non-State Actors*, 46 VAND. J. TRANSNAT’L L. 1003, 1014–18 (2013) (reviewing several weaknesses of the KPCS).

56. See John Eligon, *Advocacy Group Quits Coalition Fighting Sale of ‘Blood Diamonds’*, N.Y. TIMES, Dec. 5, 2011, at A5 (“Global Witness had expressed concerns about how the Kimberley Process was operating for some time; it said the final straw was the decision last month to allow Zimbabwe to export diamonds from the Marange fields . . .”).

57. See DIAMOND DEVELOPMENT INITIATIVE, <http://www.ddiglobal.org> (last visited Sept. 24, 2013) (explaining that the DDI “aim[s], through education, policy

Diamond-sector developments could demonstrate the virtues of regulatory competition; if one scheme fails, another will rise to take its place. Or perhaps some other dialectical “cross-pollination” will result in an alternate institutional mix.⁵⁸

The mixed public-private category also includes efforts aimed at bringing international norms to bear on corporate conduct through UN-based initiatives. Established in 2000, the United Nations Global Compact (Global Compact) establishes a global corporate citizenship initiative under which companies commit to ten principles relating to human rights, labor rights, environmental protection, and anticorruption.⁵⁹ More than seven thousand businesses have subscribed, along with representatives of other constituencies in civil society, labor, and UN agencies.⁶⁰ Companies listed with the Global Compact are required to issue annual reports regarding implementation of the principles.⁶¹ In recent years, the Global Compact secretariat has begun to enforce the reporting requirement, delisting several hundred corporations for failure to comply.⁶² Despite growth, the Global Compact members include only 40 percent of the world’s largest companies.⁶³ Beyond self-reporting, there are no monitoring or enforcement mechanisms for advancing conformity with the Global Compact principles.⁶⁴

dialogue and projects working directly with artisanal diamond miners and their communities, to demonstrate that diamonds can be an asset for growth”); cf. Smillie, *supra* note 55, at 18–19 (noting that key players have begun exploring new avenues for “provid[ing] a trustworthy consumer guarantee”).

58. See Lesley Wexler, *Regulating Resource Curses: Institutional Design and Evolution of the Blood Diamond Regime*, 31 CARDOZO L. REV. 1717, 1740–42 (2010) (“Sustained linkages among . . . institutions fosters a cross-pollination of approaches and assumptions that seems likely to be manifested in new policies.”).

59. See *The Ten Principles*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Sept. 24, 2013) (“The UN Global Compact asks companies embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption.”).

60. See *Participants & Stakeholders*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last updated May 29, 2013) (describing the ten thousand participants involved in the Global Compact initiative).

61. See *About Us*, UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last updated Apr. 22, 2013) (highlighting participant expectations).

62. See Jo Confino, *Cleaning up the Global Compact: Dealing with Corporate Free Riders*, THE GUARDIAN (Mar. 26, 2012, 12:47 PM), <http://www.theguardian.com/sustainable-business/cleaning-up-un-global-compact-green-wash> (discussing the executive director’s “mission to clean up the organisation and ensure that members are building sustainability into their core activities”).

63. *Id.*

64. See Daniel Berliner & Aseem Prakash, *From Norms to Programs: The United Nations Global Compact and Global Governance*, 6 REG. & GOVERNANCE 149, 152 (2012), available at <http://faculty.washington.edu/aseem/gc.pdf> (stating that the

More recently, the United Nations Human Rights Council (HRC) endorsed a set of Guiding Principles on Business and Human Rights (Guiding Principles).⁶⁵ This undertaking, led by Harvard political scientist and UN Special Representative John Ruggie, establishes a framework of “protect, respect, and remedy” in the context of business and human rights: a responsibility on the part of states to protect against abuses by third parties, including corporations; a responsibility on the part of corporations to respect human rights by acting with due diligence to avoid infringing the rights of others; and the need for access to effective remedies, including through corporate grievance mechanisms.⁶⁶ The framework is elaborated in thirty-one guiding principles.⁶⁷ States should enforce laws applying human rights to business enterprises, for example, and ensure internal governmental coordination with respect to related policies.⁶⁸ For their part, corporations should avoid causing or contributing to human rights harms, though the framework and principles work from the premise that international human rights law does not directly apply to corporations in most contexts.⁶⁹ Further, businesses should seek to prevent or mitigate human rights impacts directly linked to their operations, products, or services.⁷⁰ As a way of “embedding” them, human rights policies should be transparent and approved at the highest levels of corporate leadership.⁷¹

As with the Global Compact, the Guiding Principles aim broadly to bear on all corporate conduct relating to human rights. Rights are defined to include all rights denominated by the International Bill of Rights.⁷² That comprehends economic, social, and cultural rights, as well as political and civil ones.⁷³ By way of follow up, the HRC established a working group to promote and implement the Guiding

Global Compact “relies on members of the public or civil society to highlight cases of poor performance or disingenuous reporting”).

65. See Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. DOC. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter *Report of the Special Representative*] (proposal to the UN Human Rights Council for “implementing the United Nations ‘Protect, Respect and Remedy’ Framework”).

66. See *id.* at 16–27 (outlining the guiding principles for due diligence, access to remedies, and grievance mechanisms in business enterprises).

67. *Id.* at 6–27.

68. See *id.* at 6–13 (explaining the Guiding Principles as they relate to a state’s duty to protect human rights).

69. See *id.* at 13–14 (operating under the founding principle that “[b]usiness enterprises should respect human rights”).

70. *Id.* at 14–15.

71. See *id.* at 15–16 (explaining that businesses should “express their commitment to [respect human rights] through a statement of policy that is approved at the most senior level”).

72. See *id.* at 13–14 (arguing that “business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights”).

73. *Id.*

Principles, along with a forum for states, businesses, and NGOs to meet annually to facilitate implementation.⁷⁴ Ruggie vaunts the Guiding Principles as a focal point and baseline for orienting business human rights practices.⁷⁵ The Guiding Principles have been adopted by other entities, including the Organization for Economic Cooperation and Development (into its Guidelines for Multinational Enterprises), the World Bank (into its International Finance Corporation Sustainability Principles and Performance Standards), and the ISO (into the ISO 26000 program).⁷⁶ Although the Guiding Principles are nominally hosted in the United Nations, they are “not dependent on the obligations of states and their ability to transpose those obligations into national law systems.”⁷⁷ In these and other mixed frameworks, “the sources of law lie well outside states and traditional law making.”⁷⁸

As with private codes of conduct, mixed public-private schemes have come under fire for their nonobligatory, nonlegal orientation.⁷⁹ Although human rights groups supported adoption of the Guiding Principles,⁸⁰ they have recently become more critical. In its 2013 World Report, Human Rights Watch (HRW) characterized the Guiding Principles as a “woefully inadequate approach.”⁸¹ As with all

74. See Human Rights Council Res. 17/4, Human Rights and Transnational Corporations and Other Business Entities, 17th Sess., June 15 2011, U.N. DOC. A/HRC/17/L.17/Rev.1, at 2–4 (June 17, 2011), available at <http://documents-dds-ny.un.org/doc/UNDOC/LTD/G11/141/87/pdf/G1114187.pdf?OpenElement> (Human Rights Council resolution establishing “a working group on the issue of human rights and transnational corporations and other business enterprises”).

75. See JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS, at xliii–xlvi (2013) (explaining that “the Guiding Principles draw on the different discourses that reflect the respective social roles these governance systems play in regulating corporate conduct”).

76. See *id.* at 159–66 (discussing Ruggie’s process of gaining support for the Guiding Principles from “other relevant international standard-setting bodies”); see also Radu Mares, *Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress*, in THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION 1, 7, 22–23 (Radu Mares ed., 2011) (discussing international organizations’ efforts “to bring into line their human rights provisions with Ruggie’s due diligence recommendations”).

77. Larry Catá Backer, *Transnational Corporate Constitutionalism: The Emergence of a Constitutional Order for Economic Enterprises* 145 (working paper, Apr. 10, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038081.

78. *Id.* at 148.

79. Critics spurn the Global Compact, for example, as an exercise in “blue wash.” See, e.g., Andreas Zumach, *Blue Wash’ Instead of Human Rights*, DEUSTSCHE WELLE (May 30, 2011), <http://www.dw.de/blue-wash-instead-of-human-rights/a-15108305> (criticizing the Global Compact for its lack of “stringent admission criteria”).

80. See RUGGIE, *supra* note 75, at 157–69 (providing Ruggie’s personal account of the process leading up to the adoption of the Guiding Principles).

81. Chris Albin-Lackey, *Without Rules: A Failed Approach to Corporate Accountability*, HUMAN RIGHTS WATCH WORLD REPORT 2013, at 29, 32, available at http://www.hrw.org/sites/default/files/wr2013_web.pdf. For Ruggie’s response to the critique, see John Gerard Ruggie, *Progress in Corporate Accountability*, INSTITUTE FOR

voluntary initiatives, the report laments, “[T]hey are only as strong as their corporate members choose to make them, and they don’t apply to companies that don’t want to join.”⁸²

III. FULL LEGALIZATION

That leaves the possibility of public regulation to constrain corporate conduct at the global level. In one variant, legalization would emerge at the international level with the recognition of corporate duties to comply with human rights. Other legalization models would turn attention back to state-based regulation.

Legalization at the international level could take the form of a binding treaty, making direct corporate duties explicit. The United Nations Sub-Commission on the Promotion and Protection of Human Rights pursued this strategy with its drafting of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms).⁸³ The Norms were framed in mandatory terms, setting forth corporate obligations with respect to human rights. The specified rights included rights to nondiscrimination and equal opportunity, to security of persons and workers, and to consumer protection and environmental protection.⁸⁴ The duties applied to corporations within “their respective spheres of activity and influence.”⁸⁵ The Norms provided for “monitoring of corporate conduct” and “verification by” the United Nations.⁸⁶ The Norms themselves would not have had the force of law.⁸⁷ They purported to reflect existing norms and would have had the status of soft law, at least toward establishing direct obligations on the part of corporations.⁸⁸

In the end, the Norms were rejected by the UN Human Rights Commission (the forerunner to the HRC). To proponents (and in theory), the legalized approach of the Norms has the advantage of obligating corporations to comply with human rights norms in much

HUMAN RIGHTS AND BUSINESS (Feb. 4, 2013), available at <http://www.ihrb.org/commentary/board/progress-in-corporate-accountability.html>.

82. Albin-Lackey, *supra* note 81, at 33.

83. ECOSOC, Sub-Comm’n on Promotion & Prot. of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. DOC. E/CN.4/Sub.2/2003/12/Rev.2 at 4–6 (Aug. 26, 2003) [hereinafter Norms].

84. *Id.* at 4–7.

85. *Id.* at 4.

86. *Id.* at 6.

87. See David Weissbrodt & Muria Kruger, *Current Development: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT’L L. 901, 913–14 (2003) (explaining that while the Norms were not voluntary, they were recommendations and not a treaty).

88. *Id.* at 914.

the same way that states do.⁸⁹ As the infrastructure of international law matures, corporations could be brought directly before international bodies as necessary to secure human rights compliance. The Norms would have paved the way for human rights treaty committees to consider corporate conformity with human rights and would have provided for reparations as a remedy to be applied by “national courts and/or international tribunals.”⁹⁰ Because public law is mandatory, and because (in theory at least) it is directly enforceable, legalizing human rights relative to corporations would advance rights on the ground, or at least would better advance them relative to private and indirect mechanisms of enforcement.

The disadvantages of attempting full legalization are clear, however. Most obviously, as demonstrated by the Norms episode itself, there is little chance that states will agree to legalization at this point in time. Political feasibility is not the only objection to this approach. Legalization requires precision, a tall order with respect to corporate activity and human rights broadly defined. The attempt to draw a perimeter around corporate responsibility at the line of their “sphere of influence” could exaggerate the importance of proximity, would be both over- and under-inclusive, and would be vulnerable to strategic gaming (for instance, through corporate formalities).⁹¹ Moreover, legalizing corporate duties could have the unintended consequence of taking pressure off national governments to build capacity themselves to enforce domestic and international rights protections. However more robust the international infrastructure of international human rights has become, it still falls far short of the ideal of public regulation.

More realistic would be a pivot back to public authority at the national level. This approach itself has subvariants. One suggestion is that public authorities set transparency and accountability baselines from which voluntary initiatives could build out.⁹² This view also applies new governance conceptions of the state role in regulation, away from exclusive reliance on top-down command and control to include more innovative use of regulatory carrots as well as

89. See, e.g., *id.* at 903–04 (highlighting the fact that the Norms were the “first nonvoluntary initiative” and, as such, would have forced large business to remain “accountable for human rights violations”); Menno T. Kamminga, *Corporate Obligations Under International Law* (Aug. 17, 2004) (Presented at the 71st Conference of the International Law Association), available at <http://198.170.85.29/Kamminga-Corporate-Obligations-under-Intl-Law.doc> (“It would appear that all companies and governments of good will have a shared interest in creating a level playing field by addressing minimum obligations on corporate social responsibility directly to companies.”).

90. Norms, *supra* note 84, ¶ 18.

91. RUGGIE, *supra* note 75, at 49–51.

92. See, e.g., Locke, *supra* note 29 (describing “a process in which government agencies collaborate with the private companies they regulate in order to develop broad goals and metrics”).

sticks.⁹³ Advocates of legalization call for the more robust exercise of extraterritorial jurisdiction by developed states.⁹⁴ Others propose leveraging voluntary initiatives by incorporating them into public law. “The core requirements of many voluntary initiatives,” argues HRW, “could be translated into relatively straightforward regulatory mandates.”⁹⁵ In other words, existing voluntary initiatives would be adopted by states, thus transforming them into public regulatory systems with all their putative advantage.

Cases like the Bangladesh factory collapse have buttressed the case for legalization.⁹⁶ The current approach is clearly imperfect, which might augur a retreat into the more comfortable terrain of state-based regulation. But there may be magical thinking in these proposals as well. It is not clear, first of all, how states claw back the regulatory power depleted by globalization. There is little evidence, for example, that developed states are inclined to ramp up extraterritorial regulation beyond a few, limited areas. Moreover, those inclined to legalized models tend to romanticize the efficacy of state-based regulation, which also suffers serious flaws. The week before the Bangladesh factory fire, a fertilizer plant exploded in Texas, killing more than a dozen and injuring many more.⁹⁷ The federal Occupational Health and Safety Administration has just two thousand inspectors to monitor over 8 million workplaces in the United States, meaning that it can inspect each workplace only once every 131 years.⁹⁸ Even in the developed world, state capacity is

93. See generally Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501 (2009) (describing the implications of adapting the New Governance model of regulation to the international setting).

94. For instance, through the vehicle of the Alien Tort Statute. Alien Tort Statute, 28 U.S.C. § 1350 (2013).

95. Albin-Lackey, *supra* note 81.

96. Bangladesh enacted protective labor legislation in July. See Nandita Bose, *Stronger Labor Law in Bangladesh After Garment Factory Collapse*, REUTERS (July 15, 2013), <http://www.reuters.com/article/2013/07/15/us-bangladesh-labour-idUSBRE96E05R20130715> (describing the protective labor legislation enacted in Bangladesh). Bangladesh and the European Union then entered into a “Sustainability Compact” in which Bangladesh agreed to adopt various labor practices in conformance with International Labor Organization rules. See European Union & Government of Bangladesh, *Staying Engaged: A Sustainability Compact for Continuous Improvements in Labour Rights and Factory Safety in the Ready-Made Garment and Knitwear Industry in Bangladesh*, Joint Statement (2013), available at http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151601.pdf.

97. See Fernanda Santos & Clifford Krauss, *Emerging From the Rubble in a Texas Town*, N.Y. TIMES (Apr. 19, 2013), <http://www.nytimes.com/2013/04/20/us/texas-explosion.html>.

98. Randy Rabinowitz, *A Big Job, on a Tiny Budget*, N.Y. TIMES (Apr. 29, 2013), <http://www.nytimes.com/roomfordebate/2013/04/28/where-osha-falls-short-and-why/osha-has-a-big-job-on-a-tiny-budget>.

limited. In developing states such as Bangladesh, it is nascent at best.⁹⁹

IV. CONCLUSION: CONTINUUM OR TRAJECTORY?

The typology above is clearly artificial in some respects. The range of mechanisms for constraining corporate conduct may better be characterized as falling along a spectrum than into discrete boxes. It is difficult today to fully cabin institutions along the public-private divide. Blurring is inevitable. No undertaking will succeed without some elements of each, though broad characterization as oriented in one direction or the other is fairly sustained, at least, as a snapshot.

There is also a question of whether the typology represents a menu or an arc. On the one hand, postglobalization the world may have entered a period in which solutions are à la carte, in which approaches to global governance are nonisomorphic and nothing is one-size-fits-all. Different problems require different kinds of institutional solutions. Or, different approaches could all be brought to bear on the same basic challenges of corporate power, resulting in the layering of rules, public and private.¹⁰⁰ This equilibrium would be consistent with the orientation of the legal pluralists¹⁰¹ and new governance theorists.¹⁰² In that event, refinements of the various models will have utility on the ground by way of appropriately mixing and matching. Scholars are undertaking fine-grained empirical research on the efficacy of various regimes.¹⁰³

On the other hand, it could be that these developments are part of a trajectory with full public regulation at the international level as the endpoint. The move from state-based regulation to global public regulation could never have happened in one seamless, quick leap—

99. See, e.g., Editorial, *Another Round of Promises in Bangladesh*, N.Y. TIMES, May 12, 2013, at A20 (reporting that Bangladesh had fifty-one inspectors for legal compliance efforts inspecting over 200,000 factories).

100. See Tim Bartley, *Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards*, 12 THEORETICAL INQ. L. 517, 541 (2011) (illustrating how complementarity and conflict between private and public standards structure private regulation).

101. See, e.g., PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* 262–69 (2012) (explaining that pluralists consider the variety of normative communities with particular ties to a particular dispute); Peer Zumbansen, *Transnational Legal Pluralism*, 10 TRANSNAT'L LEGAL THEORY 141, 157–62 (2010).

102. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 283–89 (1998) (identifying a new form of government where power is decentralized to enable citizens to use their local knowledge to fit their individual circumstances and share their knowledge with others facing similar problems); Abbott & Snidal, *supra* note 93, at 67.

103. See, e.g., Locke, *supra* note 29. The empirical literature remains surprisingly underdeveloped given the stakes. See RUGGIE, *supra* note 75, at 73 (observing that the empirical literature remains “spotty”).

the capacity was not there at the global level at the advent of globalization. But perhaps, after a period of institution building that capacity will emerge. Even John Ruggie—who dismissed the law-oriented Norms as hopeless political reach in the early 2000s—seems to allow for the possibility of legalization.¹⁰⁴ As John Knox notes, “[I]mplementation of the [Guiding] Principles might change the political climate in ways that remove obstacles to the legal recognition of direct corporate duties.”¹⁰⁵

Corporations themselves may come around to the virtues of public regulation, even at the supranational level. Global public regulation would have three possible virtues from a corporate perspective. First, it levels the playing field by universalizing regulation. Private initiatives tend to disadvantage big, visible corporations relative to others. Second, public regulation enhances certainty. Corporations hate being regulated, but they hate uncertainty more. Public regulation tends to be self-entrenching and is less vulnerable to the sort of competitive displacement that can undermine private schemes. Finally, corporations have learned how to navigate public regulation at the national level, often to their advantage. They may come to have confidence that the same sort of rent seeking will be possible in global decision-making institutions. Corporations may be better positioned for rent seeking than those who would seek to constrain them. If corporate power presses for more robust global public regulation, it will happen.

Either way, the global system is undergoing a period of tremendous instability and innovation. Regardless of form, corporations are being disciplined to international norms. Improving the capacity and effectiveness of the global governance of business will be a major challenge for the era.

104. See RUGGIE, *supra* note 75, at 199–200 (advocating for a “carefully crafted legal instrument” at the international level to combat the “worst human rights abuses” by legal persons).

105. John H. Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations*, in *THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS FOUNDATIONS AND IMPLEMENTATION* 51, 68 (Radu Mares ed., 2012); *see also id.* at 67 (“Under the guise of rejecting direct duties for corporations, [Ruggie] may have written a rough draft of such duties, much as the drafters of the Norms sought to do.”).