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The Private Regulation of Global Corporate Conduct

David Vogel
Inaugural Speaker
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CONTROVERSIES IN GLOBAL POLITICS & SOCIETIES

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This working paper was first presented to the seminar series on Internationalization and Public Policy, sponsored by the Munk Centre, the Centre for International Studies, and the Department of Political Science. The seminar series examines how the processes and substance of binding public policies are evolving in response to four developments: the emergence of non-state economic and civil society actors as new sites of political authority, the formation of authoritative international regulatory bodies, trends toward policy harmonization or convergence across states, and cross-territorial policy transfer stemming from membership in international institutions.

David Vogel's working paper addresses the first theme: the development of authoritative standards to govern corporate activities in areas such as the environment, labour, and human rights.

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The Private Regulation *of* Global Corporate Conduct

by
David Vogel

The last decade has witnessed a significant expansion of private, non-state or market-based regulatory frameworks for governing multinational firms and global supply networks. These global civil regulations seek to embed international markets in a network of global norms and rules by establishing standards for responsible conduct – primarily with respect to environmental and labour practices – as well as mechanisms for promoting compliance with them.

This paper places civil regulation in a historical and legal context, explains its relationship to economic globalization, and describes the role played in it by governments, NGOs, firms, and international organizations. It also assesses the effectiveness of civil regulation by providing a series of case studies that variously illustrate some notable achievements, some mixed results, and some striking failures. On balance, in their effectiveness as well as in their limitations, global civil regulations have had an impact roughly comparable to that of many international treaties, which also make extensive use of "soft" law.

The long-term future of civil regulation depends on two factors. The first is a clear demonstration that global corporate responsibility can provide important business benefits. Unfortunately, to date such evidence has been lacking: there has been little indication that corporate virtue pays. The second has to do with the strengthening of domestic regulatory authorities, as well as civil society in developing countries; civil regulation can complement effective governmental institutions but it cannot substitute for them.

INTRODUCTION

This paper explores transnational governance as it is associated with civil business regulation.[1] Civil regulations employ private, non-state, or market-based regulatory frameworks to govern multinational firms and global supply networks. The notion that companies have a responsibility to "society" is more than a century old; historically, though, corporate social responsibility (CSR) has been associated primarily with initiatives by firms to address social problems at the community level, often through corporate philanthropy.[2] More recently, CSR has become more international in scope; it now focuses increasingly on the impact of global firms and markets on working conditions, environmental quality, community development, and human rights, especially in developing countries. Civil regulations seek to embed international markets and firms in a framework of global rules and norms by establishing standards for responsible business conduct as well as mechanisms for promoting compliance with those standards.

A defining feature of civil regulation is that its legitimacy, governance, and implementation are not rooted in public authority. Civil regulations operate alongside or around the state rather than through it, and they are based on "soft law" or private law rather than on legally enforceable standards. Thus, violators face social or market penalties rather than legal sanctions.[3] Civil regulation extends regulatory authority "sideways" beyond the state towards global non-state actors (Haufler 2003, p. 226). Its recent growth reflects an expanded "public role for the private sector," as well as the growing importance of "private authority in global governance"

Other versions of this paper were presented at workshops of the Global Economic Governance Programme, Oxford University, 2006, and at the Annual Meeting of the American Political Science Association, 2006. The author gratefully acknowledges the comments provided by two anonymous reviewers.

[1] The term "civil regulation" comes from Zadek (2001). It is also used by Murphy and Bendell (1999). There is an extensive literature on global civil regulation and global corporate social responsibility, to which political scientists have only recently begun to contribute. There are now five books on this subject by political scientists, four of them published since 2004: Cashore et al. (2004); Haufler (2001); Lipschutz with Rowe (2005); Prakash and Potoski (2006); and Vogel (2005).
[2] For a history of corporate social responsibility in the United States, see Heald (1988).
[3] For excellent analyses of the role and importance of "soft law" in global governance, see Kirton and Trebilcock (2004, esp. pp. 3-33), as well as Moth (2004). Each of these books contains essays on both private and public soft law.

(Haufler 2001).[4] Global corporate codes constitute part of an "emerging global public domain"; civil regulation does "not replace states, but . . . [rather] embed[s] systems of governance in broader global frameworks of social capacity and agency that did not previously exist" (Ruggie 2004, p. 519). They represent "an innovative form of governance that arose in large part owing to the legitimacy and performance limitations in traditional forms of inter-state governance" (Bernstein 2004-05, p. 160). In many developing countries, corporations have taken on responsibilities that have traditionally been the focus of international development agencies, such as promoting community development, as well as functions that were long thought to be exclusive to states, such as enforcing national laws (DeWinter 2001, p. 113).

There are important linkages between civil regulations and public policies. The former typically include commitments by their corporate signatories to obey host-country laws, and many private regulatory standards are based on those which have been developed by intergovernmental organizations such as the Organization for Economic Co-operation and Development (OECD), the International Finance Corporation (IFC) of the World Bank, and the International Labour Organization (ILO). Governments in a number of developed countries, including the United States, the United Kingdom, Belgium, France, Austria, and Germany, as well as the European Union, have promoted the development of industry codes of conduct; so have intergovernmental organizations such as the OECD and the UN.

Furthermore, there are important structural similarities between civil regulations and many government regulations. The market-based regulatory mechanisms typically employed by civil regulations – such as those relating to producer certifications, product labelling, third-party auditing, and information disclosure – are being used increasingly by governments as alternatives or complements to command-and-control regulations, especially in the area of environmental policy.[5] For example, "ISO 14001 fits within an emerging paradigm shift in environmental law, from a media-specific,

[4] See also Hall and Biersteker (2002).
[5] See, for example, Gunningham and Grabosky (1978; 2003).

'command-and-control' approach to controlling emissions and wastes to one more focused on voluntary, incentive-based, market-based, and information-based approaches" (Roht-Arriaza 2000, p. 274). However, the labelling, disclosure, auditing, and certification components of civil regulations are not subject to state authority and are more likely to be global in scope. Moreover, many "voluntary" agreements between firms and governments are voluntary in name only, in that the state retains final legal authority.[6] This is not the case for civil regulation, for which there is typically no state "back-up." "The main difference between governance beyond the state and domestic governance . . . is that the former has to rely *solely* on voluntary compliance through non-hierarchical steering modes." (Keller n.d., p. 40; italics in original). Grant and Keohane (2005) observe: "When standards are not legalized, we would expect accountability to operate chiefly through reputation and peer pressure, rather than in more formal ways" (2005, p. 35).

Still, the boundaries between "voluntary" and mandatory regulations, state and non-state regulations, private and public law, and hard and soft law cannot always be sharply drawn.[7] "The distinction between mandatory and voluntary is best thought of not as a dichotomy, but as the ends of a continuum displaying decreasing degrees of corporate discretion" (Koenig-Archibugi 2004, p. 246). It is also a fluid distinction: soft laws can become "harder," and norms can become more law-like (Skjaerseth et al. 2006, 104-20). For example, the Uruguay Round WTO agreement granted international legal recognition to the health and safety standards of the Codex Commission, and some private forestry standards as well as ISO 14001 have been accorded legal recognition by national and local governments. In several countries, corporate social reporting has become mandatory where it was once voluntary. This dynamic has also arisen at the state level: many domestic and international laws began as norms but have since become legally binding (ibid.).

Virtually all of the policies and issues addressed by civil regulations are also the subject of government regulations at the national and

[6] For a detailed and sophisticated analysis of both private and public voluntary codes and the relationships between them, see Webb (2004).
[7] See, for example, ten Brink (2002), who explores the role of voluntary regulations at the EU and national levels.

international levels. For example, reducing corruption is a major goal of the UN Global Compact as well as several industry codes. Corrupt payments have also been banned by the OECD Convention on Combating Bribery of Foreign Public Officials, as well as by some national governments. Fisheries and forests are regulated by national laws, international treaties, and civil regulations, as are many labour practices, as well as human rights. Any assessment of the impact and significance of voluntary codes must view those codes in a broader political and legal context. Their growth and impact are closely related to other national and international state-based efforts to govern global firms and international markets. Some civil regulations address gaps in existing state and interstate regulations; some have been developed to avoid additional government regulations; and still others have helped strengthen the scope and/or effectiveness of state controls over business.

This paper describes the growth of civil regulation, explains how it functions, and assesses its significance. The results of civil regulation have been mixed. On the one hand, such regulations are increasingly affecting the ways in which many global firms, industries, and markets are governed. Their impact is uneven and limited but far from inconsequential. Global civil regulation – and the principles and practices of global CSR to which it is often linked – is now an important component of global economic governance and is likely to remain so. According to Krasner's influential definition, an international regime consists of "principles, norms, rules and decision making procedures around which actor expectations converge in a given issue area" (1982, p. 2). On this basis, many civil regulations have contributed to the development and strengthening of many international regulatory regimes.

On the other hand, if a "private regime" is defined as "an integrated complex of formal and informal institutions that is a source of governance for an economic issue area as a whole," then few civil regulations fall clearly into this category. There are important structural limitations to the effectiveness and scope of much private global economic governance (Cutler et al. 1999, p. 13). International law consists of both hard and soft law (Abott and Snidal 2000). Many of the strengths and shortcomings of private global regulations mirror those of international labour, environmental, and human

rights treaties and laws, which also rely on various forms of soft law, economic incentives, and "naming and shaming" to promote compliance – the former primarily by firms and the latter primarily by states.[8] The effectiveness of global civil regulation or transnational governance is thus roughly comparable to that of many international or interstate agreements; which is to say, it is highly uneven.

If accountability means that "some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of those standards, and to impose sanctions if they determine that those responsibilities have not been met," then civil regulations have undoubtedly made *some* global firms and industries *more* accountable (Grant and Keohane 2005, p. 29). They have provided important new vehicles for non-business constituencies, primarily in Western countries, to participate in the way global firms and markets are governed; and they have forced some global firms to internalize some of their negative social and environmental externalities. To this extent, they have *partially reduced* the democratic deficit that informs the governance of many global firms and markets.

But while civil regulations can compensate for some of the shortcomings of national and international state governance, they are not a substitute for effective governmental institutions. The long-term future of private global business regulation depends on the extent to which its standards for business conduct and its mechanisms for holding firms accountable are integrated with, reinforced by, and complement state-based and state-enforced regulatory policies at the national and international levels.[9] In other words, the soft laws of CSR must become "hardened" on one or more dimensions. "Market solutions can provide incentives for firms to implement codes and standards . . . But government action – in the North and the South – remains vital to effective regulation, by setting social goals

[8] For studies of the uneven impact of international environmental agreements, see, for example, Young (1999); Haas et al. (1993); and Miles et al. (2002). For human rights, see Hathaway (2002). For a comprehensive analysis of soft law in international agreements, see Shelton (2000, esp. ch. 9); and Weiss (2000), which compares the factors that shape compliance with soft law – including civil regulations – and hard law.
[9] For a discussion of the relationship between private codes and state regulations, see Meidinger (2006a).

and upholding the freedom of civil society actors to organize and mobilize" (Graham and Woods 2005, p. 1).[10]

CIVIL REGULATION IN CONTEXT

Throughout the history of capitalism, business self-regulation has existed in parallel with government regulation; indeed, historically the former often preceded the latter. The medieval guilds exercised a wide variety of regulatory functions, including price, market entry, and quality controls. In today's economies, private regulations govern a wide variety of business activities, most notably in the areas of electronic commerce, maritime transportation, bond ratings, and financial services. Numerous technical standards have been developed by private organizations such as the European Committee for Standardization, the European Committee for Electrotechnical Standardization, the International Organization for Standardization, the International Electrotechnical Commission, and the Codex Alimentarius Commission, and all of these standards play an important role in the global economy.[11] At the national level, organizations such as the Better Business Bureau and the Good Housekeeping Seal have sought to improve business consumer practices; at the same time, many industry associations have developed rules and standards for occupational health and safety, consumer protection, and environmental quality.

Civil regulations differ from most traditional forms of industry self-regulation in three important respects. First, the central purpose of many technical standards is to lower the costs of market transactions; in contrast, civil regulations seek to protect those interests which are not directly involved in the market chain: they primarily govern the relationship of firms to *external* constituencies. Second, civil regulations are more likely to be politicized: they have emerged primarily in response to political and social pressures on business – pressures that are often spearheaded by national and transnational activists. Third, compared to traditional business self-regulation, the governance of civil regulations is more likely to be transparent and contested, and to involve non-business constituencies either formally or informally.

[10] See also Ward (2004) and Cramer and Pruzan-Jorgensen (2006).

[11] For the importance of international standards, see Mattli (2003); and *Journal of European Public Policy* 8 (3), Special Issue: "Governance and International Standards Setting," which Mattli guest edited. See also the case studies in Cutler et al. (1999).

Civil regulation does not privatize business regulation in the sense of removing it from public scrutiny. Rather, it is associated with new non-state, political mechanisms for governing global firms and markets. "Private governance helps empower global civil society by providing activist groups with political levers that exist outside state systems" (Falkner 2003, p. 79). The expansion of global civil regulation is closely linked to the emergence of a global "civil society" – that is, to an increasingly sophisticated and extensive international network of non-governmental organizations (NGOs) based mainly in North America and Europe. This network monitors and influences a wide range of global business practices.[12] "NGO's role and influence have exploded in the last-half decade" (Mathews 1997, p. 53). NGOs have emerged as effective and often legitimate political actors. While much of their political activity has focused on global public policies and institutions, over the past decade they have been seeking more and more often to influence the private sector. The multitude of participants in the movement for global corporate accountability include unions, environmental organizations, human rights and labour activists, religious and consumer groups, student organizations, and consumer groups, as well as social or ethical mutual funds and socially oriented institutional investors.

Western activists seek mainly to improve business practices in developing countries by placing public pressure on those global firms which have a highly visible presence in the United States and Europe. In doing so, these activists effectively bypass both their own governments and those of developing countries. Civil regulation thus turns globalization on its head, by turning the global scope of business activity into a source of political vulnerability for global firms rather than an economic advantage to them. A key objective of Western activists is to politicize consumer and financial markets in developed countries in order to socialize market practices in developing ones. Many civil regulations are essentially pursuing a private, market-based variant of "trading up." By transmitting more stringent regulatory standards from developed countries to firms,

[12] For the emergence and impact of global civil society and global citizen activism, whose focus frequently includes but also extends beyond private corporations and issues involving business, see Cohen and Rai (2000); Edwards and Gaventa (2001); Keck and Sikkink (1998); and Batliwala and Brown (2006).

industries, and markets in developing ones, they are attempting to privatize the "California effect" (Vogel 1995). The emergence and impact of civil regulation has been facilitated both by the growth of global brands (which make firms more vulnerable to threats to their reputations in important consumer markets) and by the expansion of international communications (which enable activists to more easily acquire information about global business practices, and then to rapidly disseminate it).

The growth of civil regulation can also be understood as part of a broader historical effort to subject business to additional social controls. Polanyi's *The Great Transformation* describes the challenges faced by Western democracies during the nineteenth and early twentieth centuries in their efforts to develop new political and social institutions and rules for governing national markets and firms. Many proponents of civil regulations are engaged in a similar enterprise: they want to extend the kinds of social controls that now exist over firms operating in developed countries to those operating in developing ones – in essence, they want to globalize "embedded liberalism" (Ruggie 2003). The multistakeholder governance of many civil regulations represents the global functional equivalent of the non-state or "societal self-governance" associated with corporatism at the national level, with Western activists playing (or attempting to play) a role similar to that of labour unions in the West (Ottaway 2001). Similarly, corporate and industry programs to improve labour and environmental conditions and to promote community development in and around their facilities and those of their contractors in developing countries can be seen as the contemporary counterparts of the welfare capitalism practised by many national firms during the late nineteenth and early twentieth centuries in Europe and the United States.

A few global civil regulations date from the 1970s and 1980s.[13] They include the Sullivan Principles, which established labour standards for foreign investors in the Republic of South Africa during the Apartheid era; the MacBride Principles, which governed MNC labour policies in Northern Ireland; and Responsible Care, which was developed to improve environmental health and safety

[13] For the origins of the movement for corporate accountability, see Vogel (1978).

practices in the chemical industry. In these same decades, the distributors of infant formulas agreed to a code to govern their global marketing practices. However, the scope of global civil regulations has expanded significantly since the mid-1990s. Private regulations that define standards for "responsible" business practices now exist for virtually every global industry and internationally traded commodity – including forestry, chemicals, computers and electronic equipment, apparel, rugs, coffee, cocoa, palm oil, diamonds, gold, toys, minerals and mining, energy, tourism, financial services, and athletic equipment – though most still cover a relatively small portion of these products or sectors.[14]

There are now more than 250 industry or product codes, nearly all of which address labour or environmental practices. Many sectors and products are governed by multiple codes. More than two thousand global firms now regularly issue reports on their social and environmental practices, and many of these firms have developed their own codes and/or subscribe to one or more industry or cross-industry codes. The UN Global Compact has more than three thousand corporate signatories, and more than one thousand corporations now subscribe to the International Chamber of Commerce's Business Charter for Sustainable Development.

During the 1960s and 1970s, interest in the global dimensions of CSR was primarily an American phenomenon. Activist campaigns, such as one that called for firms to withdraw from southern Africa, and another that promoted a boycott of companies selling infant formulas in developing countries, primarily took place in the United States. Over the past decade, however, civil regulation has become more international. In fact, in a number of respects, global CSR is now more important in Europe than in the United States. Several European governments, as well as the EU, have recently been more supportive of global CSR initiatives than has the United States.[15] Ethical brands or certifications for coffee, rugs, and wood products have larger market shares in many European countries than in

[14] For the growth of civil regulation, see Gereffi et al. (2001); Koenig-Archibugi (2004); Kolk and van Tulder (2005); and Jenkins (2001).
[15] For a good comparative overview of government efforts to promote CSR, see Aaronson and Reeves (2002). For the role of European governments in promoting CSR, and the importance of CSR in Europe, see Perrini et al. (2006).

the United States, and London has replaced New York City as the global centre of CSR activism, research, reporting, and monitoring. Today, more global NGOs are based in Europe than in the United States. A decade ago, social or ethical investment funds were uniquely American: now they exist in every European capital market, though their market shares are generally smaller than in the United States. Institutional investors are attempting to influence the social or environmental conduct of firms as often in Europe as in the United States. This "Europeanization" of CSR, particularly on the continent of Europe, is an important development as it has significantly expanded the number of global firms that are governed by civil regulations.[16]

GLOBALIZATION AND CIVIL REGULATION

Why has civil regulation grown? The growth of global civil regulation in part represents a political response to the recent expansion of economic globalization and to the firms and industries that have fostered and benefited from it.[17] Over the past two decades the dynamics of economic globalization have significantly transformed the international economic landscape in two respects. First, the locus of manufacturing has shifted from developed to developing countries. Second, the production and supply networks of global firms are increasingly transcending national boundaries: much international trade is now among firms or interfirm networks, with the higher value-added components of the value chain located primarily in developing countries and the lower value-added portions in developing ones.

Underlying the emergence of civil regulation is the perception that economic globalization has created a structural imbalance between the size and power of global firms and markets, and the capacity and/or willingness of governments to adequately regulate them. According to this argument, economic globalization has made it more difficult for national governments to hold corporations accountable: economic globalization, along with the influence of neoliberal values and policies, has undermined the ability of governments to regulate firms and markets. As "market authority" has replaced "state authority," power in the global economy has become diffused (Strange 1996, p. 44). Transnational corporations are said

[16] For the growth and impact of CSR in Europe, see also Habisch et al. (2005).
[17] See Gereffi and Meyer (2006).

to “wield power without responsibility. They are often as powerful as states and yet less accountable” (Newell 2000, p. 121). Another critic observes: “Corporations have never been more powerful, yet less regulated” (J. Vidal quoted in ibid.). Civil regulation proposes to fill the regulatory gap between global markets and global firms on the one hand, and government regulation of multinational firms on the other. It is intended to “compensate for the decreasing capacities of national governments for providing public goods [as] . . . internationalization yields an increasing gap between territorially bound regulatory competences at the national level and emerging problems of international scope” (Knill and Lehmkuhl 2002, pp. 42, 44).

The extent to which global economic integration and international competition have constrained the ability of governments to regulate the conduct of global firms and markets is debatable. The power of global firms does not dwarf that of national governments: sovereignty is not at bay, and on many important dimensions the power of states is neither declining nor in retreat. Nor is there any evidence that economic globalization has produced a regulatory “race to the bottom.”[18] The scope of business regulations continues to expand in many countries as well as globally. But it is possible to argue that the global economy is confronting a “governance deficit.”[19] There are four important ways in which additional or more effective government controls over global firms and markets could address many if not all of the criticisms of economic globalization. The inability or unwillingness of states to adopt or enforce these methods has contributed to the development and growth of non-state-based governance institutions.

The first potentially important public policy mechanism is trade policy. Developed countries with relatively stringent and extensive domestic product and production standards could, in principle, restrict imports of products produced by “irresponsible” labour or environmental practices, or from countries with poor records on human rights, while rewarding countries that follow better practices with preferential market access. Some governments have in fact done so. For example, the United States has restricted imports of both tuna and shrimp harvested in ways that violate American animal protection standards. Both the United States and the EU have

[18] For a summary of the extensive literature on this issue, see Vogel and Kagan (2004).
[19] The phrase is from Newell (2001), p. 908.

imposed restrictions on trade with Burma because of its human rights policies. Both the EU and the United States have extended preferential trade privileges to countries with stronger domestic labour and environmental standards and human rights practices (see Hafner-Burton 2005; Jorng 2003). The North American Free Trade Agreement (NAFTA) and the Central American Free Trade Agreement (CAFTA), as well as a number of bilateral trade agreements negotiated by the United States, require signatories to maintain and enforce domestic environmental and labour standards. However, the cumulative impact of trade policy as either a carrot or a stick to strengthen the regulations of developing countries remains modest, in part because few Western governments have been willing to link trade liberalization to improvements in the regulatory practices of their trading partners in any effective way.

Moreover, the rules and rulings of the WTO constrain the ability of governments to link trade liberalization to domestic social and environmental practices – even if more were willing to do so.[20] As many critics of the WTO have noted, there is a clear imbalance between the WTO's jurisdiction over domestic policies that protect producers and those that regulate them. WTO rules and rulings permit countries to impose trade restrictions if their trading partners do not adequately protect intellectual property rights, if domestic regulations constitute technical barriers to trade, or if those regulations are based on standards that lack adequate scientific justification. But WTO rules limit the use of trade restrictions if a nation's trading partners do not protect domestic working conditions, human rights, or environmental quality. International trade law "takes as a given that the responsibilities of a government toward its citizens is a matter to be determined by each government, not by the international community" (Steven Charnovitz quoted in Aaronson n.d.). Thus, "the GATT/WTO is not concerned with how a state treats its own citizens, but rather how it treats non-citizens who seek to trade" (ibid.).

WTO rules could certainly be changed so as to link global trade liberalization more closely to domestic environmental, labour, or human rights practices.[21] Many Western activists strongly support

[20] See Conca (2000).

[21] For some specific suggestions as to what these changes would look like, see Trebilcock (2004). For an analysis of how WTO rules could be (re)interpreted to govern corporate human rights policies, see Kinley and Tadaki (2004).

such a change in WTO rules, and in the case of labour standards, so do many Western labour unions. Domestic firms facing competition from less expensive imports from developing countries might also welcome extending the legal basis for trade restrictions. But global firms have strongly opposed such an extension on the grounds that it would raise their costs and possibly disrupt their supply chains. Equally importantly, many developing countries regard proposals to link trade liberalization to their domestic environmental, human rights, or labour practices as a disguised form of protectionism. To date, the preferences and influence of multinational corporations (MNCs) and of governments in developing countries have prevented a change in the rules that might strengthen linkages between international trade and national environmental and human rights practices.

A second way in which governments could control more effectively the conduct of global firms and ameliorate the negative social impacts of global markets is by expanding the scope and improving the effectiveness of international regulations. Scores of environmental treaties exist, but so far they cover a relatively small portion of global trade and production. Most of them include few enforcement provisions, and many of the provisions that do exist are poorly enforced. Moreover, the adoption of additional international agreements has often proven difficult. For example, the International Tropical Timber Organization has refused NGOs' requests that it adopt a forest certification and labelling system, largely because of opposition from developing countries (Lipschutz 2000-01). The same result has occurred in the case of global labour standards. When former U.S. Secretary of Labor Robert Reich proposed that the ILO develop a system for labelling garments based on the labour conditions under which they were produced, representatives from developing countries, led by Egypt, criticized his proposal as a disguised form of protectionism, and it was not adopted. The ILO has established standards for national labour practices, and most countries have signed on to them, but compliance is entirely voluntary and this international treaty contains no enforcement mechanisms. To date, the scope of human rights treaties does not extend to international firms.[22]

[22] For an analysis of how global firms might be made legally accountable for human rights, see Ratner (2001).

A legally enforceable international code of conduct to regulate global firms has been under discussion in various international forums.[23] During the 1970s, the ILO, the UN Commission on Transnational Corporations, and the OECD all attempted to adopt legally binding codes of global corporate conduct. None of these efforts succeeded. The OECD did adopt comprehensive guidelines for MNCs. These do "represent a consensus on what constitutes good corporate behavior in an increasingly global economy" and have influenced the content of many civil regulations, but they are non-binding (Muchliniski, in Newell 2001, p. 909). In 1992 the issue of transnational corporation (TNC) regulation was dropped from the agenda of the UN Conference on Environment and Development (UNCED), largely because of strong opposition from global firms. While Agenda 21 does incorporate recommendations that affect TNCs, it does not include a code of conduct. The dearth of legally binding standards for multinational firms also reflects a lack of international consensus about the content of such codes – in particular, their potential sanctions against non-compliant companies.

A third way that governments could better govern global business activity is by regulating more of the international behaviour of global firms headquartered in their countries. The U.S. government has done so in one important policy area: the Foreign Corrupt Practices Act restricts the bribery of foreign government officials by American firms in any country in which they do business. Thanks to American pressures, in 1999 the OECD required all of its members to impose similar restrictions. But two-thirds of the countries that signed this anti-bribery convention "have achieved little or no enforcement" (Williamson and Peel 2006, p. 4).[24] Significantly, the United States has never seriously considered broadening the scope of its legal controls over American-based MNCs to govern other aspects of their conduct outside American borders.[25] In addition to corruption, its legal controls over American MNCs primarily restrict their investments in a handful of countries on either national security or human rights grounds. For its part, the EU did consider

[23] See Kolk and van Tulder (2005).
[24] For an update, see Gurria (2006, p. 5).
[25] Several attempts have been made to use the American judicial system to hold global firms legally accountable for human rights abuses under the provisions of the 1789 Alien Torts Claims Act – largely without success. See, for example, Taylor (2004).

enacting a legally binding Code of Conduct for European MNCS Operating Abroad, but owing to strong business opposition, it decided instead to make that code voluntary. In 1997, however, it did develop codes of employment practices for registered firms with subsidiaries in South Africa (McCrudden 2000).

The fourth and most important way in which the negative impacts of economic globalization could be ameliorated is for developing countries themselves to enact and enforce laws to protect the welfare of their citizens. This certainly has been the historical pattern in developed countries, whose controls over business, labour, and environmental practices became progressively stronger as they industrialized and extended the franchise. Presumably, many developing countries will eventually adopt a similar broad array of controls over both foreign and domestic firms that sell or produce within their borders as these countries become more affluent and as their governments become more democratic and accountable. Some are already doing so, but many are not. In most cases, the problem is not so much the lack of regulations, but rather the inability or reluctance of governments to adequately enforce them. Moreover, these governments often face trade-offs – for example, tighter or better enforced domestic labour or environmental standards could restrict foreign investment, thus reducing much-needed capital inflows and domestic employment. Some governments in developing countries, fearful of discouraging investments by geographically mobile foreign firms, have either relaxed the enforcement of national regulatory standards or hesitated to impose more stringent ones. Equally importantly, some developing country governments – most notably China – restrict or discourage civic institutions, such as independent trade unions, that could play an important role in making both foreign and domestic firms more politically accountable. In the case of "failed states," public authority itself is problematic: many resource-rich governments lack the capacity to protect the welfare of their citizens – and in many cases are not interested in doing so.

The growth of civil regulation reflects not so much an actual *decline* in the regulatory authority or capacity of governments. Rather, it represents an effort to *extend* regulation to a wide range of global business practices for which the scope or effectiveness of national and international government authority is weak, limited, or non-

existent, in part for the reasons noted above.[26] For example, forestry and fishing practices are not adequately regulated by many national governments, nor are they governed effectively by international treaties. The same is true of labour standards. Likewise, some natural resource investments in developing countries have had adverse environmental and social impacts, and the royalty payments from global firms are often squandered by corrupt local elites. Accordingly, "social movements, nongovernmental organizations, and corporations – civil society in other words – have come to be seen as the 'last best hope' by those intent on providing public governance in pursuit of the common good and help for those in need" (Lipschultz with Rowe 2005, p. 17).

THE EMERGENCE OF CIVIL REGULATION

The fact that there is a governance deficit with respect to many important global business activities does not necessarily mean that new mechanisms will emerge to address it. Where have civil regulations come from? Who has initiated them? The organizational or institutional sources of civil regulations vary widely.[27] They include NGOs such as the World Wildlife Fund, Greenpeace, the Clean Clothes Campaign, Amnesty International, the Council on Economic Priorities, and Oxfam; trade associations for coffee, chemicals, mining, apparel, electronics, toys, and cocoa; trade unions such as the International Textile Workers Association; and international standards bodies such the International Standards Organization. Some civil regulations have been established with the support of governments or intergovernmental organizations. For example, the UN Environmental Program helped establish the Electronics Industry Code of Conduct, the British and American governments worked with firms in extractive industries to develop the Voluntary Principles on Security and Human Rights, the Fair Labor Association emerged from an initiative of the American government, the Ethical Trading Initiative was organized by the British government, and the German government promoted the Common Code for the Coffee Industry.

[26] For an extremely comprehensive analysis of the growth of civil regulation in the context of a global governance deficit, see Koenig-Archibugi (2004).

[27] For detailed case studies of the political and institutional development of codes in the apparel and timber sectors, see Bartley (n.d.) and idem (2003). For forestry, see Gulbrandsen (2004).

This in turn poses two additional questions: What has motivated NGOs, governments, and international organizations to promote civil regulations? And why have so many firms agreed to adopt or accept them? The motivation for Western NGOs is straightforward: they regard civil regulations as an important source of leverage over global business activity. The international impact of many large Western firms is substantial; it follows that so is their potential leverage. For example, Starbucks purchases a significant amount of the world's coffee production, Home Depot is the largest single purchaser of wood and wood products, McDonalds controls a major portion of global beef and chicken production, and Wal-Mart is the world's largest retailer. Changing the procurement policies and practices of such firms would have major global social and environmental impacts – comparable to if not greater than those of many national regulations. At the same time, many NGOs have been repeatedly frustrated by their inability to strengthen national and international regulations along the dimensions noted above. For these global activists, engaging in politics through markets represents a viable alternative political strategy, in the sense that lobbying corporations has often proven more efficient and effective than lobbying governments:

> "Social markets" . . . extend the reach of democracy and popular sovereignty [creating] . . . new, potentially quite powerful mechanisms for expressing and aggregating civic, social and political preferences. Well-ordered social markets supplement conventional channels of political expression and popular control by creating distinctive arenas of governance in which citizens participate directly, through their market choices, in influencing the behavior of powerful economic entities often resistant to other forms of social control. (Fung 2002, p. 150)

Equally importantly, the willingness of many NGOs to cooperate with firms and industry associations in developing voluntary standards and participating in their enforcement has been critical to the emergence, legitimacy, and effectiveness of many civil regulations.[28]

As noted above, some Western governments, especially in Europe, have played an important role in promoting civil regulations. Besides facilitating their formation and organization, some have provided financial support to private regulatory programs. Several European governments have indirectly promoted private, market mechanisms of corporate accountability by requiring companies

[28] See Pattberg (2005b).

that trade on their stock exchanges to issue annual reports on their social and environmental practices and by encouraging (in some cases requiring) public pension funds to consider corporate social and environmental practices in making investment decisions. The procurement policies of some governments give preference to privately certified products. For its part, the EU has been a strong supporter of global CSR, issuing a Green Paper and several other official reports and communications, funding academic research, and convening several conferences for companies and other stakeholders.[29]

The strong support of many European governments and the EU for global civil regulation reflects in part the historic ties that many European governments have with their former colonies. In addition, many aspects of civil regulation are consistent with the European approach to business regulation: the EU and many European governments make extensive use of voluntary agreements and soft regulation and often rely on private organizations to develop regulatory standards.[30] For many European governments, extending the scope of civil regulations represents a neoliberal, global version of social corporatism or social democracy; it enables them to encourage or pressure global firms headquartered in Europe to behave more "responsibly" in a world whose neoliberal institutions and doctrines have limited their formal regulatory authority.

In this context, an important advantage of civil regulations as a global regulatory vehicle is that their labelling and certification provisions are not governed by the WTO, whose rules apply only to regulations formally adopted by governments. For example, while eco-labels are regarded by the WTO as (potential) technical barriers to trade, private product labels and certifications are not.[31] Likewise, firms can demand adherence to labour and environmental standards by their global suppliers as a condition for doing business with them; governments generally cannot make such requirements a condition for market access. Thus, foreign producers that have been disadvantaged by private regulations or standards have no legal remedy: they

[29] On the EU's role, see, for example, Herrmann (2004).
[30] See, for example, Egan (2001); Joerges and Vos (1999); Golub (1998); and Ansell and Vogel (2006).
[31] For an exhaustive discussion of both private and public social and environmental labels and their role in the global economy, see OECD (2006).

must comply or risk losing export markets. That civil regulations rely on private, market-based standards and enforcement represents, then, a major "loophole" in international trade law – one that some governments and NGOs have chosen to exploit.

The Global Compact has provided the UN with a vehicle for addressing the social impact of economic globalization as it has been criticized by many activists and some developing countries. It is politically impractical for the UN to regulate global firms directly. Civil regulation provides a means by which the UN can work cooperatively with global firms to promote global economic development and social justice – without antagonizing either those firms or the governments that support them. The voluntary CSR standards adopted by the OECD and promoted by the World Bank follow a similar logic. These organizations primarily affect governmental policies through soft law; in essence, civil regulations extend this same regulatory strategy from governments to corporations. (The same dynamic holds for the ISO, whose development of ISO 14001, an environmental process standard, logically flowed from the recent focus of this international body on process standards.)

What about corporations? In some cases, industries have adopted or accepted private global regulations in order to avoid government regulation. For example, after the chemical plant explosion at Bhophal, India, in 1984, several national chemical industry associations adopted Responsible Care as an approach to forestalling national laws establishing more stringent plant safety standards. An international "Code of Pharmaceutical Marketing Practices" was adopted by global drug firms as a response to the imminent threat of public regulation at the international level, including by the World Health Organization (WHO) (Ronit and Schneider 1999, p. 252). The International Chamber of Commerce's Business Charter for Sustainable Development was developed by global firms, whose fear was that the 1992 Rio Earth Summit would lead to an expansion of global environmental regulations.

But these examples are atypical. In most cases, firms have not agreed to accept civil regulations in order to avoid additional government regulation – mainly because there has been little

prospect of additional regulations being enacted, yet alone enforced, in the first place. Nike, for example, did not agree to improve health and safety conditions in its factories in Vietnam because it wanted to prevent the government of Vietnam from strengthening its own occupational and safety standards. Nor did Shell attempt to improve its environmental and social practices in Nigeria because it was worried that that's country's government would compel it to do so. Home Depot did not change its standards for procuring wood products because it feared that the governments of the United States or Chile would mandate more responsible forestry practices. The more than three thousand firms that have signed on to the UN Global Compact did not take this step in order to prevent the UN from adopting international legally binding regulations for global corporations, since there was no likelihood that the UN would do so.

Why, then, have more and more global firms and industries agreed to recognize the legitimacy of voluntary regulations? Many civil regulations have their origins in citizen campaigns directed against particular companies, industries, and business practices. Such campaigns have proliferated over the past decade, focusing on various issues, including working conditions and wages, child labour, the income of agricultural workers, unsustainable forestry practices, business investments that support corrupt governments, and natural resource developments that adversely affect human rights and environmental quality. Often these public campaigns were initially directed at highly visible companies such as Nike, Home Depot, Shell, Ikea, C&A, Gap, Nestlé, Hennes & Mauritz, Rio Tinto, Freeport Mining, and Citibank, which then became public symbols of "corporate irresponsibility."

Few of these public campaigns, even when accompanied by product boycotts, adverse media coverage, and pressures from the financial community, have adversely affected either the sales or share prices of targeted firms, or their ability to attract and retain employees.[32] Nevertheless, many firms have responded to them by adopting their own codes of conduct, by negotiating with NGOs, and, most importantly, by accepting civil regulations. Their motives are complex. Firms that market to consumers are highly risk averse, as well as

[32] See Vogel (2005, ch. 3).

extremely sensitive to public criticisms that might adversely affect the value of their brands. "NGOs have become highly sophisticated in using market-campaigning techniques to gain leverage over recalcitrant firms" that sell directly to consumers (Gereffi et al. 2001, p. 64). But even some global firms that do not market to consumers are concerned about their reputations: they value public approval and dislike negative media attention. Many global firms have embraced CSR as a component of their risk management policies and their marketing, public, and investor relations. Finally, the values and concerns of critics of economic globalization are personally shared by some executives, particularly those who manage corporations whose traditions and cultures have historically emphasized a strong commitment to CSR, such as Timberland, Levi-Strauss, C&A, Ikea, Statoil, and Hewlett-Packard. These executives want the firms they own or manage to play a more constructive role in addressing various global social and environmental problems.

This in turns raises more interesting questions: Why don't firms simply adopt their own codes of conduct? And why do they often endorse or encourage the formation of civil regulations that also govern their competitors? Many large global firms have adopted their own regulations, which in some cases go beyond industry standards. For "targeted" firms, industry-wide regulations make business sense. Adopting higher social or environmental standards usually raises a firm's costs. Persuading competitors to adopt similar standards results in a more level playing field. Moreover, the public often does not distinguish among the social or environmental practices of firms in the same industry. Thus, for example, if one apparel manufacturer is accused of employing child labour, the behaviour of other apparel firms is also likely to become suspect. This is even more true in the case of an accident in a chemical or nuclear power plant. In the fine jewellery industry, when some diamond retailers were accused of selling "blood diamonds" mined by warlords in conflict zones, the reputation of the entire industry was damaged. To the extent that the reputations of all firms in a particular sector suffer if any one of them acts less responsibly, all may benefit from adopting similar regulations. By agreeing to common standards, firms can also learn from one another and develop a clearer understanding of what is expected of them; furthermore, they can pool their resources to reduce compliance costs. In describing the growth of industry-wide social

standards, the *Financial Times* observed that “industries seek safety in numbers” (Maitland 2005, p. 1).

Students of management have long noted that “herd effects” play a role in disseminating many management practices (Lieberman and Asaba 2006). This dynamic has promoted business support for global civil regulations. The greater the number of firms in an industry that subscribe to a voluntary code, the greater the likelihood that other firms will decide it is prudent for them to do so as well. This dynamic also operates at the industry level: the greater the number of global industries that agree to adopt voluntary codes, the greater the likelihood that other industries will do the same. The growth of civil regulations among global firms and industries has created its own momentum: few global firms or industries headquartered in the United States or Europe want to be regarded as less “responsible” or “enlightened” than their peers.

Finally, as the literature on the spread of human rights norms for governments demonstrates, changes in norms can affect policy preferences (Risse et al. 1999). What begins as a primarily instrumental and largely rhetorical commitment can, over time, come to be viewed as legitimate (Scherer et al. 2006, p. 522). “Corporate preferences are driven in part about norms about the appropriate approaches to [managing] a business” (Haufler 1999, p. 201). For many highly visible global firms, engaging in various forms of global CSR, including having a CSR office, issuing a CSR report, cooperating with NGOs, and participating in voluntary industry codes, has become a business norm – an accepted component of managing a global firm in a more politicized and transparent global economy.[33] The growth of civil regulation has not reduced the commitment of firms to profit maximization; rather, many firms have now decided that it is their enlightened self-interest to profess their commitment to “good global corporate citizenship” by subscribing to one or more business codes of conduct, as well as developing their own CSR programs.

A survey of more than four thousand executives in 116 countries reported that “eighty-four percent of respondents agree that high

[33] For a fascinating discussion of the importance of changes in business norms, see Kollman (n.d.); see also Moore Dickerson (2002).

returns to shareholders should be combined with 'contributions to the broader public good'" (Maitland 2006, p. 10). Only a little more than a decade ago, a senior manager at Nike, when asked why he had not investigated claims about abuses in factories producing products for Nike, replied, "I don't know that I need to know . . . They are our subcontractors. It's not within our scope to investigate [allegations of labour violations]" (Vogel 2005, p. 21). Few if any managers working for a visible global firm with a substantial market presence in Europe or the United States would now agree with him. According to John Ruggie, a political scientist who helped develop the UN Global Compact, "the principle is taking hold that transnational firms . . . ought to be held accountable not only to their shareholders, but also to a broader community of stakeholders who are affected by their decisions and behavior" (Ruggie 2004, p. 21).

THE IMPACT OF CIVIL REGULATION

What has been the importance of civil regulation? Under what circumstances has it or is it likely to contribute to the more effective governance of global firms, industries, and markets?

A useful way of answering these important questions is to examine a few representative case studies of the governance and impact of civil regulations. This section looks at three categories of civil regulations – those which have been relatively effective, those whose impact has been mixed, and those which have been relatively ineffective – and explores the factors underlying their varying impacts.

Relatively Effective Civil Regulations: "Conflict Diamonds" and Labour Practices in Cambodia

Two of the most important accomplishments of civil regulation have been to significantly reduce international trade in "conflict diamonds" and to strengthen labour standards in the textile export sector in Cambodia. The issue of conflict diamonds first emerged during the late 1990s in connection with the civil war in Angola. In 1998, at the request of the UN, Portugal, Russia, and the United States, the UN Security Council voted to prohibit the purchase of rough diamonds from UNITA, a rebel group, as the proceeds of these sales were being used to finance that group's civil war against

the government of Angola. Later, similar trade restrictions were extended to diamonds from another conflict zone, Sierra Leone. In 2000 the U.S. Congress passed the Clean Diamond Trade Act, which prohibited the import of blood diamonds from conflict zones. Both De Beers, which dominates the world's diamond market (and which withdrew from Angola under pressure in 1999), and Tiffany & Co., a major diamond retailer, indicated their full support for these measures and declared that they did not deal in conflict diamonds. However, several NGOs expressed concern that these companies' systems for monitoring their sources of diamond purchases were flawed.

Both De Beers and diamond retailers had an important reputational stake in assuring the public that they were not selling conflict diamonds. In 2000, a joint resolution by an association of international diamond retailers declared a zero tolerance policy for trading in such diamonds and announced that any firm found to be doing so would be expelled from the World Diamond Council. That same year, the Republic of South Africa launched the Kimberley Process (KP), named after the mining town that was at the heart of diamond production in the nineteenth century. KP has brought together all major diamond producers and retailers, as well as diamond exporting and importing countries; all told, seventy parties have signed this agreement. KP has established a certification system which requires all countries that trade or produce diamonds to issue certificates of origin that guarantee that the diamonds did not come from a conflict zone. In turn, numerous other countries have agreed not to import non-certified diamonds – even though the WTO had granted them a waiver from this trade restriction. While compliance by governments is not mandatory, each of the diamond-producing nations has agreed to on-site monitoring. In 2004, KP expelled the Republic of Congo-Brazzaville, whose diamond exports were one hundred times greater than its domestic production, effectively barring this country's diamond exports from international markets.

For their part, De Beers and the major diamond retailers have cooperated in monitoring diamond purchases. Diamonds themselves are not individually certified; rather, bags of them are certified by and in the countries in which they are produced. The process is not perfect: some alluvial conflict diamonds from the Ivory Coast continue to

reach international markets, packaged together with certified ones. Recently, NGO campaigners demanded an overhaul of Brazil's inspection system – one of the first allegations of non-compliance by a non-African country. They claimed that many of Brazil's KP certifications were fraudulent in that it was selling large numbers of diamonds harvested from an indigenous people's reserve where mining is illegal (degli Innocenti and Wheatley 2006, p. 6). Despite having been suspended by KP for a year, Lebanon seems to be again importing non-certified diamonds for its polishing industry. Other allegations of non-compliance continue to surface. Nonetheless, the KP has made clear and substantial progress in addressing a major deficit in global economic governance. According to KP, its members account for 99.8 percent of all diamond production (degli Innocenti 2006, p. 2). "KP stands as a positive example of active cooperation between governments, non-governmental organizations and the private sector" (degli Innocenti 2005a, p. 4).[34]

Labour relations in Cambodia provide a second example of relatively effective private-public cooperation in addressing a governance deficit. Improving working conditions in factories supplying products for Western retailers and manufacturers has emerged as a strong focus of civil regulation. Over the past decade, more than one hundred private codes governing labour standards have been developed in the United States and Europe. These codes work primarily through business-to-business markets: groups of Western firms establish standards for policies relating to (for example) child labour, overtime, gender discrimination, wages, and freedom of association; these firms then monitor the adherence of their suppliers through periodic inspections. While several of these codes appear to have made progress in reducing some abuses – most notably unsafe working conditions and the employment of child labour – effective and credible enforcement remains a serious problem.[35] This is for two main reasons: the large number of suppliers and subcontractors in major sectors, and the fact that Western firms have conflicting incentives. They want to protect their reputations, yet at the same time they face competitive pressures to keep their

[34] For more on the problems of conflict diamonds from the Ivory Coast, see degli Innocenti (2005b).
[35] For a summary of the literature on the impact and enforcement of labour codes, see Vogel (2005, ch. 4).

costs as low as possible while ensuring a rapid and unceasing flow of goods from their suppliers to retail outlets.

Between 1994 and 1998, apparel exports from Cambodia grew from virtually zero to more than half a billion dollars. The success of this industry attracted the attention of American textile unions for two related reasons: the unions were concerned about reports of abusive working conditions, and they wanted to bring these exports under the American textile quota system in order to protect domestic employment. While the United States had previously entered into a number of trade agreements that provided for penalties unless appropriate labour standards were enforced, it had never established positive incentives for countries that did so. It now decided to employ an economic carrot: it would increase Cambodia's annual textile quota, provided that the Cambodian government would ensure substantial compliance with national labour laws and international agreed labour rights by *all* its apparel factories (Polaski 2003).

Both parties recognized how difficult it would be to monitor compliance. The Cambodian government lacked any enforcement capacity. Several private organizations were already monitoring the labour practices of suppliers to Western firms, but their inspections lacked sufficient credibility to satisfy the U.S. government. Accordingly, both the United States and Cambodia turned to the ILO, which for the first time agreed to establish a system for monitoring workplaces. (Previously, this intergovernmental organization had only reviewed the conduct of governments.) Financial support for the ILO was in turn provided by the U.S. and Cambodian governments as well as by Western apparel firms. For its part, the ILO agreed to make the results of all its inspections public.

At first, supplier participation in the ILO inspection program was voluntary. This presented a serious free-rider problem, in that non-participating firms faced lower costs yet enjoyed equal market access, since the American quota was awarded to the country as a whole. Subsequently, the Cambodian government agreed to limit exports to the United States to those firms that agreed to participate in the monitoring program. Because all producers involved in the inspection program stood to suffer if any serious violations were reported, all now had a common stake

in adhering to the labour provisions of the trade agreement. The agreement essentially aligned the influence of the U.S. government with the interests of the Cambodian government, local producers, and Western retailers and manufacturers. The result was a measurable and cost-effective improvement in labour conditions in one of the world's poorest countries.

The U.S.-Cambodia Textile Agreement formally expired with the end of the multifibre agreement. Yet the regulatory systems it established remain in place. The ILO will continue to supervise factory monitoring though 2008, when it hopes to pass on this responsibility to the Cambodian government, whose inspection capacities the ILO is working to strengthen. Both financial support for inspections and training for factory managers now come from the Cambodian government, the World Bank, various aid agencies, and the garment industry itself. Significantly, many Western firms – most notably Gap Inc., the largest purchaser of garments from factories in Cambodia, and Nike – continue to outsource from Cambodia, even though that country's products no longer receive preferential trade treatment. The fact that textile production in Cambodia has continued to increase points to the importance of civil pressures for corporate accountability: those firms which continue to outsource from Cambodia presumably have a stake in maintaining responsible labour standards and a credible, transparent system for monitoring the compliance of their suppliers. The latter is particularly critical: "If there is one aspect of the Cambodia monitoring program that can be singled out as indispensable to its success, it is the higher level of transparency that the ILO provided through its reports . . . The reports served a multiplicity of purposes in the hands of different actors and reinforced the common interests they shared" (Polaski 2005, p. 16).

While some private labour regulations have become more transparent, few provide the detailed, plant-by-plant disclosures of specific labour practices and conditions that characterize the work of the ILO in Cambodia.

An important advantage of the Cambodian textile labour regulation scheme over private labour codes is its uniformity. Apparel manufacturers in developing countries typically produce for multiple

Western suppliers. This means that a producer that wants to have its production certified as complying with private labour standards may face a multitude of corporate and industry codes, each with its own standards and inspection systems. At the same time, a Western firm can choose which of the numerous private labour codes it wishes to follow – and these codes vary considerably in terms of their scope, stringency, and auditing practices (Pearson and Seyfang 2002). The result is a highly complicated and often confusing array of private standards.

By establishing one uniform code for all developing country suppliers and Western manufactures and retailers, the Cambodian system has significantly improved the efficiency of private corporate governance. Nonetheless, the Cambodian regulatory arrangement has yet to be replicated effectively in any other country, in part because no other country has been able to establish a credible system for monitoring supplier compliance. Representatives of different labour codes have been negotiating to harmonize their standards in particular countries in order to improve the efficiency of monitoring and enforcement, but to date no agreements have been reached.[36]

Moderately Effective Civil Regulations:
Fair Trade and Forest Certification

In two other important cases of civil regulation – namely, Fairtrade Labeling Organizations International (FLO) and the Forest Stewardship Council (FSC) – the effectiveness of private global governance has been mixed, largely because of the limited number of producers affected. Both FLO and the FSC are market-based: they employ private labelling and certification to align the interests of Western consumers with those of socially responsible global producers or exporters. Both civil regulations represent a private response to a serious global governance deficit. The former seeks to ameliorate the impoverishment of farmers owing to low global commodity prices; the latter attempts to fill the regulatory gap created by the absence of an effective international forestry treaty.

In 1997, seventeen national fair trade certification programs in Europe, North America, and Japan established the FLO as an

[36] However, a pilot program has been developed in Turkey. See Venkatesh and Gopal (2006, p. 10).

international consortium. The FLO certifies products produced in developing countries and then markets them to consumers in developed countries using the "FairTrade" (FT) label. While this social label has been used to market hundreds of products, including bananas, cocoa, tea, flowers, oranges, nuts, sugar, chocolate, and most recently cotton, the most important ethical label is for coffee, an $80 billion industry and the world's second most widely traded commodity after oil. The main purpose of FT coffee is to increase the prices paid to coffee farmers; for too many farmers, expenses barely cover the costs of production. The FTI guarantees these farmers above-world-market prices for their products – a commitment that is financed by selling FT-labelled coffee at a premium price.

The FLO exhibits both the strengths and weaknesses of consumer-based global governance. On the one hand, there is a market for virtue: many consumers do purchase FT coffee, often out of a social commitment. A growing number of coffee producers, such as Procter & Gamble, as well as retailers such as Starbucks, offer FT coffee – among other kinds – to their customers. Cafedirect, which only sells FT coffee, is the sixth-largest British coffee brand, and nearly one-fifth of the British ground and roast coffee market is FT (Levi and Linton 2003, p. 419; Beattie 2006, p. W1). A total of 35,000 firms sell FT coffee in the United States, and sales of FT coffee have tripled since 1999, making it the fastest-growing segment of the specialty or premium coffee business. This sales growth has enabled FTI to increase the incomes of about 800,000 coffee growers. Sales of all FT products in the United States have channelled $67 million to FT farmers and farm workers since 1999 (Alserver 2006, p. 5).

Yet the economic impact of FT is limited by consumer demand for its products. Consumers typically purchase products on the basis of price, convenience, and quality, not on whether they were produced "responsibly"; most consumers are happy to benefit from the lower costs of production in developing countries. Sales of FT coffee still represent less than 1 percent of both American and global coffee sales, which means that only a small proportion of coffee growers can benefit from this certification program. A variety of other social-product labels, such as for rugs and organic products from developing countries, also have emerged, but these too operate

in niche markets, primarily selling high-end goods to affluent, less price-conscious consumers. Accordingly, while ethical labels have benefited some producers in developed countries, their overall economic impact remains limited.

Forestry regulation provides a second example of the strengths and shortcomings of market-based civil regulation. After several years of negotiations among foresters, scientists, and firms, the FSC was established in 1993. It began operations three years later. Arguably the most ambitious example of the "privatization of environmental governance," the FSC is an international private-standard-setting body headquartered in Mexico City (Cashore 2002).[37] Its goal is to create a global market for wood harvested in a socially and environmentally sound manner by providing business incentives to forestry firms as well as to retailers and builders who sell or use wood products. The FSC has developed standards for forestry management. It also accredits and monitors organizations that assess wood production practices. It then issues certificates that guarantee a chain of custody for wood products, from the certified foresters to the end users of the certified products.

This program was originally conceived as a product labelling scheme. However, relatively few wood products sold to consumers are actually labelled, largely because relatively few consumers value certification. Moreover, in contrast to FT products, consumers are generally unwilling to pay a market premium for FSC products. Much like labour codes that certify producers in developing countries, the FSC primarily operates in the business-to-business market. It relies on sales to builders and wood product retailers, rather than to individual consumers, few of whom have ever heard of the FSC. For those Western firms which are willing to give preference to FSC certified products, doing so often represents a key component of their public commitment to global CSR; many such firms have agreed to do so only after strong grass-roots pressure from activists, often accompanied by threatened or actual boycotts. For some builders, the use of FSC-certified wood products has become a component of their green corporate image and marketing.

[37] See also Cashore et al. (2004). More scholarly articles have been written on the FSC than on any other civil regulation.

Activists have succeeded in persuading a number of large American and European wood or wood product retailers – including Home Depot, Lowe's Home Centers, Kinkos, SCAM (a Swedish paper company), Ikea, and Turner Construction, the largest American construction company – to either give preference to or exclusively purchase FSC-certified wood products. Globally, about six hundred firms have joined global and forestry trade networks that commit them to buying only FSC-certified wood. Several European governments as well as some American states have established procurement policies that either favour or require FSC-certified wood.

If FT's challenge is insufficient consumer demand, the FSC's most formidable challenge is the insufficiency of supply. Some forestry company owners are willing to become certified in order to gain preferential access to retailers or construction companies; for many other firms, however, FSC certification is too expensive and burdensome, especially as certified products rarely command a price premium from retailers or builders. Moreover, forestry firms have alternatives: as a response to FSC, more than forty industry-dominated alternative certification schemes have been developed. Their requirements are generally less stringent than those of the FSC (Meidinger 2006b).

In 2006, the FSC's global market share of certified wood stood at 30 percent, while that of the two major industry based and governed certification schemes totalled 57 percent (Pattberg 2006, p. 247). Worldwide, 4 percent of all managed forests are FSC certified, accounting for 7 percent of the global market in forest products. This is an important accomplishment – the number of hectares of FSC-certified wood grew from 500,000 in 1994 to more than 70 million in 2006, while between 1998 and 2006, the number of chain-of-custody certifications increased from 268 to 4,500 (ibid., p. 248). However, virtually all FSC-certified forests are located in temperate zones, and 84 percent of these are in Europe and North America, where forestry practices have long been heavily regulated by governments.

The FSC has undoubtedly improved the social and environmental practices of forestry companies in Europe and North America. It has

done so both directly and indirectly by encouraging the development of business forestry codes, some of whose standards have been strengthened to compete with those of the FSC.

Unfortunately, the most egregious forestry management practices are encountered in tropical forests, only 2.4 percent of which are certified by either the FSC or any other private certification scheme. The limited geographic scope of private forestry certification has sharply limited its ability to adequately address what is arguably the most critical forestry governance problem – namely, the accelerating rate of tropical deforestation.[38] In fact, only 6 to 8 percent of global timber production is traded, and most of this trade goes on between environmentally sensitive developed countries, rather than from developing countries to developed ones (Pattberg 2005a).

Ineffective Civil Regulations: Royalty Payments and Corruption in Resource-Dependent Developing Countries

One of the most serious global governance deficits is associated with the misuse by developing countries of the royalty payments received from extractive industries. These payments are often squandered by corrupt government officials; as a result, people who live in countries with the most abundant deposits of oil, natural gas, and minerals are very often among the world's most impoverished (Weinthal and Jones Luong 2006). In 2002 a global coalition of two hundred NGOs launched a "Publish What You Pay" (PWYP) campaign to pressure global firms in extractive industries to reveal their royalty payments to host-country governments. This advocacy campaign was subsequently supported by the Extractive Industries Transparency Initiative (EITI), spearheaded by the British government. EITI's goal is to reduce corruption by persuading governments to (a) disclose the royalty payments they are receiving and (b) establish accounting systems to prevent the misuse of those payments.

The results of both initiatives have been disappointing (Davis 2005). Seven global oil companies – all based in Europe or the United States – have agreed to disclose their payments; to date, though, their disclosures have been limited, mainly because companies are understandably worried that disclosing royalty payments will anger

[38] See Dauvergne (1997; 2001).

host-country governments. For example, when BP announced that it would be disclosing its royalty payments to the government of Angola, that government threatened to terminate BP's exploration rights. Nearly twenty countries have agreed to sign on to EITI, though to date only two – Nigeria and Azerbaijan – have actually complied with its terms. Significantly, no Latin American country or OPEC member state has endorsed EITI. Nor has India or China. An equally striking limitation of the PWYP is that no state-based global energy firm has agreed to endorse it, even though such firms – as well quasi-private energy firms based in the former Soviet Union and Asia – account for a growing share of foreign investments in this sector, especially in Africa.[39] All of this has severely compromised the effectiveness of global efforts to reduce corruption. Most obviously, resource-rich governments that benefit from the misuse of royalty payments are offering exploration or production concessions to global firms that have less demanding ethical standards.

The challenges faced by energy companies that are attempting to behave more responsibly in failed states are graphically demonstrated by Exxon's experiences in Chad. In 1998 an unprecedented agreement was reached between the government of Chad – one of the world's poorest and most corrupt countries – and the World Bank, which helped finance a $4.2 billion investment project, and several NGOs. This agreement provided that all royalty payments would be monitored by a nine-person committee, with 10 percent to be held in trust, 80 percent earmarked for education, health, and rural development, and 5 percent distributed to the oil-producing regions (Useem 2002). The agreement was hailed as ground-breaking and as a model for responsible energy development. But in December 2005 the government of Chad decided to take advantage of rising oil prices by breaking the agreement's terms (Polgreen 2005, p. A15; Cummins 2006, p. A4). It took a portion of the funds held in trust for development and allocated them to military spending; it also demanded increased royalty payments. The World Bank subsequently renegotiated the agreement, increasing the percentage of revenues under the control of the Chad government. But even those funds allocated specifically to community development appear to be having little social impact, in part because of pervasive corruption at

[39] See, for example, Yeh (2006, p. 2).

the local level. The Chad case illustrates an important limitation of global civil regulation: it is difficult to promote more responsible corporate practices when the objectives of civil regulations are opposed by host-country governments.

CONCLUSION

Global civil regulation and CSR have been hailed as promising solutions to the shortcomings of state regulation; they have also been sharply criticized on the grounds that markets are inherently incapable of addressing market failures.[40] But any realistic assessment of civil regulation should compare it not to an ideal world of effective global economic governance, but rather to actual policy alternatives. Compared to government regulations in developed countries, civil regulation is clearly less effective. Civil regulations exhibit many of the well-documented shortcomings of industry self-regulation at the national level.[41] But the effectiveness of many civil regulations is certainly comparable to that of many intergovernmental treaties and agreements – whose impact on environmental protection, labour practices, and human rights is also mixed.[42] In a number of cases – most notably with regard to labour standards and forestry – civil regulations have been considerably *more* effective than intergovernmental treaties, though their scope is more limited: they primarily affect the ways some products exported to highly visible Western firms are produced. This means, for example, that in the critical case of labour standards, they only affect enclaves of production in developed countries; only 3 percent of workers in developing countries are employed by the textile export sector.

Yet for all their shortcomings, civil regulations are undoubtedly *more* effective than the labour, human rights, and environmental regulations of many developing countries. For some sectors in

[40] For the former, see, for example, Savitz (2006). For the latter, see Lipschutz and Rowe (2005).
[41] See, for example, Lenox and Nash (1999; 2003).
[42] For studies of the uneven impact of international environmental agreements, see, for example, Young (1999); Haas et al. (1993); and Miles et al. (2002). For human rights, see Hathaway (2002). For a comprehensive analysis of soft law in international agreements, see Weiss (2000), which compares the factors that shape compliance with soft law, including civil regulations, and hard law.

some developing countries, they constitute the only effective form of business regulation. In the case of labour standards, workers fortunate enough to be employed by firms producing highly visible global brands for export to the United States and Europe represent a labour aristocracy. The environmental, social, and human rights practices of firms in developing countries that either produce for global supply chains or are directly owned by Western MNCs are often better than those of domestic producers; to the extent this is so, it largely reflects the impact of global civil regulation – and its relative effectiveness vis-à-vis local governments. By providing a political vehicle for exporting more effective regulatory practices from developed to developing countries, civil regulation has played a role – albeit a modest one – in socializing economic globalization.

In sum, civil regulations have *partially reduced* the governance deficits that characterize many global firms and markets. They are not a panacea, but neither are they an unimportant component of global governance. Moreover, many civil regulations have been established relatively recently, which means that their impact and effectiveness could increase, especially as some codes become more stringent, comprehensive, and better enforced.

What would it take to make civil regulation a more effective form of global economic governance? Two factors appear critical. First, the business case for compliance with civil regulations would need to be strengthened.[43] For all the widespread and widely believed rhetoric about the "win-win" case for CSR, many producers in developing countries regard the civil regulations imposed by Western firms as a burden – one that raises costs but produces few financial benefits. (FT-branded products are a notable exception.) This means that these firms have every incentive to do as little as possible to accommodate the demands of their Western contractors. Many have an adversarial relationship with private inspectors and often seek to deceive them. As the experience of many developed countries has demonstrated, better labour standards or improved environmental practices *can* make long-term business sense. Some producers in developed countries are beginning to recognize this; many still do not.

[43] For a critical assessment of the business case for CSR, see Vogel (2005, ch.2).

A similar logic holds for Western firms, most of which have agreed to civil regulations for defensive reasons or because it is expected of them. But because its financial benefits remain largely elusive, few firms have integrated the standards of civil regulation into their core business practices; much global CSR remains akin to corporate philanthropy, on the periphery of business strategy. As long as more "responsible" global firms do not enjoy stronger financial performance than their less responsible competitors – and to date they do not – the incentives for firms to invest sufficient resources into ensuring compliance with corporate or industry codes will remain limited, and the incentive for some firms to "free-ride" on industry codes will remain a serious problem.

The second critical determinant of the future impact of civil regulation is the relationship of developing country governments to it. Some of these governments, such as Cambodia, recognize the value of civil regulation; others, such as Chad, do not. In the case of the FSC, the pattern is more mixed: some developing country governments cooperate closely with its efforts, while others are indifferent to them.[44] Most developing countries tend to be indifferent to voluntary labour standards. However, the laws of some countries, such as China, do not permit local firms to comply with labour codes that guarantee the right of workers to choose their own representatives, while in some Central and Latin American countries, governments have harassed labour unions. In the long run, civil regulations will need to be more closely integrated with the domestic regulatory policies and the competitive strategies of developing country governments if they are to become more effective.[45] Equally importantly, developing country governments will have to promote, or at least permit, the strengthening of civil society so that their citizens will be able to define and defend their own social, political, and environmental interests vis-à-vis business firms, without having to rely on Western activists to do so in their name.

[44] For an analysis of the critical importance of the local political and economic environment in affecting the willingness of firms to comply with civil regulations, see Espach (2006).
[45] For a comprehensive discussion and analysis of how some developing countries are seeking to integrate civil regulation into their competitiveness strategies, see Zadek et al. (2005). See also MacGillivray et al. (2003). For other studies of the relationship between developing country governments and civil regulation, see Graham and Woods (2005); Ward (2004); and Cramer and Pruzan-Jurgensen (2006).

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