# Putting regulation before responsibility:
# Towards Binding Norms of Corporate Social Responsibility

*ABSTRACT*

*Globalization of business has heightened concerns regarding corporate conduct in developing countries. Critics have charged that multinational firms in particular have exported social harms involving labor, the environment, bribery, and human rights to jurisdictions outside of their home countries. Opportunities for regulatory arbitrage and the associated collective action problem such opportunities suggest, highlight the need for strong regulatory responses to these issues. Rather than prioritize the strengthening of national or international regulatory actors to address these social harms, voluntary corporate social responsibility initiatives have emerged as a favored response within the international community. This article undertakes a critical examination of the rationale for these initiatives. It argues that the premises on which they are grounded are flawed insofar as they ignore basic research concerning the drivers of regulatory compliance, fail to remedy underlying social harms, contravene broader goals of fostering strong regulatory institutions in developing countries, and undermine economic development to the extent that they erode state capacity in setting economic and regulatory policies. As an alternative to purely voluntaristic measures, this article emphasizes the need to build the capacity of local regulatory authorities. It cites two cases involving the use of domestic regulatory and enforcement power in African states as examples of how the empowerment of state institutions can constitute more effective responses to significant social harms.*

## I. Introduction

Corporate activities that harm the environment, violate labor and human rights, and corrupt state actors and institutions remain problems in all market economies. Nowhere are these problems more acute than in developing countries. On the other hand, in developed countries, it is generally thought that state action constitutes a principle remedy to market failure. On this view, domestic regulatory systems can do the work of protecting the environment and worker rights, while the judiciary can ensure that human rights are upheld and corruption prosecuted. Yet the general view is that, whether due to inadequate resources, ineptitude, or perfidy, the same expectations do not hold for developing countries.[1] As evidence of corporate transgressions has mounted, it is noteworthy that there have been few calls for international super-regulators to oversee these matters. Nor has much attention been devoted to remedying the presumed shortcomings in developing country regulatory systems that inhibit effective reductions in these social harms. Instead, the solution among policy makers and many activists has centered around voluntary corporate social responsibility (CSR) measures.[2]

CSR is an umbrella term that refers to a variety of initiatives ranging from voluntary codes of conduct to programs whereby companies can undergo external audits

---

[1] *See, e.g., The Absence of Rigor and the Failure of Implementation: Occupational Health and Safety in China*, 9 IN. J. OCCUP. ENVIRON. HEALTH 309 (2003).

[2] Examples of these initiatives include AccountAbility 1000 Framework, AA1000 Assurance Standard, Business Principles for Countering Bribery, CERES Principles, Clean Clothes Campaign: Model Code, Eco-Management and Audit Scheme, Ethical Trading Initiative: Base Code, Fair Labor Association: Workplace Code of Conduct, UN Global Compact, Global Reporting Initiative, Global Sullivan Principles of Corporate Social Responsibility, ICC Business Charter for Sustainable Development, Marine Stewardship Council's Principles and Criteria for Sustainable Fishing, The Natural Step Principles, OECD Guidelines for Multinational Enterprises, Shell Business Principles, SIGMA: Sustainable Guidelines for Management.

to verify the adequacy of their practices in a variety of areas of social concern.[3] Although generally lacking formal state power of sanction, these efforts look to international law for their normative authority. As such, they intend to apply sometimes-latent international legal prescriptions directly to corporations. Following the practices of many state-level regulatory programs in recent years, these initiatives are consistent with the broader trend in regulatory policy away from so-called "command and control" regulatory techniques and towards voluntary firm-level self-regulation and self-policing.[4]

While important in helping to galvanize public opinion around the issues, this article contends that, as currently constituted, voluntary CSR initiatives remain problematic. Properly understood, voluntary CSR measures should supplement not supplant state regulation.[5] Yet supporters of voluntary CSR initiatives fail to recognize this fact. They equivocate on the role of government regulation and thus create a

[3] Among OECD countries, these areas are generally thought to be delimited by the law and thus CSR is sometimes assumed to refer to efforts to exceed legal requirements. Other discussions, particularly those concerning developing countries, invoke CSR as a way of supplanting or overcoming inadequacies in domestic legal orders. Confusing matters further is the recent trend among business interests in the United States and elsewhere to re-define the term by leaving out the word "social". Hence, one sees press conferences with business executives promoting "corporate responsibility," which usually amounts to no more than executives and firms obeying the law. The precise boundary between CSR initiatives and legal requirements are unclear in these discussions. For the purposes of this paper, I will consider CSR as the effort to overcome inadequacies in existing legal structures and enforcement regimes in developing countries with respect to the social issues identified above. What comes under criticism in this paper are the attempts by various actors to remedy these problems primarily through voluntary measures.

[4] For a description of this view, see OECD, FROM INTERVENTIONISM TO REGULATORY GOVERNANCE (2002) on the need to maximize voluntary compliance.

[5] For a version of this view, see Dara O'Rourke, *Outsourcing Regulation: Analyzing Non-Governmental Systems of Labor Standards and Monitoring*, POL'Y STUD. J. (2003).

confused picture as to the proper role of CSR.[6] The reasons for this equivocation are not incidental but rather central to the CSR movement.[7]

There are two reasons for this phenomenon. The first issue relates to the competing discourses involved in addressing CSR questions. Roughly stated, these discourses can be defined as globalist or developmentalist. The globalists include those whose inspiration for addressing CSR matters stems from globalization, which they reduce to questions of foreign direct investment (FDI) and outsourcing by multinational corporations in developing countries.[8] Among the globalists are those who posit a declining—even shrinking role—for the state.[9] Globalists contend that multinational corporations (MNCs) elude national regulation because they operate in multiple

---

[6] *See, e.g.,* GUIDE TO THE GLOBAL COMPACT: A PRACTICAL UNDERSTANDING OF THE VISION AND NINE PRINCIPLES at 25 ("Whilst recognizing that the role of governments in ensuring respect for human rights remains extremely important..."). Although this comment seems quite strange—rather than just extremely important, most people view the state as the central, dominant authority in ensuring adherence to human rights law—it is a formulation that is quite common in CSR literature.

[7] Indeed, in the European Commission's statement on CSR, voluntarism is an essential defining element of these initiatives. *See* EUROPEAN COMMISSION, PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY COM (2001) 366 (defining CSR as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with stakeholders on a voluntary basis"). This bias towards voluntarism with respect to adherence to fundamental human rights by firms has generated some unseemly formulations. In a brochure on CSR from the international law firm Freshfields Bruckhaus Deringer, clients are advised that "companies should <u>seek to avoid</u> compulsory or child labor" and "take due account of the need to protect the environment." Freshfields Bruckhaus Deringer, Corporate Social Responsibility (2004) (emphasis added). It should go without saying that on any formulation, firms have an absolute moral imperative to avoid compulsory labor. Likewise, does the notion of "taking due account" of the environment in countries of operations not seem incredibly weak in contrast to similar legal obligations?

[8] *See, e.g.,* Michael Santoro, *Beyond Codes of Conduct and Marketing: An Organizational Integrity Approach to Global Labor Practices*, 25 HUM. RTS. Q. 406 (2003). The introduction to this article illustrates the central focus on issues of outsourcing by multinationals:

"At the turn of the century, multinational corporations (MNCs) have learned—often the hard way as a result of embarrassing exposes—that their bottom line can suffer when they fail to live up to public expectations about honoring human rights in third world countries. Among other things, global marketing firms are being asked to provide transparent assurance that their suppliers in third world nations avoid the use of child labor and honor workers rights to acceptable living wages, overtime pay, safe and healthy working conditions and free association."

*Id.* at 408. Similarly, Freshfields Bruckhaus Deringer contends that the rationale for CSR is attributed to globalization of business and market liberalization that has led many companies to initiate international operations. Freshfields Bruckhaus Deringer, *supra* note 7, at 5.

[9] *See* Nicola Phillips, *State Debates in International Political Economy* in ed. Phillips, GLOBALIZING INT'L POL. ECON. (2005) (describing hyperglobalist view); DAVID HELD, GOVERNARE LA GLOBALIZZAZIONE 30 (2005) (stating that many have posited the end of the nation state as a result of globalization).

jurisdictions.[10] On the other hand, as the name suggests, developmentalists view matters from a developmental perspective. On this view, the challenge of private sector activities in developing countries is not limited to issues of FDI and outsourcing but rather involves broader issues of institutional and market strengthening and coordination with other development priorities.

In this paper, I contend that the globalists have framed the debate incorrectly. A key reason for this conceptual mistake is that the globalists have wrongly assumed that the state is in decline. This view is a broad-brush swipe rather than the product of detailed analysis. Indeed, developments in the field of comparative and international political economy show that the story is much more complicated.[11] On this view, rather than international convergence towards one model of capitalism, states maintain distinctive types of market economies and respond to the pressures of globalization in distinct ways.[12] Moreover, state level regulatory systems remain central to defining the trajectories of different systems.[13] Other studies speak more of a changing role of the state or of the state being constrained in certain respects, but belie the hyperbolic claim that the state is declining in importance, is less relevant, or is unable to do its job.[14] Rather than true across the board, the constraints hypothesis may be true in some respects but less in others. In particular, while states may be constrained in areas of monetary

---

[10] CYNTHIA DAY WALLACE, THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL: HOST STATE SOVEREIGNTY IN AN ERA OF ECONOMIC GLOBALIZATION 11 (2002) (citing dominant view that MNCs can take advantage of the complexity of political and legal systems to create a world of their own which must accommodate itself in the conduct of its operations to many legal systems but is not in any real sense subject to any of them).
[11] *See generally*, PETER A. HALL AND DAVID SOSKICE, VARIETIES OF CAPITALISM (2001).
[12] Id.
[13] HALL AND SOSKICE, *supra* 11 at 4 ("Our premise is that many of the most important institutional structures –notably systems of labor market regulation, of education and training, and of corporate governance—depend on the presence of regulatory regimes that are the preserve of the nation-state").
[14] LINDA WEISS, STATES AND THE GLOBAL ECONOMY: BRINGING DOMESTIC INSTITUTIONS BACK IN 10 (2004). *See also* Held, *supra* note 9, at 30.

policy and financial markets, there appears to be much less support for the view that the state is constrained in matters of social, trade, industry, and innovation policies.[15] Even the sly multinational enterprises (MNEs) credited for supposedly eluding law and regulation of states, are subject to the laws of every jurisdiction in which they do business.[16] Indeed, the race to the bottom argument often made in reference to MNEs' supposed attempts to seek out unregulated markets also does not stand up to scrutiny.[17] If states cannot be shown to be subject to substantial constraints in the exercise of power to control social harms by firms, then a key argument for international rather than state based corporate social responsibility measures would seem to be lost. Moreover, even if states can be shown to be too weak to deal with implacable MNCs, then what grounds exist for believing that mere voluntary measures will prove sufficiently potent instruments of control?

Second, the globalists have reduced most of the problems involving economic activity in developing countries to exogenous factors attributable to linkages with advanced industrial economies. Economic globalization thus emerges as the culprit,

---

[15] WEISS, *supra* note 14.

[16] DAY WALLACE, *supra* note 10. A common but mistaken argument is that because the revenues of MNEs often exceed the budgets of various developing countries, the private firms essentially dominate those states. *See* Pall A. Davidsson, *Legal Enforcement of Corporate Social Responsibility within the EU*, 8 COLUM. J. EUR. L. 529 (2002)(stating that economic power of MNEs often surpasses that of states). But this is a rather hasty conclusion to draw from comparing these figures. As will be described later in the article, states wield many instruments with which to enforce law and regulation, and it cannot be said *ipso facto* that modest state revenues preclude states from enforcing law against even the largest international firms.

[17] Examining studies of tax rates, supposedly a key driver of firm arbitrage between jurisdictions, suggests that the argument for a race to the bottom is misleading. *See* Geoffrey Garrett, *Global Markets and National Policies: Collision Course or Virtuous Circle?*, 52 INTER. ORG. 787, 801 (1998) (citing tendency for multinational producers to locate in countries with large public economies and high taxes); M. Ramesh, *Globalization and Social Security Expansion in East Asia*, in ed. WEISS, *supra* note 14 at 83 (showing significant expansion of social welfare in Korea and Taiwan during period when they were integrating rapidly with the global economy); John M. Hobson, *Disappearing taxes or 'race to the middle'?*, in WEISS, *supra* note 14, at 49 (noting that states have been able to attract increased foreign investment while simultaneously maintaining and in some cases increasing corporate income tax yields).

while endogenous sources of social harm are ignored.[18] While recognizing that the problems associated with economic globalization are real, the problems affecting capitalist development in developing countries are not reducible to problems of economic globalization. Were we to magically ensure that all outsourcing and FDI were done in accordance with the highest international standards, many developing countries would still face massive problems of regulation and governance directly related to the types of social harms that CSR attempts to address. Only the developmentalist perspective speaks to those needs.

The globalists' third misconception relates to the reasons behind this set of assumptions. To uncover these reasons, one must examine recent economic and political history. As this paper will argue, that history exposes the intellectual roots of voluntary CSR programs in neoliberal economics. It calls into question a shared assumption among CSR advocates that market failure can be remedied by market mechanisms.

This paper is divided into five parts. Part II consists of an overview of some of the intellectual, policy, and business trends that have fed support for CSR programs. This paper contends that a proper understanding of CSR initiatives involves recognition of its origins in the post Reagan-Thatcher regulatory agenda, which has changed fundamental expectations about business regulation and economic development. Part III critiques some of the key assumptions concerning voluntary CSR programs with particular attention to concerns in developing countries. It highlights two significant problems, first, the lack of rigorous enforcement of such initiatives, and, second, the lack of state involvement in their enforcement and definition, which undermines broader development goals of democratic governance and the creation of well-regulated market

---

[18] *See* Freshfields Bruckhaus Deringer, *supra* note 7.

economies. In light of these problems, this paper argues for using capacity building of legal and regulatory authorities as a way to address these issues. Part IV describes and analyzes two examples of how domestic legal and regulatory actors can be empowered to further the public interest in their societies. A conclusion follows in part V.

## II. Intellectual history

To understand where the voluntary CSR movement draws its *raison d'être*, one must consider recent intellectual history. Three general trends are worth noting: first, the demise of the post-WWII regulatory and developmental state, as exemplified by the New Deal institutions in the United States and social democracy in Europe; second, market-oriented radical transformations affecting business organizations; and, third, the emergence, as a result of these trends, of new programs of self-regulation throughout the developed world. What follows is a simplification of these complex trends, however, it should nevertheless help contextualize the environment in which voluntary CSR programs have emerged.

### A. Changing Nature of the State

The modern regulatory state emerged alongside the growth of industrial economies.[19] The conditions necessitating greater governmental control over economic activities include increases in harmful externalities, such as pollution, injuries to workers, monopolistic tendencies within industry, a multiplication of the number of economic actors, and an increase in technological complexity requiring greater coordination between firms. Government's ability to address these new concerns depended upon the creation of large administrative units or bureaucracies to support its efforts. The

---

[19] *See* ROBERT BALDWIN AND MARTIN CAVE, UNDERSTANDING REGULATION: THEORY STRATEGY AND PRACTICE (1999) (describing rise of regulatory state in Britain throughout nineteenth century).

multiplicity of actors and situations required a vast regulatory apparatus supported by large resource allocations.

For the sake of illustration and because of its influential role in affecting regulatory practices internationally, I will relate the United States experience. In the United States, the modern regulatory state was, in large part, an outgrowth of the New Deal. Prior to that time, the federal government played a relatively small economic and social role.[20] What regulation existed was accomplished primarily through common law courts.[21] Judges, not bureaucrats, were the arbiters of regulation. As the guardians of the common law, judges resisted attempts by legislatures to enact laws protecting health, safety, and the environment as unwarranted infringements on the judiciary's power to determine proper regulatory objectives. The *Lochner* decision[22], in which the Supreme Court struck down a New York statute limiting the hours bakers could work on the grounds that it unconstitutionally infringed the freedom to contract, was one of the more notable examples of this type of thinking. Legislative efforts to regulate the market grew significantly with the New Deal. After initially suffering losses when the Supreme Court cast aside a number of early New Deal enactments, the Roosevelt administration succeeded in enacting numerous laws to minimize social harms of the market.[23] This marked the beginning of a larger trend. Between the New Deal and the 1970s, the federal government was to create dozens of new agencies designed to regulate a whole range of

---

[20] ALAN BRINKLEY, LIBERALISM AND ITS DISCONTENTS 38 (1998).
[21] CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 12-13 (1990)
[22] 198 U.S. 45 (1905).
[23] SUNSTEIN, *supra* note 21 at 20.

industries and remedy a variety of social ills.[24] The scope of the changes that occurred has led some constitutional scholars to consider the period a second American "rights revolution" or an effective amendment to the federal constitution.[25] Similar trends occurred in Western European and developing countries. The growth of capitalism everywhere spurred efforts to restrain its negative effects.

Noteworthy among these developments is the fact that regulation underwent a qualitative change from the New Deal to the 1960s and 1970s. In the New Deal period, the primacy of Keynesian economics led to a regulatory agenda designed to better manage the economy.[26] By the 1960s and 1970s, government regulation became more concerned with promoting individual rights than with promoting collective goods.[27] Across OECD countries, as regulation became less about demand management through such institutions as centralized wage bargaining and more about individual rights (e.g. laws against discrimination in employment), broader support for a dominant state presence in the economy eroded.

The emergence of economic stagnation and growing business unrest over bureaucratic "red tape", fed arguments for curtailing the growth of the federal bureaucracy in the U.S.[28] The economic crises of the late 1970s and early 1980s--stagflation, energy shortages, and a decline in international competitiveness--led to complaints over regulatory controls.[29] Congress also began asserting its power, seeking

---

[24] *Id.* at 24. Noting that between 1930 and 1940, the federal government created 17 new agencies but that later expansion of the regulatory state far exceeded this number. Between 1960 and the mid-1980s, more than 55 new agencies were created.
[25] *Id.* *See also* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).
[26] SUNSTEIN, *supra* note 21, at 21.
[27] *Id.* at 29.
[28] NICOLAS SPULBER, MANAGING THE AMERICAN ECONOMY FROM ROOSEVELT TO REAGAN 107 (1989).
[29] OECD, TOWARDS FULL EMPLOYMENT AND PRICE STABILITY (1977).

to reign in administrative action.[30] Likewise, courts started scrutinizing agency actions with greater frequency.[31] Immediately after his election, President Reagan began a program of comprehensive regulatory reform. The reforms instituted by Reagan at that time have since been transmitted throughout the advanced industrialized economies and developing countries.[32] It is important to review their main elements.

The signing of Executive Order 12291 by President Reagan ushered in a comprehensive program of *ex ante* procedures and criteria applied to any new regulation.[33] This change involved the empowerment of the U.S. Office of Management and Budget to act as a central authority for scrutinizing new regulatory initiatives. Two moves proved particularly instrumental in setting the climate in which emphasis on voluntary CSR grew. First, the order mandated the use of cost benefit analysis and the choice of the least burdensome alternative in connection with any proposed regulation.[34] Second, it mandated that regulators consider alternatives before advancing new regulations.[35] With this subtle shift, the view of the state as a taking on a strong role in

[30]The attempt of Congress to create a legislative veto was a particularly noteworthy instance of a larger movement for legislative oversight. *See INS v. Chadha,* 462 U.S. 919 (1983).
[31]SUNSTEIN, *supra* note 21, at 30.
[32] *See* JAMES M. BOUGHTON, THE SILENT REVOLUTION: GLOBAL FINANCE AND DEVELOPMENT SINCE THE 1990S (2000). The author describes these developments in reference specifically to the IMF experience, however, the observations have wider applicability: "The term "silent revolution" refers here to a shift in the prevailing paradigm for international economic and political relations, away from tendencies toward autarky, insularity, mercantilism, and governmental planning and control over economic activity; and toward a common set of beliefs and policies based on open international trade and finance, competitive pricing and production decisions, and cooperation between countries. To a great extent, the silent revolution of the 1980s resulted from a shift in economic philosophy toward a new classical synthesis in which government has an indirect role in, but not a direct responsibility for, ensuring national economic prosperity; in which private economic activity is promoted through good governance and the development of physical and social infrastructure." *Id.*
[33] Exec. Order No. 12,291, 3 C.F.R. 1981 at 127.
[34] Id.
[35] Id.

controlling capitalism was replaced by a general presumption against regulation unless it could be otherwise justified.[36]

The OECD regulatory reform program illustrates how diffuse these practices have become. According to the OECD, states have adopted regulatory management systems involving explicit standards for regulatory quality, the use of regulatory impact analysis, systematic public consultation on regulation, use of alternatives to regulation, review and updating of regulation, and reduction in administrative red tape.[37] It is safe to say that these principles represent mainstream thinking on regulation today.

Aside from the question of defining proper regulatory ends was the question of means. Critics complained that "command and control" regulatory regimes were costly and unnecessarily punitive.[38] This attack sought to eliminate rigid governmental prescriptions and instead allow for greater flexibility in achieving traditional regulatory aims.[39] The result has been, among other things, a growing shift to self-regulatory or management-based regulatory strategies, described more fully in Part II.C below.

The second prong of the regulatory reform agenda has been a program of deregulation in areas including communications and broadcasting, discrimination, endangered species, occupational health and safety, public utilities, and the environment.[40] Deregulatory programs were followed by successive waves of re-regulation. In the area of economic regulation, states created new frameworks for introducing competition into previously uncompetitive industries through unbundling,

---

[36] *See, e.g.*, BOUGHTON, *supra* note 32 (referencing generally light-handed approach to the regulation of markets by the Reagan Admininstration).
[37] *See generally,* OECD, *supra* note 4.
[38] BALDWIN AND CAVE, *supra* note 19 at 35-39.
[39] Id.
[40] SPULBER, *supra* note 28 at 107.

withdrawal of subsidies, and use of competition law. In the area of social regulation, enforcement was frequently weakened and in some areas regulatory burdens lightened.

The push for deregulation and regulatory reform originating in OECD countries has since been exported globally through the intervention of international financial institutions. Drawing from the widely shared belief that excessive regulation hampered economic growth, development agencies promote the reduction of unnecessary regulatory barriers such as excessive red tape.[41] Likewise, structural adjustment programs have forced reductions in state spending that have compromised state regulatory capacity in some instances.[42] International trade agreements have also driven states to remove rules that discriminate against foreign firms, thus reducing regulatory burdens in certain areas.

The third change in the nature of regulation was the demise of the developmental state in both OECD and developing countries. Slowing growth in OECD countries helped bring about the decline of the Keynesian developmental state. Driven by declining growth rates, tax revolt, and the need for fiscal restraint to avoid currency devaluation in a post-Bretton Woods environment, state *dirigiste* policies fell into disrepute. Restraints on state subsidies for national champions and caps on budget deficits as a result of economic integration further tied the state's hands. In combination with many of these forces, developing countries faced added pressure for fiscal prudence from international financial institutions. In light of the manifest shortcomings of import substitution policies and the subsequent debt crisis, structural adjustment programs and conditionality were imposed on states as a way of reducing wasteful support for state owned enterprises and profligate expenditures on state owned industry and infrastructure.

---

[41] *See* INTERNATIONAL FINANCE CORPORATION, DOING BUSINESS 2004.

[42] *See, e.g.,* Rainforest Foundation, *Forest Management Transparency, Governance and the Law: Lessons from the Congo Basin* 39 (2003), available at http://www.forestsmonitor.org/afleg/en/Case_studies.pdf.

The rise of the good governance agenda and its application to states in the South further pressured them to avoid the risk of corruption through wholesale reductions in state-sponsored investment.[43] Privatization, competition, and a reduction of state involvement in the economy have become central components of economic policy more generally and development policy more specifically.[44] The simultaneous reduction in domestic demand management and downward pricing pressures on products due to international competition and technological change, brought about a decline in aggregate demand in many countries.[45] Consequences notwithstanding, private sector development is now the dominant, if not sole, economic policy paradigm.[46] Osborne and Gaebler's now famous metaphor about the state steering and not rowing has diffused internationally.[47] A dramatically different model of the state has become dominant in OECD countries, developing countries generally, and sub-Saharan Africa in particular.

### B. Increased Managerial Innovation and Flexibility

In the last thirty years, management and production have undergone tremendous change. It is not, as the most exuberant proponents of the "new economy" suggest, one that renders traditional criteria for valuing companies wholly irrelevant. Instead, it constitutes a change in the fundamental approaches to private enterprise. According to the new approach to management, the ability to change, constantly improve processes, and reduce costs is a hallmark of success.[48]

---

[43] BOUGHTON, *supra* note 32.
[44] *See, e.g.,* MICHAEL U. KLEIN AND BITA HADJIMICHAEL, THE PRIVATE SECTOR IN DEVELOPMENT (World Bank 2003) ("Openness and competition are key reasons we can have hope for poverty reduction.")
[45] DEAN BAKER et al., GLOBALIZATION AND ECONOMIC POLICY (1998).
[46] See, e.g., KLEIN AND HADJIMICHAEL, *supra* note 44.
[47] DAVID OSBORNE AND GABLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 25 (1993).
[48] *See generally*, Thomas F. McInerney, *Implications of High Performance Production and Work Practices for Theory of the Firm and Corporate Governance*, 2004 COLUM. BUS. L. REV. 135 (2004).

Throughout much of the Twentieth Century, business organizations, particularly larger firms, tended to be bureaucratic, centrally organized,[49] and, as a result, slow and frequently inefficient. This corporate model, typified by the system of Fordist mass production, established set manufacturing processes and rigid management techniques, thereby limiting opportunities for change.[50] Gradually throughout developed economies, reductions in aggregate demand, increased international competition that limited pricing power, shortened product cycles that rendered inventories obsolete more quickly, and growing knowledge intensity of work, strained more bureaucratic business models.[51] In addition, the emergence and success of many high technology companies, with few fixed assets, led many to see flexibility and intellectual capital as the hallmarks of success.[52]

Three interrelated changes are particularly noteworthy. First, firms began incorporating team production methods on an increasing basis. In contrast to the large centrally directed firm described in the work of Alfred Chandler, decentralized structures, oriented to team or group decision making, became diffuse.[53] Under the influence of Japanese production techniques, firms began incorporating production practices that put increasing control in the hands of employee directed teams.[54] Decentralized groups were given the opportunity to use their judgment to set priorities and improve processes.[55]

---

[49] Charles Sabel, *Design, Deliberation, Democracy: On the New Pragmatism of Firms and Public Institutions* (1995), available at http://www2.law.columbia.edu/sabel/papers/Design.html.

[50] *See generally,* CHARLES SABEL AND MICHAEL PIORE, THE SECOND INDUSTRIAL DIVIDE (1982). *See also* ALFRED CHANDLER, THE VISIBLE HAND (1977).

[51] SABEL AND PIORE, *supra* note 50.

[52] Susan Helper et al., *Pragmatic Collaborations: Advancing Knowledge While Controlling Opportunism*, at 4.

[53] Sabel, *supra* note 49, *see also* Helper et al. *supra* note 51, at 5.

[54] Benjamin Coriat, *The 'Abominable Ohno Production System.' Competences, Monitoring, and Routines in Japanese Production Systems*, *in* THE NATURE AND DYNAMICS OF ORGANIZATIONAL CAPABILITIES 217, 228 (Giovanni Dosi et al. eds., 2000).

[55] Eileen Appelbaum & Peter Berg, High Performance Work Systems: Giving Workers a Stake, *in* THE NEW RELATIONSHIP: HUMAN CAPITAL AND THE AMERICAN CORPORATION 102, 103 (Margaret M. Blair & Thomas A. Kochan eds., 2000).

Second, many firms began to incorporate flexible production techniques. The move to flexible production, shortened production times and made product offerings more responsive to changes in demand.[56] Whereas a high degree of responsiveness to demand used to be confined to small, craft producers, the latter part of the Twentieth Century saw the profusion of these techniques in larger firms.[57] The development of just in time inventory practices, for instance, has allowed businesses to anticipate and respond to demands of the market while eliminating sunken inventory costs in outmoded and uncompetitive products.[58] Today's firms can combine a high degree of flexibility in product offerings with high throughput.

Third, firms instituted new approaches to quality control. Techniques such as benchmarking, or "iterated goal setting", in which the development of a new product is based on comparisons of best practices in an industry and consideration of competing alternative products,[59] have become recognized as leading management techniques. The central feature of this type of process is the review and modification of these goals in light of experience.[60] Error detection and correction in many firms now occur in real time.[61] Moreover, through the process of standardization, such thinking has even become institutionalized. ISO 9000, a widely-used management system standard, has

---

[56] Rosemary Batt, *Work Organization, Technology, and Performance in Customer Service and Sales*, 52 INDUS. & LAB. REL. REV. 539 (1999).
[57] For a description of this development, see generally PIORE AND SABLE, THE SECOND INDUSTRIAL DIVIDE (1982).
[58] Timothy J. Sturgeon, Modular Production Networks: A New American Model of Industrial Organization, 11 INDUS. & CORP. CHANGE 451 (2002).
[59] Sabel, *supra* note 49, at 4.
[60] Charles F. Sabel, *Learning by Monitoring: The Institutions of Economic Development*, *in* NEIL SMELSER AND RICHARD SWEDBERG eds., HANDBOOK OF ECONOMIC SOCIOLOGY 137 (1994).
[61] Steven J. Spear, *Just-in-Time in Practice at Toyota: Rules-in-Use for Building Self-Diagnostic, Adaptive Work Systems* 20 (Harv. Bus. Sch., Working Paper No. 02-043, 2002).

effectively codified the practice of constant monitoring and continuous improvement with respect to quality assurance.[62]

These changes in business organization have allowed firms to adapt to uncertainty caused by rapid changes in economic institutional and technological environments.[63] In contrast to more rigid manufacturing processes, in which manufacturing decisions are seen as fixed, the new system treats every arrangement as provisional.[64]

As a result of these changes in business practices, the task of the regulator has become more challenging. No longer can governments bank on consistent business practices in setting regulatory requirements. The very malleability of management practices makes it difficult to simply pinpoint the business practices for which regulation is needed. Before agencies can promulgate regulations controlling a certain type of conduct, a given practice may become outmoded. The relative decline in vertical integration strategies brought about through contracting, has given rise to more network forms of organization. As consequence of this increased flexibility in business, governments are always playing catch-up to the economy. It is not that firms necessarily evade regulatory initiatives but instead they may change their practices so frequently that regulators are often slow to catch up.[65] Within this framework, traditional command and control regulatory systems have had to change.

### C. Self-regulation Comes of Age

[62] *See* International Organization for Standardization, ISO 9000. For an interesting analysis of the broader significance of the continuous improvement philosophy, see JOHN BRAITHEWAITE AND PETER DRAHOS, GLOBAL BUSINESS REGULATION 615 (2000).
[63] MANUEL CASTELLS, RISE OF THE NETWORK SOCIETY 165 (2000).
[64] Sabel, *supra* note 49.
[65] *See e.g.,* O'Rourke, *supra* note 5 noting that the Gap, for instance, may not know which suppliers it is using at a given time.

While self-regulation has existed in a variety of forms for years (e.g. stock exchanges and the legal profession in the United States), a growing sense of the inadequacy of command and control regulation in the 1980s and 1990s led to increased attention to alternative regulatory programs. The idea was a pragmatic response to diminished resources and a realization that traditional regulation had generated unintended consequences and frequently been ineffective.[66] In the United States, the advent of the Organizational Sentencing Guidelines in 1991 set the stage for greater reliance on firm-level compliance as a way to leverage dwindling state resources and ensure that regulatory objectives were achieved.[67] Throughout the OECD, regulators no longer see companies purely in adversarial terms but also frequently recognize them as important partners in achieving regulatory objectives.[68]

As a result, firm-level self-regulatory measures have grown in importance. Typically compliance or management-based regulatory strategies provide incentives for firms to voluntarily implement compliance systems and sanction firms that lack such systems.[69] While the approaches taken differ between jurisdictions, there is widespread agreement that declining state resources, growth in the number of regulated entities, complexity of business, and the inefficacy of traditional command and control regulation, require regulators to leverage the resources of private entities in pursuing regulatory

---

[66] IAN AYERS AND JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992).

[67] *See* U.S. Sentencing Commission, Sentencing Guidelines Manual, ch. 8 (2002).

[68] OECD, *supra* note 4.

[69] Christine Parker, *Id.* at 530. *See also* Cary Coglianese and David Lazar, *Management-Based Regulatory Strategies: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOCIETY REVIEW 691 (2003) (defining management-based regulation in terms of commands issued to firms to engage in the planning and decision-making needed to identify both technologies and performance targets needed to achieve socially desired goals).

objectives.[70] Similar considerations would seem to hold in developing countries, albeit to different extents and degrees.

In some cases, rather than focus exclusively on adherence to clear cut rules process-oriented solutions have been advocated. ISO 9000, the quality assurance standard, and ISO 14000, the environmental standard developed under the auspices of the International Organization for Standardization have proved influential in putting the management systems approach at the center of debates on regulation. These approaches afford companies greater latitude in achieving compliance: so long as they adopt the proper *processes* for addressing a particular regulatory issue, companies can satisfy regulatory requirements. Of course, this approach has its shortcomings as many observers have noted that companies can have the correct process in place while failing to achieve substantive performance criteria.

## III. Critique of Voluntary CSR from a Developmental Perspective

In light of the historical context provided above, this section undertakes a critical examination of voluntary corporate social responsibility. First, I argue that if norms such as protecting the environment or human rights are generally valued, taking a purely voluntary approach to promoting compliance with such norms will produce few results. Second, I argue that notwithstanding the presumed international dimension of CSR, control of individual business firms is generally the province of states. Third, I argue that voluntary, international CSR programs undermine development priorities of strengthening domestic governance insofar as domestic regulatory institutions fail to develop their capacities to protect their citizens. Finally, I contend that a more robust

---

[70] OECD, REDUCING THE RISK OF POLICY FAILURE: CHALLENGES FOR REGULATORY COMPLIANCE (2000); GUNTHER TEUBNER, JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTI-TRUST, AND SOCIAL WELFARE LAW (1987).

model of regulation complements efforts to transcend the neoliberal model of the state by positing a positive role for the state in driving economic development.

### A. Generating Compliance: The Limitations of CSR

The best argument that voluntary CSR proponents advance as the means of generating compliance with CSR norms is based on economic incentives. For the most part, these economic incentives and disincentives are linked to corporate reputation. Thus, the theory CSR proponents advance maintains that firms respond to CSR related concerns as a result of the self-interested goal of boosting their reputations with consumers, trading partners and investors. A good reputation is thought to translate into improved sales and profitability or higher stock price and a bad reputation into their opposite. With respect to the influence on sales, reputational effects would be most evident for companies having strong consumer brands. Examples include the consumer pressure brought to bear on companies such as Nike for its reportedly abusive labor practices or Shell for its failure to intercede on behalf of Ken Saro Wiwa. In the jargon of CSR, a key challenge of the movement is to exploit these "reputational drivers" effectively. Firms will act in a socially responsible manner in order to maintain positive reputations among the public, proponents argue. It is worth noting that this argument is neoclassical in substance. Unpacking the argument exposes the following logic:

(1) Firms will choose to do what is economically in their best interests.

(2) Acting in a socially responsible manner clearly inures to their economic benefit.

(3) Therefore, firms will follow social responsibility norms.

As the following analysis of regulation and compliance shows, this logic is fundamentally mistaken. If CSR was intended to correct market failure, does it make sense to rely exclusively on market forces as the solution?[71]

Even conceding that certain firms might be responsive to incentives for improved stock price or customer pressures, these factors are unlikely to generate a high level of compliance. Consumers, trading partners and shareholders may not countenance slave labor practices by firms or massive disregard for the environment such as occurred at Bhopal. Yet given the large number of companies operating in the world, the limited attention of the actors involved, and the voluntary nature of the whole arrangement, it is unlikely that companies will be driven to achieve more than a minimum of social responsibility. Most companies are simply unknown to most consumers and, as experience has shown, to the extent consumers seem to respond to these issues, they have focused on a handful of companies. Likewise, pressures of investors to promote CSR among companies is essentially limited to listed firms and in any event generate relatively low powered incentives to which companies respond by trying to avoid major scandals.

Yet there is reason to question the strong rationality assumptions that CSR proponents attribute to firms. It is not self-evident that even if the posited incentives exist, firms will necessarily choose to act upon them. Indeed, this assumption is itself neoclassical in nature. The evolutionary tradition in economics and the related field of

---

[71] In this respect, CSR deviates substantially from the understanding of what regulation involves. *See* TONY PROSSER, LAW AND THE REGULATORS (1997) (noting that major role of regulators is to create and police markets where they would not arise or do so spontaneously). Faced with this fact, CSR advocates could contend that CSR is not designed to address market failure. As such, CSR could then cede any responsibility for remedying market failure to regulatory bodies. Yet, because there appears to be little of substance to distinguish CSR's relevant areas of concern from those of traditional regulation, there would then seem to be minimal territory for which CSR could claim exclusivity.

capabilities theory have supplemented the neoclassical view by exploring limitations on profit maximizing behavior. Nelson and Winter have argued convincingly that rather than maximize profits at every stage, firms are profit seeking.[72] Existing paths and the results of intrafirm "truces" may persuade many employees to leave well enough alone.[73]

In summary, there is reason to believe that serious flaws are involved with any CSR initiative that relies almost exclusively on market forces to drive firm adoption. Although discussions of CSR have tended to view them as without historical parallel, this is certainly not the case. Studies of organizational compliance are well advanced and bear intrinsically on the question of what public policy actors can do to induce firm compliance with particular norms. Of particular relevance are socio-legal studies and comparative analyses of organizational compliance in OECD countries.

As recognized by many regulatory scholars, there are four types of companies with which regulators have to deal.[74] Those who know the law and are willing to follow it (Group A), those who don't know the law but would like to be law abiding (Group B), those who know the law and don't want to follow it (Group C) and those who don't know the law and don't wish to be law abiding (Group D). Most CSR literature does not even reflect these basics. As this analysis suggests, Group A firms are willing to comply on intrinsic grounds. Yet for CSR proponents, it seems that it is precisely Group A that represents its greatest source of support. Surely CSR must be more ambitious than seeking to ensure that the good continue to be good.

---

[72] RICHARD R. NELSON AND SIDNEY G. WINTER, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE 31 (1982).
[73] *Id.* at 110.
[74] BALDWIN AND CAVE, *supra* note 19, at 101-2; BRAITHWAITE AND AYRES, *supra* note 66, at 19.

The most convincing argument in favor of voluntary CSR strategies concerns Group B firms. In this case, CSR can serve an educational purpose. The precise limits of CSR are visible with respect to companies in Groups C and D. On this logic, CSR proponents contend that Group C and D firms should follow CSR norms because it is economically rational to do so. To these proponents, I ask: as rational economic actors, why aren't they already doing it? Bounded rationality can be the only answer. Indeed, bounded rationality may explain the move towards CSR by Group B firms. Yet if Group C and D firms, after having been shown the error of their ways by CSR campaigners, have not acted, can one still rely on bounded rationality to explain their behavior? Could it be that there are good, countervailing economic reasons to explain the socially irresponsible behavior of these firms?

A wide range of compliance literature supports these arguments. Generally it shows that voluntary standards are not self-enforcing. Firm compliance decisions are not solely responsive to the threat of sanction, however, some form of sanction is an essential element to firms' willingness comply.[75] In competitive markets without the risk of sanction, the likelihood of opportunism by firms goes way up.[76] One of the leading

---

[75] OECD, VOLUNTARY APPROACHES FOR ENVIRONMENTAL POLICY 86 (2003) ("Binding approaches are more likely to be environmentally effective than non-binding approaches – if non-compliance does not trigger any sanctions, any environmental improvements would have to rely on strong commercial/strategic interests of firms"); Alan Carovan, Supervision at the Micro Level: Do Disclosure-Based Regimes Work? *in* THE FUTURE OF DOMESTIC CAPITAL MARKETS IN DEVELOPING COUNTRIES, at 153 (Litan et al. eds., 2003) (arguing that credible threat of enforcement is needed to ensure that disclosure based regulatory regimes work).

[76] Experience with the OECD Convention against Bribery of Foreign Officials in Connection with International Business Transactions should be sufficient to cast serious doubt on the most optimistic advocates of CSR. The 1997 OECD Convention was signed and ratified by 35 OECD member and non-member states. To date, other than a handful of prosecutions in the United States, which had enacted a predecessor law, the Foreign Corrupt Practices Act in 1977, none of the other 34 signatories has undertaken a prosecution. Peter Eigen, *Multinationals' Bribery Goes Unpunished*, INT'L HERALD TRIBUNE, November 12, 2002. Nor does it appear that states have actively taken an interest in investigating allegations of bribery. Of 20 allegations of bribery involving United Kingdom companies or citizens, only two are under formal investigation. Moreover, the UK has failed to provide assistance to the Nigerian government

proposals for management-based regulation advanced by Ayers and Braithewaite recognizes this fact explicitly. They call not for voluntary self-regulation as a stand-alone solution, but instead as part of a system of governmentally-enforced self-regulation.[77] They reason that firms must have discretion to determine appropriate means of achieving regulatory goals but that government must oversee and enforce relevant standards, particularly in dealing with less cooperative firms.

In contrast to CSR discussions in which reputational advantage is the dominant driver, research has helped conceptualize compliance in terms of a dynamic process. Bridget Hutter conceptualizes compliance as an outgrowth of a long standing relationship and series of interactions between the regulated firm and regulators.[78] From this perspective, one can say that firms have an enforcement "career", meaning, an ongoing relationship between the firm and the regulator.[79] "Enforcement officials interpret, classify, and test the regulated and act accordingly," she writes.[80] Consistent with the notion of graduated enforcement pyramids developed by Braithwaite and Ayers, as this regulatory career unfolds, the regulator can gradually ratchet up coercion in the event that

---

seeking to recover $1.3 billion in state funds deposited in 23 UK banks by the Abacha regime. Susan Hawley and Andrew Phillips, *Bribery Begins at Home*, THE GUARDIAN, 6 October 2004. The lack of prosecutions perhaps explains the view of 60 percent of German firms surveyed that the risk of corruption was "of no real significance" and therefore changing management practices were not necessary. Jimmy Burns, *Laws Fail to Halt international Business Bribery*, FIN. TIMES, October 14, 2002. Similar views were found in another survey by the investment firm Friends Ivory & Sime. According to their findings, "a large proportion [of companies surveyed] appears to have inadequate policies and implementation mechanisms." The Economist, *The Short Arm of the Law*, 28 Feb. 2002. Moreover, the Economist contends that while "a few" multinationals have taken steps to eliminate bribery, many more "have merely pretended to stamp it out." As logic would dictate, because the threat of prosecution remains illusory in most OECD jurisdictions, bribery by firms continues unabated and many firms have failed to change internal policies and procedures to prevent bribery from occurring.

[77] AYERS AND BRAITHWAITE, *supra* note 66. *See also* Christine Parker, *Reinventing Regulation within the Corporation: Compliance-oriented Regulatory Innovation*, 32 ADMIN. & SOC. 529 (2000) (conceptualizing regulatory compliance in terms of persuasion, education, and cooperation followed by sanction for failure to implement compliance systems).

[78] BRIDGET HUTTER, COMPLIANCE: REGULATION AND ENVIRONMENT 195 (1997).

[79] Id.

[80] Id.

the regulated firm fails to comply.[81] This view does not assume that coercion *must* be used but rather it recognizes that achieving something more than compliance among the willing requires an array of instruments and regulatory authorities with historical and on-going knowledge of the entities they regulate.[82] In other words, voluntary compliance may occur spontaneously but any serious discussion of compliance with a given regulatory regime requires some reference to enforcement tools as well.[83] Indeed, the very notion of voluntary compliance posited by Ayers and Braithwaite contends that the coercive power of the regulator is essential to generating voluntary compliance.[84]

Sophisticated public policies reflect this realistic understanding of the place of sanctions in any regulatory regime. One innovative approach to assessing the likelihood that regulatory compliance will occur was developed by the Ministry of Justice and Erasmus University in the Netherlands. They produced a Table of Eleven (T11) key determinants of compliance that effectively synthesized much of the learning around the topic.[85] What this framework shows is that the factors driving compliance decisions are multifaceted and complex. The T11 indicators break down the analysis into three aspects: (1) spontaneous compliance dimensions (i.e. those that generate voluntary compliance), (2) control dimensions (factors based on the likelihood of enforcement as drivers of the compliance decision), and (3) sanctions dimensions.

Consistent with the earlier discussion of Group A and B firms, most CSR compliance can be attributed to spontaneous factors. Following the T11 analysis,

---

[81] AYERS AND BRAITHWAITE, *supra* note 66

[82] *See, e.g.*, HUTTER, *supra* note 78, at 196-205.

[83] AYRES AND BRAITHWAITE, *supra* note 66 at 19 ("strategy based totally on persuasion and self-regulation will be exploited when actors are motivated by economic rationality").

[84] *Id.* at 39 ("the key contention of this regulatory theory is that the existence of the gradients and peaks of the two enforcement pyramids channel most of the regulatory action to the base of the pyramid—in the realms of persuasion and self-regulation").

[85] ~~OECD, The State of Regulatory Compliance (1999).~~

knowledge and general acceptance of particular CSR rules or standards by firms, their normative commitment to such rules or standards, and the possibility of informal control, account for most CSR compliance.[86] Contrary to radical skeptics, the existence of these influences show that firms are not *wholly* opportunistic.

Again, this is only the beginning of the analysis. Voluntary CSR initiatives—unlike binding state-imposed regulations--can rely *only* on these spontaneous drivers of compliance. Standing alone these considerations are insufficient. They ignore Group C and D firms and fail to take into account the fact that the phenomenon of spontaneous compliance occurs within a regulatory system that provides for sanctions for non-compliance. To deal with Group C and D firms (and to motivate A and B firms), the control and sanctions dimensions of the T11 framework are of critical importance.[87] Factors such as the control probability (T7) and detection probability (T8) reflect the fact that scrutiny of firms by regulators contributes significantly to levels of compliance. When dealing with uncooperative firms, the state's ability to devote substantial resources to such investigations is an important contributor to its success. Moreover, regulatory and law enforcement bodies can enforce their audit powers through the courts. The state can even employ the threat of enforcement as a bluffing strategy designed to push recalcitrant firms into compliance.[88] Such factors clearly influence the seriousness with which the audit is perceived by the audited firm. It is only logical that it also positively influences compliance. In contrast, private verification schemes, although more thorough

[86] The category of Cost-Benefit analysis is left out here, as I believe it is a notion that applies to all of T11 factors and influences firm decisions comprehensively.
[87] In this regard, I will only appeal to the experience of one who has represented firms subject to regulation. In this experience, the attitude of the regulated firm towards the regulator ranges from outright fear to at a minimum formal respect based on the implicit understanding of the powers they hold to make one's life miserable.
[88] HUTTER, *supra* note 78, at 216.

than self-reporting systems, do not permit auditors an unlimited amount of time. Without anyone mandating the audit, the incentives of the firms undergoing audit to limit the costs of the endeavor by reducing its duration are great.

Finally, sanctions regulators possess extend beyond direct economic penalties. They can issue warnings, suspend licenses of firms or their agents, deny permits, issue injunctions, and increase the frequency of inspections. As suggested by the enforcement pyramid approach of Ayres and Braithewaite, regulatory and enforcement bodies can adjust their actions in response to behavior of the regulated community. Serious economic consequences follow from the state's use of any of these powers against particular firms. In contrast, CSR initiatives must rely on the power of reputational risks, which have only an indirect or uncertain cost element, as disincentives.

### C. Regulating Firms is a State Function

Despite an increase in international commerce and law-making, regulation remains state based.[89] On a general level, voluntary CSR initiatives seek to create an international regulatory framework that applies directly to firms, thereby bypassing the state. In light of the constraints on state expenditures arising from pressures of international financial institutions and global capital markets, this attempt to regulate from above is understandable. As a matter of regulatory and development policy, however, it is mistaken.

States occupy a privileged position in connection with regulatory activities.[90] Much attention has been given to state activity in shaping the substance of international law through international fora, but along the way the central role of state-based regulation

[89] DAY WALLACE, *supra* note 10.
[90] This statement may sound platitudinous, but given CSR discourse it seems necessary to make it explicit.

in the process of controlling economic activity has become obscured. Hirst and Thompson put it well when they describe the state as the "locus of governance in a galaxy of increasingly interlinked institutions of governance above and below it."[91] In one sense, state-level regulatory systems constitute that locus.[92] Only states can undertake the necessary work to ensure that international norms to which they have bound themselves in international fora are respected in their territories.

International fora produce norms that by their very nature are generalizable across a variety of jurisdictions. Cosmopolitan democracy[93] remains a valid concept when it comes to defining generally agreed norms but cannot do the heavy lifting required to regulate locally, something that must occur through local deliberative democratic processes. Moreover, regulation of firms is in its essence particularistic. It is something states are uniquely able to do.

Only states have the knowledge necessary to regulate industries operating within their territories. They incorporate firms, whether as subsidiaries of multinationals or domestic firms. Regulatory personnel at the state level have intimate knowledge of the

---

[91] HIRST AND THOMPSON, GLOBALIZATION IN QUESTION: THE INTERNATIONAL ECONOMY AND THE POSSIBILITIES OF GOVERNANCE (1996).

[92] Part of the reason that the role of the state has been obscured in recent law and policy literature on corporate social responsibility issues arises from recent trends in international relations scholarship. An important strand originating from the field of international political economy in particular, has been a focus on matters of globalization and the transformation of contemporary governance that occurs under conditions of globalization. *See, e.g.,* Nicola Phillips, *State Debates in International Political Economy*, in GLOBALIZING INTERNATIONAL POLITICAL ECONOMY (2005). One school of thought, what some have called "hyperglobalist" has been particularly influential. It views globalization as "an inexorable, encompassing and irreversible process of global integration which heralded the obsolescence of "national" entities, not only states but also economies, societies, systems of regulation, modes of governance and so on." *Id.* Another school of thought centers on the importance of non-state actors in global governance. *See generally,* A. CLAIRE CUTLER, VIRGINIA HAUFLER AND TONY PORTER, PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (1999). According to these authors, "private authority can have structuring effects that are quite comparable to those of public authority in terms of their significance for citizens more generally." *Id.* at 369. Both strands of the debate, while identifying some important elements in international political economy today, have discounted the role of the state too severely. For additional arguments consistent with this position, see generally, WEISS, *supra* note 14.

[93] *See* DAVID HELD, PROSPECTS FOR DEMOCRACY 37-44 (1993).

regulatory framework existing in their jurisdictions. They understand the strengths and weaknesses of domestic regulatory capacity. Likewise, they can assess the relative need for self-regulatory measures versus traditional command and control regulation, for instance. Practically speaking, structures to facilitate the participation of the public in setting standards that concern matters of CSR can and should grow out of the state.

In comparison to voluntary CSR measures, which at best offer spotty coverage of firms and industries, states regulate comprehensively.[94] An environmental law, for instance, applies to all firms of a certain size. Health and safety laws apply to all firms operating certain types of facilities. CSR measures cannot claim the same degree of coverage. Indeed, they generally apply to only a subset of (self-selecting) firms. They may target only firms in certain industries or those which agree to participate in a given program. The poverty of their coverage makes the rationale for the existence of CSR initiatives—states' lack of regulatory capacity—ring hollow.

States also act in ways that have direct monetary incentive or disincentive effects. This power is most evident with respect to fiscal matters. States can, for instance, tax firms that pollute excessively, for example. Compared to reputational effects, which may indirectly harm corporate profits, the use of fiscal powers can reduce or increase profits directly, thus constituting a potentially high powered incentive device. In contrast to the massive array of financial incentives with which states can further or impede socially responsible behavior, CSR appears to lack much horsepower.

[94] The voluntary nature of CSR measures necessarily implies that they are less comprehensive than state regulation, as they rely on the "enlightened self-interest of companies" to pursue action in support of their goals. In fact, prefaces to both the UN Global Compact and the OECD Guidelines state that they are not regulatory instruments; *see generally From Red Tape to Road Signs* (Core Coalition 2004) *available at* http://www.corporate-responsibility.org (referring to the RAID, SOMO, and OECD Watch August 2004 *Review of the National Contact Points for the OECD Guidelines, for the period of June 2003-June 2004,* stating that application of OECD Guidelines on Multinational Enterprise, UN Global Compact, and other voluntary CSR initiatives has been patchy at best).

### D. Learning to Regulate (and Govern)

At their core, arguments promoting voluntary standards over regulation in developing countries rest on utilitarian or pragmatic justifications. Proponents reason that many states are unable to fulfill their obligations to enforce international or domestic legal norms and thus the international community must create some alternative system to prevent inappropriate practices from occurring. This pragmatic justification places all of the value to society of adherence to these norms on the outcomes that follow and thus ignores the social gains realized in the process of achieving those results. In other words, how society comes to adhere to particular norms generates social goods distinguishable from the outcomes. Such a process is particularly important for struggling democracies and emerging market economies.

In many developing countries, state structures are weak.[95] Regulators who are resource strapped lack the ability or means to ensure that rules are followed. Poor enforcement authorities, such as justice ministries, hinder vigorous litigation. Corruption distorts state functions. Despite the prevalence of these phenomena, it is safe to say that in many developing countries, attempts to improve the functioning of the state are on-going. But reforms do not occur in a vacuum. For reforms of the state to take hold, the state must take tangible actions to address concerns of the society.[96] The enforcement of norms relating to corporate social responsibility thus constitutes an important part of the development of the state alongside the development of the market.

---

[95] PAUL OCHEJE, A "RIGHTS" APPROACH TO GOVERNANCE IN AFRICA, IN LEGITIMATE GOVERNANCE IN AFRICA: INTERNATIONAL AND DOMESTIC LEGAL PERSPECTIVES 169 (1999) ("evidence of the weakness of the African state abounds").

[96] See *A More Secure World: Our Shared Responsibility*, Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change (United Nations 2004) (recognizing that states are the front-line actors in dealing with various threats to international security, including threats to economic development).

By developing their capacity to regulate economic activity and harmful corporate conduct, states gain needed knowledge. Initial enforcement actions and prosecutions of corporations may be difficult and challenging but by going through the process, enforcement personnel learn two things: first, that it can be done, and, second, the techniques and challenges involved in holding firms to account for their actions. Overall state capacity improves as a result of these efforts.

With successful enforcement efforts comes improved public esteem. State actors and enforcement bodies gain credibility in the eyes of the public and build the reputations of the responsible institutions. As state institutions are seen to be effective, regulatory legitimacy is enhanced.[97] In this sense, command and control regulatory systems so frequently disparaged among regulatory scholars today, may, through their bright line rules and clear enforcement practices, positively influence the public's perception of the state's legitimacy.[98] Moreover, the benefits of strong regulatory legitimacy strengthen both the state and the market. Unless the development of state capacity occurs in tandem with the development of the market, it becomes more likely that the weakness of the former will jeopardize the latter.

Alternatively, if the state shows itself to be ineffective in controlling market actors, then the state may come under attack. Angered by incompetence or lack of vigor in the executive, citizens may demand more. For regulation and, more broadly, governance to improve in many developing states, the conditions for effective redress and

---

[97] BALDWIN AND CAVE, *supra* note 19, at 35.
[98] *Id.*

communication between state and citizen must be strengthened.[99] Perpetuating the existing system of elite dominance can only retard the development process.

Strengthening these conditions involves the generation of local knowledge on what is the preferred way to control corporations in particular jurisdictions. Different jurisdictions will experience different labor practices, different production practices, and different incentive schemes. Different tax structures may enable regulators to provide incentives or disincentives that are unique to a jurisdiction. Different corporation laws may facilitate the imposition of sanctions designed to correspond to prevailing organizational structures in a jurisdiction. Different civil and criminal procedure laws may make it more or less likely that actions can be successfully brought or defended. Different licensing regimes may give regulators tools with which to control firm behavior that are unique to a jurisdiction.

Likewise, regulatory institutions learn to regulate better by gaining an improved understanding of the firms within their jurisdiction.[100] To the extent that regulators develop deeper knowledge of firm histories in their jurisdiction, they can better determine what regulatory techniques to apply. States--not private auditing firms, NGOs making an occasional visit to a country, or the press--are best equipped to distinguish cooperative from uncooperative firms and regulate accordingly.[101]

The learning that occurs within regulatory and enforcement bodies is not consigned to each institution standing alone. Such bodies can share practical experience horizontally. As it becomes understood that one method of dealing with violators works

---

[99] OCHEJIE, *supra* note 95, at 171.
[100] This effect should be presumably more dramatic among regulators that have decentralized their operations.
[101] *Cf.* STEPHEN BREYER, REGULATION AND ITS REFORM (1982).

better than another, knowledge can be shared across agencies. An environmental agency may share useful experience with an occupational health and safety regulator that improves practice in the latter, for example. Good knowledge dissemination practices with respect to regulation and enforcement may improve the state of public management overall.

Nor is learning confined to regulatory institutions. The process of defining and developing a legal understanding about law and regulations designed to implement CSR norms concerning the environment, labor or human rights domestically, enriches countries' legal systems. States implementing statutory or regulatory provisions related to CSR, can tailor their enactments to the practice of their legal systems overall while responding to the views of their citizens in determining an acceptable level of rigor of such provisions. Under conditions of scarce resources, the state must ensure coordination of regulatory priorities with broader development agendas. Moreover, after the enactment of relevant norms, courts and administrative tribunals can then develop doctrine and case law that ensures the compatibility between such norms and domestic systems. Through legislative and judicial activity, domestic actors know whom to turn to if dissatisfied. National debates can occur relating to the best way of regulating negative labor or environmental practices. Likewise, courts can explore and work out national positions on the line between nuisance and environmental harm or tort and human rights violations. By rooting CSR provisions in domestic legal systems, countries may organically tie such provisions to their shared experiences and hopes.

The view that states must exercise regulatory power within their jurisdictions over CSR matters does not limit them to command and control regulation. States may opt to develop structures in which management system standards or other more flexible regulatory structures are built into existing systems. Even states that have endorsed specific non-governmental standards, such as ISO 14000, have retained their power to regulate. Rather than exempting ISO 14000 certified firms from all forms of environmental regulation, for instance, certified firms may qualify for less intrusive or less frequent inspections or receive favorable treatment in enforcement and settlement proceedings.[102] Yet the decision as to whether such matters ought best be left to wholly self-regulatory initiatives, if ever justified, must undergo much closer scrutiny in states struggling to assert their power and establish their legitimacy.

For these reasons, the expansion of voluntary CSR regimes that sidestep state institutions creates significant problems for developing countries. Even assuming that such initiatives can deliver the social goods, they leave state institutions no better off. Indeed, to the extent that regulation of the economy comes to be seen as something that non-state actors accomplish, the priority of building regulatory capacity in already fragile African states will be underemphasized. As their markets develop, the gap between the states' abilities to oversee the market and actual market activity will only widen. Under these conditions, if voluntary initiatives, even the more rigorous ones, leave social conditions unimproved, the posited shortfall in state regulatory capacity will become of even greater concern.

### E. Beyond Economic Orthodoxy

[102] For some of the difficulties involved in state sanctioning of private standards, see Errol E. Meideiger, *Environmental Certification Programs and U.S. Environmental Law: Closer than You May Think*, 31 ELR 10162, 10166 (2001) ("The most obvious means of incorporating certification into law is for an authoritative legal body to require that firms operating within its jurisdiction to be certified").

The call to put the state back in the center of private sector regulation is only one part of the call to overcome the most pernicious applications of economic orthodoxy. Rather than stand by as mere passive observers of the development process as implicitly or even explicitly favored by neoliberals, states must develop their capacities to foster development in strategic and intelligent ways. Turning over power to control (i.e. regulate) socially harmful practices to the private sector through CSR initiatives, effectively undermines the development of state capacity not only to regulate but also expand the domestic economy and mitigate social harms.[103]

The history of neoliberalism is a history that casts state intervention in the economy as an essential evil to be avoided. Yet continuing declines in economic growth rates in African states even after neoliberal reforms suggests that development policy that looks exclusively to the private sector may be misdirected. As the International Monetary Fund (IMF) and World Bank are forced to reconsider the approach to structural adjustment, a new understanding of the role of the state and the need for more flexibility in economic policy is emerging.[104] Heterodox economists like Robert Wade and Joseph Stieglitz have made compelling arguments for a larger role of the state in economic development. From this perspective, notwithstanding the failure of certain state-led development policies, such as import substitution, the state is viewed as an important catalyst for growth.[105] The state is thus not merely the source of the "rules of the game"

---

[103] *See* George Parker, *Hungary can hold to its eurozone course, says new Prime Minister*, FIN. TIMES, 23 October 2004. In this article, the Prime Minister of Hungary is quoted as saying that "We have got 700,000 people out of 10m who don't have enough money to eat one decent meal a day...you can't tell them to take responsibility for their own welfare, that the state doesn't have a role." *Id.*

[104] See, e.g., IMF Independent Evaluation Office, *Evaluation of the IMF's Role in Poverty Reduction Strategy Papers and the Poverty Reduction and Growth Facility* (2004).

[105] *See* ATUL KOHLI, STATE-DIRECTED DEVELOPMENT: POLITICAL POWER AND INDUSTRIALIZATION IN THE GLOBAL PERIPHERY (2004) ("there is a stunning lack of evidence for the proposition that less government facilitates more rapid industrialization in the developing world....On the contrary, the evidence shows that

after which point it must get out of the way. Viewed in this context, voluntary CSR appears lost in the wilderness. At its core CSR posits a central role for non-state, voluntary approaches to regulation in relevant fields. An improved economic understanding of the role of the state versus the market sees the need for a strong state capable of investing to promote growth rather than a weak state buttressed by regulatory forces that operate independent of its authority. Promotion of economic growth as well as the reduction of negative externalities can only happen through strong state institutions.

If it is true that the neoliberal critique of the state has been behind the rise of voluntary CSR initiatives and to the extent that development experience now suggests that this critique has been oversold, one cannot consider voluntary CSR without first rethinking the view of the state. That role involves designing regulatory policy in harmony with economic and development policy. A precondition for the state playing a role in promoting economic development is improved state capacity. In departing from neoliberalism—both in its anti-Keynesian and liberalization phases—CSR begins to appear less compelling. If a greater role for the state is accepted—particularly in developing countries—there is no longer a need to accept the enfeebled solution of

---

state intervention aimed at boosting investor profitability is strongly associated with rapid industrialization"). Kohli's work is, to my knowledge, the latest and most nuanced analysis of the role of the state in economic development. As such, his work responds to and validates some of the central findings of Robert Wade. *See generally*, ROBERT WADE, GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION (1990). Likewise, Dani Rodrik has been a vocal spokesperson for the role of the state in catalyzing economic development. *See* DANI RODRIK, ed., IN SEARCH OF PROSPERITY: ANALYTIC NARRATIVES ON ECONOMIC GROWTH (2003). Of particular relevance to countering conventional economic wisdom, Rodrik finds that state involvement in the economy has not been incompatible with growth. As research on cross-national comparisons of development trajectories expands, those calling for unbending application of market liberalization measures will find less empirical footing.

voluntarism but instead we may look towards a revitalized state that can advance development that is just and vigorous.

## V. Examples of Alternatives: African Cases

The critique offered in the previous section proceeded on a general level. The following section sets out some specific examples of how state regulatory and enforcement authorities in African states can work to develop strong responses to societal needs. The first seeks to show the value of state anti-corruption enforcement. This case illustrates how building state capacity can enable states to confront socially irresponsible corporate conduct. The second concerns a more technical matter involving efforts of state regulators to coordinate their regulatory approaches and ensure equitable treatment in international negotiations. In keeping with the developmentalist view advanced in this paper, these initiatives speak to the challenges involved in creating functioning regulatory and enforcement systems rather than suggest that ambitions have been categorically achieved.

### A. Lesotho High Water Dam Prosecutions

In 1999, the Attorney General of Lesotho charged a former chief executive of the Lesotho Highlands Water Project (LHWP) with accepting $2 million in bribes from international companies over ten years.[106] Sponsored by the World Bank, the European Union, and the European Investment Bank, the LHWP is Africa's largest dam project ever, intended to supply South Africa with water and Lesotho with electricity. The Lesotho courts found the former official guilty on thirteen counts of bribery linked to the LHWP and sentenced him to twelve years in prison.[107] After his conviction, more than a

---

[106] David Greybe, *Official faces charges over R12 million bribes*, BUS. DAY (Johannesburg), July 29, 1999.
[107] News24.com, *Highlands CEO to jail for bribe*, June 4, 2002.

dozen European and North American construction companies were also named in the scandal.[108]

Among the firms named were Germany's Lahmeyer International GmbH (owned by RWE). Lahmeyer was charged on twelve counts of bribery and convicted of seven.[109] It was fined approximately $1.6 million. On appeal these counts were all sustained and the fines were increased to approximately $2 million. Similarly, Canada's Acres International was convicted of two counts of bribery and succeeded in having one count overturned on appeal. It was fined approximately $2 million for its actions. In addition to these prosecutions, the French firm, Schneider International, pled guilty and was fined $1.6 million for its involvement. Finally, an agent of an Italian member of the consortium Impreglio, pled guilty to arranging to bribe the chief executive of the project. These actions represent "the first time that courts in a developing country have convicted an international company for paying bribes rather than just prosecuting a local official for taking bribes."[110]

By all accounts, the resources required to conduct a prosecution of this magnitude were substantial.[111] The litigants were located all over the world. Tracing the proceeds of the bribes required judicial cooperation with jurisdictions including Switzerland. Aside from Switzerland, most other OECD countries and the EU failed to support these prosecutions.[112] More strangely, none of the project sponsors were willing to offset the costs of the prosecutions.[113] Moreover, because the project was set up as a corporation

---

[108] Id.
[109] C of A (CRI) 6 of 2002 (Lesotho).
[110] Peter Eigen, *supra* note 76.
[111] Testimony of Guido Pelzhorn, U.S. Senate Foreign Relations Committee, July 21, 2004, at 7.
[112] *Id.* at 7.
[113] The World Bank did subsequently blacklist Acres International from any business for three years.

separate from the state, the Lesotho government had no recourse to any funds held by the corporation to offset its costs. South Africa had considered offsetting some of the expenses, however, to date this offer has apparently not been fulfilled. The United States provided some assistance in the form of computers and Westlaw access established in the law library in the Court of Appeals building.[114]

Notwithstanding these impediments, the Lesotho courts performed well. According to judges on the Courts of Appeals and High Court, the difficulty involved in coming to terms with large legal teams assembled by the firms under indictment was significant.[115] The dedication of time and resources for a small country such as Lesotho was also considerable. Demonstrating the commitment of the government, this poor country facing an HIV/AIDS epidemic had to commit resources to this case that could have been used elsewhere.[116] Judges from other jurisdictions and practitioners provided assistance to the judiciary and attorney general's office.[117] To maximize judicial resources, one judge was assigned to the cases full time. The noticeable pride of those involved in the trials was that they had launched a major prosecution on a matter of principle. In the words of a former South African judge, the Lesotho prosecuting authorities "set an example of good governance, and have delivered a blow on behalf of all countries who face major challenges in strengthening their infrastructure through project activity."[118] It is a victory for the rule of law that a country like Lesotho was able

---

[114] Discussions with staff of the library and U.S. Ambassador.
[115] Conversations of author with Chief Justice in January 2004.
[116] Pelzhorn, *supra* note 111.
[117] Indeed, the chief prosecutor was a South African attorney, Guido Pelzhorn.
[118] Southern Africa Documentation and Cooperation Center, *Lesotho: Courts Send Strong Messages on Corruption re Highland Water Project*, August 25, 2003.

to break through international banking secrecy in just over a year and make a successful case against some of the world's largest and most powerful contractors.

### B. Forest Law Enforcement and Governance in Cameroon

The Africa Forest Law Enforcement and Governance (AFLEG) initiative serves as a clear instance where the international community has chosen the route of enhancing regulation and enforcement as opposed to voluntary CSR in addressing significant risks to the environment. After holding a summit in Yaounde in 1999, the states in Western Congo Basin held a summit in 1999 designed to ensure that forests remained a renewable resource and able to ensure biodiversity. Later Ministers from some of these countries indicated their interest in focusing on forest law enforcement and governance issues. From these beginnings, the AFLEG initiative was launched under the auspices of the New Partnership for African Development (NEPAD) as a way of strengthening a high level commitment to build capacity for forest law enforcement, in particular relating to illegal logging and hunting, associated trade, and corruption.[119] Because the ministerial-level focus of AFLEG proceeds at a fairly high level of generality and encompasses a number of states, I will focus on the experience of one of the participating AFLEG states, Cameroon, which has taken substantial steps in developing its forest protection efforts.

Timber is the second biggest export in Cameroon. As an effort to improve the efficiency of the timber industry, increase tax compliance by logging firms, and improve the welfare of local and indigenous peoples through community involvement in forest management, Cameroon enacted the Forest Act of 1994 (the "Act").[120] The Act came

---

[119] Institution for International Sustainable Development, *Sustainable Developments* (2003) available at http://www.iisd.ca/download/asc/sd/sdvol60num3e.txt.
[120] The focus on timber as the rationale for the Act contrasts with the experience of other jurisdictions, like Nepal and India, where forest management is concerned with matters of subsistence. RURAL DEVELOPMENT

into existence in part through the World Bank making it a matter of conditionality, but required additional efforts lasting approximately five years for it to become implemented.[121] Because of its focus on preserving forests as a source of an economically important resource, the Act combines concern for the environment with broader development priorities.[122]

The Ministry of Environment and Forests administers the Act through the Central Control Unit (CCU). The law initiates a decentralized program of forest management. Local communities were given the right to manage up to 5000 hectares of forest on a 25 year rotation pursuant to a management plan. Communities incur expenses for filing the plans but then reap royalties in the form of leases to logging companies. Taxes assessed on the central government level for forest activities were also shared with local communities. Private firms must obtain Forest Management Units that entitle them to log over a given area for a specified period, subject to regeneration requirements.[123]

The CCU monitors compliance with the Act through field inspections. After substantial evidence of corruption and irregularities in the forestry sector, the international NGO, Global Witness, was invited by the Government of Cameroon in 2000 to work alongside the CCU inspectors and other Ministry departments to provide independent observation.[124] In addition to providing this independent verification, Global Witness acts to build capacity among the inspectorate. It publishes periodic reports

---

FORESTRY NETWORK, COMMUNITY FORESTRY: FACING UP TO THE CHALLENGE 6 (July 2001). *See also* Global Witness, *Forest Law Enforcement and Governance in Cameroon: Second Summary Report of Independent Observer* December 2001-June 2003 at 3 (2003).

[121] RURAL DEVELOPMENT FORESTRY NETWORK, *supra* note 120, at 4.

[122] Presentation by Timothe Fomete, *Forests and Democratic Development in Cameroon*, available at http://www.odi.org.uk/speeches/envgov2002/meeting2.html.

[123] Global Witness, *supra* note 120, at 2.

[124] Interview with Global Witness 5 October 2004. According to the staff person interviewed, the government made this invitation under pressure from the UK and the World Bank.

detailing compliance with the law, practices of the inspectors including failure to sanction observed violations.

On the positive side, according to the Independent Observation reports issued by Global Witness, since the system of independent observation began, the issuance of official statements and prosecutions for illegal logging have increased.[125] As a result of program of law enforcement and independent monitoring, significant illegal logging practices are more exposed in Cameroon than in neighboring countries.[126] On the negative side, Global Witness has also exposed cases involving non-transparent or apparently corrupt practices by the Ministry, evidenced by the lack of scrutiny over permit violations by certain private firms.[127] The Ministry has also appeared reluctant to issue official statements regarding offenses and appears lethargic and non-transparent regarding fines.[128] Likewise, the standards for documenting detected infractions appear inadequate for judicial proceedings and CCU personnel undertake the inspection missions with inadequate preparation.[129] Global Witness recommends a program of training to build capacity within the institution.

The lesson of the Cameroon process is that through sustained involvement of the international community, including bilateral and multilateral donors and the NGO sector, local law and enforcement capacity can be enhanced. The Cameroon forestry initiative has not been without its critics. In particular, the extent to which community-based governance approach has actually worked is a matter of great contention. As the Global Witness review suggests, problems of corruption and competence undermine the

---

[125] Global Witness, *supra* note 120 at 3 (2003).
[126] *Id.* at 4.
[127] *Id.* at 9.
[128] *Id.* at 12.
[129] *Id.* at 9.

effectiveness of the CCU.[130] But analysis suggests that there is cause for optimism. In the words of one observer, the shortcomings may be attributed to "growing pains" as the state comes to terms with administering the new law. To development professionals working with state governing and legal institutions, the challenges Cameroon faces are familiar. Having already created a workable legislative framework, it must prevent corrupt practices from infecting its inspection function, develop enforcement capacity, prosecute cases to conclusion, and improve its competence in carrying out its oversight functions. Meeting those challenges could make Cameroon an example for the Congo Basin region.[131]

## VI. Conclusion

The notion that states should defer to international voluntary CSR initiatives as a way of regulating important aspects of their economies, in such areas as labor, human rights, and the environment, assumes erroneously that states will not need to develop this capacity.[132] To the contrary, globalization of production and trade is unlikely to stop in our lifetimes. States need to develop the relevant capacity sooner rather than later.

The AFLEG initiative and Cameroonian efforts to enhance traditional state regulatory and enforcement capacity rather than advance some sort of voluntary CSR approach targeted at MNCs may be indicative of the international community's desire to develop a rigorous response to the issue of forest conservation. If this conclusion is indeed true, then there may be reason to conclude that the matters taken up by voluntary CSR programs simply do not enjoy the degree of political support needed to get serious

---

[130] *Id.* at 9.
[131] *Id.* at 4.
[132] *See* Peter Leigh Taylor, *In the Market But not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change*, WORLD DEV. Vol. 33, Issue 1, at 129-147 (January 2005) (highlighting the importance of governance in connection with voluntary market reform mechanisms).

about the issues. Viewed in this way, voluntary CSR is a sort of pragmatic compromise while the international community weighs the need to take more forceful action. Unfortunately, rather than take a developmentalist approach—viewing these programs as transitional efforts on the way to more rigorous domestic regulation over CSR matters—the discourse surrounding voluntary CSR employs the same broad brush optimism that characterized Utopian visions in the past. Dropping down from universal heights, it promises straight-forward solutions that will overlay the entire international economy. On this view, all of the old rules no longer apply and, under the new rules, all of our problems will magically disappear.

Given the predominance of market economies in today's world, getting regulation right must be a priority. Voluntary measures can only play a role if basic regulatory frameworks are established. Contrary to the self-regulatory assumptions of voluntary CSR proponents, state regulation of the environment and labor rights and enforcement of human rights and anti-corruption laws, cannot be outsourced to international or private voluntary organizations. Empowerment of domestic regulators is an essential component of the struggle to realize the positive benefits of capitalist development while limiting its negative aspects. As experience with the New Economy showed, we ought to be skeptical of anyone suggesting that the rules of the game have shifted fundamentally such that the old problems are no longer problems. This article contends that despite the increasing dependence of firms in OECD countries on production based in developing countries, the challenges are the same unglamorous challenges that regulators have faced throughout the process of industrialization. Contrary to the universalistic aspirations of CSR, strengthening domestic regulatory and enforcement institutions in developing countries is messy work, involving processes of trial and error. We know the limitations but must not understate the benefits of the monopoly on coercive power held by state regulatory authorities. It is at a great peril that we cede these responsibilities to untested methods that intuition, analysis, and experience suggest are bound to fail.