

MULTINATIONAL CORPORATIONS AS OBJECTS AND SOURCES OF TRANSNATIONAL REGULATION

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It was my great pleasure to participate in the 2007 International Law Weekend organized in New York City by the American Branch of the International Law Association and held at the House of the Association of the Bar of the City of New York on October 25–27, 2007. My presentation, entitled “Multinational Corporations as Sources of Soft Transnational Regulation” was part of the panel “International Law Making and Non-State Actors: Toward New Paradigms?”

As described in the program notes for the conference, the panel addressed the impact of non-state actors on international lawmaking as well as the regulation of non-state actors under international institutional frameworks. It explored questions regarding the capacity of the supranational legal or regulatory framework to account for the activities of non-state actors, particularly where alternate avenues for imposing responsibility and accountability on non-state actors may exist at the national and sub-national level. This essay was my contribution to that effort. I focused on the impact of multinational corporations in the context of corporate social responsibility as a regulatory policy

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framework.¹ It seeks to develop earlier work on the dynamics of regulatory frameworks for multinational corporations as an expression of both public and private power.²

One of the most interesting dynamics of modern global law involves control of the governance mechanics of multinational corporations.³ From the perspective of public law, the objective has been to develop a network of regulatory systems through which state actors can control such entities. From the perspective of the multinational corporation, the objective has been to develop governance systems of its own to regulate the factors of production of wealth wherever located. My objective today is threefold: first, I want to describe the traditional public law regulatory framework and suggest its limitations and failures of perspective. Second, I want to illustrate the new soft regulatory framework in which the state is substantially absent and the center of regulatory activity shifts to the corporation. And third, I want to flush out some of the more important characteristics of this new regulatory framework and suggest its contours and implications within modern economic globalization.

I. THE TRADITIONAL PUBLIC LAW REGULATORY FRAMEWORK

The traditional regulatory framework for managing multinational corporations is grounded in public positive law. The sources of that positive law could

1. I agree, for example, with Jennifer Zerk, that the classic state centered model of corporate regulation is, in the modern global context, ineffective at best and counterproductive at worst, and that national governments have recognized this and are currently experimenting with alternative forms of regulation, including "self-regulation, use of incentives, awards and accreditation systems, market-based initiatives, disclosure obligations . . . and education campaigns." JENNIFER A. ZERK, *MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW* 37 (2006). I am less sure that the solution might be found in international substantive regulation or in the extraterritorial application of home state law. See *id.*, at 145. See Larry Catá Backer, *From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations*, 39 *GEO. J. INT'L L.* (forthcoming 2008).

2. See, e.g., Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39(4) *CONN. L. REV.* 1739 (2007). See also Larry Catá Backer, *Ideologies of Globalization and Sovereign Debt: Cuba and the IMF*, 24(3) *PENN ST. INT'L L. REV.* 497 (2006); Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37(2) *COLUM. HUM. RTS. L. REV.* 287 (2006) [hereinafter Backer-COLUMBIA]; Larry Catá Backer, *The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, Larry Catá Backer, *Economic Globalization Ascendant and the Crisis of the State: Four Perspectives on the Emerging Ideology of the State in the New Global Order*, 17(1) *BERKELEY LA RAZA L. J.* 141 (2006).

3. See Michael K. Addo, *Human Rights and Transnational Corporations—an Introduction*, in *HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS* 3 (Michael K. Addo ed., 1999).

be divided into four components (or fields)—sometimes related and sometimes oblivious to the effects of one set of regulatory frameworks over another. These are domestic corporate law, domestic substantive law, international substantive law and international process or enforcement authority.

A. Domestic Corporate Law

Domestic corporate law, or more generally the law of business organizations, was the traditional method for managing economic enterprises. Natural persons are born; collectives are created. Many collectives do not need the imprimatur of a government to exist. Religion, social organizations and affinity groups exist because people come together and stay together because (and for so long as) they desire. To obtain certain benefits under law, and principally the benefit of being treated as an autonomous individual under law, an entity must be created in accordance with law. Most jurisdictions now provide rules for the creation of a number of economic and other collectives. By consenting to creation under law, these entities enjoy special status. In return, the state retains the right to regulate certain critical aspects of their organization. That regulation serves as the foundation of corporate or entity law. The state that creates an entity is generally given authority to regulate its internal affairs. That regulation touches on the relationships between the primary stakeholders in these entities—for corporations, that includes shareholders, officers and directors. More importantly, the regulatory state also retains the power to determine which stakeholders are to be included within the regulatory framework. That varies from jurisdiction to jurisdiction. As a consequence, state-created entities like corporations are accorded status as independent and autonomous entities, like natural persons. Within the United States (US), there has been a century-long debate about the obligations of these entities. At one end, economic entities are viewed as essentially private and geared to the maximization of the welfare of its primary stakeholders—shareholders.⁴ At the other end, extreme economic entities are viewed as mixed public/private entities with social responsibilities beyond the periodic charitable donation.⁵

Of course, the creation of economic entities can reach only those entities that a state is empowered to create. In some jurisdictions that may include any collective that meets the statutory requirements and submits to the authority of

4. Franklin A. Gervurtz, *Getting Real About Corporate Social Responsibility: A Reply to Professor Greenfield*, 35 U.C. DAVIS L. REV. 645, 648–49 (2002) (citing *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (1919)). See also Backer-COLUMBIA, *supra* note 2, at 296; Susan J. Stabile, *Using Religion to Promote Corporate Responsibility*, 39 WAKE FOREST L. REV. 839, 841 (2004).

5. See Backer-COLUMBIA, *supra* note 2, at 298; Stabile, *supra* note 4, at 846. See generally MARK J. ROE, *POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT* (2003).

the state, irrespective of the place of their operation. In other jurisdictions, states seek the power over any entity operating in substantial respect within its territory. In most jurisdictions, entities created (and recognized as such) by one government can be recognized by others. Sometimes governments give entities created in one jurisdiction the power to operate in another as if they had been created there—except that the regulation of the internal organization of the entity is still subject to the regulatory authority of the creating state.

B. Domestic Substantive Law

However organized, economic entities are also regulated to the extent of their activities. Like individuals engaged in similar activities, economic collectives are subject to the legal regimes of the places in which they operate. These include virtually all aspects of law-making in early twenty-first century administrative states. The extent of this regulation, of course, is bounded by the territory of the regulating state. States, however, have been seeking to extend their authority beyond their borders under some circumstances. Usually that involves the extension of substantive regulation by entities operating or created within the home jurisdiction with respect to their activities in other states. Examples include the application of the Foreign Corrupt Practices Act against US companies for activities abroad,⁶ and the regulation of the activities of foreign corporations seeking access to American financial markets under the Sarbanes-Oxley Act of 2002.⁷

C. International Substantive Law

This field of regulatory effort can itself be divided into two unequally important branches, hard law and soft law. Hard international substantive law has focused for some time on aspects of human rights and development that may touch on the activities of multinational corporations.⁸ But that focus is indirect. Many powerful states continue to oppose the idea of a direct relationship between international law and economic collectives, and draw a sharp distinction between political collectives and everything else. As a result, most of the lawmaking in this area has been directed to states. Provisions are aimed at developing some system of basic harmonization of behavior norms to

6. Foreign Corrupt Practices Act of 1977, 15 U.S.C.A § 78dd-1 (West 2008).

7. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as 15 U.S.C.A § 7201) (West 2008).

8. See Julie Campagna, *United Nations Norms On The Responsibilities Of Transnational Corporations and Other Business Enterprises With Regard To Human Rights: The International Community Asserts Binding Law On The Global Rule Makers*, 37(4) J. MARSHALL L. REV. 1205 (2004); David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, 97(4) AM. J. INT'L L. 901, 901 (2003).

be implemented by states within their legal orders. Soft international law is both powerful in its own way and hortatory. It is represented in the growing business of providing multinational corporations with guidelines and standards for the conduct of its businesses across borders. Production of these guidelines has not been the monopoly of public bodies though both international institutions and national governments have sought to play a part. Among the leading efforts of such groups are the United Nations' Global Compact⁹ and the Organisation for Economic Co-Operation and Development's Guidelines for Multinational Enterprises.¹⁰ But the private sector, and especially the global civil society sector, has been busy producing guidelines of their own.

D. International Process

This regulatory framework has grown to prominence since the end of the Second World War. It seeks to make dispute resolution easier or more effective in a cross-border context. Great strides have been made in forging global systems of alternative dispute resolution, and some progress has been made in the recognition and enforcement of foreign judgments. But there is still much debate about the shape and focus of any efforts in this area. Many states are unwilling to give up cherished procedural devices and most states are reluctant to turn over control of the judicial process to extra-territorial bodies. In addition, many states still nurture weak or underdeveloped systems of dispute resolution.

E. Limitations of this Regulatory Framework

This regulatory framework has proven both durable and effective in the regulation of domestic undertakings, even those that engage in significant amounts of transnational business. However, it has proven to be less useful in the management of multinational corporations and similar entities. The principal problem has been a matter of territorial disjunction. The regulatory power of states tends to extend no further than their political borders. I have indicated that all states attempt to push those borders out a bit—to project domestic regulatory power abroad—but this is the exception rather than the conventional way of regulation. At the same time, multinational corporations and transnational actors, tend to operate across political borders—to move

9. See United Nations Global Compact, What is the Global Compact?, <http://www.globalcompact.org/AboutTheGC/index.html> (last visited, Jan. 23, 2008).

10. See Organisation for Economic Co-Operation and Development [hereinafter OECD], *The OECD Guidelines for Multinational Enterprises*, available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (recommendations addressed by governments to multinational enterprises in a number of governance areas including employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation).

assets, operations and activities in ways in which political borders become incidental to their activities.¹¹ Multinational corporations may take advantage of differences in territorial regulation in deciding the nature and character of local investment, especially in a legal context in which the free movement of capital is encouraged.¹² Since more than one state can regulate various aspects of the operations of a multinational corporation, the latter might be able to evade regulation by a strategic elaboration of its operations. When a multinational entity does not like a particular regulatory scheme, it can leave and a regulating state cannot reach the activities of entities subject to the substantive regulation of other states. Many states have been reluctant to concede authority over economic enterprises to supranational or international organs.¹³

The territorial limits of regulatory power—so simple and conventional a doctrine that it might be easily overlooked—tend to have the greatest effect on the management of the activities of multinational enterprises.¹⁴ But territorial limits are compounded by several other regulatory effects, each of which tends to have a peculiar effect when undertaken by multinational enterprises. The first includes a cluster of domestic and supranational regulatory reforms that have substantially eased restrictions on the movement of capital and investments across borders. Multilateral and bilateral trade and investment agreements, agreements between large enterprises and governments, privatization of governmental functions in favor of private enterprises and changes in domestic law (as states compete to attract global capital) have all contributed to an environment in which large multinational enterprises can more easily disperse assets and operations across borders. In this context, law becomes a factor in the production of profit—like labor and capital—to be assessed (and on account of which) business decisions will be made.

The second focuses on the effects of legal personality. There are two characteristics of legal personality that work to the advantage of multinational corporations. The first is the autonomy of every corporate actor. Each corporation stands as an autonomous individual. The second is that one legal person may own another. This latter characteristic makes it possible to construct large and complex networks of legally autonomous persons, owned ultimately by shareholders of a parent or controlling entity. Together, these two characteristics make it possible to disperse operations globally but in a way that significantly limits the liability of the entire enterprise for the actions of any of

11. See, e.g., LESLIE SKLAIR, *THE TRANSNATIONAL CAPITALIST CLASS* 38–48 (2001).

12. See, e.g., Christian Bellack, *How Performance Gaps Between Domestic Firms and Foreign Affiliates Matter For Economic Policy*, 13(2) *TRANSNAT'L CORPS.* 29 (2004), available at www.unctad.org/en/docs/iteit20045a3_en.pdf (last visited Mar. 22, 2008).

13. See PETER T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 3–15 (1995).

14. See Tania Voon, *Multinational Enterprises and State Sovereignty Under International Law*, 21 *ADEL. L. REV.* 219, 244 (1999).

its parts. While some states have sought to extend their authority over integrated networks of corporations—for example, by extending notions of enterprise or related-entity liability—those efforts are still in their initial stages. And in any case, many of these efforts flounder on the shoals of governmental resistance to projections of power by one state outside its borders—and enterprise liability has the effect of permitting the regulating state to control activity in another state by regulating the enterprise.

The third is a function of legal commodification. If economic entities may now effectively choose among legal regimes, that is, decide which among law producing political states it will establish operations and invest resources, then the legal maturity of a political state will have a significant regulatory effect. Where states have a less developed legal system, and an inexperienced or corrupt legal system, multinational corporations may be able to assert more effective control over their operations in that state. Conversely, where stability is desirable or where there is much money to be made, a multinational enterprise might be willing to put up with a more intrusive and sophisticated regulatory environment. In any case, in a global environment in which states compete for investment funds for development of local economies or otherwise compete for capital, law will serve as a commodity through which each competing state will seek to lure economic activity. This is a sort of “Delaware Effect” now understood in essentially economic terms. Some lawyers and political scientists though, may find it harder than most to see law as just another commodity offered for sale, or perhaps as a factor of production.

In addition to these systemic limits, the rise of the current system of economic globalization has produced something of a shift in the sense of the function and character of multinational corporations. Contemporary globalization has produced a conflation of sorts among public and private spheres, emphasizing markets and the diminished role of states in economic regulation.¹⁵ No longer strictly private actors servicing their principal stakeholders for their mutual benefit, corporations and other economic enterprises are increasingly seen as shouldering a set of public or socially focused obligations. States have increasingly sought to privatize governmental activity, including everything from garbage collection, to the operation of border and customs operations at points of entry, to the maintenance of prisons and the conduct of military operations. The distinctions between economic and political collectives become fuzzy in a world in which states become participants in the market and economic enterprises assume traditional governmental functions.

Some also see economic enterprises as political actors. Starting with the complicity of certain corporations in the overthrow of the Allende regime in Chile in the 1970s, multinational corporations have been implicated in the

15. See, e.g., THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 14 (2nd ed. 2000).

elaboration of political action. This has been thought unseemly, since direct political action has traditionally been limited to natural persons, political factions and domestic enterprises. Moreover, the ability of the largest economic enterprises to negotiate agreements with states gives them a position similar to nation states able to negotiate treaties. Where such activities are conducted by multinational enterprises, it appeared that sovereign authority slipped from the state and its citizens to foreign organizations. Enterprises appeared to acquire the status and power of states without any of the public obligations, responsibilities or accountability usually demanded of political governments.¹⁶

As a consequence, the last half-century has seen a vigorous debate about the status, character, obligations and sources of regulation of multinational enterprises (and principally those organizations operating in corporate form) that continues unabated.¹⁷ In its current form, the debates center on four macro issues that grow out of traditional methods of legal regulation of domestic economic enterprises:

- 1) The extent or porousness of extraterritoriality of law;
- 2) Sovereign immunity either from suit or from liability;
- 3) The responsibilities and legal character of multinational economic enterprises; and
- 4) The commodification of law.¹⁸

Each of these areas is marked by a great dynamism. What will emerge a quarter century from now will bear little resemblance to the state of enterprise regulation that forms the basis of the management of multinational enterprises today.

Reform along these lines is taking a number of forms. For example, traditional doctrines of piercing the corporate veil might be broadened to make it easier to impose liability among corporations that share a common ownership.

16. See Maria McFarland Sánchez-Moreno & Tracy Higgins, *No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia*, 27 FORDHAM INT'L L.J. 1663, 1668–72 (2004) (quoting U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc., and Cultural Rights, *Report on the Seventh Session*, annex III, ¶ 5, U.N. Doc. E/C.12/1992/2 (Nov. 23–Dec. 11, 1992); J. Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa*, 18(4) AM. U. INT'L L. REV. 851, 895–99 (2003).

17. See Backer-COLUMBIA, *supra* note 2, at 313–19; Richard Meeran, *The Unveiling of Transnational Corporations: A Direct Approach*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 161 (Michael K. Addo ed., 1999).

18. See Fleur Johns, *The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory*, 19 MELB. U. L. REV. 893 (1994). See generally R.J. BARRY JONES, *GLOBALISATION AND INTERDEPENDENCE IN THE INTERNATIONAL POLITICAL ECONOMY: RHETORIC AND REALITY* (1995); MUCHLINSKI, *supra* note 13.

The purpose of these efforts would be to make it less valuable for organizations to split their assets and operations among autonomous and legally distinct corporate entities. Others suggest the development of principles of universal jurisdiction applicable against economic enterprises. Still, others have proposed the elaboration of strict theories of enterprise liability through which the traditional notions of corporate autonomy and independence will be substantially undone. Lastly, a variety of efforts have been suggested or undertaken to harmonize legal regulation of multinational enterprises at a supranational or international level. These include liability under harmonized substantive standards for labor relations, corruption, deployment of security forces, taxation and the like. The other is to provide universal systems of jurisdiction over such enterprises either under the authority of state courts or under international dispute resolution mechanisms. But these are controversial, and a number of more powerful commercial states have sought to capture the markets in regulation of multinational enterprises by aggressively seeking to extend their regulatory schemes beyond their borders. In some cases—for example, among the US and the European Union—extraterritoriality is leveraged by strategic bargaining under which standards as between these entities are harmonized. Thus harmonized, they are extended beyond their collective borders.

Thus, from a public law perspective, the framework for the regulation of multinational enterprises can be viewed most charitably as in flux.¹⁹ At one end are attempts to bring multinational enterprises within the regulatory ambit of states, while preserving the territorial autonomy and preeminence of states as the highest form of political power. At the other extreme are regulatory efforts grounded in the idea that states ought not to be the locus of regulatory activity, but that instead, regulation of multinational enterprises must be affected at an international or at least a supranational level. The current compromise between these views (and one very popular now) is the effort to harmonize national regulation through international instruments or otherwise by multilateral efforts.²⁰ The hope is that when substantive law is substantially harmonized, differences in state systems will be effectively neutralized. The model is the market harmonization framework of the European Union.²¹ The problem is that

19. See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111(3) YALE L.J. 443, 452 (2001); Eric W. Orts, *The Legitimacy of Multinational Corporations*, in PROGRESSIVE CORPORATE LAW 247 (Lawrence E. Mitchell ed., 1995); Jean-Philippe Robé, *Multinational Enterprises: The Constitution of a Pluralistic Legal Order*, in GLOBAL LAW WITHOUT A STATE 45, 45–47 (Gunther Teubner ed., 1997).

20. See William W. Bratton & Joseph A. McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference*, 38(2) COLUM. J. TRANSNAT'L L. 213 (1999).

21. See Martin Rhodes & Bastiaan van Apeldoorn, *Capitalism Unbound? The Transformation of European Corporate Governance*, 5 J. EUR. PUB. POL'Y 406, 423–25 (1998).

many states which seek to employ this method refuse to permit any form of supranational enforcement or interpretive mechanism—like a European Court of Justice. To the extent that such systems have been tentatively put in place (consider the framework for multilateral trade regulation under the World Trade Organization) they have been cabined to the arena of state-to-state relations. Substantive harmonization without centralized mechanisms for interpretation is unlikely to produce more than a growing number of very generally worded and essentially hortatory conventions.

II. THE NEW(ER) SOFT REGULATORY FRAMEWORK IN CONTEXT: AN EXAMPLE

While public law systems struggle to reshape their character and focus as law and as an instrumental tool of management by political collectives over economic collectives, new systems of governance are arising. These new systems of governance, of behavior management, are originating within increasingly complex networks of governance to bind a growing number of functionally distinct communities of actors within the scope of their communities. These networks are made up of collectives that are not principally political. Essentially in a context in which the legal regulatory framework is fractured—that is, where states are smaller than the territory subject to the activities of economic actors—then it is likely that these economic actors might themselves begin to self-regulate over the entire territory in which they operate. The same, of course, applies to noneconomic actors—for example, religious groups, social organizations, and other communities of people who band together to submit to particular regulatory regimes.

These regulatory regimes are not the same as political regulation through law. Because these regulatory regimes are not direct legislation, they are what is commonly termed “soft” law. At one end of the soft regulatory framework are behavior frameworks originating either from public bodies or from partnerships of private and private entities. These usually include the hortatory codes of conduct or ethical rules for the conduct of multinational enterprises.²² While they have no direct legal effect, they may have an effect on the conduct of business.²³ At the other extreme are behavior frameworks created by communities of actors to regulate their internal affairs—that is, to regulate the

22. Cf. United Nations Global Compact, *supra* note 9; OECD, *supra* note 10. Most of these target not only internal corporate governance (in terms of transparency and governance), but also focus on the relationship between the enterprise and a large segment of the stakeholder community—labor, host localities, and the like.

23. See Hans. W. Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, in *LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES* 3, 4–5 (Norbert Horn ed., 1980).

relationships among them. The coercive power of the state is essentially absent in these communities. The extent of regulatory power is not great, but the power of participation may sometimes be as strong. Moreover, narrow regulatory power—that is, the power to set rules only with respect to those things in relation to which the community was formed—does not detract from the effectiveness of that regulation. These communities can exist within and around states. They seek to engage in regulation at the interstices of law-making, where law either does not or cannot provide a basis for effective regulation.

I want to examine one of those communities—that which is made up of large globally-engaged multinational enterprises. These are entities whose operations and institutional elaboration, direct or indirect, exist in more than one national territory. By that examination, I will tease out some of the characteristics of these self-referencing regulatory communities. The easiest way to illustrate these systems is by a short case study of Gap Inc. and the regulation of its suppliers in India.

Gap Inc. was founded in 1969 in San Francisco, California as a retail outlet geared toward a younger and hip-style demographic.²⁴ “Today, Gap Inc. is one of the world’s largest specialty retailers, with more than 3100 stores and fiscal 2006 revenues of \$15.9 billion. We operate four of the most recognized apparel brands in the world—Gap, Banana Republic, Old Navy and Piperlime.”²⁵ That much retail trade requires a great amount of product. And Gap Inc. feeds its stores with merchandise procured throughout the world. Gap Inc. does not manufacture a large amount of the products it sells.²⁶ Instead, it contracts with a number of independent suppliers across the globe for apparel and other items sold under the Gap Inc. and related labels.²⁷

In a traditional business environment, Gap Inc. would endeavor to enter into fairly straightforward agreements with its suppliers. In return for the production of a certain amount of products (to be described in the contract), the supplier would be expected to be paid a certain amount. The rest of the terms of such a contract would also be fairly straightforward: quality, place of delivery, inspection of goods and quality control, payment holdbacks and the like. But Gap Inc. has entered into a different form of contractual arrangement with its suppliers. These contracts have a substantial social and regulatory dimension. Gap Inc. proudly emphasizes, “[a]t Gap Inc., social responsibility

24. Gap Inc., About Gap Inc., <http://www.gapinc.com/public/About/about.shtml> (last visited Jan. 16, 2008).

25. *Id.*

26. Gap Inc., How Our Clothes Are Made, http://gapinc.com/public/About/abt_howourclothesaremade.shtml (last visited Jan. 16, 2008).

27. Gap Inc., Factory Approval Process, http://gapinc.com/public/SocialResponsibility/sr_fac_wwf_fac.shtml (last visited Jan. 16, 2008).

is fundamental to who we are and how we operate as a company.”²⁸ Gap Inc. has undertaken a responsibility for the way in which the enterprises with which it does business behave. It demands a certain uniform level of conduct from its suppliers, so that each of them conforms to what Gap Inc. determines to be an appropriate framework of conduct between its suppliers and their employees, the state and other stakeholders in the suppliers’ business.²⁹ “At Gap Inc., we believe we should go beyond the basics of ethical business practices and embrace our responsibility to people and to the planet. We believe this brings sustained, collective value to our shareholders, our employees, our customers and society.”³⁰

That “sustained, collective value” is potentially significant to Gap Inc.’s going concern value. First, it reduces the costs and increases the quality of goods. “When factories treat workers well, they also tend to produce higher quality product and deliver it on time. The more we respect and empower our own employees, the more creative and innovative our products and marketing tend to be.”³¹ Second, corporate social responsibility serves as a profitable response to consumer demand for goods procured in a particular manner. “We’re increasingly seeing that consumers care about the way companies behave in the global economy. By acting responsibly as a business, we can offer covetable products that respond to this growing consumer demand.”³² Third, corporate social responsibility is tied to corporate good governance. “We strive for best practices in corporate governance because we believe that a better-run company yields better results, and ultimately, greater shareholder value.”³³ Thus, to a great extent, Gap Inc.’s social responsibility is founded on its relationship with its two key stakeholders—consumers and investors.

The basis for this change in Gap Inc.’s relationship with its overseas suppliers dates back to 1992 when “Gap Inc. developed Sourcing Guidelines outlining general labor standards for vendors to follow.”³⁴ By 2004, Gap Inc. had produced its first annual Social Responsibility Report, widely circulated to the investor and human rights organization communities.³⁵ The next year, Gap

28. Gap Inc., Social Responsibility, <http://www.gapinc.com/public/SocialResponsibility/socialres.shtml> (last visited Jan. 16, 2008).

29. Gap Inc., Improving Factory Conditions, http://www.gapinc.com/public/SocialResponsibility/sr_factories.shtml (last visited Jan. 16, 2008).

30. Gap Inc., *supra* note 27.

31. GAP INC., 2005–2006 SOCIAL RESPONSIBILITY REPORT 12 (2005–2006), http://www.gapinc.com/public/SocialResponsibility/sr_fac_wwf_standards.shtml (follow “2005–2006 Social Responsibility Report” hyperlink under “Downloads”) (last visited Mar. 8, 2008).

32. *Id.*

33. *Id.*

34. Gap Inc., Our Social Responsibility History, http://www.gapinc.com/public/SocialResponsibility/sr_fac_hist.shtml (last visited Jan. 16, 2008).

35. *Id.*

Inc. called its first summit meeting in San Francisco “to build closer relationships and set expectations among top garment manufacturers.”³⁶ It participated in efforts to create uniform standards within the garment industry globally.³⁷ By 2006, Gap Inc. was sponsoring training sessions for the managers of its suppliers and consulting with various elements of civil society to assess its compliance with emerging labor standards.³⁸

To ensure uniform behavior among its global network of suppliers, Gap Inc. promulgated a Code of Vendor Conduct.³⁹

This Code of Vendor Conduct applies to all factories that produce goods for Gap Inc. or any of its subsidiaries, divisions, affiliates or agents (“Gap Inc.”). While Gap Inc. recognizes that there are different legal and cultural environments in which factories operate throughout the world, this Code sets forth the basic requirements that all factories must meet in order to do business with Gap Inc. The Code also provides the foundation for Gap Inc.’s ongoing evaluation of a factory’s employment practices and environmental compliance.⁴⁰

The “Code is based on internationally accepted labor standards—in particular, the International Labour Organization’s core conventions. . . . It also spells out our expectations regarding” local labor laws, environmental practices, discrimination, forced and child labor, requirements for wages and hours of employment, health and safety of workers and protection of workers’ freedom of association.⁴¹ Gap Inc. has, to some extent, legislated a labor code particular to its suppliers. In addition to suppliers; the Code extends to the entire chain of supply, so that suppliers that subcontract work must ensure that all such work be produced in accordance with the Code, whatever the other contractual requirements might exist between a Gap Inc. supplier and its subcontractors. Gap Inc. is not acting alone. “That’s why we’re actively involved in the Joint Initiative on Corporate Accountability and Workers’ Rights, an effort to develop an industry-wide alternative to often conflicting individual company codes.”⁴²

36. *Id.*

37. *Id.*

38. *Id.*

39. GAP INC., CODE OF VENDOR CONDUCT, available at http://www.gapinc.com/public/documents/code_vendor_conduct.pdf (last visited Mar. 8, 2008).

40. *Id.*

41. Gap Inc., Our Standards, http://www.gapinc.com/public/SocialResponsibility/sr_fac_wwf_standards.shtml (last visited Jan. 16, 2008).

42. *Id.* See also Joint Initiative on Corporate Accountability and Workers Rights, <http://www.join.org/english/about.asp> (last visited Feb. 1, 2008).

In order to be considered as a potential party to a contract for the delivery of goods for Gap Inc., a potential supplier must undergo a Gap Inc. supervised approval process.

In 2005 and 2006, we again required manufacturers and subcontractors that produce internally-designed and branded apparel for Gap, Banana Republic, and Old Navy to pass through our approval process before we placed any orders. This process . . . can take anywhere from a week to more than a year to complete.⁴³

Enforcement of the Code is undertaken through monitoring by Gap Inc. officials or their designees, mandatory training, inspections, and the right to impose a variety of sanctions for non-compliance.⁴⁴

If Gap Inc. determines that any factory has violated this Code, Gap Inc. may either terminate its business relationship or require the factory to implement a corrective action plan. If corrective action is advised but not taken, Gap Inc. will suspend placement of future orders and may terminate current production.⁴⁵

This overarching set of regulatory norms is imposed uniformly as the foundation on which traditional individual contracts are entered into for the delivery of goods. The policy has deep social aspects of a sort customary to legislation and unusual in output contracts, at least as traditionally conceived. Compliance efforts, for example, are spoken of in policy terms. Thus,

[F]actory monitoring remains a key element of our efforts to improve working conditions. We believe that 'what gets measured gets managed,' and monitoring data—despite its imperfections—gives us a way to assess factory conditions objectively, as well as our own monitoring performance, so that we can improve our efforts over time.⁴⁶

Gap Inc. understands that its efforts are undertaken "to create more comprehensive, long-term change in the garment industry."⁴⁷ Gap Inc.'s Code of

43. GAP INC., *supra* note 31, at 25.

44. Gap Inc., Ongoing Monitoring, http://www.gapinc.com/public/SocialResponsibility/sr_fac_wwf_om.shtml (last visited Jan. 16, 2008).

45. GAP INC., *supra* note 39, ¶ VIII.

46. Gap Inc., The Art and Science of Factory Monitoring, http://www.gapinc.com/public/SocialResponsibility/sr_fac_wwf_afm.shtml (last visited Jan. 16, 2008).

47. Gap Inc., *supra* note 34.

Vendor Conduct strictly prohibits child labor.⁴⁸ Violation of Code standards is subject to certain enforcement procedures.⁴⁹ Enforcement can result in a variety of reactions, from notice, to supervised correction, to termination of the contract between Gap Inc. and the supplier.⁵⁰ Enforcement policy under that rule has undergone some revision in recent years. Violations of the prohibition against child labor resulted in a termination of the contract between Gap Inc. and the supplier.⁵¹ “We believed that this approach sent a strong message to suppliers that underage labor was wholly unacceptable. However, we have learned from our experience over the years and extensive consultations with stakeholders that such a policy of immediate termination is not necessarily in the best interest of children.”⁵² As a consequence, since 2006, Gap Inc. imposed a new policy, “and now require[s] that any underage workers found in a factory be immediately removed from the workplace, given access to schooling, paid an ongoing wage and guaranteed a job at the factory as soon as they reach the appropriate age.”⁵³ The purpose of the policy change was to provide greater incentives to change cultures that promote child labor. “We believe that this new approach is not only in the best interest of underage workers, but also provides an effective deterrent to suppliers not to use underage labor in the first place.”⁵⁴

On October 28, 2007, the Observer ran a story that reported that “[c]hild workers, some as young as 10, have been found working in a textile factory in conditions close to slavery to produce clothes that appear destined for Gap Kids, one of the most successful arms of the high street giant.”⁵⁵ In addition, the children were subjected to long hours, threats and beatings.⁵⁶ On the same day, Gap Inc. issued a statement.⁵⁷ It explained that it had received notice of the report just prior to its publication and immediately launched an investigation. “The company noted that a very small portion of a particular order placed with one of its vendors was apparently subcontracted to an unauthorized

48. GAP INC., *supra* note 39, ¶ V.

49. Gap Inc., Violations of Our Standards, http://www.gapinc.com/public/SocialResponsibility/sr_fac_wwf_vos.shtml (last visited Jan. 16, 2008).

50. *Id.*

51. GAP INC., *supra* note 31, at 30.

52. *Id.*

53. *Id.*

54. *Id.*

55. Dan McDougall, *Indian 'Slave' Children Found Making Low-Cost Clothes Destined for Gap* THE OBSERVER, Oct. 28, 2007, available at <http://observer.guardian.co.uk/print/0,,331090351-119093,00.html> (last visited Mar. 22, 2008).

56. *Id.*

57. Press Release, Gap Inc., Gap Inc. Issues Statement on Media Reports on Child Labor (Oct. 28, 2007), available at http://www.gapinc.com/public/Media/Press_Releases/med_pr_vendorlabor102807.shtml (last visited Mar. 22, 2008).

subcontractor without the company's knowledge or approval."⁵⁸ Gap Inc. then quoted from a statement issued by Marka Hansen, president of Gap North America, which stated in part:

"We strictly prohibit the use of child labor. This is a non-negotiable for us—and we are deeply concerned and upset by this allegation. As we've demonstrated in the past, Gap has a history of addressing challenges like this head-on, and our approach to this situation will be no exception. . . . As soon as we were alerted to this situation, we stopped the work order and prevented the product from being sold in stores. While violations of our strict prohibition on child labor in factories that produce product for the company are extremely rare, we have called an urgent meeting with our suppliers in the region to reinforce our policies."⁵⁹

She also reminded her audience that "Gap Inc. has one of the industry's most comprehensive programs in place to fight for workers' rights overseas. We will continue to work with the government, NGOs, trade unions, and other stakeholder organizations in an effort to end the use of child labor."⁶⁰

This statement, along with the original press report, were posted to the web sites of important civil society actors—for example, the Business and Human Rights Resource Centre.⁶¹ The Business and Human Rights Resource Centre also posted a U.S. State Department information release that appeared to confirm that by October 31, 2007, Gap Inc. had terminated its relationship with the supplier accused of prohibited child labor practices and had pulled the apparel made by these children from its inventory.⁶² The report quoted Gap Inc.'s Hansen as stating "[a]s soon as we were alerted to this situation, we stopped the work order and prevented the product from being sold in stores," Hansen said, citing Gap's "strict prohibition on child labor."⁶³ Terhune also noted that "Gap called an emergency meeting with regional suppliers to reinforce the policy."⁶⁴

By November 4, 2007, Gap Inc. had appeared to turn the situation around to its advantage. The same reporter who had broken the story about the child

58. *Id.*

59. *Id.*

60. *Id.*

61. See Posting of Gap Inc. Press Release to http://www.business-humanrights.org/Categories/Individualcompanies/G/Gap?&batch_start=1 (Oct. 28, 2007) (last visited Mar. 22, 2008).

62. See Lea Terhune, *U.S. Clothing Company Drops New Delhi Contractor*, U.S. STATE DEPARTMENT OF STATE, Oct. 31, 2007, <http://www.america.gov/st/washfile-english/2007/October/20071031123014mlenuhret0.538357.html> (last visited Feb. 22, 2008).

63. *Id.*

64. *Id.*

slave labor by the Indian supplier's subcontractor now reported that "[i]n what would be the biggest commitment to ending child labour ever undertaken by a major retailer, Gap Inc is drawing up plans to label its products 'Sweatshop Free'."⁶⁵ McDougall reported that Gap Inc. would essentially attempt to operate a product certification program similar to one that had been successfully used in the Indian rug making sector, the "RugMark" Programme.⁶⁶ "According to Bhuwan Ribhu, a lawyer from the charity, the US conglomerate set out a series of ambitious proposals including a move that would see it relabeling its garments to allow the consumer to directly track online exactly where they are made."⁶⁷ Gap Inc. confirmed that it "was laying down the groundwork for a major commitment to fight the problem."⁶⁸ More importantly perhaps, Gap Inc.'s management went out of its way to thank the efforts of the people whose undercover investigation produced the report circulated by the Observer in its October 28, 2007 article. Hansen was again quoted: "[w]e genuinely appreciate that The Observer identified this unauthorised subcontractor [using child labour], and we acted swiftly in this situation."⁶⁹ All of this was widely reported in media that would reach Gap Inc.'s primary stakeholders—its customers and investors.⁷⁰

The day after publication of this announcement saw the production of commentary in the English language Indian media, not all of it positive.⁷¹ Natteri Adigal suggested that the efforts of the media, multinational corporations and elements of civil society seeking to end child labor did more harm than good. The harm occurred because once the tales of the rescue and reform efforts are published, the children are left on their own again.⁷² In that condition, they might have little choice but to seek the same kind of work. Indeed, it was suggested that the efforts of these stakeholders might do no more than increase the transaction costs of hiring illegal child labor.⁷³

Two weeks later, an *Associated Press* report by Michael Liedtke described the results of Gap Inc.'s investigation. "To punish the vendor, Gap imposed a six-month probation that includes a fifty percent reduction in orders placed with

65. See Dan McDougall, *Gap Plans 'Sweatshop Free' Labels*, THE OBSERVER, Nov. 4, 2007, available at <http://www.guardian.co.uk/business/2007/nov/04/3> (last visited Mar. 22, 2008).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. See McDougall, *supra* note 65.

71. See Natteri Adigal, *Do Delhi's Child Workers and Dubai's Labourers Need These Crocodile Tears?*, MERINews, Nov. 5, 2007, <http://www.merineews.com/catFull.jsp?articleID=127487> (last visited Mar. 22, 2008).

72. *Id.*

73. *Id.*

the supplier. Gap Inc. declined to identify the penalized supplier, one of the company's roughly 200 vendors in India."⁷⁴ The report also described the framework through which Gap Inc. would institute its work culture reform programs. Gap Inc. would partner with elements of civil society, principally the Global March Against Child Labour, to institute systems of monitoring of home work. These systems focus on hand embroidery and beadwork and provide grants to establish "community centers in India where such work could be performed under better-monitored conditions."⁷⁵ Gap Inc. would also "make a \$200,000 grant aimed at improving the working conditions in India and would try to recruit retailers from around the world to participate in a forum next year to address child labor issues."⁷⁶

Thus, within less than two months a significant set of events had taken place. Elements of Indian civil society had undertaken an undercover investigation of the conditions of India's child labor. Those conditions might violate Indian labor law. Those conditions also violated the social behavior norms written into the business arrangements between a multinational enterprise and its suppliers. The undercover report was leaked to the multinational enterprise a few days before a member of the global media elite published the report. The enterprise reacted immediately. It conducted its own investigation, which resulted in the enterprise pulling the goods produced through prohibited child labor from its inventory, exacting sanctions from the supplier and terminating any relationship with the subcontractor. The multinational enterprise also began working with elements of civil society to participate in programs designed to change the way in which the labor market worked in India, including grants for the regulation of garment house work and the elaboration of an extensive product certification program overseen with elements of civil society. All of this was reported in the global media and by significant elements of the human rights establishment.

But the political state was not entirely absent from the regulatory activity. Both the governments of the US and India also became involved. "A US government notification on proposed procedural guidelines issued in October on imported goods made using child or forced labour has finally acted as a wake-up call for India."⁷⁷ The Indian government's reaction was interesting—

74. See Michael Liedtke, *Gap Takes Steps to End Child Labor*, FOXNEWS.COM, Nov. 15, 2007, available at http://www.foxnews.com/prINTER_friendly_wires/2007Nov15/0,4675,GapChildLabor,00.html (last visited Mar. 22, 2008).

75. *Id.*

76. *Id.*

77. Dec. 4, 2007, at 7, available at <http://epaper.timesofindia.com/archive/skins/pastissues2/navigator.asp?login=default> (under "Publication" select "Economic Times Delhi"; then under "Year and Month" select "December, 2007"; then under "Day" select "4"; then go to page 7) (last visited Mar. 22, 2008).

its appropriate ministries met to declare their intention to implement Indian law, including the “conduct [of] annual external social audit[s] on child labour” as per the national labour laws and rules.⁷⁸ “Export promotion councils (EPC) will also prepare a perspective plan for child labour abolition in specific areas of geographical concentration.”⁷⁹ The tensions between extraterritoriality, strivings for harmonized behavior norms, regulatory power and global economic dynamics were clearly evident in the statement of the Indian minister of state for commerce Jairam Ramesh who said the US notification on proposed action against goods made using child labour had to be taken seriously. “The issue of child labour, raised in the US Congress 12 years ago but later dumped, is being revisited by the US government. This has to be taken seriously,’ he said.”⁸⁰ Indian export promotion councils will now also play a role in the monitoring of the Indian labor market, prodded by the interests of the US as expressed in threatened regulatory moves by the American Congress. Both political entities have thus moved closer to implementing the labor standards they have elaborated principally in their law codes.

Thus, a story about the abuse of child laborers in India—so common in that country that it might not have otherwise merited much attention—was powerful enough to engage a multinational corporation, a set of non-governmental organizations, international media players and the governments of two large and powerful states. All asserted a role in regulation that might have been unusual only forty years before. It is to elaborate a theory of regulatory action from the story that the next section turns.

III. THEORIZING THE FRAMEWORK: IS THERE A SYSTEM TO THIS STORY?

Is it possible to generalize a regulatory system from out of this story? This section attempts to sketch out the basic framework of a regulatory system suggested through the story of the Gap Inc. and its suppliers in India. This system, existing side by side with the regulatory systems of territorially limited states, can be characterized as a freestanding, autonomous, self-communicating system. It generates enforceable conduct rules binding on its constituency, and is accountable to a well-defined constituency. Contract serves as the means by which the “law” of this system is memorialized and made binding. While states memorialize their norms through law, contract serves a similar purpose for regulating the behavior among non-state parties.⁸¹ Though participation is

78. *Id.*

79. *Id.*

80. *Id.*

81. See, e.g., The Special Representative of the Secretary-General (SRSG), *Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*, ¶ 12, U.N. Doc. A/HRC/4/035 (February 9 2007), available at

purely voluntary, and any stakeholder is free to leave at any time, all of its members have strong incentives to participate, and within the very limited scope of its regulatory authority, each act to strengthen the integrity of the system. The primary actors include the multinational enterprise and their suppliers, non-governmental organizations, the media and investors and consumers. Government plays a limited and secondary role in the elaboration of this system. And the people actually affected—suppliers, local labor and others directly affected—are passive participants, the objects rather than subjects of this system.

How does each of the primary actors contribute to the construction of an autonomous and self-contained regulatory system? The multinational enterprise stands at the center of the system. . Through its elaboration of a tightly controlled supplier system, for example, the multinational corporation can serve as the system legislator.⁸² It does not enter merely into contracts but imposes a complex set of norms with social, cultural and political effect. It enforces its standards against its controlled groups—those persons and entities that seek to do business with it. Thus, the Codes of Conduct—and other instruments to which suppliers assented in their relations with Gap Inc.—provide Gap Inc. with both the authority to set appropriate standards of conduct and to impose sanctions. Enforcement is through extensive monitoring programs, which are as intrusive as any created by governments. These sanctions are not the stuff of contract breach. They resemble more the form of legislative or administrative management under public law codes. Gap Inc. can effectively assess civil penalties, impose training or other rehabilitation programs, compel changes in internal organization or terminate the contractual relationship with the enterprises subject to its standards. These standards themselves are targeted to the enterprise's investors and customers. While the standards are developed and implemented by the enterprise, they are usually constructed with input from elements of civil society—non-governmental organizations that have a policy or other interest in the subject of the standards. At the same time, the multinational enterprise expends much energy shaping consumer and investor opinion. A substantial portion of Gap Inc.'s website—for example, is devoted to issues of good governance⁸³ and social responsibility.⁸⁴ Both are self-

<http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf> (last visited Feb. 23, 2008).

82. See, e.g., Li-Wen Lin, *Corporate Social Accountability Standards In The Global Supply Chain: Resistance, Reconsideration, And Resolution In China*, 15 CARDOZO J. INT'L & COMP. L. 321, 329–30, 340–41 (2007).

83. See Gap, Inc., Governance, http://www.gapinc.com/public/Investors/inv_govern.shtml (last visited Apr. 6, 2008).

84. See Gap, Inc., Social Responsibility, <http://www.gapinc.com/public/SocialResponsibility/socialres.shtml> (last visited Apr. 6, 2008).

consciously targeted to investors and consumers. In these materials, Gap Inc. describes its complex network of interrelationships with non-governmental actors in setting standards.

Non-governmental organizations help shape the standards that multinational enterprises implement. They participate in the creation of standards actually developed by enterprises, and perhaps most importantly, they serve as independent monitors of compliance with these standards.⁸⁵ Gap Inc. did not invent or create a demand for a prohibition of infant labor. The work of many organizations, mobilized in large and small-scale campaigns against this practice, contributed to the formation of a public opinion strongly opposed to the use of child labor for the manufacture of consumer products in developing states.⁸⁶ That developed and strongly intuited public opinion made it desirable for an enterprise like Gap Inc. to adopt policies against the practice even if it meant imposing standards stricter than those required under the applied law of the host state. India may well have had many laws against infant labor, but it was Gap Inc. that actually enforced the prohibition in those independent economic enterprises with which it cultivated contractual relationships. Moreover, Gap Inc. embraced a complex network of non-governmental organizations for the purpose of helping develop its standards and compliance programs. Gap Inc. advertises that it is “working closely with these groups and other worker rights and civil society groups to address these issues both in our code as well as how we enforce it through our compliance program.”⁸⁷ But most importantly, non-governmental organizations are instrumental in

85. Terry Macdonald & Kate Macdonald, *Non-Electoral Accountability In Global Politics: Strengthening Democratic Control Within The Global Garment Industry*, 17 EUR. J. INT'L L. 89, 106 (2006).

By means of campaigns that were promoted at times via high-profile media attention, and at other times by the direct actions of widespread grassroots networks targeting retail outlets of familiar brands—strategies commonly referred to as “naming and shaming”—activists significantly increased public awareness of the direct power of such companies over the lives of workers in far away countries.

Id.

86. The lesson hit home in the United States with the successful mobilization of public opinion against the television talk show host Kathie Lee Gifford and her Wal-Mart marketed clothing line in 1996.

Kathie Lee Gifford, a popular daytime talk-show host and advocate of children's rights, found herself embroiled in a sweatshop scandal when Charles Kernaghan of the National Labor Committee Education Fund in Support of Worker and Human Rights in Central America told the United States by way of Congress that Ms. Gifford's clothing line, made for and controlled by Wal-Mart, was manufactured by girls barely in their teens in a Honduras sweatshop. This served as a lesson for celebrities with clothing lines that they had to monitor the manufacture of their products or face the court of public opinion.

Nancy L. Mensch, *Codes, Lawsuits or International Law: How Should the Multinational Corporation Be Regulated With Respect to Human Rights?*, 14 U. MIAMI INT'L & COMP. L. REV. 243, 244 (2006).

87. Gap, Inc., *supra* note 41.

monitoring compliance with the norms adopted by multinational enterprises to govern the behavior of its suppliers and their subcontractors. Gap Inc. did not discover the use of child labor in its Indian supplier operations on its own or through its own programs of monitoring. An undercover investigation by non-governmental organizations—human rights and child labor advocacy groups—produced the necessary information that caused Gap Inc. to act. There is an economic aspect to the participation of non-governmental organizations as well. Involvement in the efforts of multinational enterprises to harmonize the regulation of its supplier chain through the imposition of labor, environmental and other norms, is a critical source of raising funds, motivating members and increasing the membership in such organizations. Multinational enterprise regulatory work is good for the business of non-governmental organizations.

Critical to the work of both the multinational enterprise and the non-governmental organization is the media.⁸⁸ Newspapers, television, internet-based news and other information dissemination enterprises play an essential role in the development and enforcement of multinational enterprise-developed standards of conduct. The media serves principally to legitimate and to transmit the work of multinational actors legislating conduct over their networks of stakeholders or the monitoring work of non-governmental organizations, especially as multinational corporations seek to more tightly control the information they distribute about themselves and their operations.⁸⁹ The audience for those functions includes the consumer and investor sector, whose actions are essential to the wellbeing of corporate actors. But they also serve as a means of communication among the multinational corporation and non-governmental organization stakeholders.⁹⁰ The report of the groups that uncovered child labor in Gap Inc.'s Indian supplier operations did not acquire

88. This idea is well understood in the context of the American culture wars of the last century. See, e.g., Symposium, *Tune In, Turn On, Cop Out?: The Media and Social Responsibility, A Panel Discussion: Potential Liability Arising From the Dissemination of Violent Music*, 22 LOY. L.A. ENT. L. REV. 237 (2002).

89. See, e.g., Vicki McIntyre, Note: *Nike V. Kasky: Leaving Corporate America Speechless*, 30 WM. MITCHELL L. REV. 1531, 1562–65 (2004).

90. Advertising can play a critical role in the system. Referring to a successful ad campaign waged by Mobil Oil, one commentator noted:

The power of such ads, according to one scholar and the company's own CEO, was to make Mobil Oil's self-interested messages appear more objective, particularly because the ads appeared in credible media outlets, often on op-ed pages. Control over the content and presentation of these ads allowed Mobil Oil to soften its image, distract attention from its profits and counterbalance negative news stories.

Susan Dente Ross, *The Ad That Changed Libel Law: Judicial Realism And Social Activism In New York Times Co. V. Sullivan*, 9 COMM. L. & POL'Y 489, 493 (2004) (citing, S. Prakash Sethi, *Advocacy Advertising—The American Experience*, 21 CAL. MGMT. REV. 55 (1978); S. Prakash Sethi, *Business and the News Media, The Paradox of Informed Misunderstanding*, 19 CAL. MGMT. REV. 52 (1977); S. Prakash Sethi, *Issue-Oriented Corporate Advertising, Tax Treatment of Expenditures*, 19 CAL. MGMT. REV. 5 (1976)).

much impact before it was reported in the Observer—a news organ with global connections, and published in English. The validity of Gap Inc.'s responses acquired substantially more impact for having been reported in the same media organ. In this later role, the media serves as the critical vehicle for communication across stakeholder organizations. The media also serves as a critical means of communication with consumers and investors. Ironically, the media also serves as significant sources of information for governments. The media mediated much of the conversations between Gap Inc. and the civil society community—its investors and consumers. And all of this is critical for the media. All of this, of course, inures to the benefit of the media as an industry in its own right. The media is the largest consumer of information on the globe. Information is a critical factor in the production of news—the product that makes money for the media. Corporate social responsibility targeted at consumers and investors, overseen by multinational enterprises and monitored by non-governmental organizations, are very good for the business of the production of news.

Like the citizens and residents of political states, consumers and investors play a critical yet passive role in the governance systems of multinational enterprises. By their actions, they (collectively) determine the efficacy of the actions of each of the stakeholders—consumption of the products and investment vehicles peddled by multinational enterprises, support for the efforts of non-governmental organizations and readership of media.⁹¹ Consumers and investors are the object of the efforts of the other stakeholders in this system to get them to act on certain sets of beliefs. Control of the beliefs and desires of these groups—or the ability to express those beliefs and desires as policies, rules and conduct (and to impose them on those in networks of control)—affects the shape and character of the “desires” of multinational enterprises (and their taste for things like social responsibility, good governance, environmental protection, long or short term strategic thinking and the like) and the extent of their willingness to legislate for their network of stakeholders. To a great extent, then, corporate regulation has moved from a foundation in efficiency to a focus on values and their elaboration in the action of economic actors.⁹²

Like consumers and investors, government—both domestic and international public entities—play a significant but passive role in the control of the

91. This, of course, was the moral of the Kathie Gifford story. For many of the documents, see National Labor Committee, The Kathie Lee Campaign, <http://www.nlcnet.org/article.php?id=403> (last visited Apr. 7, 2008).

92. See Larry Catá Backer, *Values Economics and Theology: The Contribution of Catholic Social Thought and Its Implications for Legal Regulatory Systems, Law at the End of the Day*, <http://lcbackerblog.blogspot.com/2008/01/values-economics-and-theology.html> (Jan. 12, 2008, 10:06 EST) (last visited Apr. 7, 2008).

social and economic relationships of multinational enterprises and their suppliers. Government serves as a source of authentic memorializations of conduct norms. It is not necessarily their legal effect so much as the values they express that count. Gap Inc.'s social responsibility norms are based on the International Labour Organization's core norms.⁹³ Those norms have no legal effect, except, ironically as enacted into the contractual relations between Gap Inc. and every natural or legal person which forms part of its supplier network. Gap Inc., thus, has used governmental standards as the basis of binding regulations in a context in which supranational harmonizing legislation is impossible in a political context. It is true enough that Gap Inc.'s regulations affect only a slice of economic actors, and that they are founded in contract and not law, but within the scope of their authority they serve a purpose similar to law. As importantly, governmental pronouncements and actions—international and domestic declarations of policy or aspirational goals—tend to set the parameters of the debate that produce beliefs in consumers and investors on which both governmental and non-governmental actors base their own responses. And lastly, government sometimes tends to follow the actions of its stakeholders. The American and Indian governments appeared to act to shore up their fidelity to their laws or notions of right in time to appear to react to the “scandals” of child labor and its suppression by Gap Inc.

But what of the objects of all of this activity—the business people operating supplier factories, or their subcontractors, the children and their families, and the local communities in which all of these activities occur? Those are the groups that seem to be cut out of the process.⁹⁴ Things are done on their behalf. Working conditions are improved to better their environment. Business relationships are changed on the basis of values that might or might not be shared by local business. Yet there is little expectation that the objects of all these activities will actually participate actively in the formation and elaboration of standards and enforcement norms. All of those are imposed from outside the communities affected. The position of some is to treat host nations as sometimes suspect locations for social responsibility action because their leaders might be tempted to collude with the multinationals operating in their territory or because such states are too weak to apply their own laws, much less international standards in the face of the economic power of the multinational entity.⁹⁵ Global power, in effect, is exercised on their behalf, but based on the

93. Gap, Inc., *supra* note 41.

94. See, e.g., Li-Wen Lin, *supra* note 82; Larry Catá Backer, *Extraterritoriality and Corporate Social Responsibility: Governing Corporations, Governing Developing States*, Law at the End of the Day, <http://lcbackerblog.blogspot.com/2008/03/extraterritoriality-and-corporate.html>, (Mar. 27, 2008, 11:07 EST).

95. See, e.g., Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT'L L. 1, 2 (2003) (suggesting that the international regime's inadequacies “becomes more conspicuous when a state is weaker than an MNC, is in connivance

sensibilities of consumers and investors in developed states. From the perspective of the global order, it seems that the people of the developed world continue to impose their beliefs on others. This time, it is for their own good and the moral betterment of those who impose their values, through their decisions to purchase goods or invest in financial instruments. While it may not be a bad thing, it certainly does marginalize an important segment of stakeholders. Yet, in an ironic way, control might be every bit as strong under the harmonizing regimes of economic private regulation described here, as in the old days of direct political colonialism. But there may be a difference. Under the new regime it is possible for multinational enterprises to grow almost anywhere in the world. East Asia has evidenced the way in which shifts of economic power might affect the markets for beliefs and harmonizing regulation in the future.

IV. CONCLUSION

The circle is thus complete. Together a close-knit and well-defined group of stakeholders in a community of interest have generated a closed and self-referencing system of regulation that binds all of its elements together in webs of mutual interest and constraint. In this network government has a place, but not a primary or controlling role. In many cases it is noticeable by its absence. Contract replaces law; networks of relationships replace a political community; interest replaces territory; the regulated becomes the regulator. Yet, the freedom from political regulation suggested here is illusory to some extent. Like its political counterpart, the regulating multinational enterprise is as much a prisoner of its own stakeholders (and principally its consumers and investors) as any state is to its citizens and residents.

The system is not dependant on a particular set of actors for its operation. Any network of non-state actors can use the framework described in Section II and theorized in Section III. Indeed, it is possible that rising networks of other communities—indigenous and religious communities—might be crafting similarly frame-worked systems of non-state regulation among their respective communities. What Gap Inc. (and its supplier network regulation) suggests is that there are potentially significant gaps in the reach of law—especially in those contexts in which regulated communities stretch between political communities—in which other forms of regulatory systems might arise. While these systems may in some respects mimic political organization, their scope, framework, extent and operation will also be significantly different. In a world in which states will exist side by side with these non-state regulatory communities, law may lose some of its privilege.

with an MNC, or is more interested in foreign investment than enforcement of human rights.”); Mensch, *supra* note 86, at 245–46.

