How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance

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It would seem to be a relatively uncontroversial claim among scholars, activists, and policymakers that corporations are significant contributors to the shape and content of national and transnational regulation and that their contributions have significant effects on social welfare.¹ Yet, despite this general consensus, scholars have focused little attention on explicating the precise mechanisms through which corporations contribute to transnational regulation and governance or the extent to which the social welfare effects of regulation and policy may be attributable to corporate activity.²

In this Article, I suggest the broad contours of a methodology for beginning to think about the question, "How do corporations govern in the transnational arena?" In so doing, I explore how scholarly attention to the role of corporations in transnational regulation and governance can contribute to the development of a richer understanding of the functioning and effects of the existing transnational governance regime. At the same time, through an analysis of some examples drawn from twelve years of practice as a transnational business lawyer, I suggest how an understanding of transnational governance, enriched through a focus on corporate activity and decisionmaking, can expose new sites for political contestation and new strategies for intervention by regula-

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² One notable exception is John Braithwaite & Peter Drahos, Global Business Regulation (2000).
tors, policymakers, and activists seeking to harness and shape corporate power for the public good.

I. How Corporations Govern

To understand the role of corporations in transnational governance, one must start with a picture of the transnational regulatory regime. Transnational business regulation has long been understood as a complex matrix of overlapping local, national, regional, and international legal regimes. The content of these regimes is the product of a dynamic interaction between the applicable legal rules and the actions, both required and discretionary, of regulators and corporate actors. For example, the transnational regime for antitrust can be seen as the cumulation of national and regional legal rules given content by the exercise or non-exercise of territorial and extra-territorial jurisdiction by regulatory authorities and corporate competitors and of the behavior of corporate actors in relation to the activities of the regulatory authorities and competitors. In the transnational context, these actions and reactions, assertions of jurisdiction, failures or refusals to assert jurisdiction, and uncertainties about the scope of jurisdiction combine to produce moments of both clarity and doubt about the content of legal rules as well as numerous gaps and conflicts among and between the rules, regulators, and corporate actors. Who makes the rules, fills the gaps, and resolves the conflicts and ambiguities in this complex transnational regulatory arena? What is the role of corporate actors in this drama?

To explore these questions, we need a rough typology of specific modes through which corporate actors create and shape regulatory regimes. Sometimes corporations contribute through interpretations of or reactions to a legal rule scheme. Sometimes they supply rules where none exist. Sometimes they shape the rule scheme through direct political or economic pressure on regulators. Sometimes they shape it by evading the rule scheme and doing business elsewhere. Sometimes, to satisfy other business purposes, they adopt more stringent practices than the applicable rules require. Sometimes they act on their own to get a market edge or exploit an opportunity. Sometimes they act in groups to create a harmonized regulatory environment or to prevent regulation. These diverse forms of corporate actions and decisions are related to both the applicable legal rules and the acts and decisions of regulators, but they are not wholly determined by them. When corporations create or shape the content, interpretation, efficacy, or enforcement of legal regimes and, in so doing, produce effects on social welfare similar to the effects resulting from rule-making and enforcement by governments, corporate actors are engaged in governance.

II. The Corporation as Regulator

A hypothetical may help to make this typology more concrete. Imagine that a corporation, World Corp., has decided to build a new manufacturing plant in a developing country called Xambia.\(^4\) For a variety of reasons—perhaps lack of resources or to attract foreign investment—the Xambian government has not yet passed any regulations regarding the disposal of wastewater from manufacturing plants. Under the domestic law of Zutopia, the state where World Corp. is incorporated, the wastewater from the new plant would be deemed toxic and require special processing for disposal if the plant were there. However, Zutopian courts have not yet interpreted this regulatory regime to apply to the foreign operations of Zutopian companies.

How might the standards for wastewater disposal be set under such circumstances? One possibility is by way of action (or inaction) by the board of World Corp. Another might be through action (or inaction) by the governments of Xambia or Zutopia. A common way of understanding this type of situation would be to treat the actions or inactions of the governments as “governance” or “regulatory” and the actions or inactions of World Corp. as “private” or “reactive.” Yet this description does not do justice to the dynamic interconnectedness of each move and countermove by state and corporate actors. In fact, it becomes quite difficult in the transnational context to discern when the corporate actor or the regulator is “acting” or “reacting” and, thus, which is responsible for any particular regulatory outcome. Once we begin to loosen our customary view that states “act” and corporations “react,” it becomes equally difficult to attribute responsibility for the social welfare effects of the regulation to any given actor.

To flesh this out, let us focus first on the board of directors of World Corp. In deciding what level of processing to give to wastewater from World Corp.’s new plant, the board of directors would need to assess numerous factors, including the benefits versus the costs of adopting less stringent wastewater treatment processes than would be required had the plant been located in Zutopia. In making this assessment, World Corp.’s board would need to consider, among other things, the likelihood of Xambia adopting regulation raising treatment standards for wastewater after the plant was built, World Corp.’s ability to influence the content and/or the enforcement of any such regulation, the chances of liability in Xambia from other legal regimes (e.g., the tort system, employment law, rescission of the plant’s license to operate) or non-legal regimes (e.g., public protest, bad publicity, consumer revolt) in the event the disposal of untreated wastewater causes harm, and the risk that the envi-

\(^4\) In a real world context, World Corp. would likely conduct its operations in Xambia through a subsidiary, perhaps incorporated in Xambia. While this additional corporate actor would add another layer of complexity to the analysis, I do not believe it would significantly change the regulatory dynamics between World Corp., Xambia, and Zutopia. Thus, I have simplified the example to better focus attention on the dynamic interactions between corporate actors and regulators.
Environmental law of Zutopia would be interpreted to apply extraterritorially to operations in Xambia.

An attempt by the government of Xambia to regulate wastewater treatment standards might be met with one of several responses by World Corp. Applying the typology of corporate decisions and actions described above, World Corp. might: (i) acquiesce in the legal standard; (ii) seek to create or exploit ambiguity in the standard; (iii) seek to influence the content of the standard or the likelihood of its enforcement; (iv) choose a higher standard than is required for efficiency or convenience reasons; (v) ignore the standard because enforcement is weak or the consequences of non-compliance are small; or (vi) threaten to build its plant in another developing country with less stringent standards. These actual or anticipated actions by World Corp. and other corporate actors to regulation by Xambia may, in turn, produce a response by Xambia. If corporations choose not to invest in Xambia due to its regulatory scheme or if the government of Xambia believes that they will not, Xambia might change the scheme to be more amenable to (perceived or imagined) corporate demands. If corporations are voluntarily choosing higher standards than those required under current law, Xambia might raise its regulatory standards or it might rely on the corporate ordering process to do the job. Other developing nations competing with Xambia for foreign investment might alter their regulatory schemes in light of action taken in Xambia.

A similar story might be told to the extent that Zutopia, the state of incorporation of World Corp., sought to regulate the foreign operations of Zutopian corporations through the extraterritorial application of its environmental, tort, or corporate rules.

However World Corp.'s board weighs the risks and benefits of particular wastewater treatment schemes, in the absence of clearly applicable legal rules, the treatment standards for wastewater in respect of World Corp.'s new plant will be established by a decision of World Corp.'s board. To the extent that regulators in Xambia and Zutopia acquiesce in or do not react to the standards selected, one could reasonably say the wastewater rule in Xambia is established by the decisions of World Corp., together with the decisions of other similarly situated corporate actors conducting manufacturing operations in Xambia.

Even if regulators in Xambia or Zutopia do seek to establish legal standards, for all practical purposes the ability of Xambia or Zutopia to regulate will be, in part, contingent on negotiations with and the decisions of corporations like World Corp. Whether the state actors and corporate actors are sitting in a room negotiating or dealing through a more informal dance of reciprocal signaling and expectations, it would seem odd to treat the regulatory result as anything other than a joint product.

It goes without saying that the effects of these regulatory decisions, whether taken by World Corp., Xambia, or Zutopia, will extend to workers, neighbors, farmers, local flora and fauna, and perhaps neighboring countries to the extent the wastewater disposal affects shared water resources. In conditions of globalization, any attempt at regulation is just one move and not an end-
game. Actions, reactions, and inactions by all players in the system must be taken into account to get an accurate picture of the regime itself. Under such circumstances, if the decisions of corporate actors are indistinguishable from the decisions of state actors in terms of regulatory and social welfare effects, then treating one as "private activity" and the other as "regulatory" or "governance" activity will likely lead to more than ideological confusion. Such counterfactual characterizations may well result in significant misunderstandings about the way the transnational regulatory regime actually functions and in consequent mistakes in policymaking.

Making this point more broadly, the transnational legal order can only really be understood if we examine the ways in which "private" corporate action (or inaction) and "public" regulatory action (or inaction) interact to create and transform a transnational governance regime. Looking at the legal rules alone only gives us a part of the story. To get a fuller picture of global governance, we must begin to map the decisions of corporate actors as these actors actually function in and contribute to the matrix of legal rules, administrative practices, regulatory uncertainty, and jurisdictional overlap that comprise the transnational regulatory arena. Indeed, mapping the cumulative effects of these decisions may be as significant to understanding the functioning transnational regulatory regime as mapping the legal rules themselves.

Saying that corporate actors participate in transnational regulation and global governance does not imply that they constitute a singular global phenomenon. Like governments and quasi-governmental institutions, corporate actors are diverse. Sometimes corporations are large and sometimes they are small. They may be owned by many investors, by one, or by a few. Their securities may be publicly traded or privately held. They may operate in one industry or in several. They may conduct business in only one jurisdiction, in a few, or in many. Sometimes they are aggressive as to business risk and sometimes they are risk averse. Some focus on short-term gain and others on long-term value. Their operations may be flexible and mobile or fixed and geographically contained.

Intuitively, it seems reasonable to expect that the decisions of corporations would be influenced by their ownership and decisionmaking structures and business orientations. For example, a company working in a single industry or whose business is contingent on operating in a particular geographic location might take a longer term perspective with respect to engagement with regulators or maintaining the goodwill of local interests than a company with more diverse operations or more mobility. Small companies in emerging industries might prefer regulatory uncertainty to a clear, comprehensive regulatory regime that may function as a barrier to entry due to compliance costs or the influence of favored larger players. Corporate managers in privately held companies, who are generally subject to less stringent requirements for public disclosure of decisionmaking processes, might feel more freedom to take certain kinds of decisions or actions than managers in publicly traded companies who are subject to more rigorous disclosure requirements.
In other words, corporations with different types of ownership and decisionmaking structures and business orientations may well take different types of decisions as they pursue their business purposes. If we care about the governance effects of corporate power, we will need to better understand the variables that influence how that power is exercised both at the level of corporate behavior and at the level of corporate decisionmaking.

To summarize, it seems reasonable to expect that a corporation's ownership structure, decisionmaking structure, and business orientation will each be a function of its business objectives as they interact with the regulatory regimes under which the corporation is formed and managed and to which its decisions and actions are subject. The next step would be to map with much more particularity how this relationship works, in terms of its rules, structures, orientations, and effects.

To give some sense of how this type of analysis might be helpful to regulators, policymakers, and advocates, I will share some examples drawn from my experience as a transnational corporate attorney. Specifically, I will focus on two trans-boundary regulatory issues that arose when I was general counsel to an interactive media company based in Luxembourg, which I will call for our purposes, Interactive Media. To flesh out the complexity of the regulatory issues presented for Interactive Media, I will briefly describe the company and its business. I will then analyze the examples through the framework developed in this Article.

III. INTERACTIVE MEDIA

Interactive Media may well have been the world's first truly interactive media company. Its "product" was a bundle of services including Internet access, streaming video of television quality, and digital television embedded in fully interactive web pages. Customers could receive the company's service either on their home computer or on their television through a special set-top box. Using a combination of satellite technology and ordinary telephone lines, Interactive Media delivered its service to consumers across Europe from the United Kingdom and Portugal to Russia and the Republics of the former Soviet Union.

When I joined Interactive Media as its general counsel, it employed about ten people. The company had just completed its first significant financing, raising approximately $35 million. In the two years that followed, the company grew to about 150 employees and raised an additional $70 million in debt and equity financing. With the bulk of the capital going to technology development and satellite license fees, funds for operations were quite limited.

Though a small company, Interactive Media had some significant technological advantages. Among them were the company's methods for embedding streaming video in an interactive web format and for delivering very large

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5. While these examples are drawn from real events, both the name of the company and the facts have been altered to protect confidentiality and to sharpen the issues raised.
data files like music, films, novels, video, and software via satellite in perfect digital quality. Using satellite technology also enabled Interactive Media to avoid the enormous time and expense required by the company's competitors to connect homes across Europe one by one using fiber optic or television cable. Interactive Media's investment bankers estimated that the company's technological advantages put it ahead of all of its market competitors by three to five years.

With this background, we can turn to an analysis of the transnational regulatory problems the company faced.

IV. ONLINE CUSTOMER CONTRACTS

The first regulatory problem involved determining what law governed Interactive Media's standard online customer contracts. The company's product was distributed to consumers in three ways: through online registration, through sales by satellite television distributors, and through point-of-purchase sales at retail shops. All of these modes of purchase and sale required the subscribing customer to enter into an online contract to activate the service. Several factors made determining the legal framework that governed these contracts difficult.

The first issue was the geographic reach of Interactive Media's product. Interactive Media's satellite signal could be received in twenty-seven countries, and its website could be accessed from anywhere in the world via the Internet. Because there was no way to know technologically where a customer was actually located, either when entering into an online contract or receiving the service, the contract and consumer protection laws of at least twenty-seven countries were potentially implicated in the sale of the company's service. In addition, the information costs of discerning and analyzing the applicable law and regulatory policy in all these jurisdictions were prohibitively high. While the European Union (representing a subset of the total number of countries in the company's potential market) had some regulation regarding unfair contract terms and distance selling contracts, the basic contract and consumer protection law of the European Union's member states were not harmonized.

It might have been possible to solve the governing law problem for the company's online customer contract by drafting an enforceable choice of law provision. However, there was considerable variation in national choice of law rules, particularly when consumer protection issues were involved. Thus, discerning the choice of law rules and crafting a provision that would be reliably enforced in most or all jurisdictions were as complex as determining the applicable contract and consumer protection law itself.

In the end, the terms of Interactive Media's online customer contract were derived from the applicable laws of its most important target markets—Germany, Belgium, France, and the Netherlands. Not all of these countries had rules governing the enforceability of an online contract or the mechanisms for amending the contract's terms after the parties entered into it. Some did
have consumer protection statutes mandating terms to be implied into or imposed on consumer form contracts—terms such as opportunities to cancel, warranties that could not be disclaimed, and limits on permissible liability disclaimers. In addition, some strengthened the penalties for noncompliance with compulsory contract terms using provisions for refund rights and/or statutory damages.

Ultimately, Interactive Media's online customer contract was prepared using the most consumer-friendly rules in its key markets. For example, the contract contained an absolute right of cancellation for seven days as required by German law in all the jurisdictions where the company operated. The legal risk assessment here was that most other jurisdictions would have less stringent consumer protection provisions than the ones the company provided. If it turned out that a particular jurisdiction did have a more stringent rule, the company hoped that severe penalties would be unlikely if it had made a good faith effort to comply with the most consumer-friendly rules in important sister jurisdictions.

This example illustrates how corporate actors such as Interactive Media contribute to the transnational regulatory regime. It also suggests how a focus on the role of corporate actors in the regulatory process illuminates important considerations that scholars, advocates, and policymakers might otherwise miss through a more traditional focus on public regulators and legal rules.

First, Interactive Media's approach to its online customer contracts suggests that corporations engaged in transnational business activity strategize about which rules to follow among the range of potentially applicable rules. Scholars and policymakers seeking to better understand the dynamics of transnational regulation will need to expand their analyses beyond a focus on determining which national or supranational rules might be applicable to particular business conduct to exploring which rules corporations actually follow and why. Under what circumstances will a particular sort of company with a particular set of business objectives internationalize uniform business practices designed to comply with the high regulatory requirements of one or more markets into markets with lower regulatory requirements? When will they choose to adjust their business practices on a country-by-country basis to take advantage of national variation in regulatory requirements?

Second, the customer contracts example also suggests that when corporations are subject to multiple unclear rules in multiple jurisdictions, they may seek to develop rules of their own. The result can be a kind of international "private" private law. If this practice turns out to be pervasive in the transnational business context, and I suspect it is, it might be the case that some of the most important rules governing transnational economic activity are written in international standard form contracts, business plans, and internal corporate governance documents as well as in national consumer protection, environmental, health, and worker safety laws. Scholars, advocates, and policymakers will need to look to corporations and corporate activity in addition to
public regulators and the rules on the books if they are to get an accurate picture of the effects of transnational business on social welfare.

Third, while corporate action sometimes encourages a regulatory "race to the bottom," sometimes the rules drafted by corporate actors offer protections that exceed those available through national or transnational law. In the case of Interactive Media's online customer contracts, private rulemaking resulted in a kind of "race to the top"—or at least upward. Interactive Media's customers got very consumer-friendly contract rights, including a seven-day cancellation right, even when their national law did not require it. By contrast, a move to transnational harmonized regulation may have made things worse for consumers. In the unlikely event that some or all of the twenty-seven jurisdictions in Interactive Media's market came together to regulate online contracts and consumer protection, it seems quite possible that highest-level standards from Germany and France would not have survived the harmonization process. Although Interactive Media might have preferred harmonized rules in this circumstance, many of its customers were arguably better off with a system of dis-aggregated national regulation and ordering through corporate action than they would have been under their own national regimes or under a harmonized regulatory regime.6

If corporate ordering is an important component of transnational regulation, then it would seem crucial for activists and policymakers to understand the circumstances under which corporate ordering might enhance, rather than detract from, the achievement of their policy goals. One possible strategy that might merit further investigation emerges from the customer contracts example. The contract and consumer protection regimes of Interactive Media's key markets turned out to be very important to its decisionmaking with respect to the terms of its customer contracts. If, as seems likely, corporations frequently place importance on regulation in key markets when devising international business strategy, it might make sense in circumstances where corporations are likely to adopt uniform transnational standards to focus activism and policy attention on enhancing the applicable standards in key markets like the United States or Germany and use corporate ordering to "internationalize" those standards rather than seeking to alter the rules in countries with lower standards on a jurisdiction by jurisdiction basis or through a supranational harmonization process. Of course, to do so would require a sophisticated understanding of corporate strategy and decisionmaking processes by policymakers and activists to ensure that the desired policy goals would likely result.

6. Had compliance with the highest level of regulatory standards been too expensive or impracticable for Interactive Media, it would have preferred harmonized rules only if the rules were not harmonized at the highest levels and if the costs of compliance with the lower-level harmonized rules were less than the costs of having a standard contract for low-standard jurisdictions and special contracts for the jurisdictions with the higher standards. From these examples it should be clear that, contrary to the commonly asserted maxim, business does not always prefer harmonized rules to regulatory difference.
Although corporate ordering may sometimes produce social welfare benefits, there may still be some downsides to corporate ordering as opposed to regulating through public governance institutions. When rules are established through corporate decisionmaking rather than more public legislative processes, some interests may be substantially less likely to influence the regulatory process. For example, Interactive Media never consulted with consumers when devising the legal terms of its online form contracts for customers, though, over time, its customers' views might have been evidenced by their willingness to buy the company's service. Nor were the regulatory interests of countries other than Interactive Media's key markets fully taken into account. It is possible, for example, that some jurisdictions had legislatively determined that low consumer protection standards and a "buyer beware" approach were in the long-term interest of their citizens. By imposing higher standards through customer contracts, this policy might arguably have been undermined. These examples suggest that the corporate ordering scheme that produced Interactive Media's high consumer protection standards may nevertheless be deficient from the perspective of democratic or interest group participation because it offered little opportunity for stakeholder input in the standards setting process.

The customer contracts example suggests one way that corporations participate in transnational regulation and governance—through strategizing about which rules to follow and creating their own rules to avoid conflicts with differing national rule schemes. A second Interactive Media experience suggests some quite different corporate ordering strategies and some ways in which policymakers and activists might work with those corporate strategies to achieve regulatory and policy goals.

V. WAS INTERACTIVE MEDIA A TELEVISION BROADCASTER?

Interactive Media was a new kind of company, offering a new kind of service. It did not fit neatly into existing regulatory categories. A "make or break" question for the company was whether it would be regulated as a television broadcaster. Every jurisdiction in which it operated regulated and licensed broadcast television. Television broadcasters in Europe typically began as national monopolies, subject to numerous regulations regarding licensing, advertising, and programming content.

If Interactive Media was regulated as a television broadcaster it would have faced innumerable business and financial challenges. For instance, Interactive Media's service offered television programming with television advertising embedded in web pages that also carried the advertising of its online sponsors. Since one of the most highly regulated aspects of broadcast television was the relationship between advertising and programming, conflicts in this area would have been inevitable. This problem was exacerbated because Interactive Media offered its multimedia service in twenty-seven jurisdictions, each with slightly different regulatory schemes. Unlike the situation involv-
ing customer contracts, no "pick the high standard" solution was plausible in this case.

A second problem involved broadcast licenses. Even if Interactive Media could have obtained broadcast licenses from national regulators over the objection of large national broadcasters, the licensing requirements and fees in each jurisdiction were beyond the company's financial reach.

The applicability of the broadcast regulations to new media services like Interactive Media's was unclear. The applicable national statutes typically purported to regulate "the broadcast of television signals." In some ways, Interactive Media resembled a broadcaster. For example, the company produced and distributed its own programming content. It also distributed programming produced by other broadcasters for reception in a web environment on home computers and televisions, and customers subscribing to the company's service could "watch TV" received from the company's satellite signals.

There were, however, some significant differences between Interactive Media's service and traditional television broadcasting. In order to deliver its service in an interactive web-based format, Interactive Media was required to re-encode broadcast television signals digitally into data signals. Thus, although Interactive Media's service looked like "TV in a web page," it was actually, technically speaking, streaming data. This distinguished the company from satellite and cable television providers that frequently encrypted the television signals they carried but did not transform them from television to data format. The service was also received differently from broadcast television in that only paying subscribers could receive the company's service. In this sense, Interactive Media was analogous to satellite and cable networks, which regulators frequently treated as distributing or re-broadcasting the television signals of already licensed broadcasters, and therefore not required to obtain an independent broadcast license. In addition, from the perspective of regulatory policy, broadcast to the general public might be thought to raise different regulatory issues than services provided to self-selected consumers who chose and paid for the programming content delivered.

At the same time, the regulatory situation for multimedia companies streaming data signals was evolving. For example, the United Kingdom had begun to hint in some administrative decisions that streaming data would likely be treated as "television" subject to the broadcast regulations, although no other national regulator had spoken on the matter. The European Union, which had passed some European broadcast regulations, had left open the treatment of streaming data to permit more fact-finding as new technology markets and services like Interactive Media's evolved.

In this situation, the company pursued a strategy quite different from the one used with respect to online customer contracts. It did not sell its service in the United Kingdom, which looked as though it might apply its broadcast regulations to streaming data providers, and it interpreted the relevant national regulations in other jurisdictions not to require a broadcast license. The company's strategic plan was to exploit the current regulatory uncertainty
and build its business as quickly as possible. The hope was that by the time the regulatory situation began to be clarified, the company would have the resources and customer clout to participate meaningfully in the regulatory process and, if necessary, pay any applicable license fees. The company also anticipated that the regulatory status of streaming data providers would evolve jurisdiction by jurisdiction rather than at the European level. Interactive Media preferred incremental national changes to a European-wide solution that, it feared, might have regulated new media companies like Interactive Media out of existence.

What can be gleaned from this example? Again, we see multiple legal regimes and a corporation strategizing about how to comply with them. But, in this case, corporate ordering produced a movement away from regulation in the sense that Interactive Media interpreted the broadcast licensing regulations not to apply to them. Again, important actors and significant interests were not involved in the corporate decisionmaking process—new data services were able to avoid the strict television and advertising regulation that parent and consumer groups had fought for years to get enacted. But, on closer examination, the story seems more than just a matter of “business interests” escaping “public interests.”

Rather, as in most regulatory policy struggles, this case involved multiple interests on each side. For example, the “public interest” was anything but uniform—the parent groups supporting television licensing and advertising regulation were opposed by other consumer groups seeking access to new technologies and entertainment formats. “Business interests” were no more uniform—new technology companies, like Interactive Media, sought exemption from the burdens and expense of television regulation and licensing, and broadcasters sought to slow the development of a competitive new media industry through broad application of licensing requirements.

It is important to note that these were not only differences of regulatory policy. They also went to the structure and sources of regulation. Growing new media companies like Interactive Media preferred regulatory uncertainty to clear rules and national regulation to a harmonized European standard that might well have functioned as a barrier to entry or a significant impediment to the development of a pan-European new media industry. By contrast, large broadcast companies sought clear national and E.U. regulation that would require licensing of new media companies, believing that their significant political access and clout would ensure a favorable regulatory outcome.

Thus, had national regulators addressed these issues affirmatively, they would have been forced to choose between the interests of at least two industries and between competing visions of the consumer interest. European regulators did not avoid taking sides by not acting. By leaving the regulatory situation unclear, they facilitated the growth of new technology businesses at the expense, perhaps, of national television interests and supported consumers favoring more freedom of choice for media entertainment to the detriment of those favoring more state control over programming content and advertising. It is
hard to avoid concluding in this case that both national and E.U. regulation and policy with respect to streaming data was the product of the exploitation by new media companies like Interactive Media of a restrictive interpretation of the existing broadcast regulations and the acquiescence in that exploitation by national and E.U. regulators.

This conclusion points to another. Where corporate actors set regulatory policy through strategic corporate behavior, the background rules that influence their bargaining power relative to other market actors may have a significant impact on the regulatory regime that results. It was the vagueness of the definition of “television broadcasting” that set the terms for Interactive Media’s relations with national broadcasters. Under these circumstances, one might say that the balance between different consumer and business interests was established by the ability of companies like Interactive Media to make their restrictive interpretation of the broadcast definition stick.

This example suggests another possible strategy for using corporate behavior and corporate ordering to shape transnational regulation and policy. While it is sometimes the case that regulatory policy is thwarted when corporations avoid or evade rules, the broadcast example suggests that in some circumstances, regulators might achieve desired policy results by conscious strategies to facilitate such “evasion” or “avoidance” when it strengthens business activity in desired policy directions. The development of the new media industry and technologically innovative media products and services in Europe was in no small measure assisted by regulators not revising or expanding the existing definition of broadcast television and not creating new rules to address streaming data. Whether this particular example reflects a conscious strategy or an unintended omission on the part of regulators, it certainly demonstrates how, with the right understanding of strategy and goals of affected business interests, regulators might combine rulemaking action or inaction with anticipated corporate activity to bring about desired policy outcomes.

VI. CONCLUSION

The World Corp. and Interactive Media examples suggest a number of ways in which corporate action produces significant transnational regulatory and social welfare effects.

The World Corp. example suggested how even the development of a national rule on the treatment of manufacturing waste emerges out of a complex dynamic process of real and imagined moves and countermoves between public governance institutions and corporate actors. This view of transnational regulation and governance challenges a more traditional one that sees passive (private) corporate institutions as governed by and reacting to regulation created by active (public) national and supranational regulators. If both “public” and “private” institutions are governing and governed by a regulatory regime of their joint production, then accountability for the social welfare effects of regulatory outcomes should not fall exclusively on “public” regula-
tors and the actions and decisions of "private" corporate actors should not be exempt from public participation, review, and political contestation.

In the Interactive Media examples, we saw some ways in which transnational corporations govern through their decisions and actions and some strategies for how regulators might shape or harness corporate ordering processes to achieve regulatory and policy aims. In the example of online contracts, we saw that knowing the consumer protection rules contained in customer contracts might be as important as the statutes on the books if we are to understand the consumer protection regime as it functions on the ground. We also saw that corporate ordering sometimes produced higher standards than public legislative processes and that, in some circumstances, regulators could work with corporate ordering to bring high standards to jurisdictions with low standards. In the broadcasting example, we saw that corporate actors sometimes regulate by interpreting or avoiding potentially applicable rules to suit their business purposes. We also saw that sometimes regulators regulate through inaction instead of action. Through a narrow interpretation of existing rules or a refusal to create new ones, regulators might consciously direct corporate activity in desired policy directions by facilitating corporate actors whose activities they support to exploit the gaps or ambiguities in the rules.

Perhaps most importantly, in all of these examples, we saw that the decisions and actions of corporations have social consequences largely indistinguishable from those created by public regulators, but that corporate decisionmaking was largely insulated from public participation, engagement, or scrutiny. Generally, policymakers and activists seeking to influence "public" governance institutions focus on the mechanisms by which these institutions are themselves governed assuming that the internal authority structures, decisionmaking processes, and deliberative procedures within these institutions can have a significant impact on the policy outcomes they produce. If corporations are significant institutions in the transnational governance regime, then policymakers and activists will need to find ways to affect the decisionmaking of these corporate institutions to shape their incentives, bargaining power, and business strategies, and to make their internal decisionmaking processes more visible and open to political contestation.

The legal regime that is addressed most directly to the structure and decisionmaking of corporations is corporate law. While the particulars of corporate law vary from jurisdiction to jurisdiction, it is generally concerned with the creation, operation, rights, duties, and liabilities of corporations, as well as the rules, structures, and practices that organize decisionmaking and power within corporations. Corporate governance is generally understood to be about the relationship between shareholders and managers within an individual firm and the allocation of power, rights, duties, and rules of decision to manage that relationship. But situating this regime of corporate law and governance within the broader context of the transnational regulatory regime and global governance gives it a new significance.
If corporate decisions are significant in shaping the transnational regulatory regime, then the internal governance mechanisms and strategic decision-making processes for corporate actors should be of interest, not only to investors and managers, but to any constituency affected by corporate power. For example, participation by labor representatives on the boards of German corporations may affect the sorts of decisions they make in respect of wage rates or worker safety wherever those corporations do business. Corporate directors subject to a regime of permissive fiduciary duty rules with respect to business judgment may be less concerned about decisions that benefit the corporation but involve a low risk of highly adverse social welfare consequences (say setting low safety standards or environmental standards in a foreign plant) than directors subject to higher fiduciary standards and scrutiny of business decisionmaking. From these examples, one can see that understanding how corporations are governed becomes important, not only for persons trying to shape corporate activity domestically, but also for all those trying to affect the global governance regime itself.

In this Article, I have suggested that beginning to answer the question—"How do corporations govern transnationally?"—will require significant scholarly attention to three distinct areas. First, we need to better understand the specific mechanisms through which corporations create and shape transnational regulation and policy. Second, we need to better understand how differences between corporations—such as size, industry, risk profile, mobility, resources, long-term or short-term business orientation, and political clout—influence corporate behavior and participation in transnational regulatory and policy processes. Finally, we need to explore how differences in corporate governance mechanisms—such as internal governance structures, deliberative processes, fiduciary obligations, liability rules, and ownership structures—affect the decisions corporations make and the actions they take as regulatory institutions in the global governance arena. In this context, we might find that corporate law functions not unlike a constitution in a public governance context—shaping behavior not only within corporations, but also in the complex regulatory regime through which we are governed globally.
