Regulating Multinational Corporations: Trends, Challenges, and Opportunities

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"*And there was war in heaven.*"[1]

The once orderly arrangement of public and private power, of domestic and international law, and of the institutions through which these arrangements were realized has been upended by the very the structures legitimated in political, economic, and legal theory.[2] In place of the state, the production chain increasingly serves as a basis for collective governance.[3] Domestic and institutional actors—individuals, economic enterprises, civil society actors, public international organizations, and hybrids that emerge from couplings of these actors—along with states, now engage in a world order marked by fracture, fluidity, permeability, and polycentricity.[4] This world governance order is characterized by a stable universe of objects of regulation around which governance systems multiply and in which law is one of several systems of governance that has an impact on the organization of human and communal activity.[5] It is a governance order in which regional integration might well supplant both the state and global integration.[6]

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And yet, much of the current discourse and premises of public policy continue to indulge beliefs solidified after 1945.[7] This post-1945 system presumes a dynamic population bound to static and stable states, which reflect the communal consensus of their populations through democratic representative institutions. States operate and speak most forcefully through law, which constrains both the actions of states and the direction and scope of policy. Policy discourse is centered on these traditional presumptions in ways that sometimes ignore or diminish the reality of the governance frameworks of globalization that are growing up around the state or seek to preserve it in the face of change.[8] But these emerging governance systems, which appear all around the state in order to support activities that cross borders and thus cannot be regulated in their entirety through the application any one state's law, contradict this discourse.[9] At the base of this contradiction are two distinct approaches to regulation—one is legal and tied to the traditional structures of the state; the other focuses on social norms and is tied to the governance power of public and private institutions operating between, within, and around states.[10]

Private governance and self-regulation are viewed as threats to the social and political order.

These contradictions lie at the heart of the subject of this essay—the challenges and opportunities, and the legal and public policy context of multinational corporation or enterprise (MNE) regulation.[11] MNEs "have transcended their traditional limitation for lobbying on the national level, and have begun to involve themselves directly within global economic regulations, either by acting as transnational lobbies or by setting up rules themselves."[12] And yet, policy discussion tends to focus on the use of law to regulate MNEs whose operations extend beyond the reach of any one state or on the structures of international law that by their nature and implementation lack coherence and remedial structures. This contradiction is especially discernible in recent efforts to legally institutionalize an architecture for the regulation of the economic, social, cultural, and human rights effects of economic activity.[13] Public institutions and civil society invest substantial effort in the construction of an international legal framework for regulating multinational enterprises.[14] Private governance and self-regulation are viewed as threats to the social and political order; at the same time, private actors have increasingly turned to a variety of self-regulatory and private governance structures, some of which are recognized in international norms, in order to manage significant aspects of their operations.[15] Public actors have also sought to manage private regulatory governance by intervening in private markets.[16]

In some cases, private actors have been recruited to serve as governmental substitutes in weak governance or conflict zones.[17] From a regulatory perspective, the object of each such intervention is the international business enterprise.[18]

Focusing regulatory efforts on enterprises, however, may miss the mark. The policy problem might not be MNEs per se but rather the effects of production chains, which themselves might be understood as their own transnational legal orders, of which MNEs form a part.[19] Indeed, the failure to clearly understand whether regulation should be aimed at MNEs, at the entities through which production chains are operationalized, or at the production chains themselves, evidence the difficulty of applying legal solutions where the regulatory object is conceptually ambiguous, against which the techniques of traditional state-based law may be ineffective.[20] Yet the focus of regulation, for many, must remain on the MNE and grounded in state-based legal regimes.[21] A powerful example is the controversy over the value of a comprehensive treaty for business and human rights.[22] At its core, the controversy arose over the belief of developed states and a large sector of civil society that the regulation global business activity must be centered on MNEs (however defined) and undertaken through traditional means—the modification of the domestic legal orders of states on the basis of a treaty that creates a legal obligation on states to make and harmonize those changes.[23] Developed states and others oppose this effort as ill considered and doomed to fail, precisely because law no longer has a monopoly on regulatory authority.[24] That controversy serves as the front line in the battle between the state and law-based approach to regulation of enterprises and the social norm and transnational approach to the governance of economic systems within which the MNE is embedded.

It is in this context that one may usefully consider the legal challenges relevant to the proliferation of MNEs. This essay, presents the challenges to the establishment of a similar coherent system of legal regulation by or through states. Specifically, I aim to first examine the difficulties of regulating and managing MNEs through legal frameworks; second, to examine the current impediments to the development of coherent regulatory models for MNEs and to sketch out alternative approaches that seek to go beyond the limited and repetitive approaches to the regulation of MNEs through law. The fundamental obstacle to the legal regulation of the MNE, I argue, is the conceptual cage which constrains this use of regulation. In other words, this article proposes that as long as the challenges of MNEs are understood as institutional ones—that is, as a problem of managing something that can be conceived at some level of generality as an institution—an appropriate regulatory response will be elusive because

the aim of regulation cannot focus solely on regulating an object (the MNE as enterprise) but must instead focus on regulating a system—production chains beyond and within the state. The traditional tools available to states, such as increasingly elaborate legal intervention, are inadequate to address the rise of MNEs and global supply chains and will only produce failure.

The Challenges of Current Approaches

The effectiveness of domestic law as a regulatory framework for MNEs, or for managing cross-border macroeconomic policy, is not guaranteed. States confront a substantial governance gap in such regulatory efforts—grounded in the functional effects of globalized trade conducted through but not entirely within states.[25] Even less assured is international law, whose effectiveness as a means of managing the internal legal orders of states is, at best, not clear.[26] The greatest obstacle to international law's effectiveness stems from law's fundamental character. Laws are the authoritative pronouncement of states, and their validity is defined by the geographic borders of those same states. Less-developed and poorer states have usually been required to ignore their own democratic order and adopt legislation proposed to them by foreign states in order to preserve their connection to transnational production chains. An excellent example is Bangladesh's agreement to a series of changes to its domestic legal order in the wake of the collapse of the Rana Plaza factory building in 2013, changes directed by foreign states and associations of MNEs.[27] The effect of law's territorial nature is well known—production chains tend to transform law into a commodity, a transaction cost, or a factor in the production of wealth. Law's character as a cost of doing business assumes a larger role precisely because of its locational effects, as this cost is limited to the territory in which the law can be asserted. But this relationship between law and territory tends to upend the traditional relationship between states—especially their governmental architecture—and the global economic systems of which they now form a part. That is, laws no longer apply to a population that has no choice but to conform; rather their application now turns on the willingness of the governed to be governed. The aftermath of the Rana Plaza factory building collapse nicely exposed these relationships and the relationships of MNEs to both law and the state: MNEs factored law into production chain location decisions, sought to reform local law to their liking, and applied their own standards to their operations irrespective of location.[28] More generally, MNEs will choose to operate in certain states that provide resources (including labor), markets (consumers), or something else of

value (legal certainty, efficiency, protection of wealth, etc.).[29] Thus, states that offer strong protection of property rights and useful legal frameworks for the organization of enterprises (corporate, partnership, joint venture, and security law, for example) become important sites in production chains. However, natural resources, manufacturing capacity, cheap labor, or proximity to consumer markets can serve as equal, if not stronger attractors.[30] Additionally, some legal aspects of business essential to MNEs, such as the standards for the negotiation and interpretation of commercial contracts, have become detached from the state.[31] Already it is possible to discern the rise of self-constituted governance systems within production chains—the primary actors in which include MNEs and their suppliers, NGOs, the media, investors and consumers.[32]

It is only within this conceptual framework that one can understand the inevitable failure of state-based legal efforts to manage or control multinational enterprises, or to regulate production chains through the proxy of managing macroeconomic policy. Law can make a state more or less attractive to production chains.[33] On the other hand, the productive or consumptive capacity of states may outweigh these legal incentives or deterrents and thus counteract the need for production chains to absorb the costs of conforming to local law when MNEs choose where to operate.[34] Constrained by their own geography, states can respond with a number of somewhat predictable techniques, including exporting domestic legal systems (usually on the backs of another actor in global production chains), managing inbound investment, regulating taxation, and applying competition law and technology transfer rules to the operations of MNEs. Each of these options will be briefly examined in the context of the constraints of the territorially based state system beneath the emerging system of global production chains.

A useful place to start is with a consideration of issues of extraterritoriality, especially where it serves to export the domestic legal orders of some states into the legal orders of others. States that have little wealth or resources are on the lower end of supply and production chains. These states generally do not think in terms of the exportation of their domestic legal orders.[35] Rather, they worry about the extent to which their own domestic legal orders will be reduced to a residual role in the establishment of rule of law, superseded by the systems of other states, especially where regulation of foreign corporations and economic actors is concerned. The privilege of extraterritoriality of domestic law tends to be reserved to those states in which the enterprises that control global production chains are situated. Indeed, it has been the United States and the member states of the European Union that have tended to indulge extraterritoriality.[36] It

is the principles and legal cultures of those states that civil society actors wish to internationalize when they advance arguments about extraterritoriality as a legal response to globalization in the context of a state-based global political order.[37]

Despite this homogeneity, extraterritoriality takes a number of forms. Extraterritoriality also carries conceptions of neocolonialism and hegemonism.[38] In order to mitigate these criticisms, extraterritoriality has increasingly come to be clothed in internationalist projects—that is, projects through which states will internationalize their domestic legal orders and interpret those of other states through the lens of international standards. These internationalist extraterritorial projects claim to structure extraterritorial projections solely to advance international law and norms.[39] A variant of this is to project international norms extraterritorially.[40] A fundamental difficulty, of course, is that there is no single coherent version of international law applicable to all states. International norms, domesticated within the legal orders of the state intending to impose them on another state, tend to reflect the policy choices of the projecting state. Not every state has transposed every norm of international law into their domestic legal orders. The United States, for example, has been reluctant to incorporate the International Covenant on Economic, Social, and Cultural Rights, even after it went into effect in 1992.[41] China, on the other hand, has been less willing to attach to a Western interpretation of the International Covenant on Civil and Political Rights. Furthermore, all states tend to make reservations about the extent to which they might apply a treaty that they have ratified, creating variation even among ratifying states.[42] It is precisely the imbalance of power between states, and the different choices made by powerful states about the scope of their respective incorporation of international norms, that makes legal variation a potentially powerful weapon for outwardly projecting domestic policy as law.[43]

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Legal incoherence occurs when there is a wide variation in the extent to which international law is domesticated, or to which domestic law is projected outward. Sometimes legal obligations are imposed on domestic enterprises operating abroad (or operating through controlled subordinate enterprises that form part of global production chains). Moreover, disclosure regimes target enterprises not the production chains within which these enterprises operate. Disclosure regimes are market enhancing to the extent that they supply consum-

ers and investors with the information necessary to make whatever values-based decisions they like.[44] But such disclosure regimes have met fierce resistance and might be thwarted by the fundamental rules of the very political systems that produced them, especially in the United States.[45] Lastly, efforts at producing something like enterprise liability have to date borne little fruit. They have, however, attracted the attention of civil society actors, academics, and those with the political ambition to undermine the current structure of corporate law, one based on enterprise welfare maximization and the protection of the autonomy of enterprise legal personality.

The promises and constraints of extraterritoriality set the pattern for other, more significant efforts by states to manage MNEs through law. In each case, every state effort bumps up against its borders, and borders tend to affect the aggregate amalgam of law that may be applied within a territory. As we have seen, extraterritoriality may extend the application of law, but the price is steep. Law-applied extraterritorially may have no effect within the home state; the law projected outward may extend no further than the enterprises or activities to which the law applies. The application of this law depends on the ability of home states to enforce and of host states to resist; the product is a surfeit of law and very little order.

For host states, the result is the naturalization of multiple legal orders within their territory. For enterprises, the result is the ability to use these multiple legal regimes strategically in determining where and how to place their operations. This is well illustrated in the efforts over the last generation to develop legal regimes to control inbound investment. Between the 1970s and today, most states have moved from a legal regime hostile and suspicious of inbound foreign investment to one in which states reserve the right to review and condition such investment on sectorial exclusions and screening laws.[46] However, even these controls have been superseded by the harmonizing effects of bilateral and multilateral investment treaty regimes, which tend to reflect the norms developed by the Organization for Economic Co-operation and Development (OECD) states.[47] Some states such as China have preferred to create Special Economic Zones within their borders, where a set of rules, different from and more encouraging of connections with global production chains than those in other parts of the national territory, applies.[48] Indeed, just as developed states have been the most aggressive sources of extraterritorial law projection, they have also, through multilateral institutions such as the OECD, appeared to be at the forefront of efforts, now quite successful, to reduce barriers to inbound foreign investment and to construct rules under which such inbound investment is managed. It is

in this respect that states might be understood as having been most effective in both constructing a global legal regime within which something like global free movement of capital may occur and influencing the substance of the legal rules managing those investments.[49] This regime is coherent to the extent that, in the aggregate, it points to a set of substantially similar rules grounded in the same presumptions. These presumptions sit at the core of economic liberalism and market-oriented policy, which hold that restrictions on investment ought to be reduced. However, exceptions may be tolerated on a sectorial (transportation, computer engineering, etc.) or investor-review (foreign state–owned enterprises, etc.) basis, and the substantive rules of those investments may be affected by home- and host-state rules.

Indeed, for states that participate in the lower rungs of global production chains, the problem is not so much the construction of legal barriers to Foreign Direct Investment (FDI), but rather the development of rules that encourage FDI. The functional result is similar to that of the extraterritorial application of foreign law. In both cases, a host state creates pockets in which the domestic legal order may not apply, partially or completely. These enhanced benefit regimes may be implemented through bilateral investment treaties or through arrangements with specific enterprises. In recent years, these measures to encourage investment have to some extent been dampened by most favored nation and equal treatment rules in many bilateral investment treaties.[50] The effect of rules that encourage inbound investment, of course, might produce a race to the bottom for developing global standards to manage MNEs, and especially MNE involvement in production chains, one similar to the effect of FDI on real wages.[51] This effect might suggest that coordination in law becomes more difficult when economic incentives and the legal rules to effectuate those incentives differ between developed and developing states.

The uses of competition (antitrust) law, taxation, and technology transfer rules have substantial parallels in efforts to encourage extraterritoriality and to erect barriers to inbound investment. Competition law rules have increasingly been used to project national control up the production chain. They are most potent when they can be used to delay transnational business combinations subject to the regulatory approval of any one of the states whose competition law regime is invoked. They tend to be most useful to more powerful states or to states that sit at convergence points of global production chains, such as the United States, China, and the EU. The recent review actions under China's Anti-Monopoly Law provides a set of recent examples where national interests might have been invoked in conditions imposed to approve the InBev-Anheuser-

Busch merger and to prohibit the Coca-Cola-Huiyuan transaction.[52] However, competition law–based review is a passive device. It cannot be used preemptively because such review is only triggered on an acquisition or divestiture of operations; that is, when MNEs engage in an acquisition or divestiture that changes their share of markets for their products.[53] As such, it is an opportunistic rather than an instrumental managerial device for MNE regulation.

Taxation regimes expose the problems of developing coherent rules for the taxation of production chains and of determining what may be produced (and taxed) within each jurisdiction touched by a production chain. Taxation regimes can have significant locational effects, including the location of parent firms.[54] Moreover, the need of states and enterprises in transnational production chains to protect revenue creates the current interest in so-called tax havens, as well as in the development of rules for their regulation and sometimes their suppression.[55] This state of affairs suggests the difficulty of using tax policy as a means of regulating MNEs. First, the interests of states are often diverse and adversarial, with each wanting to secure the greatest amount of taxable income to that portion of the production chain within its borders. Second, the tension between effective unitary operations and the separate autonomy of the various parts of the production chain make it possible to engage in internal transactions (within the firm especially) that would seek to minimize tax burdens.[56] The policing of those intra-firm strategies themselves create further conflict: "Outcomes would likely be better if there is international cooperation. Currently, the possibilities for international cooperation appear to play a bigger role in options for dealing with individual evasion than with corporate avoidance."[57]

Technology transfer rules work in favor of host states with little power but substantial locational advantages that enhance their bargaining leverage. [58] They involve the use of law to force MNEs to share knowledge related to the production of their product and knowledge or methods of production.[59] They serve, like more generalized controls on inbound FDI, as a means of bargaining with and managing the relationships between inbound investors and host states. Regulatory approaches to technology transfer have been popular instruments of policy in developing countries, notably in Latin America, which sought to use law as a means of reducing what were viewed as MNE abuses—technological exploitation by the technology owner.[60] In the twenty-first century, compulsory licensing schemes were attempted, for example by Brazil against MNEs producing AIDS drugs who refused to lower their prices.[61] More generally, these legal regimes seek to extend national power to manage enterprises in production chains by regulating their control over proprietary commercially

useful knowledge. However, these types of measures work toward the effective construction of legal regimes that produce coherent and global standards for MNE conduct. Indeed, in the case of technology transfer rules, like those of impediments to inbound FDI, the rules have appeared to provide little benefit and have been largely replaced by a markets-based model suspicious of the use of law to manage the use and abuse of technology superiority by MNEs in host states and protective of intellectual property.[62]

Taking Stock: From Contradiction to Coherence?

Taken together, the forms of lawmaking described above comprise the "legal toolkit" of nations. States and international organizations have energetically used these tools to further their interests and power. States are producing more laws as they try to manage MNEs and the effects of the activities in which these entities engage but so are corporations, international organizations, and other nonstate actors. Social norms and legal norms interact in supply chain management, that interaction effectuated through interlocking chains of MNEs and related entities across a number of states. The consequence is polycentric governance where multiple actors produce multiple sets of laws or governance rules that are simultaneously applicable to the same subject—the MNE.[63] That polycentric model was clear in the wake of the Rana Plaza factory building collapse, where associations of businesses and groups of states each sought to rework the standards for building and safety inspections applicable to those factories from which they sourced products.[64] States sought to change these standards as part of a more comprehensive set of changes to Bangladeshi law; MNE collectives sought to change these standards as part of coordinated programs to protect the legitimacy of their production chains (to which their changes were directed).[65] But where does that leave the state in relation to the MNE? More importantly, where does that leave law, as an enterprise of states and the state system, in relation to MNEs?

In the aggregate, national and, to some extent, international legal regimes demonstrate the contradictions and incoherence in using law to regulate MNEs. The legal toolkit of nations illustrates the structural constraints and limitations of state action that result from the limits of state power in law-based regulation of MNEs. The structural constraints—territory, democracy, etc.—reflect the core premises that give the state system its coherence, legitimacy, and authority. These contradictions are neither ameliorated nor resolved by the proliferation of law produced by states, or by the international law frameworks that serve to

internationalize domestic law. The contradictions are exacerbated, though, by the ideology of the state order through which these lawmaking projects proliferate.[66] What is produced is nothing like a cohesive legal regime for the regulation of MNEs but rather like a competition for advantage among states that effectively accelerates a change in the character of law. Law can be better understood as a commodity or transaction cost to be measured against the benefit of placing some portion of a production chain within that territory.[67] But something more comprehensive and coordinated is necessary. The efforts, spearheaded to success by Ecuador in 2014, to induce the international community to consider the possibility of negotiating a comprehensive treaty on business and human rights transposed into the national legal orders of states suggest both the promise and the aspirational nature of efforts to use law to manage MNEs.[68]

The reasons for the current state of MNE legal regulation may be usefully divided into four distinct categories. Each suggests some of the challenges for coherent lawmaking. These challenges remain, for the moment, difficult to surmount. The base cause of that difficulty, in turn, centers on the continued strong adherence by global elites to the ideology of a static, state-centered global legal-political system based on the primacy of territory ruled by law. The value of state-based law systems as a basis for MNE regulation is increasingly belied by the reality of those global production-centered processes (and the MNEs through which they might be organized) whose governance regimes are changing the world around them.

Legislative Efforts at the National and International Level Target the Wrong Object

Legislative policy is, like many other areas of policy formulation, a prisoner of its own history.[69] Current policy for MNE regulation is no exception. What drive this regulation are, to some extent, the well-remembered scandals of the 1970s in which MNEs were complicit in regime changes in Latin America, as well as the strategic use of corporate legal personality to protect enterprise assets in the wake of disasters in the 1980s, such as the one in Bhopal, India. These regulatory efforts presupposed that regulation must target entities as their object at both the national and international levels. Indeed, regulations must target not just any sort of entity, but rather those entities operating in corporate form and sitting atop sometimes complex networks of interrelated companies that together produce an "enterprise" that "games" the law and the state.[70] Yet, such an approach tends to target the wrong regulatory object as it proves incapable

of reaching the enterprise across production chains.[71] Regulating MNEs should be understood as a proxy for the regulation of the effects of global production and value chains. Lawyers and policy analysts tend to treat value and production chains as irrelevant. However, it is the effects of production chains, rather than the forms through which they are established, that should organize structures of legal regimes, if what is meant to be managed are rights and obligations that ought to be vested in the participants of these chains from their beginning in resource gathering to their end in consumption of final products. International efforts have recently nodded in this direction; so has the OECD. Unfortunately, these shifts have not influenced law as much as they ought to have. As long as states target "things" rather than "processes" or "systems," they will invariably reach disappointing and avoidable results.

Coordinating Legislative Efforts within a Fractured Regulation Framework

MNE regulation reflects in large part the fracture between the fundamental principles of any such regulatory approach and its normative objectives. That fracture, of course, has been well reflected in the inability of international public organizations to build a unified approach to principles and objectives of human rights. Since the 1970s, the question of the substance of state regulation of MNEs and business conduct has divided states roughly into two groups (though there are variations even among these distinct camps): one group seeks to enhance and protect the economic, social, and cultural rights of their citizens and the other seeks to enhance the political and civil rights of their citizens instead. The former maintain that law is a means of providing a necessary floor of protection to economic, social, and cultural rights whose flourishing makes it possible to develop robust and authentic political and civil rights. The latter take the reverse view that robust civil and political rights are a baseline for ensuring respect for economic, social and cultural rights.[72] These fundamental differences have a deep impact on policy and on the thrust of legal regimes, especially those that might affect MNEs.[73] The United States, for example, may favor information- and disclosure-based regimes with a large ambit for public choice and may resist any move that would require a change from shareholder or enterprise wealth maximization policy. China, on the other hand, may favor control regimes in which more specific obligations are imposed and may resist transparency regimes.

Problems Posed by the Legal Structure of International Law

Lawmaking itself involves a tremendous expenditure of public capital; in democratic societies that capital may be limited and must be distributed among a host of issues facing the state. However, the legal structure of international law itself makes coordination much more expensive in terms of institutional costs, with sometimes elusive value for the political forces that must incur those expenses within states. For many states, international law and lawmaking remain obligations that require transposition into the domestic legal order to give rise to legal rights and obligations.[74] Even in states where international agreements become part of the domestic legal order upon ratification, there is no mechanism for ensuring uniform adoption. States have long been in the habit of including reservations, sometimes substantial, in their ratifications of treaties.[75] And, of course, there is no central mechanism for developing uniform interpretation and application of international law, even when it is transposed into the domestic legal orders of states. Nor is there any legal means of forcing states to ratify and adopt treaties. Beyond a few principles that have taken decades to embrace, there is little in the way of legal discipline for international coordination of national law. Indeed, frustration has produced a large literature extolling the virtues of bottom-up lawmaking through international mechanisms and into domestic legal orders as a more effective way of developing more uniform regulation.[76] Overcoming the structural constraints of international law may well be a necessary condition of increasing the viability of legal responses to MNE production systems.

The Emergence of Alternative Governance Structures

Systems cannot endure gaps in their governance and remain autonomous or sustainable. Predictability, certainty, and coherence are basic premises of operating systems—whether they are denominated law, governance, or something else. These systems can be autonomous or networked, comprehensive or functionally differentiated.[77] Their form and structure are in part reflections of the field of systems within which they must operate.[78] Societally based systems have emerged to fill the gap left by the inevitable fracture of legal efforts through states and the international system that reflects state-centered political ideology to regulate through law. Though not a problem in themselves—indeed this essay has suggested that production chain systems must be taken into account in order to effectively regulate MNEs—the emergence of such systems of governance is

seen as a problem by those who continue to believe that the traditional mechanisms of law, grounded in state domestic legal orders, hold the key to effective MNE regulation.

In the face of these efforts, though states have reverted to traditional methods of deploying law as the principal instrument of regulation, there is evidence of emerging hybrid approaches. These include states as norm makers that develop standards and "soft" law hardened in societal space (e.g., the OECD's Guidelines for Multinational Enterprise and its structures for filing complaints against MNEs who fail to conform) and projections of legal norms through private investment and assertions of shareholder power (e.g., Norway's pioneering approach through its sovereign wealth fund to use its shareholder power to apply international norms to entities in which it owns stock).[79] Sovereignty-eroding hybrid efforts at the production of consensus law among states have also emerged. These focus on the construction of more comprehensive, though for the moment not very transparent, rules of production among states in which production chains are located. The Financial Stability Board of the G-20, the OECD, and even the Trans-Pacific Partnership and related regional trade regimes herald the tactics of these new forms of organic, bottom-up, and coercive disciplines, which are eventually manifested in law.

Conclusion—Cutting the Gordian Knot

Like the scorpion in the ancient fable, the state cannot overcome its nature. It will sting the frog that carries it across the river and plunge them both to their deaths.[80] But if that is the case, it is becoming more apparent that the scorpion will either have to choose a different floating device, become accustomed to life on one side of the land divided by the river, or cease to be itself. And perhaps it is that something else that the state must become if it is to participate meaningfully, through law, in the management of the behaviors of the production chains in which MNEs operate.[81] And thus the war in heaven with which this essay opened. For those with whom this ancient reference may not resonate, what emerges from even a cursory review of regulatory approaches to MNEs is quite simple and perhaps depressing. The theory on which states are organized and function, and the way their law is legitimated, is not changing. It is tied to ancient notions of territorial power—substantial control within a territory and considerably less outside of it—and of the foundation of law in popular consent and representative democracy (or government). But, while the state has stood still, the world around it has changed and grown more important.

With globalization, the foundations of the state remain intact but are far less relevant as sources of law that can effectively control MNEs. Either the state must change its character to suit the times, or new techniques and actors will have to emerge to replace the state.

A number of emerging trends in regulatory techniques may point to new modes of action through which law and the state may play a significant role in disciplining MNEs. These include the use of public and economic power to drive consensus on basic principles of MNE governance through soft law, as well as policy that develops through standard setting undertaken or overseen by smaller alignments of powerful states. Together, these emerging responses to the challenges of MNEs in production chains may not so much reject the current law and legal framework as absorb it within the larger project of developing extralegal governance systems to manage the processes, systems, and entities through which MNEs operate. WA

Notes

1. Rev. 12:7.

2. For example, see: Philip Allott, *The Health of Nations: Society and Law Beyond the State* (Cambridge: Cambridge University Press, 2002), § 14.53; Dennis Patterson and Ari Afilalo, *The New Global Trading Order: The Evolving State and the Future of Trade* (Cambridge: Cambridge University Press, 2008); For example, see: Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995); Larry Catá Backer, "Governance Without Government: An Overview," in *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization,* ed. Günther Handl, Joachim Zekoll, and Peer Zumbansen (Boston, MA: Martinus Nijhoff, 2012), 87–123.

3. Production chains are increasingly transnational systems that include all of the steps in transforming raw materials into finished goods for sale to consumers. They are related to and sometimes used interchangeably with supply chains—systems through which people, entities, and resources are organized to move products or services from suppliers to consumers. For example, see: Makoto Yano and Fumio Dei, "Trade, Vertical Production Chain, and Competition Policy," *Review of International Economics* 11, no. 2 (2003): 237–52; For example; see: Peter Dicken, *Global Shift: Reshaping the Global Economic Map of the 21st Century,* 4th ed. (London: Sage, 2003).

4. See: Larry Catá Backer, "The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity," *Tilburg Law Review* 17, no. 2 (2012): 177–99; Terrance C. Halliday and Gregory Shaffer, eds., *Transnational Legal Orders* (Cambridge: Cambridge University Press, 2015).

5. These objects of regulation may include climate change, communicable diseases, conflicts, financial instability, corruption, migration, and trade. For example, see: Bjorn Lomborg, ed., *Global Crises, Global Solutions* (Cambridge: Cambridge University Press, 2004); For example, see: Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Oxford: Hart Publishing, 2010).

6. Regional integration occurs when two or more nation-states work together to coordinate economic, social, and political policy. For example, see: Walter Mattli, *The Logic of Regional Integration: Europe and Beyond* (Cambridge: Cambridge University Press, 1999); Consider in this light the transformative potential of the Trans Pacific Partnership. For example, see: Larry Catá Backer, "The Trans-Pacific

Partnership: Japan, China, the U.S. and the Emerging Shape of a New World Trade Regulatory Order," *Washington University Global Studies Law Review* 13, no.1 (2014): 49–81.

7. For example, see: Andreas Osiander, "Sovereignty, International Relations, and the Westphalian Myth," *International Organization* 55, no.2 (2001): 251–87.

8. See: Peter T. Muchlinski, *Multinational Enterprises and the Law*, 2nd ed. (Oxford: Oxford University Press, 2007); Janet Dine, *The Governance of Corporate Groups* (Cambridge: Cambridge University Press, 2000); Jeremy A. Rabkin, *Law Without Nations? Why Constitutional Governmebnt Requires Sovereign States* (Princeton: Princeton University Press, 2005).

9. For example, see: John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W.W. Norton, 2013); Calliess and Zumbansen, *Rough Consensus and Running Code*.

10. "The intriguing challenge arising from social norms for legal scholars is its ideological ambiguity: that social norms *precede, relate to, are in contestation of and in constant exchange with* the established, institutionalized and formalized legal order." Ibid., 250 (emphasis in original).

11. I use the terms multinational enterprise, multinational corporation, and transnational corporation interchangeably, though they do not technically refer to the same thing. For purposes of this essay those differences do not affect the analysis. For ease, the essay will use the Organization for Economic Cooperation and Development (OECD) definition of a MNE: companies or other entities established in more than one state that coordinate their operations in various ways. See: OECD Guidelines for Multinational Enterprises Guideline I (Concepts and Principles § 4) (Paris: OECD Publishing, 2011). I avoid the old issue of terminology here but note that global discourse is divided among those who view the appropriate term as transnational corporation (TNC) rather than multinational corporation, which to the minds of some must refer to enterprises that represent the joint investment of several states.

12. Andreas Nölke, "Non-Triad Multinational Enterprises and Global Economic Institutions," in *Governing the Global Economy: Politics, Institutions, and Economic Development*, ed. Dag Harald Claes and Carl Henrik Knutsen (Abingdon, UK: Routledge, 2011), 277–91, 279.

13. For example, see: David Bilchitrz and Surya Deva, "The Human Rights Obligations of Business: A Critical Framework for the Future," in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect,* ed. Surya Deva and David Bilchitz (Cambridge: Cambridge University Press, 2013), 1–26; Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (New York: Routledge, 2012); Larry Catá Backer, "Realizing Socio-Economic Rights Under Emerging Global Regulatory Frameworks: The Potential Impact of Privatization and the Role of Companies in China and India," *George Washington International Law Review* 45, no. 4 (2013): 615–80.

14. For example, see: David Kinley and Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law," *Virginia Journal of International Law* 44, no. 4 (2004): 931–1023; Surya Deva, "Human Rights Violations By Multinational Corporations and International Law: Where from Here?," *Connecticut Journal of International Law* 19 (2003): 1–57.

15. For example, see: Richard Falk, *Predatory Globalization: A Critique* (Cambridge: Polity Press, 1999); Ruggie, *Just Business*; Gunther Teubner, "Self-Constitutionalizing TNCs? On the Linkage of 'Private' and 'Public' Corporate Codes of Conduct," *Indiana Journal of Global Legal Studies* 18, no. 2 (2011): 617.

16. The clearest example of this includes private market interventions by states through sovereign wealth funds. For example, see: Larry Catá Backer, "Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets," *American University International Law Review* 29, no. 1 (2013): 1–121.

17. For example, see: Organisation for Economic Co-operation and Development, *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones* (Paris: OECD Publishing, 2006).

18. For example, see: Phillip I. Blumberg et al., *The Law of Corporate Groups: Jurisdiction, Practice and Procedure*, 2nd ed. (New York: Aspen, 2007); Jean J. du Plessis et al., "An Overview of German Business or Enterprise Law and the One-Tier and Two-Tier Board Systems Contrasted," in *German Corporate Governance in International and European Context,* ed. Jean J. du Plessis et al. (Berlin: Springer Verlag, 2012), 1–14.

19. See: Larry Catá Backer, "Are Supply Chains Transnational Legal Orders?: What We Can Learn From the Rana Plaza Factory Building Collapse," *UC Irvine Journal of International, Transnational, and*

Comparative Law 1, no. 1 (forthcoming 2015).

20. Ibid.; Edo Andriesse et al., "Business Systems, Value Chains and Inclusive Regional Developments in Southeast Asia," in *Value Chains, Social Inclusion, and Economic Development: Contrasting Theories and Development,* ed. A.H.J. Helmsing and Sietze Vellema (New York: Routledge, 2011), 151–77; Ibid.; "Indeed, it may be better to view the MNE as a productive system which can take a multiplicity of forms ranging from a highly integrated hierarchy of jointly held entities to a loose network of coordinated economic collaborators." Muchlinski, *Multinational Enterprises & the Law,* 33. See: Gunther Teubner, "The Many Head Hydra: Networks as Higher Order Collective Actors," in *Corporate Control and Accountability* ed. Joseph A. McCahery and Colin Scott (Oxford: Clarendon Press, 1993), 41.

21. See, also: Dine, *The Governance of Corporate Groups*; Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006).

22. See: John G. Ruggie, "Commentary: Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors," Institute for Human Rights and Business, September 9, 2014.

23. See: "Global Movement For a Binding Treaty," Treaty Alliance, http://www.treatymovement.com/#. Also see: Statement to the Human Rights Council in Support of the Initiative of a Group of States for a Legally Binding Instrument on Transnational Corporations Sept. 13, 2013, http://www.stopcorporateimpunity.org/?p=3830; Bolivia, Cuba, Ecuador, South Africa, Venezuela: Resolution: Human Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, U.N. Human Rights Council, A/HRC/26/L.22/Rev.1 (24 June 2014).

24. See: John G. Ruggie, Closing Plenary Remarks, 3rd UN Forum on Business and Human Rights (Geneva, Switzerland, December 3, 2014), http://lcbackerblog.blogspot.com/2014/12/blog-post.html.

25. "The root cause of the business and human rights predicament today lies in the governance gaps created by globalization—between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences." See: John Ruggie, Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, U.N. Human Rights Council 8th Session, Agenda item 3 A/HRC/8/5 (7 April 2008) ¶ 3.

26. As discussed below notes 77–79. For conceptual framing, see: Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996).

27. See: "Joint statement by European Commission/HRVP and US agencies on the Second Anniversary of the Rana Plaza disaster in Bangladesh," European Commission, April 24, 2015.

28. See: notes 77–79.

29. John H. Dunning, "Location and the Multinational Enterprise: A Neglected Factor?," *Journal of International Business Studies* 29, no. 1 (1998): 45–66; Klaus E. Meyer, Ram Mudambi, and Rajneesh Narula, "Multinational Enterprises and Local Contexts: The Opportunities and Challenges of Multiple Embeddedness," *Journal of Management Studies* 48, no. 2 (2011): 235–52.

30. See: Peter T. Muchlinski, "Law and the Analysis of the International Oil Industry," in *The International Oil Industry: An Interdisciplinary Perspective,* ed. Judith A. Rees and Peter R. Odell (London: MacMillan, 1987), 142.

31. For example, see: Dan Wielsch, "Global Law's Toolbox: How Standards Form Contracts," in *Regulatory Competition in Contract Law and Dispute Resolution,* ed. Horst Eidenmüller (Oxford: Hart Publishing, 2013), 71–110.

32. See: Penelope Simons and Audry Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*, (London: Routledge, 2014), 89–93. See also: Gunther Teubner, "Self-Constitutionalizing TNCs?"; Gunther Teubner, "The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-Determination," in *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification,* ed. Rainer Nickel, (Antwerp: Intersentia, 2010), 2003-2014.

33. Certainly that is the view of the World Bank and its good governance campaigns grounded on voice and accountability, political stability and the absence of violence, government effectiveness, regulatory quality, rule of law, and corruption control systems. For example, see: "Worldwide Governance

Indicators," World Bank.

34. For example, see: Amanda Perrry Kessaris, "Finding and Facing Facts About Legal Systems and Foreign Direct Investment in South Asia," *Legal Studies* 23, no. 4 (2003): 649–89.

35. More powerful states have the ability to resist and reject such projections of domestic legal orders of foreign states. The result, of course, is greater variation in the "law" applicable to conduct. For example, see: Harry L. Clark and Lisa W. Wang, "Foreign Sanctions Countermeasures and Other Responses to U.S. Extraterritorial Sanctions" (paper written for USA Engage, August 2007).

36. Most famously, the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. § 78dd-1, et seq. (accounting transparency requirements and interdiction of bribery of foreign officials); For example, see: David J. Gerber, "The Extraterritorial Application of the German Antitrust Laws," *American Journal of International Law* 77, no. 4 (1983): 756–83. Also see: Joanne Scott, "Extraterritoriality and Territorial Extension in EU Law," *American Journal of Comparative Law* 62, no. 1 (2014).

37. For example, see: Daniel Augenstein and David Kinley, "When Human Rights 'Responsibilities' become 'Duties': The Extra Territorial Obligations of states that Bind Corporations," in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?,* ed. Surya Deva and David Bilchitz (Cambridge: Cambridge University Press, 2013), 271–94.

38. Cf. Upendra D. Acharya, "Globalization and Hegemony Shift: Are States Merely Agents of Corporate Capitalism?," *Boston College Law Review* 54, no. 3 (2013): 937–69.

39. For example, see: Sara Seck, "Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations," *Trade, Law and Development* 3, no. 1 (2011): 164–202. But also see: Makau Mutua and Antony Anghie, "What is TWAIL?," *ASIL, Proceedings of the Annual Meeting* 94 (2000): 31–40. Matua and Anghie start their essay by asserting that the "regime of international law is illegitimate. It is a predatory system that reproduces and sustains the plunder and subordination of the Third World by the West"; Ibid., 31.

40. See: Sara Seck, "Emerging Market Multinational Home States, Extractive Industries, and the Inside/Outside Problem," *Law at the End of the Day* (blog), July 2, 2015, http://lcbackerblog.blogspot.com/2015/07/sara-seck-on-emerging-market.html.

41. See: International Covenant on Economic, Social and Cultural Rights, General Assembly resolution 2200A (XXI) of December 16, 1966; See: David P. Stewart, "United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations," *DePaul Law Review* 42, no. 3 (Summer 1993): 1183–1207. But also see: Daniel J. Whelan and Jack Donnelly, "The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight," *Human Rights Quarterly* 29, no. 4 (2007): 908–49.

42. See: Laurence R. Helfer, "Not Fully Committed? Reservations, Risk and Treaty Design," *Yale Journal of International Law* 31 (2006): 367–82.

43. Certainly the most powerful states have already made it clear, in the context of rebuilding a global financial regulatory architecture after 2007, that projection of their consensus norms, developed as standards, have been incorporated in arrangements between FSB states and others. "Policies agreed by the FSB are not legally binding, nor are they intended to replace the normal national and regional regulatory process. Instead, the FSB acts as a coordinating body, to drive forward the policy agenda to strengthen financial stability. It operates by moral suasion and peer pressure, to set internationally agreed policies and minimum standards that its members commit to implement at national level." "What We Do," Financial Stability Board; See: Larry Catá Backer, "Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order," *Indiana Journal of Global Legal Studies* 18, no. 2 (2011): 751–802.

44. "A disclosure regime encompasses all legally recognized information claims that a system if corporate governance or a financial system furnishes financial contracting parties with." Jens Wüstemann, "Disclosure Regimes and Corporate Governance," *Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift für die gesamte Staatswissenschaft* 59, no. 4 (2003): 717–26. But disclosure regimes have been broadened to include requirements under soft law, corporate self-disclosure regimes, and international disclosure regimes. For example, see: Peter T. Muchlinski, "Enron and Beyond: Multinational Corporate Groups and the Internationalization of Governance and Disclosure Regimes," *Connecticut Law Review* 37,

no. 3 (Spring 2005): 725–63; Judith van Erp, "Effects of Disclosure on Business Compliance: A Framework for the Analysis of Disclosure Regimes," *European Food and Feed Law Review*, no. 5 (2007): 255–63.

45. Thus, in the United States the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 203, 124 Stat. 1376 (2010) requires the Securities and Exchange Commission to issue regulations requiring corporate disclosure of the sourcing of certain rare minerals originating in African conflict zones. See: *National Association of Manufacturers v. Securities and Exchange Commission*, No. 13-5252 (slip op. D.C. Cir., April 14, 2014), opinion on rehearing No. 13-5252 (slip op., D.C. Cir., August 18, 2015), the District of Columbia Circuit Court of Appeals determined that such regulations constituted unconstitutionally compelled commercial speech, thus violating the First Amendment of the U.S. Constitution.

46. Development, however, remains an important consideration for some states. For example, see: José Antonio Ocampo and Joseph Stiglitz, eds., *Capital Market Liberalization and Development* (New York: Oxford University Press, 2008); Welber Barral, ed., *Direito e Desenvolvimento: Análise da ordem jurídica brasileira sob a ótica de desenvolvimento* (São Paulo: Editora Singular, 2005).

47. For example, see: Jeswald W. Salacuse and Nicholas P. Sullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain," *Harvard International Law Journal* 46 (2005): 67, 76; For example, see: Jeswald W. Salacuse and Nicholas P. Sullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain," *Harvard International Law Journal* 46, no. 1 (Winter 2005): 67–130; See, e.g.: Organisation for Economic Co-operation and Development, *Code of Liberalization of Capital Movements* (OECD Publishing, 2013), 3. "Framework for countries progressively to remove barriers to the movement of capital, while providing flexibility to cope with situations of economic and financial instability." Ibid., 3.

48. For example, see: Douglas Zhihua Zeng, ed., *Building Engines for Growth and Competitiveness in China: Experience with Special Economic Zones and Industrial Clusters* (Washington, DC: World Bank Publications, 2010).

49. For example, see: John B. Goodman and Louis W. Pauly, "The Obsolescence of Capital Controls?: Economic Management in an Age of Global Market," *World Politics* 46, no. 1 (1993): 50–82.

50. Most favored nation clauses in trade agreements provide that each of the contracting parties will grant to the other any right, privilege, etc. that it has granted any third countries. The effect of these provisions is to reduce the ability of developing states to favor one state over another. At their limit, they can serve to privilege foreign investors with an investment treaty over domestic investment. See: Scott Vessel, "Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties," *Yale International Law Journal* 32, no. 1 (Winter 2007): 125–89; Peter T. Muchlinski, "Caveat Investor?: The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard," *International and Comparative Law Quarterly* 55, no. 3 (2006): 527–58.

51. See: Leyla Davarnejad, "Strengthening the Social Dimension of International Investment Agreements by Integrating Codes of Conduct for Multinational Enterprises," Global Forum, 7 (March 27–28, 2008), available at http://www.oecd.org/investment/globalforum/40352144.pdf; Jan Peter Sessa, *An Economic Analysis of Bilateral Investment Treaties* (Dordretcht: Gabler, 2011), 124–54; See: Ozay Mehmet and Akbar Tavakoli, "Does Foreign Direct Investment Cause a Race to the Bottom?," *Journal of the Asia Pacific Economy*, 8, no. 2 (2003): 133–56.

52. "In its conditional approval of the deal, MOFCOM found no anticompetitive impact from the transaction yet prohibited InBev from increasing its holding of the 27 percent of Tsingtao Beer that Anheuser-Busch held or its own 28.56 percent holding of Zhujiang Brewery and from buying interests in two other Chinese beer brewers without prior MOFCOM review even if the transactions would otherwise be exempt from AML review." See: Yee Wah Chin, "M&A Under China's Antimonopoly Law: Emerging Patterns," *Business Law Today* (September 2010).

53. See: Maher M. Dabbah, *International and Comparative Competition Law* (Cambridge: Cambridge University Press, 2010), 20–30.

54. See: Salvador Barrios et al., "International Taxation and Multinational Firm Location Decisions," *Economic Papers* (Directorate-General for Economic and Financial Affairs, European Commission),

Economic Papers 356 (January 2009); James R. Hines, Jr., Tax Policies and the Activities of Multinational Corporations," NBER Working Paper No. 5589 (May 1996).

55. For dialogue on globalization, see: Markus Henn, "Tax Havens and the Taxation of Transnational Corporations" (Friedich, Ebert and Stiftung International Policy Analysis, June 2013), http://library.fes.de/pdf-files/iez/global/10082.pdf; See: Jane G. Gravelle, *Tax Havens: International Tax Avoidance and Evasion* (Washington, DC: Congressional Research Service, January 15, 2015).

56. "Intra-firm trade makes it possible for TNCs to shift costs and profits internally and across borders from one country to another. This encourages one of the most prevalent methods of tax avoidance, because the company can shift costs and profits in a way that is most tax favourable for the corporation as a whole." Henn, "Tax Havens and the Taxation of Transnational Corporations," 4.

57. Jane G. Gravelle, "Tax Havens," 28.

58. See: M. Blakeney, *Legal Aspects of the Transfer of Technology to Developing Countries* (Oxford: ESC Publishing, 1989); Keith E. Maskus, *Intellectual Property Rights in the Global Economy* (Washington, DC: Institute for International Economics, 2000).

59. Miagsam Santikarn, *Technology Transfer* (Singapore University Press, 1981), 4.

60. See: Blakeney, "Legal Aspects of the Transfer of Technology," 35–42; Santikarn, "Technology Transfer," 24–35.

61. For example, see: Shaira Bhanji, "Bullying the Boss? Compulsory Licensing for Antiretroviral Drugs in Brazil and Thailand," *Global Health Review* (October 21, 2011).

62. "Results suggest that open trade policies are crucial for developing countries to be able to attract technology. But openness alone is not sufficient, for strong absorptive capacity and the ability to adapt foreign technology are important for ITT to effect local technical change." Bernard M. Hoekman, Keith E. Maskus, and Kamal Saggi, "Transfer of Technology to Developing Countries: Unilateral and Multilateral Policy Options," *World Development* 33 (2005): 1587–1602.

63. For example, see: Mark B. Taylor, "The Ruggie Framework: Polycentric Regulation and the Implications for Corporate Social Responsibility," *Nordic Journal of Applied Ethics* 5, no. 1 (2011): 9–30; Jamie Darin Prenkert and Scott J. Shackelford, "Business, Human Rights, and the Promise of Polycentricity," *Vanderbilt Journal of Transnational Law* 47, no. 2 (2014): 451–500.

64. See: Dorothée Baumann-Pauly, Sarah Labowitz, and Nayantara Banerjee, "Closing Governance Gaps in Bangladesh's Garment Industry—The Power and Limitations of Private Governance Schemes" (SSRN working paper, March 12, 2015); Backer, "Are Supply Chains Transnational Legal Orders?"

65. For the state effort, see: Bangladesh, European Union, and International Labour Organizaton, *Joint Statement Staying engaged: A Sustainability Compact for continuous improvements in labour rights and factory safety in the Ready-Made Garment and Knitwear Industry in Bangladesh* (Geneva, July 8, 2013), http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151601.pdf. For discussion of the progress of comprehensive legal changes contemplated in the Compact were addressed in European Commission, see: *Bangladesh Sustainability Compact, Technical Status Report* (April 24, 2015). For discussion of the MNE efforts advanced through the Accord on Fire and Building Safety in Bangladesh and the Alliance for Bangladesh Worker Safety, see: Baumann-Pauly et al., "Closing Governance Gaps," and Backer "Are Supply Chains Transnational Legal Orders?"

66. See: Larry Catá Backer, "On the Tension between Public and Private Governance in the Emerging Transnational Legal Order: State Ideology and Corporation in Polycentric Asymmetric Global Orders" (SSRN working paper, April 16, 2012).

67. The notion is a substantially expanded version of the older idea of regulatory competition, but now understood from the perspective of the consumer rather than the producer. "Law has become a commodity in many parts of the world and in relation to many different topics." Horst Eidenmüller, "Regulatory Competition in Contract Law and Dispute Resolution," in *Regulatory Competition in Contract Law and Dispute Resolution*, ed. Horst Eidenmüller (Oxford: Hart Publishing, 2013), 1–10.

68. See: Larry Catá Backer, "Considering a Treaty on Corporations and Human Rights: Mostly Failures But With a Glimmer of Success," (Coalition for Peace & Ethics working paper, June 2015).

69. Cf., Richard E. Neustadt and Ernest R. May, *Thinking in Time: The Uses of History for Decision-Makers* (New York: Free Press, 1986).

70. There has been a long-held interest among academics who have challenged the effects of the doctrines of corporate autonomy, which when combined with the doctrine that corporations may own other corporations, can give rise to a segmentation of the work of a firm among various parts, each protected against the liability of the others, but which must operate together to serve the purposes of economic activity to which it is directed. This challenge is bound up in the insight that legal definitions of corporations and economic definitions of enterprises do not encompass the same set of institutions. For example, see: Meredith Dearborn, "Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups," *California Law Review* 97, no. 1 (2009): 195–261; Some states, notably Germany, have moved to produce a mild form of enterprise liability law. See: Thomas Raiser, "The Theory of Enterprise Law in the Federal Republic of Germany," *American Journal of Comparative Law* 36, no. 1 (1988): 111–29.

71. For a useful conceptual discussio, see: Fleur E. Johns, "The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory," *Melbourne University Law Review* 19 (1994): 893–923.

72. See: Larry Catá Backer, "Realizing Socio-Economic Rights."

73. Ibid.

74. That is certainly the case in the United States, which distinguishes between self-executing treaties (treaties that are incorporated into domestic law) and non–self executing treaties that remain an obligation of the government but give rise to no domestic rights until transposed into law by Congress. See: Jordan J. Paust, "Medellin, Avena, the Supremacy of Treaties and Relevant Executive Authority," *Suffolk Transnational Law Review* 31, no. 2 (2008): 301–33; *Medellín v. Texas*, 552 U.S. 491 (2008).

75. That is where treaties are directly applicable within the domestic legal order of a state on adoption. See: John H. Jackson, "The Status of Treaties in Domestic Legal Systems: A Policy Analysis," *American Journal of International Law* 86, no. 2 (1992): 310–40.

76. For example, see: Janet K. Levitt, "Bottom Up International Lawmaking: Reflections on the New Haven School of International Law," *Yale Journal of International Law* 32 (2007): 393–420.

77. Consider the rise of international framework agreements between MNEs and global union federations. See: Dimitris Stevis, *International framework agreements and global social dialogue: Parameters and prospects* (International Labour Organization, 2010).

78. Cf., Niklas Luhmann, "The Autopoiesis of Social Systems," in *Sociocybernetic Paradoxes: Observation, Control and Evolution of Self-Steering Systems,* ed. F. Geyer and J. Van d. Zeuwen (London: Sage, 1986), 172–92.

79. Organisation for Economic Co-operation and Development, *Guidelines for Multinational Enterprises* (2011); Larry Catá Backer, "Case Note: Rights And Accountability In Development (Raid) V Das Air (July 21, 2008) and Global Witness V Afrimex (August 28, 2008); Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations," *Melbourne Journal of International Law* 10, no. 1 (2009): 258–307; See Larry Catá Backer, "Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets," *The American University International Law Review* 29, no. 1 (2013):1–122.

80. A scorpion asks a frog to take him across a river with an assurance that the scorpion will not sting the frog. Halfway across the river the scorpion stings the frog. As he dies, the frog asks why he was stung, dooming them both, to which the scorpion replied, "it is my nature." See: William A Borst, *The Scorpion and the Frog: A Natural Conspiracy* (Bloomington, IN: Xlibris Corp., 2004).

81. For example, see: John Cantwell, John H. Dunning, and Sarianna M. Lundan, "An Evolutionary Approach to Understanding International Business Activity: The Co-Evolution of MNEs and the Institutional Environment," *Journal of International Business Studies* 41, no. 4 (2010): 567–86.