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Private Global Business Regulation

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Abstract

Regulations that govern the social and environmental impacts of global firms and markets without state enforcement are a relatively new dimension of global business regulation. The growth of such voluntary “civil regulations” reflects both the expansion of legitimate authority in the global economy outside the state and the increasing use of alternative regulatory instruments to govern firms, including self-regulation, market-based instruments, and soft laws. In response to global social activism, many firms have adopted voluntary regulatory standards to avoid additional regulation and/or to protect their reputations and brands. Activists have targeted highly visible firms and have been willing to work cooperatively with them. The most important civil regulations are multi-stockholder codes, whose governance is shared by firms and nongovernmental organizations (NGOs), and which rely on product and producer certifications. Such codes face the challenge of acquiring legitimacy and of persuading both firms and NGOs of the value of their standards. The emergence of civil regulation addresses but does not resolve the challenge of making global firms and markets more effectively and democratically governed.

CSR: corporate social responsibility

INTRODUCTION

This article selectively reviews the scholarly literature on a relatively new dimension of the governance of international business, namely codes, regulations, and standards that are not enforced by any state and that address the social and environment impacts of global firms and markets, especially in developing countries. Closely associated with the principles and practices of corporate social responsibility (CSR), socially focused voluntary global business regulations, also referred to as civil regulations, have expanded significantly since the early 1990s (Zadek 2001). Approximately 300 codes now govern most major global economic sectors, including energy, minerals and mining, forestry, chemicals, textiles, apparel, footwear, sporting goods, project finance, and coffee and cocoa.

Although there is an extensive body of academic research on voluntary global business codes and CSR, only a portion of it has been written by political scientists, primarily by students of international relations. Accordingly, this article selectively includes contributions from other fields, including law, sociology, management, business ethics, and international and development studies. Its aim is to critically review a broad range of scholarship that is relevant to understanding the emergence, structure, and impact of civil regulation, and its significance as a new and evolving dimension of global economic governance. It also identifies the shortcomings of this literature and outlines an agenda for future research.

THE RISE OF GLOBAL CIVIL REGULATION

Haufler (1999) was one of the first political scientists to publish a study of global civil regulation. Her essay appears in an edited volume on the changing role of business in contemporary world affairs whose purpose is to challenge the assumption of many regime theories that states are the primary, if not exclusive, partic-

ipants in international regimes. The volume explores how nonstate actors are “increasingly engaged in authoritative decision-making that was previously the prerogative of sovereign states, describing how and why frameworks for governing international economic transactions are created and maintained by the private sector, both with and without government cooperation” (Cutler et al. 1999, p. 16).

Haufler explores the emergence of global environmental industry self-regulation. Going beyond compliance with legal requirements, many global firms have demonstrated increased willingness to assume responsibility for ameliorating their negative environmental impacts. Haufler argues that there has been a significant change in corporate norms regarding environmental practices, due in part to the increased awareness by many firms and industries of the benefits of eco-efficiency. However, when compared to the other examples of private business self-governance explored in the Cutler et al. volume, such as online commerce, the management of international mineral markets, and marine transport, private authority structures for environmental governance remained relatively undeveloped in 1999. They did not (yet) constitute an international regime as defined by Krasner (1982, p. 2) as “principles, norms, rules and decision-making processes around which actor expectations converge in a given issue area.”

In *The Public Role for the Private Sector: Industry Self-Regulation in a Global Economy*, Haufler (2001) documents the growth of private regulatory standards for environmental protection, worker rights, and data privacy. She primarily attributes these developments to the public pressures of activist campaigns and the threat of regulation. Haufler characterizes the substantial growth of industry self-regulation across multiple sectors as an important “new source of global governance, that is mechanisms to reach collective decisions about transnational problems with or without government participation” (Haufler 2001, p. 1). She observes that private regulations appeal to both global firms and western

governments because they address the concerns of critics of economic globalization without increasing the regulatory burdens on firms, which would risk undermining their global competitiveness.

Although Haufler presents some evidence of improved industry practices, she concludes that industry self-regulation faces considerable organizational and enforcement problems and is therefore unlikely to prove an adequate response to the market and political failures associated with economic globalization. "While industry self-regulation has become a key component of the policy debate. . . . The problems that self-regulation attempts to address are often problems of national governance, and it is there that most responsibility still rests" (Haufler 2001, pp. 3, 121). Her mixed but, on balance, skeptical appraisal of the actual and potential impact of voluntary international business regulation is consistent with the conclusions of other researchers.

Haufler's analysis makes an important distinction between traditional industry self-regulation and newer codes of conduct. Traditional self-regulation, which can be traced back to medieval Europe, primarily involves technical rules and guidelines for various materials, products, and processes aimed at improving coordination and lowering transaction costs. More recent industry codes, such as the Sullivan Principles for business conduct in South Africa during the apartheid regime, focus on the social impact of business. Originated in response to activist pressures, these newer forms of industry self-regulation politicize business decision making, pressuring firms to make expenditures and commitments they would not otherwise have made. They are also more likely to either directly or indirectly involve political constituencies outside the firm. "One of the most significant changes in recent years is that the 'who' in 'who governs?' must now be expanded to include the participation of nongovernmental and noncorporate actors" (Haufler 2006, p. 92). However, not all civil regulations pro-

vide opportunities for public participation, and virtually all "public" participation is by western activists.

This expansion of legitimate authority in the global economy outside the state is further explored in a volume edited by Hall & Biersteker (2002). The authors describe why and how this authority is also being exercised by private sector markets, market actors, nongovernmental organizations (NGOs), and transnational actors. This book's intellectual contribution is to take the concept of global private authority "one step beyond the international political economy by examining the authoritative dimensions of other private, nonstate and nonmarket based actors in the contemporary international system," including those that rely on moral authority (Hall & Biersteker 2002, p. 7). The governance dimensions of moral authority are described by Lipschutz & Fogel (2002), who examine the privatization of environmental regulation through the growth of voluntary business codes and certification standards. While acknowledging the accomplishments of some voluntary standards, Lipschutz & Fogel, like Haufler, remain skeptical of the capacity of regulations that rely on market incentives rather than government mandates to provide a stable foundation for moral action by profit-seeking firms. However, like Haufler, Lipschutz & Fogel (2002) do not analyze or explain variations in the effectiveness of such regulations.

"Governance without government" has long been observed and theorized by political scientists (e.g., Rosenau & Czempiel 1992). For example, Kobrin (1998, pp. 383–84) describes a "postmodern world of multiple and overlapping authorities: sovereign and non-sovereign, territorial and non-territorial." Studies of civil regulation often explicitly situate its emergence in the context of changes in the structure of global governance. Thus the growth of civil regulation has been characterized as "a shift in global business regulation from state-centric forms toward new multilateral, nonterritorial modes of

NGO:
nongovernmental
organization

regulation, with the participation of private and nongovernmental actors” (Scherer et al. 2006, p. 506). According to Ruggie (2004a, p. 519), “the effect of the new global public domain is not to replace states, but to embed systems of governance in broader global frameworks of social capacity and agency that did not previously exist.” Similarly, Falkner (2003) suggests that civil regulation represents not a straightforward power shift away from governments and toward firms but rather a movement toward a more complex relationship between private and public actors. Abbott & Snidal (2006) describe the emergence of a complex “governance triangle” in which many international standards are now selected, implemented, monitored, and enforced by varying combinations of states, firms, and NGOs. The role of private regulation as a new form of global environmental governance beyond the state is also explored in depth by Pattberg (2007).

CIVIL REGULATIONS AS SOFT LAWS

Civil regulations are soft laws. States have often chosen softer forms of governance as a way of facilitating international cooperation because of the significant costs and limitations of enacting legally binding standards (Abbott & Snidal 2000, Shelton 2000, Morth 2004). Forms of soft law range from private and voluntary codes and certification and labeling systems to transparency obligations on the part of governments. Its defining feature is that compliance depends on the voluntarily supplied participation, resources, and consensual actions of governments and/or firms. As Grant & Keohane (2005, p. 35) observe in another context, “When standards are not legalized, we would expect accountability to operate chiefly through reputation and peer pressures, rather than in more formal ways.”

Hard Choices, Soft Law: Voluntary Standards in Global, Trade, Environment and Societal Governance presents a detailed and comprehensive analysis of the increasing reliance on soft law

mechanisms to govern business on the part of states, firms, and NGOs (Kirton & Trebilcock 2004). It primarily focuses on the role of both state and nonstate soft law on labor and environmental standards in developing countries at both the national and international levels. The soft law approach is said to offer many advantages, including timely action when governments are stalemated or otherwise unable to effectively respond to the challenges of economic globalization. However, soft laws often lack the legitimacy and enforcement mechanism of hard law. The editors predict that many of the critical issues in global regulatory governance will revolve around the shifting relationship between hard and soft laws, and between state and nonstate regulation. They correctly emphasize that soft laws must be understood as a complement to hard laws and not a substitute for them.

CIVIL REGULATIONS AND TRADE AGREEMENTS

The relationship of civil regulations with trade agreements is discussed by Hockin (2004), MacLaren (2004), Ostry (2004), Wilkie (2004), Trebilcock (2004), Webb & Morrison (2004), and Bernstein & Hannah (2006). In part owing to pressures from NGOs and trade unions, some regional and bilateral trade agreements initiated by the United States and the European Union now link market access to the labor and environmental standards and the human rights practices of their trading partners (Aaronson & Zimmerman 2008). These agreements often complement the civil regulations of firms that have established voluntary standards for their suppliers in developing countries. Much to the disappointment of many activists, the World Trade Organization (WTO) typically does not permit market access to be linked to domestic labor or environmental standards. However, the certification and sourcing standards of civil regulations represent a major loophole in WTO rules: Global firms can refuse to import products from suppliers who

do not comply with their standards, whereas states generally cannot. Similarly, whereas state-based labeling standards and requirements fall under the WTO's jurisdiction, voluntary social and environmental labels by firms currently do not.

An important advantage of civil regulations is that they essentially bypass ongoing conflicts about state sovereignty, which have often restricted western governments from using trade policies to affect the domestic regulations of developing countries. Thus, ironically, WTO rules have created an important incentive for using voluntary, private standards rather than public ones, since the latter can be more readily challenged as non-tariff trade barriers. Although the adoption of civil regulations by governments would clearly strengthen their effectiveness, it would also subject them to WTO scrutiny—unless they were recognized as legitimate international standards. Yet the fact that civil regulations have established different standards for similar products, sectors, or processes will make it more difficult for any of them to be recognized as international standards.

THE BLURRING OF PRIVATE AND PUBLIC REGULATION

The growth of private international business regulation can also be understood in the context of increased reliance on regulatory instruments other than command and control to regulate the social conduct of firms. “Self-regulation has come of age; it represents an increasingly viable alternative to the market and the state” (Porter & Ronit 2006, p. 41). Many domestic corporate practices in the United States and Europe are governed by voluntary agreements or codes of environmental management practice—some of which have been promoted by states and others established by firms or NGOs (Nash & Ehrenfeld 1997, Brink 2002, Webb 2004, Morgenstern & Pizer 2007). The market-based regulatory mechanisms employed by many civil regulations, namely producer certification, prod-

uct labeling, third-party auditing, and information disclosure, have also been used as domestic regulatory instruments by governments (Andrews 1998). An important voluntary global environmental standard, ISO 14001, “fits within an emerging paradigm shift in environmental law, from a media-specific ‘command-and-control’ approach to controlling emission and wastes to an approach more focused on voluntary, incentive-based, market-based, and information-based approaches” (Roht-Arriaza 2000, p. 273).

However, the boundaries between voluntary and mandatory regulations, state and nonstate regulations, private and public law, and hard and soft law cannot always be sharply drawn. To the extent that firms have subscribed to civil regulations because of threats to their market positions or to avoid government regulation, they are voluntary only in a legal sense. More broadly, “the distinction between mandatory and voluntary is best thought of not as a dichotomy, but as the ends of a continuum” displaying varying degrees of corporate discretion (Koenig-Archibugi 2004, p. 122). The relationship between private and public regulation is also dynamic; soft laws can become harder, and norms can become law (e.g., the important case of international human rights) (Risse et al. 1999). Cutler (1997, pp. 266, 280) insightfully writes that “the private/public distinction is a historically specific analytical construct that has undergone revision with changing material, ideological and institutional conditions,” adding that “today the distinction obscures more than it clarifies about the nature of power and authority in international relations,” an assessment that is shared by other studies of international relations that examine private business regulation.

CIVIL REGULATION AS GLOBAL BUSINESS REGULATION

The emergence of civil regulations as a component of global business regulation is primarily attributed to three related

developments. The first is economic globalization itself. In 2003 the number of transnational firms was estimated at 63,000 firms, which had more than 800,000 subsidiaries and millions of suppliers (Ruggie 2003); in 2005, transnational firms accounted for one tenth of the world's GDP and one third of all exports (Clapp 2005). Accordingly, the investment and management decisions of global firms and their relationship with their global supply chains now play a key role in shaping labor practices, environmental quality, and human rights conditions, especially in developing countries.

The second related development is the lack of adequate state mechanisms at both the national and international levels to govern global firms and markets. Whether, or to what extent, the state is "in retreat" remains a subject of lively debate among political scientists (Strange 1996). Nonetheless, economic globalization does appear to have made it "more difficult for national governments to hold corporations accountable than in the past" (Keohane 2003, p. 146). Underlying virtually every scholarly and popular discussion of global civil regulation is the claim that the global economy suffers from a democratic governance deficit, often attributed to the constraints posed by global competitive pressures on the willingness and capacity of states to effectively regulate both global and domestic firms.

According to Lipschutz & Rowe (2005), whose book, *Globalization, Governmentality and Global Politics*, presents a comprehensive and highly critical study of civil regulation, the turn to politics though markets reflects the dominance of neoliberal ideology and an associated decline in state controls over business at both the national and international levels. Bernstein (2005, p. 160) states that "civil regulations represent an innovative form of governance that arose in part owing to the legitimacy and performance limitations in traditional forms of interstate governance." According to Knill & Lehmkuhl (2002, pp. 42, 44), "civil regulation is intended

to compensate for the decreasing capacities of national governments for providing public goods [as]... internationalization yields an increasing gap between territorially bound regulatory competence at the national level and emerging problems of an international scope."

THE ROLE OF NONGOVERNMENTAL ORGANIZATIONS

The emergence of what has been characterized as a "global public domain" is closely linked to another dimension of globalization, namely the increasingly prominent role of nonstate actors in global politics (Ruggie 2004). More than 30,000 NGOs now operate internationally and ~1000 draw their membership from three or more countries (Ruggie 2007). There is an extensive literature on what has been described as "transnational civil society" (Batliwala & Brown 2006), "transnational civil activism" (Tarrow 2005), "global citizen action" (Edwards & Gavanta 2001), "global social movements" (Cohen & Rai 2000), "activists beyond borders" (Keck & Kathryn 1998), and "global civil society" (Lipschutz 2005). According to Wapner (1995, p. 340), the increasing politicization of global civil society requires scholars to clarify conceptually the political character of governing efforts not associated with the state. He adds that "a failure to take note of the world civic efforts of nonstate actors leaves one with only an incomplete understanding of world politics itself."

While studies of international advocacy networks and organizations primarily explore the efforts of these groups to influence the policies of national governments and intergovernmental organizations, several also describe the strategies of NGOs that have chosen to focus some or all of their political activity directly on the private sector. This choice stems in part from NGOs' frustration at the considerable power exercised by corporations over national governments and intergovernmental institutions and the resultant

failures to establish legally binding global business regulations—a failure noted in several studies of civil regulation. For example, during the 1970s, the International Labor Organization and the United Nations Commission on Transnational Corporations both unsuccessfully attempted to develop legally binding codes of global business conduct. One important civil regulation, the certification standards of the Forest Stewardship Council (FSC), emerged directly from the inability of NGOs to persuade governments to enact an effective international forestry treaty (Clapp 2005).

Civil regulation has thus also emerged in order to “help empower global civil society by providing activist groups with political levers that exist outside state systems” (Falkner 2003, p. 79). Its emergence is “said to offer a new and different model for framing, voicing, and implementing market and public policy rules,” a model that can make business rule making more democratic (Webb 2004, p. 23). “Engaging the corporate sector in the rapidly expanding web of corporate social responsibility initiatives can help narrow the governance gaps that now exist between global markets and state-based authority structures” (Ruggie 2007, p. 35). By providing opportunities for consumers and investors to engage in politics via markets, civil regulation has created new sites for political activity outside states (Micheletti & Stolle 2007).

Private codes of conduct are thus “regarded by their proponents as civilizing influences that temper the hazards of global market forces by giving globalization a human face” (Cutler 2006, p. 200). In attempting to transmit more stringent regulatory standards from developed countries (i.e., where most NGOs are based and where their political impact is concentrated) to the business operations of western firms in developing countries, NGOs are essentially seeking to privatize the “California effect,” a term coined to describe the strengthening of national regulations through international trade (Vogel 1995). The underlying objective of

these western-based activists is to globalize “embedded liberalism” by developing mechanisms of social controls for global firms similar to that described at the national level in Polanyi’s *The Great Transformation*—a work frequently cited in the literature on civil regulation (Ruggie 2003).

Yet these claims remain largely theoretical for two important reasons. First, there is little systematic evidence about how most civil regulations have actually affected corporate practices and the extent to which they have ameliorated the oft-cited shortcomings of state regulation and interstate treaties. Although some voluntary business codes have clearly had a discernable impact, their overall importance as a mechanism of global business regulation remains unclear. Second, although western-based NGOs claim to speak in the name of the underrepresented citizens in developing countries, those citizens remain largely silent. Thus, the extent to which civil regulations have actually made global business regulation more democratic remains problematic. The critical question remains: To what extent has the growth of civil regulation made the governance of multinational firms and markets more politically accountable?

The support for civil regulation on the part of many NGOs also reflects a change in their strategies for interacting with business, as described by Doh & Teegeen (2003), Gereffi et al. (2001), and Rondinelli & London (2003), and analyzed by King (2007). Many activist groups have decided that working directly with companies to develop and help enforce global codes of conduct for them and their suppliers constitutes an effective, albeit a second-best, strategy for bringing about substantive social and environmental improvements in developing countries. Although adversarial relationships between NGOs and firms continue, both informal and formal cooperation between global firms and transnational NGOs have measurably increased. There is considerable evidence of “a shift [by NGOs] from boycotts to global partnerships” (Domask 2003, p. 157). Such cooperative relationships

FSC: Forest Stewardship Council

have increased the ability of NGOs to participate in and influence corporate decisions regarding global labor and environmental practices.

GLOBAL BUSINESS ACQUIESCENCE

What about corporations? As Levy & Kaplan (2008) observe, it is surprising how readily large, multinational corporations (MNCs) have adopted CSR standards and reporting mechanisms, considering the lack of financial incentives or regulatory coercion. The typical large MNC based in the United States and Europe now both has its own code of conduct and subscribes to one or more voluntary regulations. It has a dedicated CSR staff and is also likely to issue periodic reports on its social and environmental practices, some of which are independently audited.

In some cases, business self-regulation represents a political strategy for avoiding additional government regulation. For example, Responsible Care, the chemical industry's code of conduct, was adopted by several national chemical associations in part to forestall national laws establishing more stringent plant safety standards following the chemical plant explosion at Bhopal, India in 1984. The International Chamber of Commerce's Business Charter for Sustainable Development was initiated by global firms who feared that the 1992 Rio "Earth Summit" would lead to an expansion of international environmental regulation. But these examples are exceptional. In most cases, there has been little likelihood of additional regulation, especially at the international level or on the part of developing countries.

The willingness of firms to accept civil regulations is primarily attributable to three other factors. The first and most important is pressure from NGOs, who have become "highly sophisticated in using market-campaigning technique to gain leverage over recalcitrant firms" (Gereffi et al. 2001, p. 64). Global civil activists have frequently

succeeded in turning the global scope of firms against them, making their global brands and global supply networks into a source of political vulnerability (Klein 2000). The past 15 years have witnessed a steady series of creative and often well-funded public campaigns that have sought to "name and shame" highly visible firms in North America and Europe through media exposés, demonstrations, and threatened or actual boycotts (e.g., Bartley 2003, 2005; Bendell 2004; Sasser et al. 2006; O'Rourke 2005). The selection of corporate targets by activists is determined by corporate reputation, market position, and the proximity of activists to a firm's headquarters. In addition, activists are more likely to confront the leading global firms in each industry. Some scholars assert that there has been a measurable increase in politically oriented consumerism (Micheletti et al. 2004). According to Fung (2002, p. 150), "well-ordered social markets supplement conventional channels of political expression and popular control by creating distinctive arenas of governance in which citizens participate directly, through their market choices, in influencing the behavior of powerful economic entities often resistant to other forms of social control." Yet there is little evidence that consumer behavior has become more politicized. Most consumers continue to make their purchasing decisions primarily on the basis of price, quality, and convenience; few activist campaigns have affected market shares or corporate profits (Vogel 2005). Nonetheless, many large firms are highly risk-averse. Anxious to protect their reputations and the value of their global brands, they have often responded to public protests, or even the threat of public protests, by agreeing to change particular policies and practices and in many cases by publicly subscribing to private codes of conduct.

A second factor is linked to changes in corporate strategies. In some cases, firms have come to regard civil regulation, as well as other dimensions of CSR, as consistent with their business objectives. The claim that acting more "responsibly" by taking into account

the concerns of nonbusiness “stakeholders” is in the long-term financial interests of business dominates much popular and business writing on CSR (Vogel 2005). There is considerable anecdotal evidence to support the business case for CSR, especially with respect to some environmental practices. For example, becoming more eco-efficient can reduce business costs, and there are niche markets for premium “green” products (Esty & Winston 2006). But much writing on CSR exaggerates the business benefits of more responsible corporate behavior (e.g., Hart 2005). After more than 150 statistical studies of the relationship between corporate social and financial performance, a causal relationship between the two has yet to be demonstrated (Margolis et al. 2007). Nevertheless, it is clear that many managers do believe—or at least act as if they believe—that there are business benefits associated with improving their social and environmental practices and in agreeing to voluntary regulatory standards.

A third, related explanation for the willingness of many firms to adopt standards that go beyond legal requirements is that business norms and values have changed. The literature on CSR and civil regulation (e.g., Dashwood 2004, Hauffer 1999) frequently claims that business acceptance of CSR in general and civil regulation in particular both reflect and reinforce a shift in norms for acceptable global business behavior. According to Ruggie (2004b, p. 21), who helped establish the United Nations Global Compact (a statement of principles that more than 3000 firms have endorsed) “the principle is taking hold that transnational firms . . . ought to be held accountable not only to their shareholders, but also to a broader community of citizens who are affected by their decisions and behavior.” Business acceptance of the principles and practices of civil regulation is thus said to have a normative, or constructivist, as well as a material and strategic component. The former component may well exist, but its importance and impact are difficult to document.

THE DIVERSITY OF VOLUNTARY CODES

Extensive and detailed overviews of the growth and diversity of voluntary codes find that they vary widely in their scope, monitoring and enforcement, and governance (Jenkins 2001, Utting 2001, Kolk & van Tulder 2005). Nearly all civil regulations are industry- and/or product-based. They primarily address either labor or environmental practices, with a particular focus on high-profile issues such as child labor, sweatshops, forestry practices, diamond mining, and coffee and cocoa production. Labor codes are concentrated in sectors that supply consumer goods, often through highly visible brands, whereas environmental codes have primarily emerged in forestry, energy, minerals and mining, chemicals, and, most recently, electronics. A few codes address corporate human rights practices, primarily in the natural resources sector.

The vast majority of voluntary codes have been adopted unilaterally by trade associations or individual firms. While often enacted in response to public or political pressures, they do not provide any formal opportunities for nonbusiness constituencies to participate in their formulation or enforcement, although in some cases NGOs do monitor and report on business compliance with them. Relatively few industry and corporate codes are independently monitored; some contain no monitoring provisions at all, and others are monitored by the firms themselves. Their content also varies considerably. Some, such as the UN Global Compact, establish general principles or goals, whereas others, such as ISO 14001, emphasize reporting requirements or process requirements. Some codes contain relatively specific performance standards, although these vary considerably.

MULTI-STAKEHOLDER CODES

The most important civil regulations are multi-stakeholder codes, whose quasi-public character has enabled them to be extensively

NSMD: non-state
market-driven

and intensively studied (Utting 2001; Meidinger 2006a; Auld et al. 2007; Bartley 2003, 2007a; Conroy 2007). In contrast to industry self-regulations, which are usually unilaterally enacted, multi-stakeholder codes' standards and compliance procedures result from negotiations among businesses, as well as national governments, NGOs, and/or trade unions. Described as "one of the most innovative and startling institutional designs of the past 50 years," these transnational codes directly involve nonbusiness constituencies in their governance (Cashore et al. 2004, p. 4). These codes typically incorporate global product and producer certifications as well as provisions for the independent monitoring of suppliers. Non-state market-driven (NSMD) governance systems that recognize and track the markets' supply chain of responsibly produced goods and services have proliferated in recent years. Their professed objective is to ameliorate a wide range of global social and environmental market failures, including fisheries depletion, forest deterioration, and sweatshop labor practices. The growth in the number of such codes stems from three factors: the lack of credibility of industry self-regulation, the increase in consumer and NGO influence and activism, and the influence of norms of "good governance" that emphasize the importance of collaboration and partnership.

Bartley (2007a) identifies two theoretical approaches to explain how such codes emerge: a market-based approach that views them as a collective action response by businesses to the "naming and shaming" campaigns waged by activists and a political approach that examines them as the outcome of broader conflicts about the power of states, markets, and civil society in the context of neoliberal globalization. His analysis emphasizes the explanatory power of the latter, stressing the importance of the institutional factors that underlie the political construction of new market institutions. Bartley's (2005, 2007a,b) research describes the critical role of states, NGOs, social movements, trade unions, and founda-

tions in initiating and supporting new institutions of private transnational governance. Bartley (2005a) explains how and why each came to view multi-stakeholder governance as an appropriate policy response to conflicts over the legitimacy of existing governmental and international regulations and the factors that led firms and particular industrial sectors to agree to participate in them.

Bernstein & Cashore (2007) address a critical question: How do NSMD governance systems acquire legitimacy or rule-making authority? Lacking state authority, they must create incentives for firms to accept their certification requirements or require that their suppliers do so. If these standards are too stringent, few suppliers are likely to request certification and/or few firms will agree to acquire some or all of their purchases from certified suppliers. However, if standards are too lax, they will not be endorsed by NGOs. In short, for NSMD systems to work effectively, both firms and NGOs must agree to compromise; the former must accept more stringent standards than they would prefer, while the latter must recognize the unwillingness of firms to make costly changes in their business practices.

Bernstein & Cashore (2007) argue that the key to understanding how NSMD governance systems have emerged lies in recognizing that business preferences are not static. Over a period of time, relatively successful NSMD systems have been able to create new identities and shared norms. "They are engaged in legitimating processes that contain elements of logics of 'appropriateness' and 'argumentation' in which stakeholders and target actors can discuss, argue, and deliberate in increasingly legitimate arenas about NSMD governance and specific standards" (Bernstein & Cashore 2007, p. 368). While both an instrumental "logic of consequences" and a constructivist "logic of appropriateness" are almost always at work, the latter becomes progressively more important as NSMD systems become more institutionalized (Bernstein & Cashore 2007, p. 349). Bernstein & Cashore's research

describes how both firms and activists gradually come to share common expectations about appropriate standards for private governance. The setting in which they interact is also dynamic one. Firms learn how to work through NSMD systems to maintain and advance their competitive positions while NGOs come to accept NSMD governance as a legitimate arena in which to define standards for business conduct.

The certification model of NSMD governance has spread rapidly during the past 15 years (Conroy 2007). Beginning with forestry and some elements of organic production, it has now expanded to factory production and to agricultural products including coffee, cocoa, sugar, and flowers, as well as to fisheries and tourism. In each case, suppliers that meet specific standards are awarded certifications, which then serve to communicate to either firms or consumers that these products have been produced responsibly. In principle, social certifications benefit firms that sell to consumers by improving their reputations and protecting their markets, and they benefit developing country suppliers by maintaining or increasing their global market access.

The growth of the certification model across multiple sectors has not occurred independently; rather, a few NGOs and foundations have played a critical role in spreading the idea of certification from one sector to another, in effect functioning as policy entrepreneurs (Auld et al. 2007). According to Auld et al., the relative impact of these initiatives across sectors, as well as the particular form that NSMD systems have taken, is linked to two factors. The first is industrial organization. NSMD systems are most likely to be effective in sectors that are dominated by large, vertically integrated firms because such firms are both more vulnerable to public pressures and more able to afford the additional costs of certification. The structure of these systems is also influenced by the location of supply chains. For example, when the resource being targeted is more diffused and scattered, such as fish stocks, the challenge of establish-

ing an effective NSMD system increases. In addition, the public benefits NSMD certification is likely to provide are most significant when the primary producers are in developing countries and the primary consumers are in developed ones, since the latter's willingness to pay more will have a greater marginal impact.

A second variable is related to public policy. Firms are more likely to accept NSMD certifications when public regulatory standards are relatively stringent, which means that such systems will often first gain support in regions where they are needed the least. This explains the relative success of the FSC in certifying forests in developed countries and its relatively slow progress in developing ones. An important exception to the latter generalization is agricultural Fair Trade certification, which has effectively targeted relatively poor agricultural producers in developing countries. However, Fair Trade certification is also unusual in that Fair Trade certified products are marketed directly to consumers, some of whom are willing to pay a price premium for them. By contrast, few other certified products have identifiable consumer "brands."

ENVIRONMENTAL CODES

Forestry standards have been the most extensively studied civil regulations (e.g., Lipschutz 2000, Bostrom 2003, Gulbrandsen 2004, Pattberg 2005, Meidinger 2006b, Auld et al. 2007, Sasser 2006). The most comprehensive study, *Governing Through Markets*, analyzes the accomplishments and limitations of one of the most developed civil regulations, namely the certification standards for sustainable forestry practices developed by the FSC (Cashore et al. 2004). This book seeks to account for the variations in support for the FSC among forestry firms in the United States, British Columbia, Germany, the United Kingdom, and Sweden. Although firms in each region/country were initially skeptical of the FSC, their subsequent behaviors diverged significantly. FSC certification

gained widespread support in both British Columbia and the United Kingdom and limited support in both the United States and Sweden, with Germany falling in between. Significantly, in each place, forestry firms have an alternative to FSC certification: They can and have often established industry-governed forestry codes.

Governing Through Markets demonstrates that these variations in the ability of the FSC and its supporters to gain acceptance from firms are linked to the position of the country/region in the global economy, the structure of the domestic forestry sector, and the history of forestry on the public policy agenda. When a hospitable environment exists, the FSC is able to “convert” forestry companies and their owners without having to compromise its standards, whereas in an inhospitable environment, FSC supporters must weaken their standards in order to attract industry certification. But in the latter case, competitor programs to the FSC have often strengthened their own regulations as a response to pressures for improved forestry practices demanded along the market’s supply chain. Thus efforts to achieve legitimacy places pressure on both the FSC and its industry competitors to alter their rules—both upward and downward (Cashore et al. 2004). However, this study does not examine the actual impact of either category of voluntary forestry codes on forestry practices.

The experience of the FSC demonstrates not only the interaction of different kinds of voluntary codes but also the dynamics of the relationship between civil regulations and state policies (Pattberg 2006). Governments are an important source of demand for FSC certified wood and wood products. Several European governments, as well some American states, either require or give preference to FSC certified products in their procurement decisions. The government of South Africa has effectively outsourced its forest surveillance operations to the FSC, and Denmark has recognized the FSC label as an instrument to

assure the legality of timber imports. The experience of the FSC thus illustrates how civil regulations can both affect and be affected by public policies.

Although most studies of private forestry regulation focus on their role in developed countries, Espach (2006) analyzes the acceptance of FSC standards in two developing countries, namely Argentina and Brazil. He explains the relative effectiveness of the FSC in Brazil and its limited impact in Argentina by examining the relationship between the demand for and the supply of global private forestry certification. The demand for such programs depends on the importance of exports to northern markets, the extent to which northern firms and NGOs have an important domestic presence, the risks of state regulation, and the possibility of a targeted negative campaign by environmental and community NGOs. The supply of such programs is related to the degree of industry concentration, the presence of a capable administrative agency, favorable treatment by local regulatory authorities, and the availability of independent stakeholder groups capable of increasing the legitimacy of program participation. Espach’s analysis complements the work of other scholars in emphasizing the critical role of both the domestic and international economic and political environment in determining the legitimacy of civil regulations. However, like Cashore et al. (2004), he does not examine how code adoption has actually affected forestry practices.

Moving beyond forestry codes, Prakash & Potoski (2006) posit that voluntary environmental standards such as ISO 14001 can be usefully analyzed as clubs. Firms that choose to subscribe to such voluntary standards and/or require that their suppliers do so, are often required to bear additional costs. In return, they receive excludable branding benefits that enable them to receive credible recognition for their environmental commitments by stakeholders (i.e., both environmental activists and governments) who value

the standards that their club membership signifies. However, these benefits are in turn linked to the stringency of the club's compliance mechanisms. Standards that are weakly enforced provide firms with fewer "branding" benefits.

What makes ISO 14001 participation credible, and thus valuable for companies, is that compliance with its standards is independently monitored. This ameliorates an important shortcoming of many voluntary environmental standards, namely that after formally subscribing to them, firms may choose to "shirk." According to a study by Lenox & Nash (2003), the effectiveness of environmental industry self-regulation is contingent on the nature of the monitoring and compliance mechanism brought to bear on noncompliant firms although their data is confined to the United States.

Potoski & Prakash (2005a,b) report that firms certified under ISO 14001 pollute less than nonadopters, and that they are also more likely to better comply with public laws. However, their analysis of the impact of ISO 14001 is only based on evidence from the United States. Their findings are also partially challenged by another study, which finds that although adoption of this voluntary regulation does appear to reduce the health risks facilities impose on communities in the United States, it does not improve such firms' regulatory compliance (Toffel 2004).

According to a study of 108 countries over seven years, ISO 14001 adoption in exporting countries is positively associated with the extent of ISO adoption by firms in the countries to which they export (Prakash & Potoski 2006). Similarly, research on 98 countries over six years concludes that ISO 14001 adoption in host countries is related to the extent of foreign investment by firms from home countries that have a high level of ISO 14001 adoption (Prakash & Potoski 2007). An important implication of these findings is to challenge the claim that economic globalization invariably produces a "race to the bottom." Rather, these

results suggest that civil regulation can promote the global "trading up" of regulatory standards (Vogel 1995). But what is missing from these studies of ISO 14001 is any analysis of the actual impact of certification on the environmental practices of firms in developing countries.

Moreover, as Clapp (1998) notes, the privatization of global environmental governance through codes such as ISO 14001 has conflicting impacts on developing countries. Many western firms require certification as a condition for doing business with suppliers in developing countries, thus making it a de facto global standard. This means that producers in developing countries are required to bear the often considerable costs of securing certification, which may impose a serious financial burden and thus effectively serve as (private) nontariff trade barriers. Moreover, unlike international environmental agreements, in whose negotiations developing countries are able to participate, developing country producers are not involved in shaping ISO 14001's standards. More broadly, private regulations may exacerbate rather than ameliorate the imbalance of power in the global economy by "privileging the market over alternative forms of governance, biasing governance toward market mechanisms and giving corporate choices a disproportionate say in policy development and implementation at the expense of state representatives and public participation" (Bernstein 2005, p. 165).

LABOR CODES

Several studies examine the extensive array of labor codes that have emerged since the early 1990s, describing their origins, their varying standards, their mechanisms for promoting compliance, and the challenges they face in improving labor conditions (e.g., see Liubicic 1998; Diller 1999; Pearson & Seyfang 2001; Bartley 2005, 2007a; Esbenshade 2004). These private regulatory systems are almost as complex as the supply chains they seek

to monitor. They feature chains of standard setters, layers of monitoring and enforcement, and competing systems of incentives, as well as large variances in the competence, extensiveness, and independence of their monitoring practices. Labor codes have created a wide spectrum of new regulatory processes, some purely privatized, some collaborative, and some socialized (O'Rourke 2003).

While acknowledging the lack of data that would make it possible to assess how the many diverse private labor codes are actually working, O'Rourke (2003) argues that they all face a number of weaknesses and challenges. Most importantly, the length and breadth of apparel supply chains (often extending to thousands of factories for each western firm), combined with the ability of firms to move production quickly among factories and hide behind multiple layers of ownership, make systematic inspections extremely difficult. The brief site visits of inspectors are often superficial and frequently miss less obvious violations. Fung et al. (2001) suggest that it would be possible to build upon the core dynamics of nongovernmental regulatory systems if monitoring methods and their results were more transparent, since this would enable the performance of factories and their monitors to be systematically compared. However, this goal remains elusive because very few western firms make the results of their factory monitoring public.

One of those few firms is Nike. An important study of the impact of Nike's labor practices finds that, despite significant effort and investment by the firm and its staff, the monitoring of working conditions in the factories of suppliers has had limited results (Locke et al. 2006). Several other case studies of the impact of voluntary labor codes report highly uneven results (Jenkins 2001, Hartman et al. 2003, Esbenshade 2004, Mamic 2004, Wells 2007). There is some evidence of progress in reducing child labor and improving factory conditions, but less on limiting compulsory overtime and increasing wages. Meanwhile,

few codes have been effective in assuring the rights of workers to bargain collectively.

Liubicic (1998, p. 139) argues that those who claim public pressures are capable of promoting a "race to the top that will make multinational corporations a powerful instrument in the pursuit of human rights" have overlooked serious limits to the effectiveness of labor codes and labeling schemes. First, the reach of western codes is limited to small enclaves of employees in developing countries; these codes primarily affect workers employed by manufacturers that make branded goods for export to the United States and Europe. The focus of most labor codes on sweatshops effectively excludes the large numbers of workers employed in agriculture, who often work under far worse conditions. Second, the effectiveness of monitoring is constrained by inadequate funding and by inability to monitor the informal economy and household employment, which are often part of global supply chains. Perhaps most critically, the unwillingness of western firms to pay a price premium for more responsibly produced products severely constrains both the ability and willingness of developing country contractors to comply with corporate and industry labor codes.

Liubicic (1998) also notes that effectively enforced western codes may actually undermine the welfare of developing country workers. For example, under consumer and activist pressures, a firm may abandon the use of child labor in countries where such labor is critical to family incomes. To the extent that voluntary labor codes replace rather than complement state regulations, developing country governments are essentially ceding their sovereignty to the demands of western activists, who are the primary drivers and the main "consumers" of labor codes. Many labor codes essentially empower NGOs, rather than developing country workers, and the two's priorities can often conflict. The long-term effectiveness of private labor codes may well lie in public recognition of their limitations,

leading them to be replaced or complemented by more effective national and international public regulations, a conclusion echoed by Diller (1999).

SHORTCOMINGS OF CODE RESEARCH

The above review does not exhaust research on specific voluntary codes. There have been studies of the UN Global Compact (Therien & Pouliot 2006), human rights codes (Watts 2005), Fair Trade International (Courville 2005), the Marine Stewardship Council (Constance & Bonanno 2000), and codes for coffee production (Giovannucci & Ponte 2005), as well as several studies of Responsible Care (Gunningham 1995, King & Lenox 2000, Garcia-Johnson 2000, Howard et al. 2000). However, this entire body of literature has two significant weaknesses. First, relatively few civil regulations have been studied in depth; indeed, more research has been published on the FSC and forestry codes than on all other codes combined. This means that we know relatively little about the vast majority of civil regulations, how and why they were established, and how and how well they are working. It is as if scholars tried to understand the significance of government regulation by studying a small sample of existing laws and rules.

Second, too few studies examine the global impact of civil regulations. Virtually all quantitative studies of the impact of both ISO 14001 and Responsible Care focus on developed countries, most commonly the United States. In the case of the FSC, we know more about its origin, standards, governance, and patterns of firm adoption in developed countries than we do about how the spread of certification has actually affected the conditions of forests in either developed or developing countries. Although there have been several studies of the impact of labor codes, they are primarily based on case studies, which are not necessarily representative. There are few scholarly studies of the effectiveness of

most civil regulations. These two major gaps make it difficult to assess the overall impact of civil regulations on either business behavior or the conditions they were established to ameliorate.

OUTLINING A RESEARCH AGENDA

The growth of civil regulation poses important questions that could usefully engage political scientists, especially those working in the subfields of international politics, comparative politics, public law, and government regulation.

One key research question has to do with the relationship between civil regulation and public or state regulation. Civil regulations and state policies can interact in many ways. Private regulatory standards can function to avoid additional state regulations, to complement or better enforce state regulations, as a precursor to more stringent state regulations, or as a substitute for state regulations. Under what conditions and how frequently has each outcome occurred? This issue is particularly critical with respect to the governments of developing countries, as their failures to adequately regulate domestic firms are the reason why much global civil regulation exists in the first place. But it is also important to explore at the international level, where many of the regulatory failures that have prompted civil regulation have also occurred. It is also relevant to understanding the limited efforts of developed countries to adopt legally binding regulations for global firms based in their countries.

Governments engage with civil regulations in various ways. Some western governments, primarily in Europe, have helped to initiate and finance civil regulations, and have sought to promote compliance with them by mandating corporate social and environmental reporting and by requiring or encouraging “ethical” investment policies by public sector funds (Aaronson & Reeves 2002, Habisch et al. 2005). For their part,

some developing country governments regard western-based civil regulations as a vehicle to improve domestic regulatory enforcement, whereas others view them as an intrusion on their sovereignty. Some developing governments expect civil regulations to improve their global competitiveness, whereas others perceive them as threatening their access to global markets by raising domestic production costs in order to satisfy western activists. Students of public policy and comparative politics could contribute to the literature on civil regulation by exploring the varying responses of governments to them and by explaining how they interact with other regulatory policies and development strategies.

Another critical issue has to do with the political accountability and democratic nature of civil regulations. Advocates of civil regulations claim that, by providing nonbusiness constituencies with new political and market mechanisms to affect business decisions, these regulations can help address the democratic deficit in global corporate governance. But virtually all these nonbusiness constituencies are located in developed countries. Too much attention has focused on the extent to which civil regulations are or are not dominated by global firms and not enough on the lack of representation from political constituencies in developing countries—including local firms. We also need to better understand how civil regulations affect the interests and influence of nonstate actors in developing countries, including their impact on the strengthening of civil society.

We know much more about what codes require and why firms have subscribed to them than we do about the extent of actual business compliance. Scholars need to apply to the study of nonstate regulations the sophisticated tools they have developed to measure and explain corporate compliance with government regulations. We need to get inside the “black box” of firms to better understand how civil regulations have changed their behaviors. How do both global firms and their develop-

ing country suppliers determine what financial and organizational resources to allocate to complying with them? How do they balance the costs of acting more “responsibly” with the business risks of not doing so? In what ways has the often-cited change in business values and norms actually affected the decisions of global firms, such as where to outsource and invest and whether to pay a premium for more responsibly produced products? How does compliance with civil regulations interact with global competitive pressures to reduce costs? Studies of corporate political strategies need to incorporate an analysis of how firms engage in nonstate market-based politics and also to explore the relationship between business adoption of voluntary standards and their efforts to influence public policies.

This in turn raises another important question: How effective have civil regulations been in achieving their professed public interest objectives? The answer clearly varies across different kinds of regulations, issues, and industries. Some civil regulations have been much more effective than others. Too many assessments of the actual and potential impact of civil regulations—both positive and negative—assume that it is all of a piece, when in fact the impact of civil regulations is both highly uneven and still evolving. Moreover, it is critical to assess not only the current effectiveness but also the *relative* effectiveness of civil regulations. Their impact should be compared not to an ideal world of effective command-and-control regulations in developed countries but to real-world alternatives. More specifically, how do their strengths and weaknesses compare to international environmental, labor, and human rights treaties, many of which also rely on soft law, as well as to the domestic regulations of developing countries, many of which are poorly enforced? What factors are likely to affect their future legitimacy, scope, and impact—and what are their structural limitations?

Existing research on private global business regulation raises but does not answer the critical question: What mix of domestic and

international, private and public, and hard and soft law would enable global firms and markets to be better governed? This is a serious subject that deserves more serious scholarly analysis than it has received.

Research on global civil regulations by political scientists must be interdisciplinary. Although this survey has emphasized studies of civil regulation by political scientists and research published in political science jour-

nals, most work on this topic has been written by scholars and others outside the discipline and appears in both academic and nonacademic publications that are unfamiliar to most political scientists. Drawing on this research, contributing to it, and integrating its findings into our discipline would significantly advance our understanding of a relatively new and still evolving dimension of international business regulation.

DISCLOSURE STATEMENT

The author is not aware of any biases that might be perceived as affecting the objectivity of this review.

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