

 Open access • Journal Article • DOI:10.2139/SSRN.1658730

Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order

— [Source link](#) 

Larry Catá Backer

Institutions: Pennsylvania State University

Published on: 13 Aug 2010 - Social Science Research Network

Topics: Transnational governance, Collaborative governance, Global governance, Project governance and Multi-level governance

Related papers:

- [Private Environmental Governance and International Relations: Exploring the Links](#)
- [Global governance and the United Nations system](#)
- [The Institutionalisation of Private Governance Conceptualising an Emerging Trend in Global Environmental Politics](#)
- [Private-Public Interaction in Global Governance: The Case of Transnational Commercial Arbitration](#)
- [Business in Zones of Conflict and Global Security Governance: What has been Learnt and Where to from Here?](#)

Share this paper:    

View more about this paper here: <https://typeset.io/papers/private-actors-and-public-governance-beyond-the-state-the-1ursbh8ddb>



2011

Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order

Larry Cata Backer
Penn State Law

Follow this and additional works at: http://elibrary.law.psu.edu/fac_works

 Part of the [Business Organizations Law Commons](#), [International Law Commons](#), [International Trade Law Commons](#), and the [Transnational Law Commons](#)

Recommended Citation

Larry Cata Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order*, 18 *Ind. J. Int'l L.* 751 (2011).

This Article is brought to you for free and open access by the Faculty Works at Penn State Law eLibrary. It has been accepted for inclusion in Journal Articles by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order

LARRY CATÁ BACKER*

ABSTRACT

Transnational corporations are at the center of extraordinary and complex governance systems that are developing outside the state and international public organizations and beyond the conventionally legitimating framework of the forms of domestic or international hard law. Though these systems are sometimes recognized as autonomous and authoritative among its members, they are neither isolated from each other nor from the states with which they come into contact. Together these systems may begin to suggest a new template for networked governance beyond the state, but one in which public and private actors are integrated stakeholders. This provides the source of the questions explored in this article: Is it possible to detect this new template for transnational governance of economic activity (in general) and corporations (in particular) developing through principles of transnational private governance? Is public governance in the twenty-first century taking on the characteristics of transnational corporate governance? The questions suggest three objectives. The first is to examine the organization of communities of states through the normative lens of private transnational governance. A secondary objective is to

* W. Richard and Mary Eshelman Faculty Scholar and Professor of Law, and Professor, School of International Affairs, Pennsylvania State University. Please send correspondence to lcb911@gmail.com. My thanks to my research assistants, Jana Viktoria Nysten (LL.M., 2010, Pennsylvania State University), Su Jin Hong (J.D., 2011, Pennsylvania State University), and Bret Stancil (J.D., 2013, Pennsylvania State University) for excellent work on this project. An earlier version of this article was presented as "Private Governance, Soft Law, and the Construction of Polycentric Networks for the Regulation of Transnational Corporations" at the conference entitled "Kongress: Transnationalismus in Recht, Staat und Gesellschaft," at the Universität Bremen, in Bremen, Germany, from March 3–5, 2010. My thanks to our host, Graf-Peter Calliess, and to the conference participants for their comments.

Indiana Journal of Global Legal Studies Vol. 18 #2 (Summer 2011)
© Indiana University Maurer School of Law

suggest the importance of communication—structural coupling—between developing private governance systems and emerging transnational public governance systems. That communication suggests the development of the institutional intermeshing of both autonomous systems of governing communities of private actors and communities of states. The third objective is to consider whether emerging governance frameworks, public and private, might be arranged together in a way that credibly suggests a system of coordinated metagovernance. After an introduction, Section I of this article examines the governance constitutions of multinational economic actors. Section II then turns to a consideration of corporate constitutionalism within a metagovernance framework. The focus is the governance framework of the G-20's Financial Stability Board (FSB). The G-20-FSB framework points to the future of governance systems in which the state participates in a collaborative governance structure, but in which states share rule-making power with public and private nonstate actors. The FSB template points to the organization of governance as a collegial enterprise in which states and traditional law-based systems interact with nonstate actors and their norm-based systems to develop integrated governance with global reach. Thus reconstituted, a new set of arrangements might well arise, one in which amalgamations of the most powerful states and private regulatory bodies assert authority once reserved to states alone.

INTRODUCTION

In the twentieth century, the “color line”¹ bedeviled efforts to constitute political communities in accordance with their aspirational and functional realities. It was grounded in notions of segregation within constructed hierarchies built on the oppositional racial binary: white and others. The color line demarcated borders between those who regulate and those who are regulated; it suggested a hierarchy of governance within which only one group was recognized as a legitimate producer of regulation. The color line found its way into everything from the internal social and political organization of states through law² to

1. For the origin of the idea, see W.E.B. DU BOIS, *THE SOULS OF BLACK FOLKS: ESSAYS AND SKETCHES*, at vii-viii (1903). For the expression of the same sentiment from the other side of the color line, see OSWALD SPENGLER, *THE HOUR OF DECISION* 204-29 (1934).

2. See generally, e.g., FRANK W. SWEET, *LEGAL HISTORY OF THE COLOR LINE: THE NOTION OF INVISIBLE BLACKNESS* 117-80, 403-64 (2005) (discussing the color line in the United States). As an apparatus of the Apartheid South African state see, for example, Jonathan Hyslop, *White Working-Class Women and the Invention of Apartheid: “Purified”*

the construction of notions of sovereignty and the legitimacy of subordination and colonization between states in international law.³ Though the color line never accurately described the reality of social organization or governance, its ideology proved to be durable.

If the color line was said to be one of the great issues of the twentieth century, the conference organizers⁴ have described what can usefully be understood, for this current century, as the rise of an equally perverse construct, which I will call the “governance color line.” On the one side stands the state and with it a mechanics of legitimate governance: law, sovereign will, democratic organization, force, and the like. The state defines the universe of the public sphere. Since 1945, the state has increasingly acted in concert through a vast array of public organizations the governance authority of which is derived from or dependent on the good will of the states supporting those entities through the exercise of their legitimate mechanisms of asserting power.⁵ Together, these entities represented the full extent of legitimate public power. It was to this public sphere that the ultimate will of a people constituted as a state could be asserted through law.

Beyond this public sphere, all other governance communities and systems, from the most mundane and local to the most elaborate and pervasive, are rounded up in a “private sphere.” This private sphere is understood as subordinate to the state and subject to its regulation.⁶ It has no authority to legislate; it governs through moral suasion, contract, and the consent of the members of the group that subjects itself to private order rule systems. It includes everything from established churches, civil society organizations, and large multinational corporations to informal associations of like-minded individuals that come together for some purpose or other. These communities could be quite informally structured or organized as elaborately as a state.

Afrikaner Nationalist Agitation for Legislation Against “Mixed” Marriages, 1934-9, 36 J. AFR. HIST. 57 (1995).

3. See, e.g., WESTEL W. WILLOUGHBY, *THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW* (1924). For a discussion, see, for example, ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2005).

4. An earlier version of this article was presented at the conference entitled “Kongress: Transnationalismus in Recht, Staat und Gesellschaft,” at the Universität Bremen, in Bremen, Germany, from March 3–5, 2010.

5. See, e.g., JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 1-57 (2006). For more on controversial aspects of these mechanisms see, for example, CYNTHIA DAY WALLACE, *LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE* 2-5 (1983). See also *infra* pp. 6-7 and note 24.

6. For a discussion of the private sphere see, for example, Jennifer L. Johnson, *Public-Private-Public Convergence: How the Private Actor Can Shape Public International Labor Standards*, 24 BROOK. J. INT’L L. 291 (1998).

However organized, they all tend to govern through the development of social norms.⁷

This public-private divide is well-known and much maligned.⁸ On the one hand, it is derided as a basis for organizing the state around separable spheres, one public (political) and the other private (economic/social/religious), that denigrates or subordinates activities consigned to the private sphere.⁹ Conversely, it is criticized as an attempt to legitimate principles of governance power beyond the state.¹⁰ In both cases, the emphasis on the power of nonstate actors to produce rules that have a binding effect on others is viewed as illegitimate or threatening, in the latter case either to the primacy of law-based systems, or to the organization of the power to govern through states.

But globalization, with its de-emphasis on the integrity of the territorial borders of states, destroyed the old presumption of a substantially complete identity between subjects and objects of regulation.¹¹ Because such private entities, especially large nonstate actors, could avoid regulation in one single state by extending their operations into the territory of other states, it became easier for these entities to avoid political regulation and substitute themselves as new regulators of behavior, each within the scope of its enterprise

7. For a discussion of social norms, see generally, Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); as applied to governing private sphere actors see, for example, Victor B. Flatt, *Act Locally, Affect Globally: How Changing Social Norms to Influence the Private Sector Shows a Path to Using Local Government to Control Environmental Harms*, 35 B.C. ENVTL. AFF. L. REV. 455 (2008).

8. See, e.g., JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 61 (2006).

9. Feminist literature has made substantial contributions in this area. See, e.g., Shelley Wright, *Interdisciplinary Approaches to International Economic Law: Women and the Global Economic Order: A Feminist Perspective*, 10 AM. U. J. INT'L L. & POL'Y 861, 862 (1995) ("Western liberal theory has constructed the private sphere of home, children and domesticity as the space where women live and work for much of their time. This sphere tends to be hidden—invisible to the public world of law, governments, States, international institutions and transnational corporations—the sphere where men are said to live and work.").

10. See generally, e.g., Oscar Schachter, *The Decline of the Nation State and Its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7 (1998) (concerning the impact of globalization on international law).

11. See, e.g., BARBARA EMADI-COFFIN, RETHINKING INTERNATIONAL ORGANIZATION: DEREGULATION AND GLOBAL GOVERNANCE 1 (2002) ("The apparently contradictory processes of fragmentation and globalization are not, despite empirical appearances, in opposition, but are instead part of the historical development of the global political economy. Fragmentation, unless extreme, serves to increase the number of states in the system, thus dispersing national power.") (citing Robin Brown, *Globalization and the End of the National Project*, in BOUNDARIES IN QUESTION: NEW DIRECTIONS IN INTERNATIONAL RELATIONS 54 (John Macmillan & Andrew Linklater eds., 1995)).

operations.¹² In some cases, it also permitted a greater degree of freedom from regulation by others, including states.¹³ In other cases, it suggested the ability of groups of nonstate actors to come together to create autonomous regulatory communities or to offer regulatory services to communities of other nonstate actors—for example by creating a system of rules for sustainable environmental practices, certification of compliance could then be offered to interested companies.¹⁴ At the dawn of the twenty-first century, then, these entities and their governance organs could organize increasingly strong formal and functional attacks on the monopoly of legitimate governance authority asserted through the state. Beyond its functional effect, vesting governance authority in private actors, an object of this movement had the effect of questioning the organizing frameworks on which the conventional global order has been based. Among the most important of these are multinational corporations¹⁵ and transnational institutionalized religions.¹⁶

Multinational corporations are at the center of this extraordinary and complex metastasis of governance outside the state, hard law, and municipal law regimes. Within this emerging governance environment, it is possible to conceive of corporations that can regulate themselves—by arranging their operations so that they are subject to the state regulatory regimes of their choice. The resulting basket of regulation more closely reflects the preferences of large enterprises with respect to

12. See generally GRALF-PETER CALLIESS & PEER ZUMBANSEN, *ROUGH CONSENSUS RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* (2010); Larry Catá Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 ILSA J. INT'L & COMP. L. 499 (2008).

13. See, e.g., Larry Catá Backer, *The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, 41(4) TULSA L. REV. 541 (2006).

14. See generally Benjamin Cashore, *Legitimacy and the Privatization of Environmental Governance: How Non-state Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority*, 15 GOVERNANCE: INT'L J. POL'Y 503 (2002).

15. For a discussion, see, for example, Tania Voon, *Multinational Enterprises and State Sovereignty under International Law*, 21 ADEL. L. REV. 219 (1999).

16. See, e.g., Larry Catá Backer, *Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering*, 16 IND. J. GLOBAL LEGAL STUD. 85 (2009). More ominously, political and economic actors without a state have increasingly institutionalized and bureaucratized their organization, creating governments operated under a constitution and subject to a juridified code of conduct overseen by an administrative structure. See, e.g., Jayshree Bajoria & Greg Bruno, *Background: al-Qaeda*, COUNCIL FOREIGN REL. (Apr. 18, 2008), <http://www.cfr.org/terrorist-organizations/al-qaeda-k-al-qaida-al-qaida/p9126>. Even more generally, religion has augmented its role in international public sphere and as a consequence has increased its role in governance. See Rosalind I.J. Hackett, *Rethinking the Role of Religion in Changing Public Spheres: Some Comparative Perspectives*, 2005 BYU L. REV. 659.

the aggregate regulations to which they wish to be subject than the imposition of popular will through the law of any single nation-state.¹⁷ It is also possible for these entities to intermesh, producing industry-wide regulation.¹⁸ More interestingly, corporations, as private entities, can develop autonomous governance systems for the management of their global supply chain operations; regulating through contract, a large multinational enterprise may more effectively harmonize the rules under which a large group of globally scattered small suppliers operate than would any multilateral public law efforts.¹⁹ Free movement of capital and operations has made it possible for the largest enterprises to satisfy their regulatory preferences and impose their own rules within a regulatory community in which corporations, investors, consumers, nongovernmental organizations, and the media substitute for the state and its organs.²⁰ These autonomous systems are both institutionalized and regulatory, but exist only within specifically defined and functionally distinct frameworks.²¹

These movements and tensions have provoked strong reactions from the state sector. The sense of the defensive position of the state is illuminated nicely in recent comments of the President of the French Republic, Mr. Nicolas Sarkozy, addressing the fortieth World Economic Forum at Davos, Switzerland. Acknowledging the seismic rearrangement of governance power, which is the central concern of this article, he declared: "We must now invent the State, the company and the city of the 21st century."²² He offers a reconstituted state model that rejects the idea of the irrelevance of the state, grounding the state's renewed relevance in public-private linkages that privilege political

17. See Backer, *supra* note 13.

18. See, e.g., Dan Danielson, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 HARV. INT'L. L.J. 411 (2005).

19. Wal-Mart's CEO H. Lee Scott spoke of the need for harmonization to satisfy its stakeholders. Greg Levine, *Scott Warns China Wal-Mart Suppliers Re "Standards,"* FORBES.COM (Oct. 20, 2005), http://www.forbes.com/2005/10/20/wmt-environment-ceo-cx_gl_1020autofacescan08.html ("The factories in China are going to end up having to be held up to the same standards as the factories in the U.S.," Scott said.)

20. See Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739, 1747 (2007).

21. See, e.g., MULTINATIONALS, ENVIRONMENT AND GLOBAL COMPETITION (Sarianna M. Lundan ed., 2004) (concluding from empirical evidence that self-regulation seems to work for environmental concerns because of, and to the extent of, the forces in the global markets).

22. President Nicolas Sarkozy, *Address at the 40th World Economic Forum in Davos, Switzerland* 6 (Jan. 27, 2010) [hereinafter *Sarkozy Speech*], (transcript available at https://members.weforum.org/pdf/Sarkozy_en.pdf).

authority.²³ Sarkozy mocks the idea of the end of the state and the advent of what he calls “nomadism” and a rediscovery of “nationality.”²⁴

If Mr. Sarkozy’s sentiments express the general sense of the highest levels of the public sector, it might appear that an attempt to resurrect a version of the governance “color line” is in the offing. But the reality appears to be more complicated. In the form of an elite intergovernmental construct, the so-called Group of Twenty (G-20),²⁵ and its principal instrumentality, the Financial Stability Board (FSB),²⁶ a new form of public sector governance appears to be emerging alongside that of private governance systems. It is a governance apparatus that is said to foreshadow planetary governance in this century.²⁷ To reinvent the state one must look to the governance frameworks for private entities, especially those developed at the supranational level. Public governance in the twenty-first century is taking on the characteristics of transnational corporate governance.

This confrontation of the governance “color line” suggests the thesis of this article: Is it possible to detect a basic template for transnational governance of economic activity (in general) and corporations (in particular) developing through principles of transnational private governance? The objective of this article is to examine the organization of communities of states through the normative lens of private transnational governance.²⁸ A secondary objective is to suggest the importance of communication between developing private governance systems and emerging transnational public governance systems. But it also suggests the possibility of governance fusion. Thus, the third objective of this exploration is to examine the plausibility of the suggestion that emerging governance frameworks, public and private, might be arranged together in a way that credibly suggests a system of coordinated metagovernance.

23. *Id.* (“[W]hat remains to be done is to . . . invent a new linkage between public action and private initiative.”).

24. *Id.*

25. *See About G-20*, G-20, http://www.g20.org/about_what_is_g20.aspx (last visited July 3, 2011) (“The Group of Twenty (G-20) Finance Ministers and Central Bank Governors was established in 1999 to bring together systemically important industrialized and developing economies to discuss key issues in the global economy.”); *see also* G-20, *THE GROUP OF TWENTY: A HISTORY* 42-43 (2008), available at www.g20.utoronto.ca/docs/g20history.pdf (“The key distinguishing feature of the G-20 has been its membership. No other forum has brought together a regionally representative group of systemically important developed and emerging economies for informal discussion and dialogue. The G-20 filled an important gap in the governance structure of the international economic and financial system.”).

26. *See generally Overview*, FIN. STABILITY BOARD, <http://www.financialstabilityboard.org/about/overview.htm> (last visited Mar. 7, 2011).

27. Sarkozy Speech, *supra* note 22.

28. *See generally* CALLIESS & ZUMBANSEN, *supra* note 12.

This metagovernance system is constituted through frameworks of institutional communication—structural coupling—that link and order a rising set of governance subsystems.²⁹ These governance subsystems include a host of private governance systems (multinational corporations asserting governance over their supply chains through contractual and other relationships), global governance frameworks for private governance,³⁰ and autonomous corporate constitutionalism.³¹ From out of this cosmos of distinct but intertwined systems, one can see emerging a distinct polycentric system of transnational corporate governance made up of the continuous interactions of dynamic private and soft law systems. The form of this governance is cooperative and public. It is state-centered but not exclusively so.³² The FSB governance framework suggests both the contours of polycentric governance and the points of cooperation and tension among such governance communities, as functionally distinct regulatory communities seek to preserve their autonomy and cooperate within interlinked regulatory streams. Yet this does not suggest the disappearance of transnational private governance so much as the metamorphosis of the state in the face of the movement of governance power beyond territorial borders.

29. This suggests Gunther Teubner's framework for the construction of an autonomous constitutional basis for enterprise communities through the hypercyclidity of linked systems of private and public codes of corporate governance. See Gunther Teubner, *Self Constitutionalizing TNCs?: On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, 18 IND. J. GLOBAL LEGAL STUD. (2011).

30. Among the most important current iterations of this approach is the United Nations' Protect, Respect, Remedy framework. See The Special Representative of the Secretary-General, *Business and Human Rights: Towards Operationalising the "Protect, Respect and Remedy" Framework, delivered to the Human Rights Council and the General Assembly* U.N. Doc. A/HRC/11/13 (April 22, 2009), available at <http://www2.ohchr.org/english/issues/globalization/business/docs/A.HRC.11.13.pdf>.

31. These consist of the following three principal Organisation for Economic Co-operation and Development (OECD) guidelines for the conduct of corporations: OECD, *PRINCIPLES OF CORPORATE GOVERNANCE* (2004), available at <http://www.oecd.org/dataoecd/32/18/31557724.pdf>; OECD, *GUIDELINES FOR MULTINATIONAL ENTERPRISES* (2011), available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf>; OECD, *GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES* (2005), available at <http://www.oecd.org/dataoecd/46/51/34803211.pdf>. See also Larry Catá Backer, *Transnational Corporate Constitutionalism: The U.N. Global Compact, the OECD Guidelines for Multinational Enterprises and the Emergence of a Constitutional Order for Economic Enterprises*, Address at the Copenhagen Business School Conference: *The Constitutionalization of the Global Corporate Sphere?* (Sept. 17-18, 2009), available at <http://lcbackerblog.blogspot.com/2009/09/transnational-corporate.html>.

32. Compare Gregory T. Euteneier, *Towards a Corporate "Law of Nations": Multinationals Contribution to Customary International Law*, 82 TUL. L. REV. 757 (2007) (holding state and nonstate actors to same standard), with Thomas F. McInerney, *Putting Regulation Before Responsibility: The Limits of Voluntary Corporate Social Responsibility*, 2 VOICES DEV. JURISTS, no. 3, 2005 (privileging states as enforcement vehicles).

The analysis produces irony: to save the state, the state itself must adapt to the governance frameworks of private transnational governance bodies. Thus reconstituted, a new set of arrangements might well arise, in which amalgamations of the most powerful states and private regulatory bodies assert authority once reserved to states alone. But it also suggests more: in particular, the weakening of the border between hard and soft law even within public sector governance. The convergence of form suggests a functional convergence of governance—the private corporation with public obligations, and the regulatory state that participates in markets. Public and private corporate bodies, once divided by an insurmountable conceptual barrier, now become mirrors of one another. “No question, now, what had happened to the faces of the pigs. The creatures outside looked from pig to man, and from man to pig, and from pig to man again; but already it was impossible to say which was which.”³³

I. THE GOVERNANCE CONSTITUTIONS OF MULTINATIONAL ECONOMIC ACTORS

The focus on governance by nonstate entities acknowledges a reality about which there is growing academic attention.³⁴ Indeed, even law has slowly,³⁵ if gracelessly, moved to recognize the “transnational” in law³⁶ and its relation to the study of the governance systems of nonstate actors,³⁷ though the nature and substance of this interaction remains

33. GEORGE ORWELL, *ANIMAL FARM* 113 (1945).

34. See, e.g., *BEYOND MARKET AND HIERARCHY: INTERACTIVE GOVERNANCE AND SOCIAL COMPLEXITY* (Ash Amin & Jersy Hausner eds., 1997); EMADI-COFFIN, *supra* note 11.

35. See, e.g., Craig Scott, “*Transnational Law*” as Proto-Concept: Three Conceptions, 10 *GERMAN L.J.* 859 (2009); Peer Zumbansen, *Transnational Law*, 4 *COMP. RES. L. & POL. ECON.*, no. 2, 2008.

36. See, e.g., Mathias Reiman, *From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum*, 22 *PENN ST. INT’L L. REV.* 397, 401-09 (2004); Harold Hongju Koh, Remarks at the Wednesday Luncheon Session of the 83rd Annual Meeting of the American Law Institute in the State Room of the Mayflower Hotel, Washington, D.C. (May 17, 2006), available at <http://www.ali.org/index.cfm?fuseaction=news.transcripts>.

37. See, e.g., *MULTINATIONALS, ENVIRONMENT AND GLOBAL COMPETITION*, *supra* note 21; Danielson, *supra* note 18; Andreas Georg Scherer, Guido Palazzo & Dorothee Braumann, *Global Rules and Private Actors—Towards a New Role of the Transnational Corporation in Global Governance*, in *INTERNATIONALES MANAGEMENT IM UMBRUCH 3* (Michael-Jörg Oesterle ed., 2007); Larry Catá Backer, *Principles of Transnational Law: The Foundations of an Emerging Field*, *LAW AT THE END OF THE DAY* (Mar. 9, 2007), <http://lbackerblog.blogspot.com/2007/03/principles-of-transnational-law.html>.

highly contested.³⁸ However strong its internal coherence as a field of legal study, transnational law's single-minded focus on the governance systems of functionally distinct regulatory communities of nonstate actors has made it possible to better understand these systems as self-referential, autonomous, closed systems with their own internal regulatory dynamic, fully constituted and able to communicate (interact) effectively with other governance systems within, above, and around the state.³⁹ The key to understanding these systems lies in their distinct constitutions, their relationship to other communities, and their relationships with the members of their communities. These member-created systems focus on serving the needs of the group. The essence of that creation lies in the objectives of the group, which need not all be the same. That suggests a fundamental challenge to the homogeneity that serves as a basic premise of the state order—an inversion of the premises of governance legitimacy. All states are created for the same purpose and function along similar lines using a standardized set of tools (whatever the variation in implementation, which itself forms the essence of the science of politics). Transnational nonstate governance theories suggest a fundamental break with the three-legged stool of legitimate governance—state, law, and territory. Nonstate entities now govern through regulatory techniques that might mimic and sometimes supplement or supplant, but are not effectuated through law, nor are grounded in jurisdictional limits measured by “metes and bounds.”⁴⁰ More importantly, such governance is not necessarily understood as derived from or subordinate to this three-legged stool of legitimacy. Governance has been moving from a mindless servant of hierarchy and unity to a more horizontally constituted and networked set of governance orders in which states participate but do not necessarily subordinate to their own governance orders.

38. Compare Paul Schiff Berman, *International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005), with Pierrick Le Goff, *Global Law: A Legal Phenomenon Emerging from the Process of Globalization*, 14 IND. J. GLOBAL LEGAL STUD. 119 (2007).

39. See, e.g., Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644 (1989); David Friedman, *Private Creation and Enforcement of Law: A Historical Case*, 8 J. LEGAL STUD. 399 (1979); Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 3, 10-18 (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., 2004); Claudia R. Williamson, *Informal Institutions Rule: Institutional Arrangements and Economic Performance*, 139 PUB. CHOICE 371 (2009).

40. This is the traditional system under the common law for the measurement and description of the borders of real estate.

Indeed, a rising mountain of studies (whether or not self-consciously denominated transnational) has made it increasingly difficult to dispute that at least one group of nonstate actors, multinational enterprises, now comprise a group of autonomous, functionally differentiated organizations which, within the scope of their authority, have exercised regulatory authority.⁴¹ They present the institutionalized face to a phenomenon made possible by the effects of globalization, which are said to reduce the importance of borders as regulatory devices and lay bare the weakness of governmental power, especially among least developed states.⁴² These enterprises have exercised their regulatory authority to produce law, understood more broadly than as the product of a legislature or court.⁴³ Still, that exercise of regulatory power has been effectuated within a closed regulatory system with its own internally cohesive rules of interpretation and dispute resolution.⁴⁴

Within a global regulatory context in which “[n]o one is in charge,”⁴⁵ the approaches to regulation of large multinational corporations has become both as complex and as contested a subject as the regulation of states within a transnational or international framework. Currently, among the corporate social responsibility (CSR) community, there are three principal approaches to the deployment of CSR in the context of corporate regulation—the extraterritorial application of the (favored) laws of certain jurisdictions (usually from developed states); the development of substantive rules of corporate responsibility as international law (usually reflecting the position of developing states though serving the policy objectives of portions of developing-state elites); and privatization of corporate regulation beyond the traditional

41. See, e.g., Tim Büthe, *Governance Through Private Authority: Nonstate Actors in World Politics*, 58 J. INT’L AFF. 281 (2004); Peter T. Muchlinski, “Global Bukowina” Examined: Viewing the Multinational Enterprise as a Transnational Law-Making Community, in GLOBAL LAW WITHOUT A STATE 79 (Gunther Teubner ed., 1997). See generally Virginia Haufler, *Beyond Government: Business Self-Regulation in International Affairs* (Carnegie Endowment for Int’l Peace, Study Group on the Role of the Private Sector, Discussion Paper no. 1), available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=583>.

42. See, e.g., Peter T. Leeson & Peter J. Boettke, *Two Tiered Entrepreneurship and Economic Development*, 29 INT’L REV. L. & ECON. 252 (2009).

43. See, e.g., Marc Amstutz, *Global (Non-)Law: The Perspective of Evolutionary Jurisprudence*, 9 GERMAN L.J. 465, 474-76 (2008) (distinguishing characteristics that separate law from nonlaw).

44. For a traditional application in public law, see Joachim Wieland, *Germany in the European Union—The Maastricht Decision of the Bundesverfassungsgericht*, 5 EUR. J. INT’L L. 259 (1994). The same idea can be said to apply to internally closed nonstate governance systems. See Backer, *supra* note 20.

45. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 112 (1999) (emphasis removed).

scope of corporate governance.⁴⁶ Multinational corporations have exercised governance in two distinct forms of particular interest to this article. The first is with respect to internal systems of governance across the entire spectrum of the operations of an enterprise. This involves not merely internal governance rules, sometimes better known when taking the notorious form of “voluntary codes,”⁴⁷ but also the framework for managing relationships among all the factors of production of corporate activity up and down the corporate supply chain. The second is exercised among the community of enterprises. This form of governance has been effectuated through purely private efforts,⁴⁸ or more famously, public-private organs, and memorialized in soft law rules⁴⁹ and enforcement systems. Each is described in turn.

A. *The Self-Regulating Corporation*

One can understand the internal regulation of the corporation in two respects. The first is the development of an internal corporate constitution. This singular corporate constitutionalism has been well explored, though somewhat pessimistically.⁵⁰ The second is the development of an external corporate constitution. This is perhaps better understood as the appearance of a self-constituting substantive organizational framework within the entity and its factors of production and interaction. This supply chain corporate constitutionalism has been developed in studies of the enterprise operations of large multinational corporations.⁵¹ In both aspects, the corporate enterprise changes its fundamental character. It ceases to function solely as an object of law

46. See ZERK, *supra* note 8.

47. See, e.g., Canada Office of Consumer Affairs, *Voluntary Codes Guide—What Is a Voluntary Code?*, INDUSTRY CANADA, <http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca00963.html> (last visited Jan. 20, 2011).

48. Consider product certification programs that have harmonized standards for product conformance to basic human rights notions. See, e.g., Errol Meidinger, *Multi-Interest Self-Governance Through Global Product Certification Programmes*, in RESPONSIBLE BUSINESS: SELF-GOVERNANCE AND THE LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS 259 (Olaf Dilling, Martin Herberg & Gerd Winter eds., 2008).

49. See, e.g., Anna di Robilant, *Genealogies of Soft Law*, 54 AM. J. COMP. L. 499 (2006).

50. See 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 203 (Rainer Nickel ed., 2010).

51. See, e.g., Fabrizio Cafaggi, *Private Regulation, Supply Chain and Contractual Networks: The Case of Food Safety*, (Robert Schman Ctr. for Advanced Studies, European Univ. Inst. Working Paper No. 10, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1554329; Ans Kolk & Rob Van Tulder, *The Effectiveness of Self-Regulation: Corporate Codes of Conduct and Child Labour*, 20 EUR. MGMT. J. 260 (2002).

and assumes a (self-) regulatory role. But the character of that self-regulation is different. In the former case, the corporation assumes a power over its internal constitution within the ambit of state regulation. In the latter case, the corporation reverses roles with the state; it becomes a consumer of regulation. The state becomes the merchant; regulation becomes the principal commodity produced by states for “sale” to geographically mobile economic entities.

1. *Internal Regulation*

It is now possible to speak of the internal constitution of the corporation as an autonomous, coherent, and closed regulatory system in a way that might have been incomprehensible even a decade ago.⁵² The analysis posits that

[t]he distinctive regulatory problem posed by MNCs [Multi-National Corporations] is their ability to operate an integrated command and control system through two disaggregated institutional structures. The first of these structures is the collection of discrete corporate units—parent, subsidiary, sister, and cousin companies—that make up the MNC group. The second disaggregated structure housing the MNC is the global system of separate nation-states in which those corporations are registered and do business.⁵³

In the usual case, this regulatory autonomy centers on the ability of a firm to avoid distasteful (to it) regulations relating to its operations. By carefully choosing the place, form, and method of operation, it can effectively decide the manner in which it will be regulated. States may legislate, but the enterprise will submit to those regulations only to the extent they are either unavoidable or desirable (i.e., profitable). The recent change of domicile of the American corporation Halliburton provides a telling example.⁵⁴ From the perspective of the self-regulating corporation, the role of states has changed. No longer holders of a monopoly power to regulate the enterprise, states are now, from this perspective, understood as mere producers of a good—regulation—that

52. See Backer, *supra* note 12.

53. Eric Engle, *Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?*, 20 ST. JOHN'S J. LEGAL COMMENT. 287, 300 (2006).

54. Christine Lagorio, *Halliburton's Dubai Move Sparks Outcry*, CBS NEWS ONLINE (Mar. 12, 2007), <http://www.cbsnews.com/stories/2007/03/12/business/main2558620.shtml>.

can be characterized as a cost of operations. "Competition [is] not just between products, but also between governance systems."⁵⁵

Self-regulatory autonomy requires coherence within a system of rules complete enough to provide closure, and sufficiently bureaucratically developed to permit elaboration, application, and enforcement. Within the model of the self-regulatory global corporation described above, this coherence is effectuated through the ability to move operations between regulating public jurisdictions, the adoption of voluntary codes and rules of internal conduct, and the adherence to voluntary standards developed by communities of public and private supranational regulators.⁵⁶ Together, these provide a basis of rules that can order a large range of corporate operations, and that can be enforced through contract.⁵⁷ Enforcement can be effectuated privately, through arbitration and related methods, or by invoking the judicial systems of appropriate states. In the latter case, of course, there is evidence of the sort of structural coupling that is an everyday feature of coherent systems.⁵⁸

But the possibility of both coherence and autonomy of such internal regulation of nonstate actors has also been questioned. The strongest criticism of the possibility of autonomous self-governance is based on the soft law forms in which this closed regulatory construct is often elaborated. Specifically, because corporate self-governance is essentially grounded in soft law, it may represent a successful effort to privatize public regulation more than the liberation of corporations from the regulatory matrix of the state. This suggestion finds its most interesting expression in recent work by Gunther Teubner.⁵⁹ He suggests a contradiction in the turn to soft law as an alternative to conventional public law, which moves power away from both state and shareholder.⁶⁰

The contradiction of soft law that exhibits critical characteristics of hard law, that is, of soft law that operates functionally like hard law, but that is not hard law because it was not produced through the procedures specified for the production of law under the conditions

55. Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 330 (2001).

56. See ZERK, *supra* note 8.

57. Backer, *supra* note 20, at 1753.

58. On structural coupling among autonomous but interrelated systems, see, for example, Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419, 1420 (1992); Marc Amstutz, *The Letter of the Law: Legal Reasoning in a Societal Perspective*, 10 GERMAN L.J. 361, 376 (2009); Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 LAW & SOC'Y REV. 727, 737 (1989).

59. Teubner, *supra* note 50.

60. *Id.* at 1.

specified in the constitutions of states, has important consequences. This contradiction suggests a resolution outside the parameters of conventional state-law constructs. What is “voluntary” within the domestic legal orders of states can be understood as mandatory within the governance systems of those who have adopted the “voluntary” regimes. As far as they are concerned, the voluntary rules are mandatory within the parameters of their governance system.⁶¹ Whatever their character, “when they were first spawned, they are no longer mere public relations strategies; instead, they have matured into genuine civil constitutions—in the fashion of constitutional pluralism.”⁶² Teubner advances five factors contributing to the evolution of soft law regimes, of governance without government, which he calls juridification, constitutionalization, judicialization, hybridization, and intermeshing.⁶³ Yet, it is not clear whether these institutionalist tendencies have produced governance without government; that is, the rise of fictive governance that supports fictive entities beyond the control of the state, or merely a vehicle for the privatization of governance still controlled by the state.⁶⁴ Autonomy, however, can be enhanced through a “strength in numbers” strategy Teubner identifies as “intermeshing,”⁶⁵ a private sector variant of the governance structures of the European Union.⁶⁶ Intermeshing will play a key role in the construction of a new model of transnational public governance in the form of the FSB.

But there are other methods of autonomous internal regulation beyond the construction of private supra-entity governance intermeshed frameworks. The first involves privatization of standard setting. The second involves delegation of substantive standards for products or

61. See, e.g., Larry Catá Backer, *Part II: The OECD, Vedanta, & the Indian Supreme Court—Polycentricity, Transnational Corporate Governance and John Ruggie’s Protect/Respect Framework*, LAW AT THE END OF THE DAY (Nov. 3, 2009), <http://lcbackerblog.blogspot.com/2009/11/part-ii-oecd-vedanta-indian-supreme.html>.

62. Teubner, *supra* note 50, at 2.

63. *Id.*; see also Teubner, *supra* note 39, at 16.

64. There is always a danger, Teubner relates, that such codes will become little more than the privatized expression of public law. Teubner, *supra* note 50, at 9. Already there is a great tendency among Western states to do just that, as well as to exercise governance indirectly. See Larry Catá Backer, *Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring After Sarbanes-Oxley*, 2004 MICH. ST. L. REV. 327.

65. Teubner, *supra* note 50, at 9-10.

66. Just as the Member States of the European Union together might create broader and more powerfully effective cross-state norms, so too might multinational “states” do the same within cooperative regulatory communities. Thus, Teubner notes “the emergence of intercompany networks as an extension of the corporate code onto an entire production network. Global commodity chains have developed, which constitute neither market relationships nor integrated multinationals.” *Id.* at 9.

corporate behavioral norms to nongovernmental organizations. Private sector standard setting or certification bodies are nongovernmental organizations that provide either product or behavior standards or certification of product quality based on compliance with certain rules.⁶⁷ Compliance with globalized standards is now critical for the functioning of global economic markets. These standards apply with equal strength to the largest multinational corporation and the smallest supplier in a complex supply chain.⁶⁸ Standard setting bodies represent both private centers of governance and effectively coordinated public-private governance through well-institutionalized interactions.⁶⁹ Standard setting has provided a means through which governments have privatized governance while retaining authority over the larger objects of policy.⁷⁰ Standard setting is not limited to products but may also touch on process or behavior, once the exclusive domain of law. One area meriting attention is that of corporate governance.⁷¹ The International Organization for Standardization's (ISO) recently launched international standard guidelines addressing CSR, to be codified as ISO 26000, provides a useful example.⁷² Standards compliance is sometimes also enhanced by third-party evaluation

67. See Steven Bernstein & Erin Hannah, *Nonstate Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, 11 J. INT'L ECON. L. 575 (2008) (suggesting that the development of transnational social and environmental standards might pose a challenge to another transnational governance system, that of the WTO and describing solutions).

68. See, e.g., Khalid Nadvi, *Global Standards, Global Governance and the Organization of Global Value Chains*, 8 J. ECON. GEOGRAPHY 323 (2008) (using the case of Nike's termination of a supplier agreement with its Pakistani manufacturer of soccer balls to analyze the relationship between standards and governance).

69. Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 547 (2009).

70. For the approach of the European Union, see *Opinion of the Economic and Social Committee on the Communication from the Commission to the Council and the European Parliament on Technical Harmonization and Standards: A New Approach*, 1985 O.J. (C 169) 15.

71. See Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 ECOLOGY L.Q. 479, 489-91 (1995).

72. See INTERNATIONAL STANDARD FOR ORGANIZATION, GUIDANCE ON SOCIAL RESPONSIBILITY (2010). See also *Future ISO 26000 standard on social responsibility published as Draft International Standard*, INT'L ORG. STANDARDIZATION (Sept. 14, 2009), <http://www.iso.org/iso/pressrelease.htm?refid=Ref1245>. This project is new in the sense that the guidelines are not certifiable—thus, they are not standards with standardized compliance. For a critical review of the process of development and the potential effects of ISO 26000 on small and medium-sized enterprises, see OSHANI PERERA, *HOW MATERIAL IS ISO 26000 SOCIAL RESPONSIBILITY TO SMALL AND MEDIUM-SIZED ENTERPRISES (SMEs)?* (2008), http://www.iisd.org/pdf/2008/how_material_iso_26000.pdf.

entities. The most common examples are the debt- and credit-rating agencies. The methodologies and standards used to issue ratings can have profound effects on markets and behavior, as individuals, companies, and states modify their behavior to maximize their rating potential.⁷³

More directly relevant to governance are certification programs, through which nongovernmental actors certify compliance with their published standards.⁷⁴ Certification is available for both products and operations.⁷⁵ Certification mimics public regulation—a third-party organization creates a set of standards grounded in substantive values for the production of a product and then offers to certify corporate compliance with these standards. Complying companies can then advertise their certification as proof of compliance with a set of third-party standards that advances certain social, economic, political, ethical, or other values. In some instances, certification is used as a supplement to internal corporate constitution making.⁷⁶ In the form of social accountability standards, these programs provide a supranational institutional framework for the development of corporate behavior standards that are regulatory in effect but not dependent on the substantive law of any particular state. Their effects, especially within developing states, can be profound, and their harmonizing effects substantial.⁷⁷

These efforts suggest a different vector of governance—the deployment of autonomous entities to serve as the institutionalized source of substantive values and rules for the social conduct of economic actors. These rules become binding because corporations embrace them. When the certification standards do not reflect customary notions among the communities of actors affected thereby, then they are not

73. See, e.g., Dieter Kerwer, *Standardizing as Governance: The Case of Credit Rating Agencies*, in COMMON GOODS: REINVENTING EUROPEAN AND INTERNATIONAL GOVERNANCE 293 (Adrienne Héritier ed., 2002).

74. “Third-party independent product certification is the most reputable, because it ensures that a neutral body representing the interests of all the parties . . . governs the certification process.” *Certification in Brief*, BUYER BE FAIR: THE PROMISE OF PRODUCT CERTIFICATION, http://www.buyerbefair.org/certification_brief.html (last visited Jan. 20, 2011).

75. See, e.g., Tracy Cooper, *Picture This: Promoting Sustainable Fisheries Through Eco-Labeling and Product Certification*, 10 OCEAN & COASTAL L.J. 1, 2 (2004-2005).

76. Margaret M. Blair, Cynthia A. Williams & Li-Wen Lin, *The New Role for Assurance Services in Global Commerce*, 33 J. CORP. L. 325, 343 (2008). “In this way, multinational firms may be drawing more small and local firms in more countries into their orbit.” *Id.* at 338.

77. See Li-Wen Lin, *Corporate Social Accountability Standards in the Global Supply Chain: Resistance, Reconsideration, and Resolution in China*, 15 CARDOZO J. INT’L & COMP. L. 321 (2007).

embraced and the standards provider either changes its standards or abandons the field. Still, two points are important here, for both the construction of autonomous sources of corporate behavior and patterns of governance. The first is the importance of the third-party standards model as a source of governance rules. The second is the supranational and institutional character of these third-party providers. Together, product or standards certification provides substantial evidence of the power of private entities and groups to organize themselves to develop commonly applicable standards as well as the mechanisms to implement these certification systems. It also provides evidence of the customary character of these standards. To succeed they must reflect the customs and values of the parties—radical positivism is not likely to be successful in these efforts precisely because these standards are all grounded on the consent of the parties to them.

2. The Corporation as Regulator of Functionally Differentiated Production Units

It is hardly enough to consider corporate governance autonomy merely by reference to its internal constitution. Its external constitution—the frameworks through which it autonomously regulates behavior among its important stakeholders—adds an important facet to institutionalization and the reach of private governance among nonstate actors. The corporate external constitution evidences networked governance within a chain of relationships that bind a corporation, for example, to customers, investors, suppliers, and monitors. These networks seek to harmonize behavior among a larger set of actors within the strict bounds of the relationships among them.

It is in its relationships with its supply chain that the autonomy of corporate governance can be discerned. In these contexts, the corporation does not merely seek to regulate itself—either by strategically moving its assets to achieve an appropriate mix of regulatory environments for the various facets of its operations, or through the application of externally produced voluntary codes as a sort of corporate constitutionalism. Instead, it seeks to regulate its relationships with other individuals and entities that contribute to its own productivity. Alternatively, corporations seek to regularize behavior through the application of behavioral norms or standards generated by other groups—particularly nongovernmental organizations that certify products and set standards, or standard-setters concerned with substantive rules for product production and quality.

But these regulatory entities are not states. Nor do they have access to the full palette of coercive measures that make states such powerful internal actors. And the extent of regulatory power is not great. But the power of participation may sometimes be as strong. Moreover, narrow regulatory power, that is, the power to set rules only about matters with respect to which the community was formed, does not detract from the effectiveness of that regulation. These communities can exist within and around states. They seek to engage in regulation at the interstices of lawmaking, where law either does not or cannot provide a basis for effective regulation.⁷⁸ Most important, they operate through the medium of soft law—regulation through policy and contract. These instruments do not serve as a conduit for the imposition of the law of a single domestic legal order. Instead, they represent the construction of private regulatory environments through an internalization of transnational public and private norms.⁷⁹ Within these systems, the individual state may play a role but a distinctly secondary one. International organizations, groups of states acting together to produce a common position on matters of substantive conduct, play a larger role in the generation of norms that may be adopted by these economic self-regulators. It is possible to see in the construction of the harmonizing regulations of multinational corporations throughout their supply chains, a freestanding, autonomous, self-communicating system, generating enforceable conduct rules binding on its constituency and accountable to a well-defined constituency.⁸⁰

These regulatory regimes are not effectuated using the well-known tools of state regulation—positive law and judicial and administrative decisions. Rather, contract serves as the means by which the “law” of this system is memorialized and made binding.⁸¹ Like its political counterpart, the regulating multinational enterprise is as much a prisoner of its own stakeholders (and principally its consumers and investors) as any state is to its citizens and residents. Nor are these regulatory collectives disconnected from the regulatory role of the state (or collections of states); autonomy is not meant to suggest isolation. “Similarly, legal subsystems coexisting in isolation from the remaining bulk of international law are inconceivable. There will always be some

78. See Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to “Private” Regulation*, 71 U. COLO. L. REV. 1263 (2000) (discussing regulation of the Internet).

79. See *supra* notes 60-78. This idea is nicely captured in Graf-Peter Calliess and Peer Zumbansen’s notion of rough consensus and running code that reorients the question of “when and how norms are recognized as law.” CALLIESS & ZUMBANSEN, *supra* note 12.

80. For an elaboration, see, for example, Backer, *supra* note 12; Backer, *supra* note 20; Cafaggi, *supra* note 51; Kolk & Van Tulder, *supra* note 51.

81. Backer, *supra* note 12.

degree of interaction, at least at the level of interpretation.”⁸² But it does suggest that the traditional element of complete subordination to the will of a state is absent, even as the corporate entity navigates among state domestic legal orders, international legal norms, and the governance frameworks of investors and competitors.

Law is a useful medium in these communications between the state and its people (an internal communication that deepens the self-conscious separation of that community from others) and between the state system (that speaks through law) and other (social) systems of governance. In this sense, law serves as both the means through which normative standards are manifested (effectively merging the form of law with its substance), and the method through which normative standards can be conveyed and preserved authoritatively to both those who are bound and those who may be interested (effectively merging the form of law with the techniques of communication). Law, then, serves as a means to couple (or communicate) between law and its social context in the interactions between legal and social systems.⁸³ But social norms, the governance language of nonstate systems, can serve similar functions going in the other direction. A recent important example involves the development of corporate regulatory systems that supplement or supplant product content regulation.⁸⁴

The corporation as the center of systems of functionally distinct supply-chain-driven governance units suggests another set of institutional governance patterns that will become influential in the construction of supranational public governance. The first is the importance of functional jurisdictional limits. Corporate external constitutions are effective only to the extent they relate to their specific objects. The second is the importance of consent in the operation of these systems. Consent in the corporate context is expressed through contract and the maintenance of economic or social relations. Third is the fundamental importance of monitoring, disclosure, and surveillance as a tool of governance. These are not systems of clear positive law so much as systems grounded in the indirect implementation of principles

82. Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT'L L. 483, 492 (2006).

83. Luhmann, *supra* note 58, at 1419; Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

84. See Lyndsey Layton, *Wal-Mart bypasses federal regulators to ban controversial flame retardant*, WASH. POST, (Feb. 26, 2011, 10:13 PM), <http://www.washingtonpost.com/wpdyn/content/article/2011/02/25/AR2011022502977.html> (discussing Wal-Mart's initiative in banning polybrominated diphenyl ethers (PBDEs) from its stores in response to consumer advocacy complaints).

through the mechanics of monitoring, disclosure, and evaluation of compliance.

Corporate regulators operate autonomously but in a stream of constant communication with states and other public and private regulatory authorities. Law systems do the same. An institutionalization of the networking of these formative and communicative functions would provide a mechanism for coordination and harmonization among systems that might reinforce the autonomy of each through a framework within which competitive cooperation is possible.⁸⁵ We leave behind the classical model of the rule-of-law state grounded in positive (or customary) law pronounced by an authoritative body clothed in the legislative power, and enter the world of the panopticon and the disciplines.⁸⁶

B. The Corporation as Subject/Object of International Public/Private Governance

The difficulties of regulatory autonomy and coherence might be ameliorated where communities of corporations (and other nonstate actors), like the community of states, come together for the elaboration of governance frameworks that can exist autonomously. Commentators looking elsewhere have increasingly noted the rise of alternative systems of regulation that cut across borders, either hybrid systems or regulatory systems based on private law.⁸⁷ From the perspective of self-regulating corporations, this opens an even greater set of possibilities for fashioning an internal regulatory framework that suits them, rather than any single political community seeking to assert exclusive regulatory authority.

The external constitutions of the corporation are not purely the product of internal dynamics. As functionally differentiated units well networked within the webs of the powerful relationships that constitute interinstitutional social, political, and economic relations, the constitutions of corporations are also subject to contribution from beyond the "territory" of corporate power. It is apparent that in the form of the modern multinational corporation, large aggregations of private power can, and often do, overwhelm the more limited and territorially

85. See Larry Catá Backer, *Inter-Systemic Harmonization and Its Challenges for the Legal-State*, in *THE LAW OF THE FUTURE AND THE FUTURE OF THE LAW* 427-37 (Sam Muller et al. eds., forthcoming 2011).

86. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 176-77 (Alan Sheridan trans., 1977).

87. See, e.g., John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 *NW. U. L. REV.* 641 (1999).

based public power, especially (but not exclusively) of small states.⁸⁸ These entities might subvert not only the traditional order hierarchy represented by the state, but also the global monopoly of power represented in the public power. The danger is similar to that posed by the largest states during the first half of the twentieth century, whose unchecked power threatened to unbalance the state system through singular application of public power.

Just as one antidote to unbalanced, uncontrolled state power served as an incentive to the construction of the international system after 1945,⁸⁹ a cure to imbalances in power between public and private corporate bodies might be provided by the construction of a framework for cooperative governance existing at a level beyond either state or corporate governance. These more recent efforts point not merely to the efforts at the construction of a soft law (that is, a nonstate) rule framework to govern these new nonstate bearers of governance power, but these efforts also suggest a pattern for the governance of regulatory systems of nonstate (mostly economic) actors in which public bodies participate directly (and states indirectly). They also suggest a pattern for the governance of the regulatory systems of states in which private bodies participate. For that purpose, state collectives have sought to construct governance frameworks that mimic those being developed by private organs. Specifically, the models of third-party certification and standard setting have produced a public sector analogue.

The effort has sought to construct a “mixed” governance framework, in which groups of states produce norms. There is an expectation that the domestic legal orders of participating states will turn these norms into law, but the norms also simultaneously serve as the source of private regulation for the internal and external constitutions of enterprises. The object is not so much to reassert the authority of any particular state, but rather to aggregate public power at the international level and develop norms within that aggregation to be applied to the emerging governance aggregations of private power represented by the community of multinational corporations. The resulting polycentric systems would both preserve the superiority of state power within their territories and impose global standards on consenting communities of private actors. The Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises system represents one attempt to

88. On power asymmetries between large multinational corporations and small states, see, for example, Gary Chartier, *Sweatshops, Labor Rights, and Competitive Advantage*, 10 OR. REV. INT'L L. 149, 175 (2008).

89. See, e.g., Larry Catá Backer, *God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century*, 27 MISS. C. L. REV. 11 (2007).

operationalize such a system. The United Nations' Global Compact project⁹⁰ and more recently the Protect, Respect, Remedy Principles framework,⁹¹ represent another.⁹²

1. The OECD Corporate Governance System

The OECD⁹³ has elaborated a set of three constituting groups of behavior norms, the Principles of Corporate Governance,⁹⁴ the Guidelines for Multinational Enterprises,⁹⁵ and the Guidelines on Corporate Governance of State-Owned Enterprises.⁹⁶ Together, these provide a comprehensive set of principles for the governance of economic enterprises in the organization of their government and in the rules limiting the range of their behaviors with other actors. The power of this framework is evidenced by the willingness of other international governance actors to use it. Thus, for example, the "World Bank benchmarks the corporate governance framework and company

90. UN GLOBAL COMPACT, <http://www.unglobalcompact.org> (last visited Jan. 20, 2011).

91. See Larry Catá Backer, *The United Nations' "Protect, Respect, and Remedy" Human Rights Project: On Operationalizing a Global Framework for the Regulation of Transnational Corporations*, 9 SANTA CLARA J. INT'L LAW (forthcoming 2010).

92. OECD, GUIDELINES FOR MULTINATIONAL ENTERPRISES, *supra* note 31.

93. The OECD is an intergovernmental organization representing most developed states. See *About OECD*, OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited Jan. 20, 2011). For a discussion, see, for example, Larry Catá Backer, *Rights and Accountability in Development (RAID) v Das Air and Global Witness v Afrimex: Small Steps Towards an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10 MELB. J. INT'L L. 258 (2009). http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html

94. OECD, PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 31.

95. OECD, GUIDELINES FOR MULTINATIONAL ENTERPRISES *supra* note 31. The Guidelines were most recently revised in May 2011. The Guidelines provide voluntary principles of business behavior covering virtually every aspect of the operations of an economic enterprise. "Although many business codes of conduct are now available, the Guidelines are the only multilaterally endorsed and comprehensive code that governments are committed to promoting." OECD, POLICY BRIEF: THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2001), available at <http://www.oecd.org/dataoecd/12/21/1903291.pdf>. "In 2010, ten years after the last revision of the Guidelines, the 42 adhering governments agreed on the terms of reference for carrying out an update of the Guidelines. The update aims to ensure the continued role of the Guidelines as a leading international instrument for the promotion of responsible business conduct." *Guidelines for Multinational Enterprises: About*, OECD http://www.oecd.org/about/0,3347,en_2649_34889_1_1_1_1_1,00.html (last visited July 3, 2011).

96. OECD, GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES (2005), available at <http://www.oecd.org/dataoecd/46/51/34803211.pdf>.

practices of countries against the OECD Principles as part of the 'Reports on the Observance of Standards and Codes' initiative."⁹⁷

The critical aspect of these normative constructs is their independence from the state. Though the OECD principles are not purely the product of the entities they purport to govern, neither are they products of any one state.⁹⁸ Like the U.N. Three Pillar Framework discussed below, the OECD also recognizes both the autonomy and binding nature of the social norm system (the substantive provisions of which it seeks to enforce through its own provisions) over those of state law systems in which corporations operate. More importantly, the OECD system is built on the idea that stronger corporations have public roles within states with weak governance law systems.⁹⁹ The insights from the OECD Risk Awareness Tool now better reveal their governance implications,¹⁰⁰ which are meant to substitute multinational governance, with corporate self-governance in its relationship with others, for law systems within territories in which the state is largely marginal. This is meant to avoid the problem of a blind adherence to a hierarchy-of-rule system that always posits the supremacy of law systems even where the state is effectively absent. "Such contexts attract marginal and illicit enterprises, which treat them as law-free zones."¹⁰¹ But the issues of public functions of private enterprises in weak governance zones remains contentious even within the OECD.¹⁰²

97. Financial Standards Foundation, *Principles of Corporate Governance*, ESTANDARDS FORUM, http://www.estandardsforum.org/about_standards/principles-of-corporate-governance (last visited Jan. 20, 2011) ("Participation is voluntary. As of October 2007, ROSCs for 41 countries have been published on the World Bank website with the authorization of the respective country. Only low- and middle-income countries and economies in transition have been assessed.").

98. "For over 35 years, these guidelines have occupied a unique space within the world of corporate social responsibility. They are the only ones formally endorsed by governments, 42 at last count. And they do bring together labor, civil society, and business to create the broadest possible consensus behind them. This is truly the work of a global policy network in action." Hillary Rodham Clinton, U.S. Sec'y of State, Commemoration of the 50th Anniversary of the OECD On Guidelines for Multinational Enterprises (May 25, 2011), *available at* <http://www.state.gov/secretary/rm/2011/05/164340.htm>. *See also* Backer, *supra* note 31.

99. OECD, RISK AWARENESS TOOL FOR MULTINATIONAL ENTERPRISES IN WEAK GOVERNANCE ZONES (2006), *available at* <http://www.oecd.org/dataoecd/26/21/36885821.pdf> [hereinafter RISK AWARENESS TOOL].

100. The OECD Council explained that in such weak governance zones "governments, international organisations and multinational enterprises can each draw on their distinctive competences to contribute to the efforts of strengthening governance in such zones." *Id.* at 5.

101. John G. Ruggie, U.N. Special Representative, Consultation on Operationalizing the Framework for Business and Human Rights, Opening Remarks (October 5-6, 2009), *available at* <http://www.business-humanrights.org/SpecialRepPortal>

touches on jurisdiction. Here the great difficulty is defining the scope of the obligations to be imposed, formally and socially, on enterprises. There is a great tension between the need for precision and certainty—the great foundation of law systems—and the reality that in practice all activity is intimately interconnected—the foundation of systems of social or customary norm systems.¹⁰⁶ The second challenge focuses on the legal and policy incoherence of domestic legal systems.¹⁰⁷ Related to incoherence is the problem of complexity. Together they suggest that the state has been slow to coordinate its policies either with its international obligations or within its own domestic legal orders, a point driven home with an example from governance in South Africa.¹⁰⁸ If multinational corporations are bound by a social norm system structure beyond conventionally applicable law structures, as Mr. Ruggie suggests, then such enterprises are bound to provide an adequate mechanism for enforcing its norm obligations.¹⁰⁹ Autonomous systems tend to provide for the vindication of rights and the management of obligations undertaken thereby. That is also the case within private social norm systems. This brings the last challenge of polycentric systems, the restructuring of governance power that recognizes that the most developed private entities may have superior public obligations to those of developing states in which they operate, which is especially the case with respect to remedies.¹¹⁰

<http://www.business-humanrights.org/Documents/Ruggie-speech-to-Geneva-consultation-Oct-2009.pdf>.

106. Mr. Ruggie rejects legal formalism as the sole basis for the construction of the social framework for business conduct. “Virtually all rights are relevant, though some may be more so than others in particular circumstances. This fact needs to inform the policies of states and companies alike.” *Id.* at 2.

107. *Id.*

108. *Id.* at 2-3 (“Not long ago, the government of South Africa was confronted with a startling instance of how serious this lack of policy coherence can be when investors from Italy and Luxembourg took it to binding international arbitration under a bilateral investment treaty. The investors claim that certain mining provisions of the Black Economic Empowerment Act amount to expropriation, entitling them to compensation. . . . An official policy review explains that, among other reasons, ‘the Executive had not been fully apprised of all the possible consequences of BITs,’ including for human rights.”).

109. “In effect, this replicates the ‘legalistic’ approach I’ve just described: if it isn’t required by law, we don’t need to do it. Companies thereby deny those who are adversely affected by their activities an opportunity to resolve issues that may be readily remediable.” *Id.* at 3.

110. “The incidence of corporate-related human rights abuse is higher in countries with weak governance institutions: local laws either do not exist or are not enforced, even where the country in question may have ratified all the relevant international human rights conventions. The worst cases occur amid armed conflict over the control of territory or of the government itself.” *Id.*

The point suggests a convergence in governance capacity—developed states and the largest multinational corporations are closer in form and operation than either are to less-developed states and smaller corporations. Larger corporations and developed states are then more likely to look to each other for governance harmonization than either would look to developing states or smaller corporations.¹¹¹ That, in turn, suggests a fundamental reorientation of governance chains grounded in a functional abandonment of the public-private distinction. In place of this dual system, another is emerging, one in which the comparative law project will need to bridge gaps between public law-based state systems and private social norm-based systems. If at least the most advanced multinational enterprises are the functional equivalent of states, then they ought to undertake burdens commensurate with their power and effects.¹¹² The consequences may be profound for the relationship between state-based law systems and transnational norm systems (and the related social license construct). The public obligations of private enterprises cannot be based on the law systems of states—that would suggest an unnatural extension of state power to nonstate actors. Instead, that public authority must be sourced within the norm system that serves as the other foundation of corporate governance power. The issue of corporate public power, then, both reflects and acknowledges the limits of law and the autonomy of norm systems that exist in parallel but separate spheres. The tensions in those relationships must be mediated, especially where the private power can no longer be brought under the control of any single law system. This is most profoundly felt in related supranational public regulatory efforts, for example in efforts to specify the governance power of corporations in so-called weak governance zones.¹¹³

C. *The Corporate Global Soft Law Constitution*

The principles exemplified by the OECD governance projects, and those like it that seek to elaborate a constitutional system of corporate

111. Consider the response of the Chair of the Financial Stability Forum to the criticism “that it excluded developing or emerging economies.” Enrique R. Carrasco, *The Global Financial Crisis and the Financial Stability Forum: The Awakening and Transformation of an International Body*, 19 *TRANSNAT’L L. & CONTEMP. PROBS.* 203, 204 (2010). Chairman Crockett’s explanation for this lack of representation was that the FSF could be more effective if it was “homogenous.” *Id.*

112. Ruggie, *supra* note 105, at 3 (claiming companies are “only slowly discovering that in many situations meeting legal requirements alone may fall short of the universal expectation that they operate with respect for human rights—especially, but not only, where laws are inadequate or not enforced.”).

113. See, e.g., RISK AWARENESS TOOL, *supra* note 99.

governance and behavior, start from a presumption of universal values as a basis for the organization of corporations and their governance structures. In that context, the state retains an important role, but not the principal regulatory role. Private governance, in its constituting aspects, looks to supranational entities for its sources; it is not dependent on the constitutional traditions or the coercive power of states. This brings the discussion to its core—the centrality of notions of polycentricity in the construction of public-private governance systems. Globalization has made single system techniques obsolete. The inability of states to reach every actor that affects them or for private entities to operate outside the limits of their social norms suggests that governance systems must seek to harness both.¹¹⁴ Incompatible systems, law and norm, must effectively find a way to communicate and harmonize values and relevance for their constituting communities, whether these are citizens, consumers, employees, or investors.¹¹⁵

Indeed, it is now possible to speak of three new and distinct constitutional phenomena.¹¹⁶ The first is the development of principles of transnational corporate constitutionalism that mimic those of state-centered constitutionalism.¹¹⁷

This sees the company as something distinct from the contracting partners' original compact but seeks to show that, in coming together and using the corporate tool, the contractors have created an instrument that has a real identity separate from, and quite distinct from, the original contracting partners. The company, if you like, "floats free" from its founders and becomes a separate person with its own interests. Inherent in this approach

114. *Id.* at 4.

115. See Elinor Ostrom, *Vulnerability and Polycentric Governance Systems*, IDHP UPDATE, no. 3, 2001, available at http://www.ihdp.uni-bonn.de/html/publications/update/ihdpupdate01_03.html; Larry Catá Backer, *Governance Without Government: A Preliminary Overview*, LAW AT THE END OF THE DAY (June 16, 2009), <http://lbackerblog.blogspot.com/2009/06/governance-without-government.html>.

116. See *supra* notes 60-92 and accompanying text. See also Backer, *supra* note 31.

117. See, e.g., Stephen Bottomley, *From Contractualism to Constitutionalism: A Framework for Corporate Governance*, 19 SYDNEY L. REV. 277, 291 (1997) ("Companies are political institutions not simply because they are players in social power relations, but also because they themselves are systems in which power and authority, rights and obligations, duties and expectations, benefits and disadvantages, are allocated and exercised, whether actively or passively, collectively or individually. Each company is a body politic, a governance system.").

is a distinction between the notion of the origins of a company and its dynamic existence after foundation.¹¹⁸

The second is the elaboration of an institutional framework for transnational corporate constitutionalism, which posits both an autonomous community of corporations and the institutional mechanisms for the development of rules for their organization and behavior.¹¹⁹ The internal constitutions of corporations are increasingly sourced from norms whose origins are developed outside the state. Those norms are reflected in both the internal corporate governance of these actors and their external relations with other state and nonstate actors. The external constitution of corporations is increasingly tied to supranational systems as corporations become the subjects of an international regulatory community existing alongside that of managing states.

The most important element is the least well expressed—the detachment of corporate governance from the state with a corresponding attachment to a supra-national level of governance. Whatever the source of constitutional principles—that source is no longer centered on or dependent on the state for its articulation or control. In order to avoid the power of the state, nonstate systems seeking functional autonomy must adapt the models or practices of supranational public organization. And the most important lesson is strength in numbers, an institutionalization of intermeshing. These notions also touch on characterization. Nonstate systems are viewed as deficient precisely because they are not states and cannot regulate in the manner of states—that is, through law. The assumption underlying this conceptual framework is ideological—positing a hierarchy of governance within which positive law (starting with the higher law of the constitution) sits at the apex, and below which other forms of rule systems reside in a state of dependency. Thus the reference to the internal constitution of corporations as soft law is at its foundation not descriptive but normative and relational—asserting the position of these frameworks as less legitimate because they are not products of a state and are subordinate to the law systems of whatever states with which these entities come into contact. They are criticized because they are not

118. JANET DINE, *THE GOVERNANCE OF CORPORATE GROUPS* 26 (2000).

119. “Neo-liberalism and its institutional partner, the investment rules regime, aim to institutionalize a model of constitutional government intended primarily to facilitate the free flow of goods, services, capital and persons unimpeded across the borders of national states.” DAVID SCHNEIDERMAN, *CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY’S PROMISE* 2 (2008).

law.¹²⁰ But that is precisely the point. These enactments are meant to serve as the law of the governance community for which it is made. It is not a product of the state or dependent on the state apparatus as either source or enforcer. Changing the frame of reference also changes the nature of these enactments—voluntary codes are not binding on states or corporations through the organs of state enforcement but are binding within the governance systems of the corporations themselves through the same mechanism that makes state law systems work—that is, through the consent of the governed.

Governance polycentricity of this kind results in part from fears of erosions of state power either to supranational public collectives or private governance collectives. The great gatekeeper totem is law—as long as states retain a monopoly of law, and defend the position of law as the superior form of governance, states permit some room for governance in those areas where state power may not comfortably reach. To extend the law power of multistate collectives or private governance collectives is viewed as a threat and aggressively opposed.¹²¹ As such, when measured against the well-ordered and stable institutional framework of the state, the power of corporate self-governance, as both a matter of internal organization, and the ordering of its relationships among all actors contributing to its enterprise, appears unstable, unenforceable, and open-ended. Yet, within the governance universe each represents, the systems appear both autonomous and binding—not as law (understood as proceeding from states) but as governance (proceeding from the consent of the governed organized in behavior regulating groups).

Taken together, the elements of nonstate regulatory systems become clear. Such systems are dependent on the creation of entities—either a singular aggregation (like a corporation) or a group of actors—that can distinguish themselves from others along functional lines. This group acquires substance by institutionalizing its connections and vesting that institutional construct with regulatory authority to which each member

120. See Mark B. Baker, *Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise*, 20 WIS. INT'L L.J. 89 (2001); Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389 (2005); Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 78-81 (2002).

121. The alternative, and less well-accepted response, at least within the community of public actors, is based on a willingness to acknowledge the public power of these private institutions and to bring them within the regulatory framework that binds other public actors. See Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006).

agrees to be bound. Members are rewarded for compliance by conferral of the benefits of membership in the governance community and by maintaining group cohesion. They may be disciplined through the power to exclude them from the group, and therefore also exclude them from participation in the construction of a regulatory framework within which the collective will operate. Lastly, the group acquires an authority to interpret and apply its regulatory framework against its members. Now constituted as an autonomous, self-conscious entity with structure and internal coherence within the scope of the purposes for which it was created, it can communicate with other similar entities—states, other regulatory public organs, and private entities.¹²² To the extent its membership is powerfully constituted, it can extend its reach well beyond its members; its activities providing the basic material for the creation of custom and practice norms among all similarly situated entities. It exists apart and well within a dynamic cluster of public and private regulatory communities, each controlling its members within the limited scope of their respective power.¹²³

This model provides substantial insights into the self-organization of nonstate actors within governance systems that are narrowly tailored to (i.e., functionally differentiated for the attainment of) the objectives for which stakeholders come together. This form of governance may echo those commonly associated with law states—treaty, contract, soft law and the like. But these expressions of the form of governance are not meant to invoke the basic sources of public power. Instead they derive authority from the community itself and within that group are binding as the “law-system” of the governance community. More importantly, such autonomous self-constitution permits a more orderly interaction with other systems of governance, not the least of which is the state itself. But interaction need not mean subordination within the domestic legal orders of one or another state. This template provides a legitimating conceptual basis for the autonomy of governance systems that are not derived from and subordinate to state power. So constituted, it is a powerful tool for structuring governance that cannot be grounded in the traditional forms, tools, assumptions, and frameworks of state-law systems. And thus it is possible to discern an unintended consequence of this development—the potentially

122. Jean-Philippe Robe, *Multinational Enterprises: The Constitution of a Pluralistic Legal Order*, in *GLOBAL LAW WITHOUT A STATE*, *supra* note 41, at 45, 45-47, 52-56.

123. For states, this is marked by the limits of their territory; for functionally differentiated nonstate regulators, it is marked by the description of the function the community serves. See, e.g., Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 *MICH. J. INT'L L.* 999, 1019-45 (2004).

significant importance of these forms of governance to the construction of public governance systems of states. It is to that possibility, and the consequences of that possibility, that this article turns next.

II. CORPORATE CONSTITUTIONALISM WITHIN A METAGOVERNANCE FRAMEWORK

While it is useful to begin to grasp the scope, nature, and character of nonstate regulatory systems, like those of multinational corporations (and related enterprises), it is hardly enough. These regulatory systems, closed and coherent, do not exist in a vacuum, nor are their development and operations ignored by other important regulatory systems. A networked polycentricity is at the heart of key public efforts to develop governance systems for multinational corporations that are not embedded within the law systems of states. These public efforts serve the state as well, by connecting the construction of these nonstate autonomous self-constituting systems to states. Yet in making these systemic connections, the character of domestic legal orders also changes. It follows that, in order to understand the importance of these nonstate systems, it is necessary to explore their operations at the borders of their jurisdiction, and in the way in which they interlink with other regulatory actors. It is critical to examine the way in which these emerging models of private governance can be turned on the state itself. If private entities can assert governance functions and if states engage in markets like private participants, do the patterns and approaches to private governance have application to the state system at the supranational level?

States have not been idle in the face of the transformation of power and governance frameworks. Some have begun to exhibit a willingness to conduct their affairs through participation in global economic markets rather than solely through the traditional methods of legislation. With the rise of state-owned enterprises that mimic global multinational enterprises and large sovereign wealth funds that emulate private global investment vehicles, it is possible to conceive of states as market participants on a global scale.¹²⁴ At the same time, states continue to project their regulatory authority against the worldwide operations of enterprises operating within their territories,¹²⁵

124. See Larry Catá Backer, *Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State Owned Enterprises, and the Chinese Experience*, 19 *TRANSNAT'L L. & CONTEMP. PROBS.* 3 (2010).

125. On the efforts to use extraterritoriality principles to regulate multinational enterprises from home or host states, see, for example, Anne-Marey Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 *AM. J. INT'L L.* 461 (1989);

or with effects within their territories, for example in the United States under the Alien Tort Claims Act.¹²⁶

For all of its dynamic elements, these changes suggest a messy business. States are still strong, in the conventional sense, and some retain the disposition to be aggressive to the extent of their ability to control.¹²⁷ In some respects, the state may effectively operate through private enterprises, with public governance reducing itself to little more than a privatized expression of public law.¹²⁸ Though some states have effectively ceased to exist,¹²⁹ others exist as equals or inferiors in power to smaller states, transnational corporations, and civil society actors.¹³⁰ Moreover, not all states are facing changes in the nature of their power and the exercise of their sovereignty vis-à-vis other states and nonstate actors in the same way. Neither the development of governance without government nor government without a state is happening in single-minded linear fashion. Many nonstate actors continue to operate within the law systems of states that can effectively control them, but an increasing number do not. The ease of movement of capital and the integrity and uniformity of global standards for governance, coupled with growing expectations of behavior among states, makes existence beyond the power of a state increasingly feasible. And feasibility nurtured into fact produces a necessary turn to governance. The relationships among these actors change both in context and over time. But what makes for the greatest part of the mess is that all of these actors are simultaneously acting against each other, over and over again in contexts that change over place and time.

This messiness does not so much suggest a reactionary putsch by states as it heralds a reevaluation of state power. This movement is not unconsciously pursued. Again, Mr. Sarkozy's populist musings at the World Economic Forum in Davos are useful. To preserve the state at the apex of global regulatory hierarchies, one must incorporate one's rivals within a larger system in which power might be shared along new lines and potentially to the advantage of the old class of hierarchs. For that

Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1 (1997).

126. Alien Tort Claims Act, 28 U.S.C. § 1350 (2006); see also Burley, *supra* note 125.

127. See, e.g., Reza Dibadj, *Panglossian Transnationalism*, 44 STAN. J. INT'L L. 253 (2008).

128. See, e.g., Teubner, *supra* note 44.

129. Peter T. Leeson & Claudia R. Williamson, *Anarchy and Development: An Application of the Theory of Second Best*, 2 LAW & DEV. REV. 75 (2009); Ken Menkhaus, *Governance Without Government in Somalia: Spoilers, State Building, and the Politics of Coping*, 31 INT'L SECURITY 74 (2006).

130. See Larry Catá Backer, *Economic Globalization Ascendant: Four Perspectives on the Emerging Ideology of the State in the New Global Order*, 17 LA RAZA L.J. 141 (2006).

purpose, Mr. Sarkozy offers his audience something quite startling—not the reconstituted empire of the state, but a new protean singularity, a union of strong states acting collectively with powerful regulatory nonstate actors . . . the G-20!¹³¹ This lightly institutionalized intergovernmental construct “foreshadows the planetary governance of the 21st century. It symbolises the return of politics whose legitimacy was denied by unregulated globalisation.”¹³²

The G-20 is arguably a large and wobbly intergovernmental construct and hardly the stuff of governance. The G-20 is an intergovernmental amalgamation of economic regulatory authorities from the G-20 states.¹³³ Its mandate has been appropriately vague and comfortably intergovernmental, suggesting no regulatory power.¹³⁴ Indeed, the G-20 takes pains to distinguish itself as a conclave of states without supranational institutional aspirations.¹³⁵ Yet, this is deceiving. First, the G-20 has acknowledged its role as a vehicle through which its members might work through regulatory matters for transposition within their respective national legal orders through a commitment to deepen cooperation to improve the regulation, supervision and the overall functioning of the world’s financial markets.¹³⁶ But one aspect of its operations merits closer study. The FSB, which emerged newly institutionalized and reconstituted in September 2009 from its predecessor, the Financial Stability Forum, suggests a new form of governance mechanism above the state, but one that might significantly constrain the regulatory scope of private transnational actors. This section first suggests the contours of the FSB as both coherent and regulatory. It then considers the regulatory impact of the FSB governance template on nonstate public-private governance.

131. Sarkozy Speech, *supra* note 22, at 4.

132. *Id.*

133. The “Group of Twenty (G-20) Finance Ministers and Central Bank Governors was established in 1999 to bring together systemically important industrialized and developing economies to discuss key issues in the global economy. The inaugural meeting of the G-20 took place in Berlin, on December 15-16, 1999, hosted by German and Canadian finance ministers.” *What is the G-20*, G-20, http://www.g20.org/about_what_is_g20.aspx.

134. “The G-20 is the premier forum . . . that promotes open and constructive discussion between industrial and emerging-market countries on key issues related to global economic stability. By contributing to the strengthening of the international financial architecture and providing opportunities for dialogue on national policies, international co-operation, and international financial institutions, the G-20 helps to support growth and development across the globe.” *Id.*

135. “Unlike international institutions such as [OECD], IMF or World Bank, the G-20 (like the G-7) has no permanent staff of its own.” *Id.*

136. *See id.*

A. *The Financial Stability Board System*

The FSB is the institutionalized, administratively more bureaucratized, and formally organized vessel for the coordination of a large network of national and supranational regulatory actors that emerged out of the Financial Stability Forum (FSF).¹³⁷ By 2008, this anemic form of intergovernmentalism created as an appendage of the G-7 (now reconstituted as the G-20) was proving inadequate as a response to the apparent need to show a greater readiness to coordinate responses to the economic crisis, and especially the need to produce something tangible to demonstrate public sector responses.¹³⁸ For that purpose, the FSF was reconstituted as the FSB in 2009.¹³⁹ “In a world lacking a global financial regulator, the FSF’s function is to promote the development and adoption of standards and codes that, when adopted into domestic regulatory frameworks, will reduce vulnerabilities in the international financial system that may lead to global crises.”¹⁴⁰

The FSB has acquired an institutional form that is similar, in many ways, to those of many international organizations with a strong intergovernmental character.¹⁴¹ Its charter does not create any legal rights or obligations, or produce, formally, a fully constituted legal personality.¹⁴² But for the purposes of its work, that may make little difference.¹⁴³ Thus, as constituted, the FSB fulfills three broad

137. For an excellent discussion of the FSF on the eve of its transformation, see Carrasco, *supra* note 111.

138. Carrasco argues that the “FSF’s work prior to the current crisis was underwhelming.” *Id.* at 207. But ironically enough, its most important work might become a key ingredient of the work of the new FSB. “The most ambitious project was the adoption of a Compendium of Standards, intended to harmonize and make many sets of standards published by standard setting bodies more workable.” *Id.* However, with the start of the crisis in 2007, the FSF produced a series of reports that suggested in broad outline, an approach to structural reform for the amelioration of the crisis. *Id.* at 208-14.

139. The FSB was created in April 2009, but its charter became effective only at the conclusion of the G-20 meeting on September 25, 2009. Financial Stability Board Charter art. 17 [hereinafter FSB Charter], available at http://www.financialstabilityboard.org/publications/r_090925d.pdf.

140. Carrasco, *supra* note 111, at 205.

141. The FSB operates through four administrative organs: the Plenary, the Steering Committee, the Chair, and the Secretariat. See FSB Charter, *supra* note 139, arts. 6-7, 11, 13-15.

142. *Id.* art. 16.

143. The FSB has already moved quickly to deepen its informal organizational structure. FSB, OVERVIEW OF PROGRESS IN IMPLEMENTING THE LONDON SUMMIT RECOMMENDATIONS FOR STRENGTHENING FINANCIAL STABILITY: REPORT OF THE FINANCIAL STABILITY BOARD TO G20 LEADERS 1 (2009), available at http://www.financialstabilityboard.org/publications/r_090925a.pdf.

purposes.¹⁴⁴ The first is to serve as a nexus point for the large group of economic regulatory agencies that exist at the national and international level. The second is to generate information and data with respect to problems and policy approaches to national action. The third is to generate guidelines and other proto-regulation that could then serve as a legislative template for transposition into national legal orders. The FSB also serves as the generator of global customary standards to be followed by the community of states generally,¹⁴⁵ and specifically as a governance clearinghouse for states and other public organizations, to promote harmonization of governance creation and transposition.¹⁴⁶

The FSB mandate further suggests a role as a collaborative state-based governance body coordinating the governance activities of nonstate governance bodies. It is tasked with a coordinating role for governance efforts of private and hybrid transnational regulators, principally the work of standard setting bodies (SSBs),¹⁴⁷ including coordinating regulatory communication between states and private governance bodies.¹⁴⁸ It is also to “support contingency planning for cross border crisis management, particularly with respect to systemically important firms.”¹⁴⁹ These efforts, targeting so-called “too big to fail” institutions, are collaborative at both the transnational¹⁵⁰ and national levels.¹⁵¹ The FSB also manages the supervisory intergovernmental entities, management entities, and the supervisory colleges.¹⁵²

144. FSB Charter, *supra* note 139, art. 2; *see also* G20, DECLARATION ON FURTHER STEPS TO STRENGTHEN THE FINANCIAL SYSTEM 1 (2009), *available at* http://www.g20.org/documents/fin_deps_fin_reg_annex_020409_-_1615_final.pdf.

145. The understanding, of course, is that collective action by the G-20 will have a strong ripple effect on the regulatory approaches of nonG-20 states. On the theoretical underpinnings of the presumptions that underlie this framework for super-state-led globalization, *see* Backer, *supra* note 130.

146. *See* FSB Charter, *supra* note 139, art. 2(1)(b)-(d).

147. *Id.* art. 2(1)(e).

148. *Id.* art. 2(2).

149. *Id.* art. 2(1)(g).

150. *See* FSB ET AL., GUIDANCE TO ASSESS THE SYSTEMIC IMPORTANCE OF FINANCIAL INSTITUTIONS, MARKETS AND INSTRUMENTS: INITIAL CONSIDERATIONS (2009), *available at* http://www.financialstabilityboard.org/publications/r_091107c.pdf.

151. *See* Press Release, FSB, FSB Welcomes US Proposals for Reducing Moral Hazard Risks (Jan. 22, 2010), *available at* http://www.financialstabilityboard.org/press/pr_100122.pdf.

152. The FSB is to “set guidelines for and support the establishment of supervisory colleges.” FSB Charter, *supra* note 139, art. 2(1)(f); *see also* Press Release, FSB, Statement of Mario Draghi Chairman of the Financial Stability Board to the International Monetary and Financial Committee (Oct. 11, 2008), *available at* http://www.financialstabilityboard.org/press/st_101009.pdf. Supervisory colleges have now been established for more than thirty large

Significant evidence of the potential influence of this organization can be gleaned from the three reports produced for the 2009 Pittsburgh G-20 meeting. The first focused on measures for improving financial regulation.¹⁵³ By June 2010, the FSB was able to release an interim report.¹⁵⁴ The second report more strongly suggested a connection between public and private transnational governance.¹⁵⁵ The issue of transnational regulatory standards for compensation issues was taken up in more detail in the third report.¹⁵⁶ This report related specific proposals on compensation governance, structure, and disclosure to strengthen adherence to the FSB Principles for Sound Compensation Practices, issued in April 2009.¹⁵⁷ The FSB followed this with a March 2010 assessment of the transposition of these standards by state and nonstate economic actors.¹⁵⁸

complex financial institutions identified by the FSB as needing college arrangements. UNITED STATES, CHAIR OF THE PITTSBURGH G20 SUMMIT, PROGRESS REPORT ON THE ACTIONS TO PROMOTE FINANCIAL REGULATORY REFORM 2 (2009), *available at* http://www.g20.org/Documents/pittsburgh_progress_report_250909.pdf. These supervisory colleges are meant to coordinate work among agencies modeled on the European concept of coordinating committees and the U.S. process for supervisory cooperation across its state-based regulation system but apply to global enterprises, especially in regulated industries (e.g., insurance). *See, e.g.*, INT'L ASS'N OF INS. SUPERVISORS, GUIDANCE PAPER ON THE USE OF SUPERVISORY COLLEGES IN GROUP-WIDE SUPERVISION (2009), *available at* http://www.iaisweb.org/view/element_href.cfm?src=1/8138.pdf. http://www.aciforex.com/docs/marketttopics/20090427_FSB.pdf.

153. *See* FSB, IMPROVING FINANCIAL REGULATION (2009) (identifying nine areas of governance objectives), *available at* http://www.financialstabilityboard.org/publications/r_090925b.pdf.

154. FSB, REDUCING THE MORAL HAZARD CAUSED BY SYSTEMICALLY IMPORTANT FINANCIAL INSTITUTIONS (2010), *available at* http://www.financialstabilityboard.org/publications/r_100627b.pdf.

155. *See* FSB, *supra* note 143.

156. *See* FSB, FSB PRINCIPLES FOR SOUND COMPENSATION PRACTICES: IMPLEMENTATION STANDARDS (2009), *available at* http://www.financialstabilityboard.org/publications/r_090925c.pdf.

157. *Id.*; *see also* FIN. STABILITY FORUM, FSF PRINCIPLES FOR SOUND COMPENSATION PRACTICES 1 (2009) ("The FSF Principles for Sound Compensation Practices are intended to apply to significant financial institutions, but they are especially critical for large, systemically important firms."), *available at* http://www.financialstabilityboard.org/publications/r_0904b.pdf.

158. *See* Press Release, FSB, FSB Assess Progress on Reforming Compensation Structures (March 30, 2010), *available at* http://www.financialstabilityboard.org/press/pr_100330a.pdf. *See also* the report itself, FSB, THEMATIC REVIEW ON COMPENSATION (2010), *available at* http://www.financialstabilityboard.org/publications/r_100330a.pdf. The focus on social norms—what the report termed industry practice—was also extensive and suggested a need to blend a harmonized public law approach effectuated within all participating states with the development of a common framework for industry practice. *See id.* at 14-16.

Taken together, the emerging FSB construct suggests a new and curious form of transnational governance. It is hierarchical—designed to privilege the role of the state in its operation. This is particularly apparent in its emphasis on devising methods of taming autonomous private global economic actors through state-based or supranational regulation.¹⁵⁹ But the governance apparatus is not controlled exclusively by states, nor directed solely at public governance. At its core, the FSB framework is cooperative, public, and supranational: states and nonstate regulatory actors play a critical but secondary role. The FSB structure acknowledges the regulatory role of private transnational actors, mostly in the form of SSBs, yet also acknowledges the power of large private entities to act autonomously. Indeed, the focus on the disruptive power of the largest of these enterprises (at least in terms of global economic governance) suggests both an acknowledgement of their autonomy and an effort to subordinate them to public governance structures beyond the state.¹⁶⁰

The reliance on collaborative soft law instruments—principally in the form of standards and principles developed in collaboration with a complex set of international actors—also suggests a governance structure in which implementation is devolved downward. States are expected to transpose evolving governance frameworks within their domestic legal orders, whether or not they participated directly in their development.¹⁶¹ Transnational soft law developed within the FSB framework becomes a gateway to hard law that is crammed down on nonparticipating jurisdictions through the application of pressure from the G-20 member states.¹⁶² In earlier contexts, this fear of cram down generated some resistance of developing states to coordinate the work of SSBs with transnational actors like the WTO.¹⁶³

Private economic actors are involved as well. It is assumed that they are to some extent responsible for the transposition of these norms into

159. UNITED STATES, CHAIR OF THE PITTSBURGH G20 SUMMIT, *supra* note 152, at 10 (“The objective is to ensure that all systemically- important institutions, markets and instruments are subject to an appropriate degree of oversight and regulation.”).

160. FSB, OVERVIEW OF PROGRESS IN THE IMPLEMENTATION OF THE G20 RECOMMENDATIONS FOR STRENGTHENING FINANCIAL STABILITY 9 (2010), *available at* http://www.financialstabilityboard.org/publications/r_100627c.pdf.

161. FSB, PROGRESS SINCE THE PITTSBURGH SUMMIT IN IMPLEMENTING THE G20 RECOMMENDATIONS FOR STRENGTHENING FINANCIAL STABILITY 10 (2009), *available at* http://www.financialstabilityboard.org/publications/r_091107a.pdf.

162. FSB, FSB FRAMEWORK FOR STRENGTHENING ADHERENCE TO INTERNATIONAL STANDARDS 2 (2010), *available at* http://www.financialstabilityboard.org/publications/r_100109a.pdf; Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance*, 20 EUR. J. INT’L L. 575, 580 (2009).

163. *See, e.g.*, Lang & Scott, *supra* note 162.

their operations in a way that mimics the expectation that states would do the same through the transposition of standards into their domestic legal orders. Such transposition is meant to follow from the regulatory efforts of supranational corporate regulatory bodies, like the OECD, which serve as the focal point of corporate soft law generation.¹⁶⁴ Indeed, the supervisory college mechanism can be understood as representing both an acknowledgement of the regulatory authority of large private global actors, and an effort to harmonize the systems of their operations to patterns of public supranational organizations in the public sector.¹⁶⁵

Yet, the FSB framework is not without its structural weaknesses. Among the greatest of them are what corporate lawyers might refer to as “path dependence” and what organizational theorists might describe as intellectual hazard. Path dependence suggests the power of institutional inertia to create its own set of normative values and priorities that are then served by structures of law and social norms.¹⁶⁶ The FSB would certainly be a prisoner of path dependence but of a more complex form. Polycentricity at the heart of the FSB structure would aggregate path dependent systems as they both seek to converge and to preserve the inherent characteristics that make them different. The FSB would have to carefully navigate between a functional (and perhaps formal) project of harmonizing behavior rules and the need to avoid using the FSB structure as a thinly disguised effort to tame and subordinate nonstate governance structures within the state system, or vice versa. Failure could lead to irrelevance, as states and nonstate governance actors would abandon substantial commitment to its harmonizing project.

If path dependency suggests the rationalization of inertia as an institutional device, the concept of intellectual hazard suggests the related danger of conceptual and communicative failure. “Intellectual hazard . . . is the tendency of behavioral biases to interfere with

164. This initiative “responds to a call by G20 Leaders at the April 2009 London Summit and complements initiatives by the Global Forum and OECD to promote adherence to international standards in the tax area, and by FATF for standards concerning anti-money laundering and combating the financing of terrorism.” FSB, *supra* note 162, at 2-3.

165. See, e.g., INT’L ASS’N OF INS. SUPERVISORS, *supra* note 152, ¶ 38 (explaining the rationale of colleges within the insurance industry).

166. Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999). Bebchuk and Roe distinguish between structural and rule driven path dependence. The former “is structure driven . . . the ways in which initial ownership structures in an economy directly influence subsequent ownership structures.” *Id.* at 137. The latter is rules based. These rule structures “can shape choices between ownership structures that have and do not have a controlling shareholder.” *Id.*

accurate thought and analysis within complex organizations [and] impairs the acquisition, analysis, communication, and implementation of information within an organization and [its] communication between an organization and external parties.”¹⁶⁷ With respect to endeavors like the FSB, Geoffrey Miller and Gerald Rosenfeld suggest the difficulty of intellectual hazard bias as inherent in the perspectives of the individuals that staff the FSB and the focus of the organization in terms of the way it comes to understand its objectives.¹⁶⁸ The FSB as a nexus point for governance, then, is also a point of its greatest weakness, if communication is strategic and limited by the conceptual blinkers that drive the entities whose governance power the FSB seeks to coordinate. In a sense, the greatest danger posed for FSB systems is built into the complexity of the system itself—failures of policy and institutional cultural coherence, failures of communication. But this is a danger that suggests the development of the institutional autonomy of the enterprise, its complexity and coherence.

In summary, the FSB suggests an autonomous governmental structure and mandates a coherent scope of authority. It exercises regulatory authority, and a strong power to interpret, but a limited authority to enforce. The aggregate of this institutionalization, apparatus building and governance framework may be the organization of a supranational entity that is meant to serve as a clearinghouse for legislation and as a forum for the harmonization and coordination of national measures. This sort of polycentric transfer grounded in coordination, consultation, and the development of customary standards, hardened into the law and social norm systems of public and private governance entities has become a powerful force at the international level and is unlikely to disappear.¹⁶⁹ The value to national

167. Geoffrey P. Miller & Gerald Rosenfeld, *Intellectual Hazard: How Conceptual Biases in Complex Organizations Contributed to the Crisis of 2008*, 33 HARV. J.L. & PUB. POL’Y 807, 808 (2010).

168. “Experience suggests that the problem of intellectual hazard will not be effectively addressed if the personnel in the agency charged with identifying systemic threats to financial stability are simply recycled regulators and central bankers. They will not bring new ideas to the table; on the contrary, they will come as advocates for their agency’s positions and as defenders of their agency’s turf and power. These people will suffer from the forms of intellectual hazard we have already observed in regulators: asymmetry bias embodied in fixed positions on policy questions, self-serving bias in the form of turf protection and blame avoidance, and authoritarian bias in the form of deference to the agencies that delegate personnel to these new monitoring bodies.” *Id.* at 838.

169. See generally, ANDREW F. COOPER, TESTS OF GLOBAL GOVERNANCE: CANADIAN DIPLOMACY AND UNITED NATIONS WORLD CONFERENCES (2004). Cooper notes that “[t]hese conferences shifted the focus of UN attention away from attempts to accommodate globalisation through integrated economic interaction towards the promotion . . . of universal social values and a demand for transparency and greater inclusion in

governments is great—no longer solely accountable to their respective electorates for the difficult economic and regulatory choices that they might have to make, states could now lean on the work of this organization as both the excuse for and the source of blame for measures they might now appear to have to implement. A voluntary organization provides another face to modern transnational governance—a soft structure producing soft regulation that is then absorbed at the national level. And perhaps more importantly, it provides a nexus point for the organization and dissemination of knowledge about economics and economic regulation that will seek to control and serve as the foundation for discussions of these issues at a supra- or transnational level of governance. The FSB is meant to set the terms of discussion as well as to frame regulatory responses and private behavioral norms. It is to produce standards that become law within states and governance norms among private actors. It coordinates and synthesizes. It does not legislate but produces law; it does not govern but it produces standards. It does not administer, but it produces information and monitors.

B. The Face of Cooperative Networked Regulation

It is one thing to suggest a new public transnational governance apparatus; it is quite another to find evidence of the character of that governance. Still, a review of the FSB's agenda suggests the potential contours of public governance at the supranational level. For that purpose, it is useful to evaluate the foundational structure of the FSB's cooperative governance in the production of integrated soft law applicable to both public and private actors—states and economic entities.¹⁷⁰ To that end, it is useful to consider the complex framework adopted for coordinating soft law standards for financial regulation, a significant function of the FSB. It is also useful to consider the ways in which such frameworks are then expected to be transposed into the domestic legal orders of states and the operating systems of private actors.

The coordination work of the FSB, through its elaboration and implementation of a “Compendium of Standards,” forms one of the principal functions of the entity.¹⁷¹ The object is to produce governance

international power structures and decision making processes.” *Id.* at 1. This movement “stands at the intersection between purpose and means in relation to the debate over sovereignty.” *Id.* at 122.

170. Details may be found in FSB, *supra* note 143.

171. See *About the Compendium of Standards*, FIN. STABILITY BD., <http://www.financialstabilityboard.org/cos/index.htm> (last visited Jan. 21, 2011).

through soft law to “foster a race to the top, wherein encouragement from peers motivates all countries and jurisdictions to raise their level of adherence to international financial standards.”¹⁷² The compendium consists of twelve key standards.¹⁷³ These standards are understood as both transnational and soft law, “representing minimum requirements for good practice.”¹⁷⁴ The standards are divided into three broad groups: macroeconomic policy and data transparency,¹⁷⁵ institutional and market infrastructure,¹⁷⁶ and financial regulation and supervision.¹⁷⁷ These three broad groups of standard categories define a regulatory matrix within which a large group of transnational regulators produce

172. FSB, *supra* note 162, at 1.

173. “The 12 standard areas highlighted here have been designated by the FSF as key for sound financial systems and deserving of priority implementation depending on country circumstances.” *Twelve Key Standards for Sound Financial Systems*, FIN. STABILITY BD., http://www.financialstabilityboard.org/cos/key_standards.htm (last visited Jan. 21, 2011).

174. *Id.*

175. This grouping includes standards dealing with monetary and financial policy transparency, fiscal transparency, and data dissemination. See IMF, CODE OF GOOD PRACTICES ON TRANSPARENCY IN MONETARY AND FINANCIAL POLICIES (2000), available at <http://www.imf.org/external/np/mae/mft/code/eng/code2e.pdf>; IMF, CODE OF GOOD PRACTICES ON FISCAL TRANSPARENCY (2007), available at <http://www.imf.org/external/np/pp/2007/eng/051507c.pdf>; IMF, GENERAL DATA DISSEMINATION SYSTEMS (1997), available at http://dsbb.imf.org/images/pdfs/gdds_oct_2003.pdf; *Special Data Dissemination Standard (SDDS)*, INT’L MONETARY FUND (1996), <http://dsbb.imf.org/pages/sdds/home.aspx> (last visited Jan. 21, 2011).

176. This group consists of six identified standards: payment and settlement systems, corporate governance, market incentives, insolvency, auditing, and accounting. COMM. ON PAYMENT & SETTLEMENT SYS., CORE PRINCIPLES FOR SYSTEMICALLY IMPORTANT PAYMENT SYSTEMS (2001), available at <http://www.bis.org/publ/cpss43.pdf>; COMM. ON PAYMENT & SETTLEMENT SYS., RECOMMENDATIONS FOR SECURITIES SETTLEMENT SYSTEMS (2001), available at <http://www.bis.org/publ/cpss46.pdf>; FIN. ACTION TASK FORCE, FATF IX SPECIAL RECOMMENDATIONS AGAINST TERRORIST FINANCING (2002), available at <http://www.fatf-gafi.org/dataoecd/8/17/34849466.pdf>; FIN. ACTION TASK FORCE, THE FORTY RECOMMENDATIONS OF THE FINANCIAL ACTION TASK FORCE (2002), available at <http://www.fatf-gafi.org/dataoecd/7/40/34849567.PDF>; OECD, PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 31; WORLD BANK, PRINCIPLES AND GUIDELINES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS (2001), available at http://www.worldbank.org/ifa/ipg_eng.pdf; *International Standards on Auditing (ISA)*, IAASB (2002), <http://www.ifac.org/IAASB/Pronouncements.php#Standards> (last visited Mar. 20, 2011); *International Accounting Standards (IAS)*, INT’L ACCOUNTING STANDARDS BD. (2002), <http://www.iasb.org/> (last visited Mar. 20, 2011).

177. This group consists of three identified standards covering banking supervision, insurance, and securities regulation. See BASIL COMM’N ON BANKING SUPERVISION, CORE PRINCIPLES FOR EFFECTIVE BANKING SUPERVISION (2006), available at <http://www.bis.org/publ/bcbs129.pdf>; INT’L ASS’N OF INS. SUPERVISORS, INSURANCE CORE PRINCIPLES (2003), available at http://www.iaisweb.org/_temp/Insurance_core_principles_and_methodology.pdf; INT’L ORG. OF SEC. COMM’NS, OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION (1998), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf>.

standards that conform to overall financial policy goals, and which are aggregated through the FSB into a soft law codex applicable to its member states and the entities operating within their collective borders.

The regulatory environment becomes clearer now. The FSB assumes the role of a bridge institution. On the one hand, it is the coordinating point for the aggregation of transnational soft law. On the other, the FSB serves as a clearinghouse for the transposition of these norms down to states (starting with the G-20) and private entities (starting with transnational actors operating within the territories of the G-20). Implementation of the regulatory standards cleared through the FSB is to be accomplished through application of the usual elements of transnational soft law governance, taking one of three forms: leadership by example, undertaken by the member states of G-20/FSB; peer reviews of member state compliance through international organizations tasked with a surveillance function; and the development of surveillance capabilities, “a toolbox of measures to encourage adherence to international cooperation and information exchange standards by all countries and jurisdictions.”¹⁷⁸ This was emphasized again in the summer of 2010 when the FSB announced the launching of further “tool box measures” initiatives.¹⁷⁹

Leading by example puts a sloganeering face on an important downstream managerial aspect of FSB operations. It represents a commitment by the Member States of the FSB (the G-20) to implement the standards adopted in the course of the horizontal cooperative efforts of the FSB described above.¹⁸⁰ Upstream assessment through an IMF-World Bank Financial Sector Assessment Program (FSAP), occurring every five years, represents an upstream commitment to permit a supranational entity authority to monitor compliance. This transfer of authority upward and away from the state remains a sensitive issue, especially to the extent it touches on traditional notions of state sovereignty.¹⁸¹ Upstream assessment is reinforced by the peer review

178. FSB, *supra* note 162, at 1.

179. Press Release, FSB, FSB Launches Initiative to Promote Global Adherence to International Cooperation and Information Exchange Standards (Mar. 10, 2010), http://www.financialstabilityboard.org/press/pr_100310.pdf.

180. FSB, *supra* note 162, at 1.

181. A recent application of that sensitivity to transnational regulatory efforts was evidenced at the Copenhagen Climate Conference at which the Chinese refused to agree to external monitoring of self-imposed obligations on the grounds of interference with sovereignty. See Jonathan Watts & John Vidal, *China Blamed as Anger Mounts over Climate Deal*, THE GUARDIAN (London), Dec. 20, 2009, <http://www.guardian.co.uk/environment/2009/dec/20/china-blamed-copenhagen-climate-failure> (“The deal, finally hammered out early yesterday, had been expected to commit countries to deep cuts in carbon emissions. In the end, it fell short of this goal after China fought hard against

element of monitoring—a task which emphasizes the collaborative nature of governance through the G-20/FSB framework.¹⁸² Lastly, disclosure provides both benchmarking and a pool of data that has internal effects—deepening discipline among member states—and external effects, providing a behavioral template for use by other states. But the toolbox is more than that. It also serves as a principal method for enforcement. That enforcement approach mimics those developed for private governance systems—transparency, benchmarks, exposure, and coercion.¹⁸³

The face of this new governance by example is already somewhat evident.¹⁸⁴ Spain, Italy, and Mexico are said to be the first countries examined regarding the effectiveness of their implementation of the rules to prevent future financial crises.¹⁸⁵ The reviews are separate from the FSB assessments that were started in 2010 on how countries are implementing bonus and compensation rules.¹⁸⁶ The FSB is also conducting an initiative to encourage global compliance with the compendium of standards it is managing.¹⁸⁷ The launch in March 2010 of the FSB's initiative to promote global adherence to international cooperation and exchange standards is illustrative of both the form of governance and of its assumption that collectives of the largest states and most influential corporations will develop a customary set of practices to which the rest of the world's actors will eventually subscribe.¹⁸⁸ Financial Sector Assessment Program appraisal is to occur every five years and will be conducted under the authority of the IMF—indeed, the FSAP has been a well-developed tool for that purpose over the course of the last decade.¹⁸⁹ Now thoroughly tested, its approach will be globalized as applied to a broader range of actors. Ironically, the forms of governance now part of the FSB's arsenal bear a resemblance to the modalities of governance within the supply chain of large multinational corporations.¹⁹⁰ In this area, at least, there is a sort of

strong US pressure to submit to a regime of international monitoring. . . . 'For the Chinese, this was our sovereignty and our national interest,' said Xie Zhenhua, head of China's delegation.”)

182. FSB, *supra* note 143, at 2.

183. *Id.* at 4.

184. See Joseph Heaven, *Spain, Italy Said to Be First for FSB Peer Reviews (Update1)*, BLOOMBERG/BUSINESS WEEK (Jan. 20, 2010), <http://www.businessweek.com/news/2010-01-20/spain-italy-are-said-to-be-first-to-undergo-fsb-peer-reviews.html>.

185. See FSB, *supra* note 162, at 9.

186. *Id.*

187. *Id.* at 9-10.

188. Press Release, FSB, *supra* note 179.

189. See *The Financial Sector Assessment Program*, IMF, <http://www.imf.org/external/NP/fsap/fsap.asp> (last visited Mar. 20, 2010).

190. See Backer, *supra* note 20.

convergence of operational form. On the issue of hierarchy of governance power, the answers have yet to be written.

What emerges from the surprising self-revelation of the French President is that the FSB, of course, is new and yet quite comfortably embedded within emerging European public sector models of collective governance. When formerly strong states weaken (in the case of Europe, as a consequence of a long period of suicidal internal warfare in the twentieth century), then union of some kind effectively reconstitutes power and retains the illusion of sovereignty. More importantly, welcoming former subordinates to the exclusive global power club can serve as a way to retain power. Once subaltern states appear more than willing to play (as long as a substantial line of states remain beneath the new collective). Lastly, one must consider the effects of the potentially severe strains on the power of state-centered positive law as a regulatory mechanism. Absorption of new modalities of governance beneath a superstructure of conventional law preserves the legal superstructure in which "law," transposed into the domestic legal orders of communities of states occupies the superior place. Yet, this construct does not appear to advance the reactionary state resurrection project so much as it highlights the powerful pull of governance from the state to alternative centers of power.

This analysis brings one back to the point where this examination started with Mr. Sarkozy's search for global governance in the state. But it is a collaborative governance enterprise, the FSB, and not the state, that now emerges as one face of the template offered by Mr. Sarkozy for the coming system of global governance. There is something old-fashioned about this governance model. The FSB model is grounded on the willing participation of states, in the aggregate still the most powerful actors on the globe, but the assertion of power has been recast in completely modern form (and by modern I mean adopting the patterns of multilateral governance forged after 1945). It is soft and indirect. One no longer sees power marching through the streets of an occupied place (though that happens now and again, though not so much for governance purposes as for the management of populations whose governments resist global governance norms). One understands power in the form of principles, benchmarks, standards, objectives, and rules. One feels the effects of these forms of governance through the regulatory power of surveillance. The rules themselves are both bureaucratized and juridified. They are formulated through mandarinate¹⁹¹ and interpreted through global networks of

191. Mandarinate means a cadre of functionaries that have been socialized to a single purpose and who control a coherent set of values and objectives for the elaboration of which they may be deployed by the authorities that ultimately control or manage them.

judges. Rules are not imposed. They are transposed and adopted through a long and amorphous process of consultation, construction, adoption, and management. And they are complex, both in their own field and together as a network of governance over economic and related activities of states and others.

Soft law making, and governance through behavior-controlling mechanisms—monitoring, evaluation, transparency, and the like—also mask power. This aspect of power within soft regulatory approaches permit states to avoid accountability, or more ironically put, to temper the effects of direct democracy in the relationship of state apparatus to sovereign populace. The FSB suggests a power-masking system in which a supranational organ appears the source of governance, but in which the states that are the objects of these regulatory proposals are also the members of the entity doing the proposing and controlling the nature and extent of its work. Within this closed circle of power diffusion, everything is ultimately a product of the work of the community of states that means to use the FSB as a sword and shield for the effectuation of policies and regulatory approaches neither politically palatable nor effective if left to the traditional forum of less connected sovereign state governmental organs. In a world that is grounded politically on theories of mass democracy, the new governance suggested by Mr. Sarkozy and constructed through FSB, is grounded in an aristocracy of experts. That reality colors Mr. Sarkozy's Davos efforts at "populism" with both irony and perversity.¹⁹²

But soft law also proclaims the irrelevance of law systems. It is true enough that soft law works poorly within the law systems of states and the state-law system. Soft law is not enforceable, nor has it been appropriately transposed within the state law system—the domestic legal order of states. It is understood as a way station to the achievement of a traditional hard law regime grounded in the state.¹⁹³

Cf., Wells Klein and Marjorie Weiner, *Vietnam*, in *GOVERNMENTS AND POLITICS OF SOUTHEAST ASIA* 315-420 (George McTurnan Kahin, ed., 1959) ("The Chinese Confucian ideal on which the mandarin state was based represent[s] a single hierarchy of values that the mandarins had a vested interest in maintaining." *Id.* at 378).

192. On the criticism of the speech as populist, and therefore easily dismissed as political ravings, see, for example, O. Gersemann & M. Hollstein, *Sarkozy haut in Davos kräftig auf den Putz*, WELT ONLINE (Jan. 27, 2010), <http://www.welt.de/politik/article6007512/Sarkozy-haut-in-Davos-kraeftig-auf-den-Putz.html>; Jörg Eigendorf, *Davos – ein Gipfel der Ratlosigkeit und des Frusts*, WELT ONLINE (Jan. 31, 2010), <http://www.welt.de/wirtschaft/article6050001/Davos-ein-Gipfel-der-Ratlosigkeit-und-des-Frusts.html>.

193. For a recent analysis, see Douglas W. Arner & Michael William Taylor, *The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation?*, 32 U. NEW S. WALES L.J. 488 (2009).

Yet that alien status (as “not law”) also points to the autonomy of soft law from both state and law. Soft law is soft as law, but it is hard among those who embrace its norms. As part of the rules of its own normative framework for governance, this “soft law” is “hard.” If that is so, then the language of that governance would not be that of the state, or of law, but more likely would adopt the language of consent and contract.¹⁹⁴ That is the essence of legitimacy conceptions underlying recent transnational regulatory efforts.¹⁹⁵

C. The FSB and Transnational Governance—Cooperation and Hierarchy Within Global Polycentricity

The FSB suggests an important addition to the construction of the framework of transnational global governance—one in which states, international organizations, and nonstate actors construct an increasingly elaborate system of self-government. This system is polycentric, diffuse, and dynamic.¹⁹⁶ Together, these formal and informal authorities construct a layered, closed system of self-governance.¹⁹⁷ The FSB adds an important layer to this dynamic complex of governance. It suggests another layer to the networked governance that is a hallmark of globalization and of which multinational corporations and international organizations play an increasingly critical part.¹⁹⁸ This section considers the regulatory consequences for the FSB as a networked system within a greater network of public and private governance.

194. Backer, *supra* note 12, at 26.

195. See, e.g., Report of the Special Representative of the Secretary-General on Human Rights, Transnational Corporations, and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Hum. Rts. Council, U.N. Doc. A/HRC/8/5 (April 7, 2008), available at <http://198.170.85.29/Ruggie-report-7-Apr-2008.pdf>.

196. James Rosenau, *Governance, Order, and Change in World Politics*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 1, 4 (James Rosenau & Ernst-Otto Czempiel eds., 1992).

197. Friedrich Kratochwil & John Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT'L ORG. 753 (1986).

198. See, e.g., 1 MANUEL CASTELLS, *THE INFORMATION AGE: ECONOMY, SOCIETY AND CULTURE: THE RISE OF THE NETWORK SOCIETY* (1996); JOHN H. DUNNING, *ALLIANCE CAPITALISM AND GLOBAL BUSINESS* (1997); CHRISTOPHER FREEMAN, *THE ECONOMICS OF HOPE: ESSAYS ON TECHNICAL CHANGE, ECONOMIC GROWTH, AND THE ENVIRONMENT* (1992); Mark Ebers & Anna Grandori, *The Forms, Costs, and Development Dynamics of Inter-Organisational Networking*, in THE FORMATION OF INTER-ORGANISATIONAL NETWORKS 265 (Mark Ebers ed., 1999); THE EMBEDDED FIRM: ON THE SOCIOECONOMICS OF INDUSTRIAL NETWORKS (Gernot Grabher ed., 1993); John Hagedoorn, *Trends and Patterns in Strategic Technology Partnering Since the Early Seventies*, 11 REV. INDUS. ORG. 601 (1996).

In its specific organization, the FSB itself adds a level of governance that is meant to draw in states. It is regulatory governance, developing what appear to be soft law standards and guidelines that are then treated as transposed into national legal orders as a sort of mandatory requirement.¹⁹⁹ The result is a separation between political power and accountability. This follows because the source of legislation is transnational and collective, rather than national, though accountability remains national. It is possible, as a result, to understand the rise of these soft and indirect regulatory systems as grounded in the success of the model of the European Union, rather than in traditional intergovernmentalism at the international level.²⁰⁰ The FSB's work is thus intimately connected to the ongoing work of a number of key international organizations. Each of them, in turn, provides a connection between standard setting, regulation, and states—principally involving, but not limited to, G-20 member states. In this way, standard setting provides an indirect way for state input beyond the G-20, encouraging “buy in.”²⁰¹ It suggests the “comitological”²⁰² aspects of the global governance—in which there is an indirect, though potentially powerful, connection between the sovereign will of states and the mechanisms through which governance is effectuated. They are by no means the same, but the echo is clear enough: the construction of a supranational institutional structure where harmonization of rules can be developed and then transposed into the national legal orders of the participating states.

This analysis suggests the strong connection between transnational private governance and emerging systems of public governance above the state. Consider the “toolbox” methodologies for standard setting and enforcement now a significant part of the FSB's governance arsenal.²⁰³ To some extent, this approach builds on governance elements now well established within private transnational governance systems. That mimicry extends beyond the form of the method—the toolbox itself—to

199. It might also be possible to suggest a similarity to notions underlying the “direct effects” doctrine of EU law. See Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

200. See Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173 (2001).

201. On the theory of “buy-in” and its utility within regulatory theory, see, for example, Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998).

202. On comitology within the EU framework, see, for example, Jens Blom-Hansen & Gijs Jan Brandsma, *The EU Comitology System: Intergovernmental Bargaining and Deliberative Supranationalism?*, 47 J. COMMON MARKET STUD. 719 (2009).

203. See text *supra* Part II.B.

the intermeshing of that governance approach with related efforts through other initiatives.²⁰⁴ In this complex intermeshing, one can discern the development of consolidated norms within networked aggregations of privately constituted autonomous groups, negotiating for a harmonized set of regulatory standards at a supranational level. At this level, the public law-private law distinction falls away as well.²⁰⁵

Specifically, the intermeshing of regulatory networks of multinational corporations creates an autonomous governance framework, which then intermeshes with autonomous networks of states and vice versa. The model of the state and the multinational corporation as the basic and default binary foundation of analysis may no longer be as relevant as it once might have been.²⁰⁶ Just as multinationals have congregated within networks, so too have states. It is those functionally differentiated networks of states, either formally or informally constituted, that might best serve the interests of helping corporate codes reach escape velocity. That result is not a product of altruism, but instead flows naturally from the value to groups of (the most powerful) states of a consolidated and autonomous community with which they can negotiate for more efficient global relationships. Here, globalization is a crucial factor. The consequence suggests the construction of polycentric governance frameworks in which the corporation might owe duties to states in which they operate (and within the political system of which they assume a subordinate role), and also simultaneously assume obligations under social norm systems generated by and generally applicable to the global community of corporations. We move, then, from a universe that privileges the state to a governance universe in which actors may acquire obligations and privileged sources grounded in the social-norm frameworks of nonstate regulatory communities and legitimated on their own terms.²⁰⁷

204. An excellent example of this, perhaps, is the work of the Business Leaders Initiative on Human Rights (BLIHR). See BUSINESS LEADERS INITIATIVE ON HUMAN RIGHTS, <http://www.blihr.org/> (last visited Jan. 21, 2011). The BLIHR also developed a toolbox fashioned from a number of principles developed by related governance actors. See CHIP PITTS & JOHN F. SHERMAN, BLIHR, HUMAN RIGHTS CORPORATE ACCOUNTABILITY GUIDE, available at <http://www.blihr.org/Legacy/Downloads/Accountability%20Guide%202008.pdf>.

205. "This human rights impact assessment tool is to be used by companies to ensure that current and future business practices meet human rights standards recommended in the framework established by the UN Special Representative on business and human rights." Jim Kelly, *Roadmap Announced for Human Rights Global Governance of Transnational Businesses*, GLOBAL GOVERNANCE WATCH (June 24, 2009), http://www.globalgovernancewatch.org/spotlight_on_sovereignty/roadmap-announced-for-human-rights-global-governance-of-transnational-businesses.

206. Robe, *supra* note 122.

207. Li-Wen Lin has recently argued that these private transnational law systems might well also leak into the law of both host and home states, and as such, ought to be an

In that context, the FSB structure suggests a restructuring of power hierarchies. The largest states now unite with the largest private regulators and assume the highest positions within structures of regulatory power. Together, they deal with each other from positions of relative equality. They operate within collaborative structures—from the great public supranational organizations to the great private regulatory organizations. They operate through soft and hard law instruments. A *mélange* of statutes, judicial decisions, voluntary codes, sector standards, and regulatory contracts provide a face to the new regulatory architecture. The relationship among those instruments, and the need to order them into something that is at least complementary, suggests the great object of collaborative regulation at this highest level. On that basis, for example, the FSB subsumes within it both public and private regulatory actors. Within the FSB structure, a small state like El Salvador has more in common with a small economic enterprise, in terms of regulatory power, than it does with the People's Republic of China—or Wal-Mart. The FSB suggests the vigor of the “Munich” principle of international relations, now transposed into law as a source of legitimacy and power: the notion that third-party states (and now powerful private regulatory actors) may impose settlements on others, including those touching on legal regulation. The governance structures that appear soft and inchoate are becoming harder indeed.

CONCLUSION

Graf-Peter Calliess is right to note that we have entered “an era with more, bigger, and increasingly influential transnational corporations than any time before . . . , but also an era when these corporations’ *de facto* independency from a certain nation-state as their home base is growing.”²⁰⁸ The growth of the regulatory power of nonstate organizations highlights the public/private governance line. Once understood as segregated objects of laws and put into governance ghettos whose borders were strictly controlled by the state, nonstate entities are now assuming governance roles well beyond the comprehension of theoretical constructs of even a generation ago. The object is not so much revolutionary as it is complementary and leveling.

object of comparative law study. See Li-Wen Lin, *Legal Transplants Through Private Contracting*, 57 AM. J. COMP. L. 711 (2009).

208. Graf-Peter Calliess, Professor, Univ. of Bremen, Address at the Conference *Kongress Transnationalismus in Recht, Staat und Gesellschaft* (Mar. 3, 2010). See Graf-Peter Calliess & Jens Mertens, *Transnational Corporations, Global Competition Policy, and the Shortcomings of Private International Law*, 18 IND. J. GLOBAL LEGAL STUD. (forthcoming July 2011).

It suggests the reconstitution of governance away from a linear, hierarchical, monopolistic exercise, in which only one sovereign could occupy a geographic space at a time. In its place, functionally differentiated governance systems have emerged, converging within dynamic governance networks of private and public power. The result is “the differentiation of global law into transnational legal regimes, which define the external reach of their jurisdiction along issue-specific rather than territorial lines, and which claim a global validity for themselves.”²⁰⁹ Corporate constitutionalism suggests that entities can exist to some extent outside the shadow of the state and can commodify the products of domestic legal orders. It suggests that the instruments of such existence need not depend, either with respect to form or function, on the forms of authoritative public norm making through law. It also suggests a framework for polycentric governance for global actors beyond the state.

Taken together, the organizational and substantive program institutionalized within the FSB has provided another “glance into the extremely complex structure of norm creation in the transnational arena, with important connections to the transformation of the regulatory landscape of the nation-state”²¹⁰ and the social norm governance of private bodies. Still, the evidence, range, and scope of transnational management of economic activity embodied in the work of the FSB are both aspirational and at the earliest stages of their development. Institutionalization and coordination are both young and uncertain within a G-20 structure in dynamic transition. But more importantly, the FSB structure suggests the forms through which public and private governance has begun to converge.

The organization of power will be divided not based on the public or private character of the organization, but rather on regulatory control of the enterprise—be it state or corporation. Within these networks of governance and systems, it is possible to see the outlines of governance and government in the coming decades. Nonstate actors are constructing governments without states. States are becoming more involved in projections of public power through private markets in which they compete with private actors in functionally differentiated sectors of activity that no single state controls and they have developed a taste for privatizing governmental functions.²¹¹ Networks of actors have begun governing using a panoptic model of transparency, disclosure, and efforts to control the machinery for the production and

209. Fischer-Lescano & Teubner, *supra* note 123, at 1009.

210. CALLIESS & ZUMBANSEN, *supra* note 12, at 123-24.

211. See Backer, *supra* note 64.

elaboration of values.²¹² The push toward collective action, the use of soft law as a vehicle for hard governance through the utilization of the governance power of surveillance and disclosure, and the incorporation of regulation through supranational public as well as private organs will set the tone for government in the coming century. These techniques and structures, and their framing of substantive governance, are ones equally applicable to private as well as to public regulators.²¹³ Within that framework, large aggregations of economic power (usually operating in corporate form) will have a significant public role to play, and aggregations of political power (usually organized as states) will have a significant role as participants in private governance.

212. See Larry Catá Backer, *Global Panopticism: States, Corporations, and the Governance Effects of Monitoring Regimes*, 15 IND. J. GLOBAL LEGAL STUD. 101 (2008).

213. See, e.g., Thomas McInerney, *Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 CORNELL INT'L L.J. 171 (2007); Murphy, *supra* note 120.