

**PUBLIC-PRIVATE INTERACTIONS IN INTERNATIONAL
REGULATION FOR CORPORATE SOCIAL RESPONSIBILITY**

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PUBLIC-PRIVATE INTERACTIONS IN INTERNATIONAL REGULATION FOR CORPORATE SOCIAL RESPONSIBILITY

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Introduction

The growth of codes of conduct for corporate social responsibility since the mid-1990s has revived debates that date back at least 30 years, although in a new and very different context. The domination of neo-liberal ideologies since the early 1980s helped to power the construction of an international legal and institutional framework for business that emphasises corporate rights and restricts state regulation. It was all the more ironic, therefore, that corporations themselves, generally as a result of external pressures, should feel a need for industry or corporate codes to govern their activities. These have covered a variety of issues, ranging from environmental impact to consumer protection, as well as health and safety of employees and even terms and conditions of employment. Such initiatives were understandably viewed with some suspicion by activists and others who had been advocating the regulation of business activities against a tide of neo-liberal arguments for free markets, privatization and deregulation.

Suspensions of corporate codes are exacerbated by the fact that such codes generally take the form of voluntary self-regulation, especially when this is contrasted to the rights sought by or granted to corporations, which have been embodied in treaties, which are formally legally binding. Certainly, the failure to anchor corporate responsibilities in binding obligations can deprive such regulation of both the important symbolic power of formal law, as well as the law's more instrumental aspects of penalties and sanctions. However, it is also important not to overlook the many limitations of formal law, especially when it is to be applied on a global scale.

This paper will discuss the interaction between corporate codes and formal legal requirements, at national and international levels. It suggests that corporate codes have a legitimate place, but they should be more firmly anchored within a broader regulatory framework which establishes obligations as well as rights for business. This could be based on new approaches to combining binding 'hard' law with non-binding 'soft' law standards, notably through a Framework Convention.

First however, the paper will put these issues a broader context, by sketching out a more general analysis of the emergence of new forms of governance based on regulation, involving managers and technical experts, perhaps forming what Kees van der Pijl has called a 'cadre class' (van der Pijl 1998). I argue that this is part of an extensive restructuring of both the apparently 'private' sphere of business and economic activity and the 'public' sphere of politics, and of their interaction, involving a breakdown of the classical liberal international state system.

I. REGULATING CORPORATE CAPITALISM: FROM CLASSICAL LIBERALISM TO MULTI-LEVEL GOVERNANCE

States and Corporations

International business in various forms has a long history, and even the currently dominant form of the Transnational Corporation (TNC) goes back to the end of the 19th century. However, it was in the 1960s that the political implications of the growth of TNCs came onto the global agenda. The rapid growth especially of US TNCs in the 1950s and 1960s produced a very significant qualitative change in the world economy, since it involved the international integration of economic activity internalized within firms, or in Marxist terms the international centralization of capital (Andreff 1984). Despite the improvements in international communications, and contrary to common assumptions, the organization of businesses on a global scale is not easy (its history is littered with disastrous ventures into foreign markets, as well as successes), and hence the increasing dominance of TNCs needs to be explained.

The competitive advantages of TNCs were not due to increased international political integration, but the converse: it was their ability to take advantage of and manage *differences* in the social, political and economic conditions between countries which powered their rapid growth.¹ Indeed, in the early days of TNCs before 1914, an important motive for the establishment of foreign production was to get behind tariff walls. Clearly, some obstacles are too difficult to surmount, such as discrimination against foreign ownership, or severe volatility in conditions between countries. However, the institutional framework developed after 1945 was very propitious for FDI, precisely because it involved a strong but limited form of international economic coordination. The system devised at Bretton Woods, described by Ruggie as 'embedded liberalism' (Ruggie 1982), gave national states the primary responsibility for internal socio-economic management, while facilitating increased liberalization of trade and of current account foreign exchange payments. TNCs became adept at selecting and combining the most appropriate locations for their operations, based not only on social and economic conditions (such as skilled but relatively low-cost labour), but also political and regulatory factors.

The global reach and visibility of TNCs created a tension with the dualist hierarchy of national-international law that characterised the classical liberal international state system which emerged after the French revolution and during the 19th century. The liberalism of the 18th century enlightenment envisaged a state based on an impersonal sovereignty, the 'rule of law, not of men', through a state autonomized from the realm of 'civil society' where the 'private' exchanges between free and equal citizens take place. Classical liberalism did not dream of a single world society, or even a global market. The counterpart to the national state and its free

¹ J. H. Dunning, a leading theorist of TNCs, explains their growth in terms of ownership-specific and location-specific advantages, deriving from their 'privileged ownership of, or access to, a set of income-generating assets, or from their ability to coordinate these assets with other assets across national boundaries' (2001, 176).

and equal citizens was seen as an international society of autonomous states, politically independent of one another, but interacting through free international trade, rather than the coerced or unequal exchange of mercantilism (Kant 1795/1966). Hence, the classical liberal international system consisted of a community of equal, sovereign states, loosely coordinated by international law consisting of consensual rules and agreements based on broad general principles, and an allocation of jurisdictional competence between them based primarily on territoriality.

Under classical liberalism, national law governs individual legal subjects, while international law directly binds only states. Large-scale business enterprise had been conducted in the pre-liberal era through the privileged monopolistic trading companies, which were authorized by and had close links to the state. In the first part of the 19th century capitalist states continued to keep control over incorporation, although it was increasingly used to permit the mobilization of capital for large-scale infrastructural projects such as canals and railways. However, in the last third of the 19th century, following the spread of laws allowing automatic incorporation, the joint-stock company came to be considered a 'private' legal person.² The corporate form provided an institutional framework enabling a socialized accumulation of capital, but within the private property system, and this became increasingly dominant with the growth of capital markets and the movements to concentration of capital after 1875. The fiction of separate legal personality not only enabled the famous separation of ownership from control, but perhaps more importantly it gave the freedom to develop flexible corporate structures, alliances and networks, including cross-national corporate groups which became the TNCs.

Nevertheless, the size and importance of corporations made them a prime target for public regulation, extending also to nationalization, and in the case of TNCs this could be by either or both home and host states. This exposed them to multiple and sometimes conflicting regulatory requirements, which came to the fore in the 1960s. Since that period there have been both academic debates and political conflicts over the appropriate regulatory framework for a system of global business that became both increasingly internationally integrated and increasingly socialized, in the corporate form.

State Sovereignty in the Classical Liberal System

The period of decolonization sparked a growing emphasis on national economic sovereignty, expressed in particular in the articulation by developing countries of a New International Economic Order (NIEO).³ This was formulated at the height of

² Horn & Kocka 1979, Freedeman 1979, 1993. From the liberal viewpoint, even joint enterprises created by states are to be governed by national law if they fulfil a 'commercial' function, and may only be treated as organizations under international law if they fulfil 'public' functions (Seidl-Hohenfeldern 1987). The difficulty of applying this distinction was shown in the litigation following the collapse of the International Tin Council.

³ This was formulated in various UN resolutions, culminating in the Charter of Economic Rights and Duties of States (CERDS), adopted in 1974 by the UN General Assembly, which affirmed the right of every state to 'full permanent sovereignty ... over all its wealth and natural resources and 'to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and ... to nationalize, expropriate or transfer ownership of foreign

the assertion of economic nationalism by developing countries, and especially the wave of nationalizations of oil, mining and other natural resources. While these entailed a forced divestment of ownership rights, foreign companies generally received substantial compensation, and often maintained or regained an extensive role in managing the same operations (Faundez and Picciotto 1978, Lipson 1985, 121-2). In fact, nationalizations did not reduce the economic dependence of the primary producer countries on world markets,⁴ indeed they generally found themselves prey to falling or fluctuating prices for their products.

As a counterpoint to the moves attempting to strengthen national economic sovereignty, others proposed international measures. For some, this flowed from the recognition of the weakened role of national states in the world economy, expressed most pointedly by Charles Kindleberger's assertion that 'the national state is just about through as an economic unit' (1969, 207). George Ball, a US under-Secretary of State and UN representative (later Chairman of Lehman Brothers International), proposed the 'denationalization' of TNCs. He argued that a supranational citizenship for TNCs should be provided by treaty, since in his view the pragmatic policy followed by TNCs of obeying local laws in each country where they operate would not resolve the 'inherent conflict of interest between corporate managements that operate in the world economy and governments whose points of view are confined to the narrow national scene' (Ball 1967, 28; Ball 1975). However, this radical liberal proposal had little resonance either among business leaders, who generally preferred to deal with national states separately, or among critics of big business, who felt it would enable business to escape from the control of national states.⁵

From a Marxist perspective, Robin Murray suggested that the international economy should be seen 'not as an aggregation of national economies, but as a total system in which nations are subordinate structures' (1971, 85). He argued that the international expansion of TNCs did not necessarily undermine the nation-state, since firms are 'politically opportunist', and that increased international integration of production, growing national economic interdependence, and decreasing national powers of economic management pointed to a need for new forms for the exercise of international state functions, including international coordination. He received a rapid, perhaps over-hasty reply from Bill Warren, who in addition to criticising Murray's analysis of the internationalization of capital, argued that since the contradictions between capital and the state are in general non-antagonistic, new international regulatory measures would quickly be forthcoming:

'the tax authorities are rapidly getting control of the internal transfer price problem and it is clearly not going to be long before the central bankers, international organizations and State policy-making bodies chain down the

property, in which case appropriate compensation shall be paid... taking into account ... all circumstances that the State considers pertinent'.

⁴ In 1987-8 forty-one developing countries were acutely dependent on one or a few commodities for export revenues, e.g. Uganda 92% on coffee, Guinea 82% bauxite, Dominica 73% bananas, Zambia 83% copper, Cuba 74% sugar (Raffaelli 1995, 212).

⁵ See e.g. the responses to the more elaborated proposals by Kindleberger, in Kindleberger 1980.

Euro-dollar monster so that it is no longer available to do the bidding of large firms' (Warren 1971, 88).

Belying this rash prediction, both international tax avoidance and global finance have flourished, and their exploitation has been a major factor in the competitive advantage of TNCs.

Despite their disagreements, both Murray and Warren were suggesting that a reinforcement of the existing classical liberal international system would take place, their preference being for a strengthening of national controls over firms and of international cooperative arrangements between states. Along these lines, the NIEO aimed to complement national economic sovereignty, at least in relation to producers of primary products, through intergovernmental commodity agreements.⁶ Agreements for five commodities (cocoa, coffee, rubber, sugar and tin) operated with mixed success for some years until they lapsed or collapsed (which was the fate of the Tin Agreement in 1985). They seem to have had little impact in reducing price volatility, which was the hope of consumers; and only the Coffee Agreement, which was based on export controls, succeeded for a while in the producers' aim of achieving 'more equitable' prices, but this broke down due to 'an unevenness and perceived unfairness of the distribution of the benefits among and within the producing countries' (Gilbert 1996, 16).⁷

Fragmentation of the State

The major trend in the 1980s was clearly the withdrawal of governments from direct involvement in economic activity, which mainly took the form of the privatization of state-owned firms and assets. Privatization appeared to be part of a wider move away from state-centred direction of the economy, especially as it was accompanied by much talk of deregulation and free markets. There were indeed pressures and proposals to restructure administrative arrangements in many states, aiming to dismantle state intervention. However, the role of the state, or the public sphere more generally, has not diminished,⁸ rather there has been a fragmentation⁹ of the national state.

⁶ These included as members both consumer and producer countries, inevitably creating tensions, e.g. over whether the minimum intervention price should reflect existing costs or create a disincentive to over-production. However, even a producers' cartel such as OPEC has only been relatively successful by relying on Saudi Arabia's ability to provide price leadership, in effect aligning itself with the major consumers (the USA), and preferring to discourage alternative energy sources by keeping prices low (in constant 1990 prices oil was \$23 per barrel in 1975, peaked at nearly \$50 in 1981 and then fell back, averaging \$18 in 1986-90: Raffaelli 1995, 210). OPEC has frequently found it as hard to enforce production quotas as did the commodity agreements.

⁷ The International Coffee Agreement remains in existence in attenuated form, mainly to provide information and research. By comparison with the international agreements, agricultural and primary product price support mechanisms are more stable within large countries or common markets, notably the USA and the EU, although they are generally regarded as distortive of world production.

⁸ This is shown even by crude measures such as state expenditure as a proportion of GDP, which strikingly has continued to increase despite extensive privatization. Total tax revenue in relation to GDP has risen in developed countries, according to OECD data, from an unweighted average of 30.4% in 1974 to 36.9% in 2001; this is part of a long-run trend, for developed states: public

Certainly, the impetus to privatization and deregulation was powered by anti-statist ideas. The assumption that state action is normally in the public interest was undermined, for example by economic analyses which argued that regulation is usually 'acquired' by the industry concerned and 'designed and operated primarily for its benefit' (Stigler 1971, 3). These echoed some more empirical political and sociological studies which, from very different political perspectives, showed that even if the impetus for state regulation came from wider political pressures, business had generally been able to turn it to advantage by its dominance of the political processes or through regulatory 'capture' (Kolko 1963, 1965; Bernstein 1955). In the case of nationalized industries, although state ownership in many countries did much to enable the establishment of extensive infrastructures within a public service ethos, the institutional framework of nationalized industries provided little or no public accountability. Thus, central governments were poorly equipped to evaluate the increasingly large-scale and complex investment decisions demanded by social changes and new technologies in most public services. The increased difficulty of legitimizing general taxation (especially income taxes) to finance the rising public expenditures generated by the socialization of the economy created a 'fiscal crisis', to which governments of all political hues had to respond.

In practice, however, privatization and regulatory reform often tended to produce little if any reduction of state activity, but instead changes in its form. In the US, which had almost no state ownership and a long tradition of regulation by independent agencies, there was criticism of 'command and control' forms of regulation for being excessively legalistic and adversarial (Bardach & Kagan 1982). This led to new debates and theories about regulation and its design (e.g. Noll 1985), spilling over to other countries (notably Australia), and developing new approaches to 'smart regulation' (Gunningham & Grabosky 1998). This has involved some intriguing shifts in the *character* of rules and law, away from direct control by central state bodies, and towards functionalist modes of governance delegated to technical specialists and based on the construction of new professional regulatory cultures. These experts, economists, accountants, lawyers, scientists and managers, in many ways constitute a new 'cadre class' (van der Pijl 1998, ch.5).

Thus, the so-called 'retreat of the state' left a gap which was quickly filled by new institutions and techniques of regulation. These generally involved new types of relations and interactions between the political or 'public' sphere of the state and the 'private' sphere of firms, industry and other social institutions. Influential ideologists argued for a redefinition of the role of government, to separate 'steering' from 'rowing': politicians should define aims and targets but subcontract delivery, which should be competitive and aim to meet the needs of customers (Osborne &

expenditure by European governments was some 5-10% of GDP at the start of the 20th century (OECD 2001, 28; see also Hobson 2003). However, the tax revenue/GDP ratio in developing countries has been about half that of OECD countries (Zee 1996).

⁹ Picciotto 1997. This concept has some similarities to Rhodes' analysis of the 'hollowing-out' of the British state (Rhodes 1997); however, I prefer the term fragmentation, which avoids the implication that the state has been weakened, and I think better captures the growth of regulatory networks (although this is also an important part of Rhodes' thesis).

Gabler 1992). Although the emphasis was on new types of cooperative interaction between the state and business, it often involved a further proliferation of regulation. Thus, in the UK, where 'club rule' of a close-knit elite based on the 'gentlemanly ideal' had long been based on extensive self-regulation by the City, the professions and industry, the regulatory state meant the introduction of more elaborate and formalized regulation (Loughlin and Scott 1997, Moran 2003).

These developments were seen as a shift from the Keynesian welfare state to a 'new regulatory state' better able to deal with the 'risk society' (Braithwaite 2000). More critically, followers of Foucault argued that the state is a 'mythical abstraction', without either the unity or functionality attributed to it, and suggested a broader understanding of 'governmentality' as involving 'a proliferation of a whole range of apparatuses pertaining to government and a complex body of knowledges and 'know-how' about government' (Rose and Miller 1992, 175). In this light, the shift from welfarism to neo-liberalism means that 'private enterprise is opened, in so many ways, to the action at a distance mechanisms that have proliferated in advanced liberal democracies, with the rise of managers as an intermediary between expert knowledge, economic policy and business decisions' (ibid. 200). Rose and Miller challengingly point out that what they regard as the neo-liberal realignment was actually sustained by its consonance with critiques of the welfare state made from the very different perspectives of civil libertarians, feminists and socialists, but that there remains nevertheless a strong nostalgia for the ideals of collective provision and solidarity held out by welfarism.

However, these changes should not be seen as an inevitable unfolding of a socio-economic logic, but the result of a prolonged process of social and economic struggle, resulting in the restructuring of the relations between what is regarded as the 'private' sphere of economic activity, and the 'public' realm of politics and the state, interacting with changes in the character of these spheres themselves. In parallel with the fragmentation of the 'public' sphere, major transformations have also been occurring in the so-called 'private' sphere of the market and the firm. Large-scale mass manufacturing has been reorganized, and the centralized bureaucratic firm has become the 'lean and mean' corporation, concentrating on its 'core competences', but operating within a web of strategic alliances, supplier chains, and financial and governmental networks (Harrison 1994, DiMaggio 2001).

The reasons or causes have been equally diverse, but they are deep-rooted and have involved a mixture of political and economic factors, but they have generally been driven by social pressures from below. There have been widespread revolts against autocratic power in the family and the factory, the classroom and the boardroom. In general terms, these entail a rejection of authoritarian domination and the power to control truth embodied in tradition, involving demands for increased personal autonomy and dignity, equality (notably, between women and men), the ending of coercion, and economic justice. Rather than the desire for economic liberalization bringing about political democratization, it has been the struggles against autocracy that have created an opening for economic liberalization. While undermining patriarchy and hierarchy, these anti-authoritarian movements have also paved the way to post-industrial capitalism, with its emphasis on information-management, flexible working and a global outlook. These processes have brought about the

transition to post-industrial capitalism, or what Manuel Castells has called the Information Age (Castells 1998).

The Networked State and the Dilemmas of Neo-Liberalism

Accompanying the fragmentation of national states in the past three decades has been the growth of a complex network of regulatory institutions and arrangements. This includes not only formal international institutions, but in particular *sub-state* arrangements for international cooperation between specialists exercising specific regulatory functions, as well as other kinds of informal governance arrangements cutting across states, and involves all kinds of private and public social actors: social activists, scientific experts, professionals, academics, and business managers. A specialist on regulatory reforms of governments in OECD countries suggests that the management of the interdependent world economy occurs through a 'web of formal and informal intergovernmental regulatory relationships ... that simultaneously empowers and constrains governments', and 'an intricate network of vertical and horizontal links between all levels of government' attempting to coordinate 'regulatory systems [that are] growing progressively more complex and *multi-layered*'.¹⁰

It can certainly be argued that recent developments represent simply the further extension of the liberal international system, and not any fundamental transformation. This view may be described as hyper-liberalism. Thus, Anne-Marie Slaughter has suggested that the growth of international networks of government officials at the substate level represents international cooperation of the 'disaggregated State as opposed to the mythical unitary State' (Slaughter 2000, 178). Although she goes so far as to describe this as 'the real New World Order' (Slaughter 1997, Slaughter 2004), she generally views it as a strengthening of the liberal state system, since she considers it simply entails cooperation between government officials, who can be held accountable by citizens through national state mechanisms (Slaughter 1997). In response to those who argue that this is a more far-reaching phenomenon which raises basic questions about political legitimacy, she has conceded that there may be some accountability problems (Slaughter 2001), and has responded with a 'menu of possible solutions' and some 'global norms' (Slaughter 2004, 230-260). These generally seek to preserve the inter-governmental character of these forms of cooperation, while making them 'more visible'. However, she does go so far as to suggest mobilizing around them a 'whole set of transnational actors', which might even amount to 'a kind of disaggregated global democracy based on individual and group self-governance' (Slaughter 2004, 240).

In contrast, the ideologies more usually associated with neo-liberalism are critical of, or hostile to, international regulatory cooperation. The collapse of the Soviet system and other experiences of state crises led to a triumphalism about the virtues of 'free markets', and a return to fundamentalist liberalism. This asserts that the efficient allocation of economic resources, and even social harmony, are best assured by unrestricted interactions and exchanges between individuals. Hence, the

¹⁰ Jacobs, in OECD 1994: 17, emphasis in the original.

role of the state is essentially to enforce contracts and to protect rights in private property. Other kinds of regulation are seen as 'interventions' by the state and generally regarded as unnecessary and harmful. This has been reinforced by the increased popularity of economic theories of politics, which analyze political and social institutions in terms of interactions between rational utility-maximizing individuals. From this perspective, collective action amounts to self-interested attempts by organized groups to secure their special interests (Olson 1965), often described as 'rent-seeking'. To counteract this, 'public choice' theories of the state advocate constitutional principles that would limit or 'discipline' what they regard as the discretionary powers of government, and so prevent them from being captured by organized interests (Buchanan and Tollison 1984).

This viewpoint leads to support for international economic agreements which lock-in national states to binding obligations to liberalize their markets, thus preventing organized interest groups from securing national regulations which are viewed almost by definition as protectionist. Such international obligations restrict the powers of national states, but this is seen as desirable, and indeed as enhancing individual freedom and even democracy, since national states are considered to be prey to the 'tyranny of the majority'.¹¹ Other kinds of international arrangements, for example to agree harmonized or common standards, or to cooperate in regulatory enforcement, are viewed with suspicion as 'mercantilist' deals or state cartels. The preferred alternative is regulatory competition, which is seen as offering the possibility of 'exit' to asset-owners from the high costs of inefficient and protectionist regulations, as well as constraining states to resist pressures for regulation which would make national producers less competitive.

It is this type of free-market or fundamentalist neo-liberalism that has underpinned much of the rhetoric about globalization, sparking opposition from 'anti-globalization' protesters. Yet, while it certainly provides an explanation and justification for the impetus to national deregulation resulting from international liberalization, it offers little basis for understanding the enormous growth of networks of international cooperation and coordination that have in fact accompanied liberalization and played an equally important part in shaping global change. Yet much of the anti-globalization movement mainly targeted this free-market neo-liberalism, so that many of the debates about 'globalization' have had an air of shadow-boxing. Only lately have some critics refocused on the forms and contents of international institutions and rules (Monbiot 2003), and the protest movements have rejected the 'anti-globalization' label in favour of the slogan 'another world is possible' (Fisher and Ponniah 2003, Mertes and Bello 2004, George 2004), or even 'globalization from below' (Brecher et al. 2000).

¹¹ This perspective was influential in the international trade community, for example in the thinking of Jan Tumlir, who headed the GATT research department until his death in 1985 (Sally 1998, 153ff), and is still put forward as a rationale for the WTO (see McGinnis and Movsesian 2000), although the WTO agreements go well beyond liberalization obligations.

At the same time, the 'market fundamentalism' of what became labelled as the 'Washington consensus' came under criticism in the 1990s.¹² The World Bank in particular began to place emphasis on the importance of social and even state institutions, as well as 'social capital', in providing strong foundations for capitalist economies.¹³ Although more favourable to state action, these policies begin from perspectives justifying political intervention where 'market failure' can be identified, and they generally favour a 'market-friendly state'. Market failure is generally said to arise from 'externalities' (costs or benefits of a transaction which are external to the parties themselves), inadequate information, or imperfect competition. Such situations may justify some form of state 'intervention', although the general presumption is that it should be a minimalist correction, to restore the free flow of private transactions, for example by providing an appropriately defined legal remedy or property right. A particular type of externality is said to be due to the existence of 'public goods': those which are both non-rivalrous in consumption (enjoyment by one person does not detract from enjoyment by another), and non-excludable. Ensuring the production of public goods is said to justify state action, although this could be either by direct state provision or by granting rights or imposing obligations on private actors. Thus, scientific discoveries, technological innovations and cultural artefacts, which are generally regarded as public goods, may be stimulated either by state subsidies or by state-granted intellectual property rights.

Such concepts have strong attractions for economists and others who analyze social relations in terms of exchange between atomized individuals, but they merely provide some necessary corrections to the implications of the individualist perspective while attempting to maintain its basic assumptions. On closer examination, however, it can be seen that whether goods are private or public does not simply result from their essential or natural characteristics, but these qualities

¹² Dezalay (1998) has provided a sociological account of the professional competitive strategies (especially the investment in mathematical economics) that enabled Chicago economics to conquer the Washington institutions (the IMF and the WB), and to overcome the relative marginalization of those institutions from the real centres of economic power in Wall St. by providing the ideological underpinnings for the massive bail-outs (benefiting mainly creditors such as Citibank) following debt crises such as Mexico's in 1994-5. A paper by John Williamson in 1990 outlined the 'intelligent convergence' in Washington around ten conditions for 'policy reform' in debtor countries. These were castigated by the next wave of WB economists, led by Stiglitz, who advocated a less rigidly monetarist set of prescriptions termed the 'post-Washington consensus' (Stiglitz 1998), which Williamson rejoindered were essentially compatible with his earlier formulation (Williamson 1999).

¹³ After a decade of structural adjustment policies which were heavily criticized as undermining public provision, in 1989 the Bank identified a 'crisis of governance' in sub-Saharan Africa, and published a more general report on *Governance and Development* in 1992; its study of the East Asian 'miracle' of 1993 gave some recognition to the important role of the state (although watered down for political reasons: Wade 1996); this trend culminated in the 1997 World Development Report, *The State in a Changing World* (Tshuma 2000, Faundez 1997). This increased attention to the social aspects of economic development was also reflected in the Bank's increasing emphasis on 'social capital'; a vigorous critique by Ben Fine (1999) traces the development of the concept from its origins in new microeconomic analysis, through the work of American sociologists (Coleman, Granovetter and Putnam), which he distinguishes from the use of the concept of social capital in the more contextualized and grounded sociology of Bourdieu.

are socially constructed.¹⁴ This different ontological viewpoint emphasises that it is the expectations and understandings embedded in social relations and underpinned by social norms that determine whether costs or benefits are 'externalized'. These are not just abstract debates, but have great political salience. For example, there has been strong political opposition to the extension of liberalization of services under the WTO to sectors such as water or education, which many wish to protect on the grounds that they involve essentially public goods. However, applying the tests of rivalrousness and excludability does not show them to be essentially public, any more or less than other services such as telecommunications or financial services, which have been liberalized. The real issue is to evaluate whether liberalization would improve the organization of such activities in terms of both efficiency and social justice. This generally depends on appropriate regulation to safeguard the public interest, which is just as important for all types of services, including finance and communication.

Despite their limitations as theories, such approaches have been increasingly deployed, often to permit apparently neutral and objective techniques of economic analysis to be applied to social and political institutions (Ogus 2004, 41). They have generally been used to examine the justifications and appropriate design for national state regulation. Only relatively recently has there been some consideration of the implications for international cooperation of 'international externalities' (especially damage to the environment), or 'global public goods' (Stiglitz 1995, Kaul et al. 1999). Furthermore, although these analyses may suggest situations where state action or cooperation are desirable, they provide no basis for considering how or why such cooperation might occur. This gap is generally filled by game theory, especially 'free-riding' (which suggests when compulsory joint action is required) and the 'prisoners' dilemma' (which suggests the circumstances in which rivals might both gain from cooperation). Here they link up with neoliberal institutionalism in international relations, which has underpinned in particular the study of 'international régimes' (Rittberger 1993).

Generally, however, neoliberal theories find it extremely difficult to understand or explain the major changes in the nature and relationships of the so-called private and public spheres, and the transformation of international economic and political action, which are characteristic of the current period. Yet, paradoxically, it is these neoliberal ideologies that have provided the bases for the dominant analyses and prescriptions for what is termed global governance.

¹⁴ For a cogent demolition of the concept of public goods see Malkin and Wildavsky 1991, and for an attempt to refine it Kaul 2001. The concept is an excellent example of what Marxists call commodity fetishism: taking the characteristics of a social system of economic activity which involves exchange to be determined by the natural properties of the goods which are exchanged.

II. NEO-LIBERALISM: STRONG BUSINESS RIGHTS, WEAK RESPONSIBILITIES¹⁵

Business Protection and Regulation

The assertion of national sovereignty as the expression of economic nationalism in the 1970s posed a symbolic threat to the principles of protection of property rights which Britain and then the US had sought to establish in international law during their respective periods of imperial domination in the 19th and 20th centuries.¹⁶ The CERDS of 1974¹⁷ asserted not only the right of a state to expropriate property (which might be conceded, subject to conditions, under classical liberalism), but also that compensation need only be 'appropriate', as judged by the state itself. In practice, of course, the need to access the international capital markets remained the main incentive for states which did carry out property expropriations or nationalizations to reach accommodations with foreign owners on compensation, whether by negotiation or submission to arbitration.

The capital-exporting states had sought to reinforce this normatively, mainly by negotiating bilateral investment treaties (BITs) with willing capital-importing countries, an initiative begun in 1959 by Germany and then taken up by other European states. These treaties provided basic guarantees, especially against expropriation, with a relatively modest standard for protection based on 'fair and equitable treatment', fulfilment of contracts and non-discrimination, as well as compensation for any takings. However, on the whole these BITs did not restrict the direct regulatory powers of host states; in particular, they allowed the host state to regulate entry, impose ownership limitations or conditions, and specify performance requirements (Dolzer & Stevens 1995). Indeed, one analyst described them as embodying 'nationalism behind a liberal façade' (Vandevelde 1998a; see also Vandevelde 1998b). This explains the willingness of developing countries to negotiate such agreements, since they continued to consider controls over inward investment important to ensure that it contributed to economic development, as evidenced in the success of the East Asian developing countries, including China.

During the 1980s, however, pressure grew for countries wishing to attract investment to adopt a completely 'open door' policy, and to abandon access controls, ownership restrictions, and performance requirements. This stance was embodied in the US model BIT of 1980, which required *pre-entry* National Treatment (although this was subject to specific exclusions in actual treaties negotiated), and this approach has been adopted also by Canada and Japan. This apparently minor legal change would have enormous regulatory implications, since it would give foreigners a right of entry, to establish local branches or affiliates, buy assets and bid for contracts. Most capital-importing countries continued to resist these pressures, and rejected suggestions that a multilateral investment treaty along these lines be included in the Uruguay Round of trade negotiations which resulted in the

¹⁵ An earlier version of this and the next section was published in an article in the *Columbia Journal of Transnational Law* (2003) 42:131.

¹⁶ Lipson 1985.

¹⁷ See footnote 3 above

establishment of the WTO. However, the negotiation of BITs gathered momentum in the 1990s (UNCTAD 1998), and some of these treaties conceded pre-entry National Treatment.¹⁸

In the meantime, the attempt to develop a multilateral agreement on investment (eventually known as the MAI) shifted from Geneva to Paris, where the negotiations were hosted by the OECD, only to be abandoned in failure after three years in 1998 (Picciotto and Mayne 1999). It was apparently a surprise to some that even developed countries, which account for the bulk of international investment, and are generally both exporters and importers of capital, failed to agree a strong investment liberalization and protection standard. However, a major reason for the difficulties encountered between the negotiating governments, exacerbated by the criticisms from an internationally-organised campaign and articulated by their increasingly concerned domestic constituencies, was the realization of the potentially far-reaching deregulatory impact of this type of treaty. This resulted in growing lists of national exclusions, as well as more general carve-outs in the agreement itself, negating its intended purpose of establishing a high level of market access and investment protection (Picciotto 1998).¹⁹ Despite the failure in Paris, the issue was raised again in Geneva, and added (at the behest of the EU) to the WTO's Doha negotiations agenda, until removed after the Cancun meeting in 2003 due to continued developing country resistance. Nevertheless, investment provisions, as well as an enormous swathe of other economic regulatory issues, are included in the increasing number of bilateral 'free trade area' (FTA) agreements which the US, the EU and several other OECD states have been negotiating with some willing states. These appear intended to put pressure on the multilateral negotiations in the WTO, by establishing new benchmarks for treaty obligations.

This new generation of international agreement is creating much more far-reaching obligations to allow foreign business access to national economic space, involving legally binding restrictions on national state regulatory powers. These entailed not only the removal of border controls on admission of investments, but also granting foreign investors legal rights to challenge domestic laws through international arbitration, by alleging de facto discrimination or on the grounds of the taking of a property right. The increase in these legal challenges, brought under both BITs and NAFTA's chapter 11,²⁰ has demonstrated the willingness of some investors to

¹⁸ By September 2004 the US had negotiated 48 such treaties, 38 of which had been ratified. Russia had not yet ratified the treaty signed in 1992, and none of the rapid-growth economies in east Asia and Latin America had ratified a BIT with the US, with the exception of Argentina (in 1991, entering into force in 1994): see <http://www.state.gov/e/eb/rls/fs/22422.htm>, last accessed 30/11/2004, and for a full database www.tcc.mac.doc.gov.

¹⁹ At the same time the eruption of the financial crisis in Asia in 1997, spreading also to Russia, drew attention to the dangers of a rapid and unregulated liberalization of investment.

²⁰ The cumulative total of all known cases brought under international investment agreements had risen to 160 by November 2004, 92 of which had been initiated after 2001; even allowing for spate of claims (37) against Argentina following its financial crisis of 2001, this is a big rise (UNCTAD 2004). It is also an under-estimate, since only the World Bank's ICSID facility maintains a public record of claims, and many agreements give investors the option of ad hoc arbitration procedures with greater secrecy.

devote large resources by resorting to international law to challenge national state actions, or seek massive compensation for failed ventures.²¹ Arbitral tribunals have in practice been generally cautious, with some exceptions, in exercising their powers, which are potentially considerable due to the open-ended nature of the general standards expressed in the treaties (Peterson 2004, 11). Nevertheless, the availability of recourse to this procedure clearly gives foreign firms considerable additional powers of pressure against host governments.

The primary effect of these very broad international obligations is to undermine very many existing national economic governance arrangements which may be argued to discriminate against or hinder market access by foreign firms. However, the outcome is not generally a reduction but an increase of formal regulation, often exercised by specialist bodies relatively independent of the central state. The activities of these sub-state regulatory bodies is increasingly coordinated internationally and circumscribed by international standards.

International Business Standards and 'Soft Law'

The slogan 'No Rights without Responsibilities', adopted by campaigners against the MAI (Mabey 1999, 65), encapsulated the criticisms levelled by many analysts of the emerging regulatory framework for international business. They point in particular to the weakness of the social responsibility standards established at the international level for business, compared to the strength of the rights that firms have been given to challenge national laws, outlined above.

In the 1970s, pressures to adopt global standards of responsibility for TNCs were generally channeled into the formulation of non-binding Guidelines or Codes by intergovernmental organizations (UNCTAD 1996). Some had a broad scope, such as the ILO Tripartite Declaration of 1977, the OECD Guidelines of 1976, and the aborted UN Code of Conduct for TNCs; others a more specific regulatory focus, such as the UN Set of Principles for the Control of Restrictive Business Practices of 1980; and some were aimed at specific industry practices, such as the WHO's Baby-Milk Marketing Code of 1981 (Picciotto 1999; Richter 2002).

The decision for these instruments to take the form of non-binding codes or guidelines, sometimes described as 'soft law', was not, however, simply due to a desire to weaken them. A major advantage of such Codes is that they can be expressed in terms of obligations directly applicable to individuals and firms. Also, it is often easier to reach agreement in much more detailed and specific terms when drafting this type of code than an instrument which is intended to be solemnly binding. Yet there is nothing to prevent a non-binding code from being implemented

²¹ The disputes range over a wide swathe of issues, including the regulation of broadcasting or newspapers, exploitation of precious metals, environmental zoning of factories, licensing of waste disposal, financial services regulation, and licensing of cellular telecommunications. They often entail high-profile political or social repercussions of a business activity, such as the long-term water-supply contract concluded by the city of Cochabamba (Bolivia) with a consortium led by Bechtel, leading to substantial increases in rates, followed by riots and eventually a declaration of martial law; company executives were forced to leave the city when told their safety could not be guaranteed (Peterson 2004, 17-19). Recently announced arbitration claims include that by Menatep, the investment vehicle through which Yukos is owned (Jack and Munter 2004), and the Dabhol power project in India involving Enron, Bechtel and General Electric.

as law by states: indeed, many states have enacted laws based on the Baby-Milk code. Conversely, states often fail to ratify treaties, which thus may have little or no practical effect.

Not surprisingly, the impact of these instruments has greatly depended on the effectiveness of the mechanisms for monitoring and ensuring compliance, and especially on the strength of social pressures brought to bear mainly through civil society organizations (trade unions and other social movements). Too often the fact that they were not legally binding was used to justify a failure or even refusal to back up these codes with adequate procedures for monitoring compliance or dealing with alleged violations. Thus, 'non-binding' was assumed to mean 'aspirational', which is not at all the same thing.

At the same time, international law has developed few if any instruments governing the responsibilities of international business. For example, only in 1997 did the OECD agree a treaty to combat bribery of foreign public officials, although a draft had been developed through the UN in 1979 (UNCTAD 1996, I-103). The UN returned to the issue in 2001, and a Convention against Corruption was eventually opened for ratification in 2003. However, it should be stressed that these are traditional treaties, which simply create obligations for states. They are required to bring their national laws in line with the treaty requirements, and enforcement is left to each state. There has been some attempt to improve the procedures for monitoring the effectiveness of state implementation. In particular, the OECD Convention involved a follow-up programme through a working group which has used 'peer review' procedures to evaluate implementation. But the treaties themselves do not create any obligation on individuals or firms, and it is largely left to state authorities to ensure compliance.

Thus, the bulk of the instruments developed since the 1970s to establish standards of responsibility for international business not only remained non-binding in form, but were generally supported by weak mechanisms for monitoring compliance. This was the background to the emergence in the late 1990s of corporate codes.

Corporate Codes: Effective Tool or PR Hype?

The sudden spate of adoption of corporate codes from the mid-1990s took many by surprise, and raised new questions for both critics and defenders of big business. The mantra of liberalization suggested that if business were left free to pursue profit, economic growth and social development would follow. Yet here were companies voluntarily committing themselves to a wider range of social and environmental goals. It was quickly apparent, however, that this did not originate from simple altruism on the part of their directors, but from an awakened awareness of the importance of the firm's image to its customers, workforce, and investors. Reputational damage could quickly hit bottom-line profits, while investment in social responsibility could reap long-term benefits.

Some learned this lesson with a dramatic suddenness. A notable case in point was Royal Dutch Shell, which in 1995 suffered a double blow. The company's decision to end the life of its Brent Spar oil platform by sinking it in the North Sea was exposed to the media spotlight by a dramatic stunt by Greenpeace, although the activists' denunciation of Shell's environmental irresponsibility was later felt to have been exaggerated. On the other side of the world, a campaign by the Ogoni people in

the Niger delta, culminating in the Nigerian government's putting to death of nine of their leaders including the writer Ken Saro-Wiwa, drew the world's attention to the company's apparent indifference to the environmental damage and social deprivation which its highly profitable activities did nothing to alleviate, and seemed indeed to exacerbate. By April 1998, the firm produced the pioneering Shell Report 1998, subtitled *Profits and Principles - Does There Have to be a Choice?*, which stated it was 'about values. It describes how we, the people, companies and businesses that make up the Shell Group, are striving to live up to our responsibilities - financial, social and environmental'. These were the three dimensions of the so-called 'triple bottom line' of sustainable development, against which Shell proclaimed that all companies would soon be expected to account for their activities. Shell went even further in recasting its annual report for 2000 entirely in terms of social responsibility and health, safety, and the environment (Williams 2000).

Shell's experience showed that it was not enough for a firm, especially a large TNC, to manage its operations simply in compliance with the law, and leave it to governments to deal with social issues in the public interest. The decision to sink the Brent Spar complied with all the regulations agreed among the states bordering the North Sea. The failure of oil wealth to benefit ordinary people especially in the oil-producing regions in Nigeria could be attributed to the distribution formula which allocated the bulk of revenues to the central government, where it was dissipated in corruption (Frynas 2000, Wheeler et al. 2002). None of this protected the company from consumer boycotts and loss of employee morale resulting from damage to its reputation. As one commentator put it, 'close observers of Shell have said the company's reaction to those crises was not that they were temporary unpleasanties to be weathered but truly corporate culture-altering events that shook the staid old giant to its core' (Williams 2000).

Shell's experience was replicated by other companies sensitive to consumer concerns and reliant on brand-names, for example in the apparel industries and retailing. High-profile campaigns on US campuses targeted firms such as Nike and The Gap for their use of supply-chain sub-contractors employing workers who were often under-age and in sweatshop conditions. Incidents such as the fire in 1993 at the Kader toy factory in Thailand which supplied major toy companies, and videos showing children in Pakistan's Sialkot stitching footballs with a FIFA label prior to the 1996 World Cup, were used by international trade union organizations to highlight breaches of international labour standards (Justice 2002). Firms found that the brand-names trusted by consumers which were often their most significant asset could quickly be endangered by campaigns which revealed the 'labour behind the label' (Klein 2000).

Within a short space of time many companies and industrial associations had adopted voluntary codes. An OECD study collected some 246 codes, about half of which were issued by individual firms, and some 40% by associations, the remainder mainly by stakeholder coalitions and NGOs (OECD 2000). They generally dealt with matters of concern to consumers, such as labour and environmental standards, as well as compliance with law, and issues of potential risk to the firm, such as bribery and corruption. There were, however, considerable variations both of subject matter and of style, especially in the degree of specificity.

This revival of interest in establishing global standards of corporate responsibility once again drew in intergovernmental organizations. Thus, UN Secretary-General, Kofi Annan, in a speech to the World Economic Forum, Davos, on 31 January 1999, challenged world business leaders to 'embrace and enact', both in their individual corporate practices and by supporting appropriate public policies, nine universally agreed values and principles derived from UN instruments, which were embodied in a UN Global Compact (www.unglobalcompact.org). However, this initiative was in turn criticized by activists as no more than an attempt to lend the legitimacy of the UN to corporate public relations hype (TRAC 2000). The International Labour Organization has also become involved, especially in relation to labour standards, and has established a business and social initiatives database (www.ilo.org/basi).

The private and voluntary nature of these initiatives raised two central questions. These were the rather haphazard and selective content of the codes, and the lack of effective implementation mechanisms or procedures for monitoring compliance. Thus, an analysis by the ILO of labour-related content in approximately 215 codes showed that the majority (especially of enterprise-drafted codes) used self-defined standards; reference to national law was relatively frequent especially in relation to wage levels; but no more than one-third referred to international labour standards even in general terms, and only 15% (almost exclusively those developed with trade union or NGO involvement) referred to freedom of association and/or collective bargaining (ILO, 1998, para. 46ff). The OECD study showed only 13% of the codes referring to labour issues mentioning ILO standards, and 30% freedom of association (OECD 2000, paras. 18-19).

As regards implementation, the bulk of corporate codes rely on internal follow-up and monitoring (OECD 2000, para.85). Even where there is provision for external involvement, for example in third-party or industry-association codes, critics have raised serious doubts as to whether this is genuinely independent. Lack of effective implementation was the main reason for refusal of trade unions and some NGOs to join the US Fair Labor Association (Jenkins 2002, 24). Private management consultants have of course been quick to offer their services for compliance auditing, but doubt has been cast on both their independence and competence (LARIC 1999, O'Rourke 2002). On the other hand, NGOs have been wary of being drawn into this role, for fear of becoming co-opted and merely lending their legitimacy to corporate public relations (Kearney 1999). The ILO's survey document raised the possibility of its adopting a proactive role, towards both specification of the content of codes and verification procedures (ILO 1998, para. 138), but in practice it has adopted the minimalist alternative of providing advice and information (ILO 2003).

The self-selected nature of the content, and the lack of independent external implementation or monitoring mechanisms, inevitably generate scepticism about the value and effectiveness of corporate codes. Although serious study of the effects of codes is still in its infancy, there is some evidence that firms adopting a code do not perform any better against benchmarks relevant to that code's standards.²²

²² See notably the study by King and Lenox (2000) of the chemicals industry's Responsible Care programme.

Public scepticism of corporate codes has been further fuelled by the startling revelations of unscrupulous behaviour on a massive scale by senior managers, following the dramatic collapses of corporate giants such as Enron and WorldCom and the crash which followed the dotcom bubble. The enquiries into Enron, for example, revealed that a combination of financial engineering and sophisticated tax avoidance enabled it to declare in its financial statement between 1996 and 1999 net income of \$2.3bn, but losses for tax purposes of \$3bn (McIntyre and Nguyen 2000; US Congress 2003, p.6). Significantly, only one of the codes analysed in the OECD study mentioned taxation (OECD 2000, para.29), yet international tax avoidance was pioneered by TNCs and has become a major factor undermining and destabilizing public finance (Oxfam 2000). This loss of public confidence in corporate management has so far led mainly to some strengthening of corporate governance mechanisms, especially the US Sarbanes-Oxley Act of 2002.

III INTEGRATING CORPORATE CODES WITHIN A GLOBAL RULES-BASED FRAMEWORK

Embedding Codes in Law

Much of the discussion of corporate codes is based on the assumption that by definition they exist outside or beyond law. Their advocates stress that their strength lies in their voluntary character, which gives them the flexibility to be tailored to the characteristics and circumstances of the business, and to raise standards by encouragement and self-generated commitment, as opposed to the rigidity and instrumentalism of externally-imposed and bureaucratically-enforced law. Corporate critics and sceptics, on the other hand, challenge the effectiveness of self-selected and self-monitored standards.

On closer examination, this sharp distinction between voluntary codes and binding law can be seen to be inaccurate, undesirable and unnecessary. Codes entail a degree of formalization of normative expectations and practices and, even if they do not directly take the form of law, they may have indirect legal effects. The challenge is to design a framework or architecture which can combine the strengths of corporate codes and formal law. Codes may have legal effects in a number of ways.²³

Firstly, they may be enforceable through private law. For example, they may constitute or form part of contractual agreements. This may be the case where a firm formulates a code for its business networks, for example a brand-name retailer for its sub-contractors and suppliers, or a major oil company such as Shell for its retail outlets. Typically, companies have in practice preferred to avoid such effect, by specifying that such codes are not intended to be formally legally binding. However, it is also generally made clear that if identified breaches of the code are not followed up by remedial action, they would lead to non-renewal of commercial contracts (Fridd & Sainsbury 1999, p.231). In addition, obligations to facilitate monitoring of compliance may form part of the formal commercial contract. Associational and Third-Party codes are also likely to have effect as contractual arrangements, under which participating firms may be entitled to certification (which can be used in their

²³ A literature survey focusing on national laws especially in Europe is provided by Jülich and Falk 1999.

product and brand-name marketing) provided the agreed monitoring mechanisms verify that they comply with the provisions of the Code.

This flexible relation between formally binding legal obligations and more specific standards which in practice determine when to invoke the law is a familiar concept. It has long been known that breaches of formal contractual obligations in business agreements are often dealt with flexibly (Macaulay 1963). Hence, the formally non-legal status of supply-chain codes should not in itself be a concern, unless it is a signal that the code is not intended to be taken seriously.

Codes may also lead to legal enforcement by private parties based on national state regulatory law. For example, firms proclaiming their adherence to a code create expectations which may be legally enforceable by their customers or other stakeholders. Thus, the California Supreme Court has allowed an action to be brought against Nike for breach of false advertising and unfair competition laws. The action challenges the accuracy of the Report commissioned by Nike on compliance with its corporate code by suppliers, and used in Nike's corporate publicity, which had found no evidence of illegal or unsafe working conditions at Nike factories in China, Vietnam, and Indonesia (*Kasky v. Nike* 2002).

At the level of international law also, voluntary standards or codes can be given a legally binding status. For example, the World Trade Organization (WTO) agreements on *Technical Barriers to Trade* (TBT) and on *Sanitary and Phytosanitary Measures* (SPS) establish an obligation on states to use relevant standards developed by appropriate international organizations 'as a basis for' national regulations affecting internationally-traded goods. This has the effect of converting standards developed by organizations such as the Codex Alimentarius Commission, which those bodies themselves do not regard as binding, into mandatory obligations for WTO members.

Thus, there is no rigid separation between 'soft' and 'hard' law, between totally voluntary codes and strictly binding laws. The interesting and important question therefore is how to construct an 'architecture' of normative arrangements which can combine and integrate the two in the most fruitful manner. This requires first an analysis of the strengths and shortcomings of each, and then an evaluation of the different forms of combination.

Analysis of corporate codes, briefly surveyed above, suggests that they have two main advantages. Firstly, they can be tailored to meet the specific needs of particular businesses, and applied with awareness and sensitivity to their particular circumstances and local context. For example, rigid laws strictly applied may be a harmful way to tackle the problem of child labour in poor communities and countries. A simple prohibition against employing children below a certain age may merely result in their being excluded from relatively better-paid jobs in the formal sector and forced to resort to work which is physically and morally much more damaging. Thus, the UK's Ethical Trading Initiative (ETI) Base Code requires adherents to end new recruitment of child labour, but also 'to develop or participate in and contribute to policies and programmes which provide for the transition of any child found to be performing child labour to enable her or him to attend and remain in quality education until no longer a child'.

This suggests that laws should establish minimum acceptable requirements, while codes should be aspirational and aim at significant enhancement, as well as providing constructive arrangements for achieving such improvements.

The flip side of this flexibility, however, is one of the significant disadvantages of codes, their patchy and uneven content, resulting from self-selection. Hence, an important function for the broader governmental and intergovernmental codes (such as the UN Global Compact) is to provide a template of basic principles of CSR, which to some extent they are already performing. However, this has not been expressed as establishing either a basic minimum, or as taking the form of binding requirements. Thus, the flexibility and adaptability of the code format may result in firms picking and choosing from among the standards, effectively diluting them, instead of building more specific provisions and targeted programmes onto them.

This suggests that formal law could play a helpful role in defining minimum standards or templates for the content of codes. These could be amplified or specified in more detail by firms, to tailor the standards to their own circumstances. In this way, corporate codes could provide real value-added, instead of tending to dilute the standards applicable.

An International Framework

Legal frameworks for regulating corporate codes could be established at national, regional, and global levels. An example of a national law is the proposal submitted to the Australian Senate in 1998 for legislation to require Australian TNCs to report on their compliance with a range of defined CSR standards.²⁴ The rejection of this proposal perhaps indicates some difficulties with the approach it adopted. Firstly, it adopted a prescriptive approach by seeking to define directly the CSR standards on which firms should report compliance. This would tend to result in minimalism, a least-common-denominator definition of standards. For example, although the Bill did include a provision on taxation, it was limited to a duty 'to comply with the tax laws in each country in which it operates'. As suggested above, a better approach would be to require firms to draw up their own codes, but based on a minimum specification. Thus, in addition to compliance with national tax laws, firms could be required to establish guidelines to prevent tax avoidance, which could be tailored to their particular type of business and their international structure. Similarly, it is better to ask firms to establish environmental impact assessment and environmental performance standards for themselves, adapted to their own business, while requiring them to be based on required minimum specifications.

The second problem with national requirements is the issue of jurisdiction. A home state which requires specified standards to be complied with not only by companies incorporated under its laws or in respect of activities within its territory, but also by foreign affiliates and for activities abroad, may be accused of excessive or 'extraterritorial' claims to jurisdiction. However, the law need not be blind to business reality. Obligations can clearly be placed on the parent company, and its directors, which can extend to the worldwide activities of the firm, to the extent that

²⁴ Parliament of the Commonwealth of Australia, draft Corporate Code of Conduct Bill (1999-2000, no. 1878), presented by Senator Bourne.

these activities are under their de facto control.²⁵ By requiring parent companies within their jurisdiction to establish CSR standards for the worldwide activities of the integrated firm, home countries would be encouraging such firms to spread best practice internationally, which could be regarded as legitimate.

Nevertheless, it would be easier and in many ways more desirable for such requirements to be agreed internationally as far as possible, so that national law can be based on international agreement. Here again, a new approach seems to be needed. Intergovernmental organisations have faced the dilemma, since the initial movement in the 1970s to develop codes of conduct for TNCs, that they have no power to create legal obligations binding directly on firms. Mainly for this reason, measures such as the OECD Guidelines for TNCs have taken the form of 'recommendations jointly addressed by governments to multinational enterprises'. At the same time, they have been formulated in fairly abstract and general terms. However, it is notable that codes with a more specific focus have been more detailed and specific: a case in point is the WHO Code of Marketing of Breastmilk Substitutes. This indeed has been used by some states as the basis for national legislation. Where it has been felt necessary to establish binding legal obligations, these have been directed at states, and tend to be expressed in minimalist terms even if their focus is specific, as with the anti-bribery conventions mentioned above.

An alternative approach could adopt the technique of a Framework Convention. This has emerged in recent years, as a means of establishing a set of objectives and principles which are binding on states, together with implementation mechanisms and processes for the formulation of more specific norms. Initiated for the purposes of developing regimes for environmental protection (such as Climate Change), the technique has been adapted by the WHO for its proposed Framework Convention on Tobacco Control (Bodansky 1999). Its advantages are that it can establish an organizational and procedural basis to develop new standards, as far as possible through deliberative processes involving a range of civil society as well as governmental participants, providing a stronger basis for mutual trust.

A Framework Convention can also adopt a more flexible approach to combinations of hard and soft law codes. For example, it can establish legal requirements on participating states to lay down specifications for corporate codes in general terms, while providing that they should be based on appropriate internationally-agreed standards which may be developed subsequently. As explained above, the WTO agreements establish a Framework Convention in this sense, since they require states to ensure that national regulations do not create unnecessary obstacles to trade

²⁵ This approach has been adopted by some courts in considering private law claims of liability of a parent company for injuries caused by activities carried out through foreign subsidiaries. It is much easier to accept that home country courts should have subject-matter jurisdiction if the claim is based on the direct liability of the parent (due to the knowledge of the company and its directors and managers of the dangers involved in the activity in question), rather than vicarious liability based on the ownership relation: see *Lubbe et al. v. Cape Industries* (2000). Compare also the consent decree in *The Amoco Cadiz* (1984), which implied that if a firm is operated as an integrated whole, the parent company could be presumed to have knowledge of and involvement in the activities which caused the damage.

by 'basing' them on internationally-agreed standards where they exist. The example of the WTO can also be adapted to deal with the criticism that international investment agreements are one-sided in granting significant rights to investors without any responsibilities. A Framework Convention could provide an umbrella for a number of related agreements which would deal with both investor rights and responsibilities.

The technique of related agreements could be used, firstly, to clarify the impact of investment protection obligations on national law. As with the TBT and SPS agreements under the WTO, a presumption could be created that national measures based on internationally-agreed standards (e.g. of environmental protection, or human rights) would be valid. This would help to prevent disputes or claims based on indirect discrimination or de facto expropriation.

Secondly, international agreements and standards could be associated within a multilateral investment framework either on a required or conditional basis. Some international instruments might be considered to embody such core values and standards that they should form an essential part of the package, just as the TRIPS agreement has made acceptance of basic intellectual property rights a requirement of participation in the WTO system. This might be the case, for example, for the ILO Declaration on Fundamental Principles and Rights at Work of 1998. Other issues which might be regarded as an essential part of a multilateral investment framework, and for which multilateral agreements already exist which could be used or adapted for the purpose, include combating bribery, and cooperation in tax enforcement.²⁶ This model might also be an appropriate way to deal with the difficult problem of tax benefits and incentives, by associating a code on unfair tax competition, along the lines of the codes now being applied within the EU and by the OECD. Association of such agreements within a single framework would help to create public confidence that the benefits extended to investors by globalization would be complemented by a strengthened framework of international cooperation to prevent abuse of the freedoms of the global market.

Both agreements and non-binding standards could also be associated on a basis of reciprocal conditionality, which would provide flexibility. Thus, states could choose to extend investment protection benefits only to investors from states participating in specified agreements. Such conditionality could also be applied to enterprises, through an appropriate Denial of Benefits clause. This would permit a state to deny the benefits of investment protection to enterprises breaching specified or related standards. Thus, for example, a host state could rule out bids for licences or concessions, or cancel them, if the enterprise concerned were found to be in breach of relevant standards. Thus, a firm which breached Prior Informed Consent procedures, or provisions of the WHO Infant Formula Code, could be denied the right to bid for public contracts.

²⁶ The 1988 Convention on Mutual Administrative Assistance in Tax Matters agreed in the Council of Europe and the OECD provides an existing framework for cooperation which goes beyond the minimal provisions of bilateral tax treaties. It has now been supplemented by the OECD Model Agreement on Exchange of Information in Tax Matters, adopted as part of the drive against Harmful Tax Practices.

Finally, relevant agreements and standards could be associated within a multilateral framework for investment on an opt-in basis. States and enterprises could be encouraged to sign up to a range of agreements and codes as appropriate to their activities and circumstances. This would help to provide a higher visibility for positive regulatory standards, as well as helping to authenticate both those standards and their monitoring and compliance mechanisms.

CONCLUSIONS:

I have argued that a shift has occurred over the past thirty years in the nature of the world system, from classical liberal internationalism to multi-level global governance. The regulation of business or economic activities carried out by TNCs lies at the heart of these changes. It might help to illustrate and evaluate them if we briefly consider two salient examples.

The first is suggested by the discussion in section I above of the international commodity agreements. These attempted to establish an inter-state arrangement for ensuring stable and fair prices, so that governments acted on behalf of producers and consumers in negotiations over what should be a fair price. As already mentioned, the difficulty of agreeing what should be a fair price by this type of political mechanism proved intractable. However, the breakdown of the commodity agreements re-energized attempts to provide fair prices directly to producers in poor countries through fair-trade movements, focusing mainly on consumer products such as coffee and tea, and based on labelling and certification systems which have become internationally harmonized.²⁷ Indeed, it has recently been reported that the success of the brands set up by the Fairtrade Foundation have led Kraft and Nestlé to develop their own 'sustainable development' coffee brands (Bowers 2004). These are reportedly to be certified by the US-based environmental NGO the Rainforest Alliance, but will not aim to pay the producing farmers a significant premium over the market price, as does Fairtrade, so that the price premium charged to the consumer would be less, allowing Kraft and Nestlé to undercut Fairtrade. Whatever the progress of these battles, it can be said that there is now a much more open set of political processes than under the old state-based system, with greater accountability and more opportunity for grass-roots political engagement.

The second example is provided by the tragedy of the gas leak at Bhopal, the world's worst industrial disaster, which occurred 20 years ago. The issue of responsibility for the failure of the plant's safety system was dealt with essentially under the state-based system. Union Carbide, the TNC involved, argued that the issue should be dealt with in India and under Indian law, whereas claims were made on behalf of the victims to have the matter adjudicated in the US courts. Under the classical liberal system, this issue depended on the relative liability of Union Carbide Corporation (UCC), the US parent company, which had just under a 50% share of the operating company, Union Carbide India Limited (UCIL), due to the limits on foreign ownership imposed by Indian law at the time. The allocation of responsibility both between the different corporate entities involved and especially as between the home state (the US) and the host state (India) makes it hard if not impossible to focus on the central question of whether the Bhopal plant was

²⁷ Fairtrade Labelling Organizations International, <http://www.fairtrade.net>.

designed and operated under acceptable standards for this type of process. Concern about the industry's poor public image due in part to events such as the Bhopal disaster motivated the US Chemical Manufacturers' Association to develop the Responsible Care programme to raise safety and environmental impact standards in the industry (King & Lenox 2000). It now operates as a world-wide system coordinated by the International Council of Chemical Associations. Once again, it is evident that this provides a more transparent system, with greater accountability and more opportunities for direct engagement by groups or organizations of workers, affected communities or concerned citizens, compared to the state-based system.

Undoubtedly, however, these new governance arrangements have some significant limitations, and offer political challenges. This paper has attempted to analyze some of these limitations, as well as putting forward some proposals for overcoming them, as one contribution in response to those challenges.

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