Corporate power and global order

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INTERNATIONAL LAW AND ITS OTHERS

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Although international lawyers thinking about global order generally focus on the interplay of nation-states and international institutions, international law as a discipline has also long sought to account for the significant role played by non-state actors, particularly corporations, in the system of global governance. From the Dutch and later the British East India Companies to the modern multinational enterprise, the enormous impact of corporate actors on the shape and content of national and transnational regulation and the significant effects of corporate activity on local and global social welfare have challenged the narrative of a world exclusively governed by states. International law has treated corporations as a subject for regulation, as an influence on regulation, and has worried that corporations might be a force that escapes regulation. Perhaps to preserve the unique sovereign character of nation-states and intergovernmental institutions, international lawyers have been hesitant to treat transnational corporations as state-like creatures. In any event, we have not traditionally thought of corporations as producers of regulation or as governance institutions.1

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1 Though it is beyond the scope of this essay, it would be interesting to explore some of the possible implications for public international law doctrine of treating corporations
In this chapter, I suggest that our understanding of transnational regulation and global governance would be enriched were we to think about corporations not as the ‘private’ other to the ‘public’ nation-state, but rather as legal institutions performing public regulatory functions with public welfare effects not unlike nation-states. At the same time, I suggest how a focus on the role of corporate activity and decision-making in global governance can expose new sites for political contestation and new strategies for intervention by regulators, policy-makers and activists seeking to harness and shape corporate power more effectively for the public good.

To explore the question, ‘How do corporations govern globally?’, we need a typology of specific modes through which corporate actors create and shape local, national, regional and transnational regulatory regimes.

The fact that corporations influence regulation by applying political and economic pressure to affect the legal rules and administrative decisions made by local, state and transnational regulators is well known. Corporations pressure regulators through the provision of information, the creation of studies and polls, the organization of industry associations and interest groups, the generation of campaigns to shape public opinion, and political contributions. They might seek to induce regulators to create or alter regulation to better accommodate their corporate activities by offering to invest in a regulatory jurisdiction. They might also apply regulatory pressure when they threaten to disinvest or actually move to another jurisdiction to take advantage of more favourable regulation elsewhere. When corporations pressure regulators in these ways, we customarily still think of the public institutions as the regulatory and governing bodies, although the stronger the corporate pressure, the more it might make sense to see the public institution as an agent of, rather than an obstacle to, corporate regulatory power.

as quasi-public regulatory institutions, acting sometimes in concert and sometimes in conflict with states. Such a conception would seem to call for a re-examination of international law doctrine ranging from the generation of customary law to state responsibility to conceptions of sovereignty and jurisdiction, not unlike the one that emerged in the twentieth century around the creation of international institutions. While international law scholars managed to accommodate the legal personality of international institutions as sub-sovereign creations of the will of sovereign states, the corporation is rarely conceived of by international lawyers as the expression of sovereign will. Rather, it is usually insulated from scrutiny under international law precisely because of its ‘private’ rather than ‘public’ character. For more on the corporation as a regulatory institution, see Dan Danielsen, ‘How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance’ (2005) 46 Harvard International Law Journal 411.
The significance of corporate decisions as an autonomous regulatory force is somewhat more pronounced when corporations shape regulation through acquiescence in a particular rule scheme. The power of corporate acquiescence is easiest to see in circumstances where the applicability or jurisdictional reach of a particular rule is contested. In this context, acquiescence by some corporations may strengthen the perceived legitimacy of a particular rule scheme and perhaps de-legitimate another. In so doing, it may empower or embolden the regulatory authority to apply the rule to other actors. Acquiescence by one corporation may dissuade other corporate actors from resisting or avoiding the rule scheme. It might also suggest to the regulator how the rule is likely to be perceived by other corporate actors and whether the rule is likely to result in adverse effects like encouraging corporate actors to evade the rule by conducting operations in other jurisdictions.

Corporations also exercise a kind of regulatory authority when they interpret rules to apply or not apply in particular cases. This form of corporate regulatory power is particularly pronounced where the applicability of a particular rule is not clear and there is no single regulatory or judicial authority to declare a definitive or binding interpretation of the rule as is so often the case in the transnational context. We might imagine these decisions as preliminary – subject to confirmation or contradiction by regulatory authorities and courts. In practice, however, corporate rule interpretation and behaviour often defines de facto the margins and meanings of legal rules. Such interpretations may also encourage other corporate actors to take similar positions. While these corporate interpretations might eventually result in an adverse reaction by corporate competitors or regulators or both, if the corporation's interpretation of the rule made manifest through its behaviour is not challenged by competitors or regulators, the corporate interpretation of the rule becomes the de facto rule until such time as the rule is changed or challenged by corporate or regulatory action. Even in circumstances where the rule at issue is clearly applicable, corporations may decide to ignore the rule because enforcement of the rule is unlikely or the benefits of ignoring the rule outweigh the likely adverse consequences of its breach. Given that rule compliance is overwhelmingly voluntarily controlled and few rules are actually enforced primarily through regulatory or police action, this type of corporate regulatory power can be particularly important.

Perhaps it is easiest to see corporations as regulators when they create their own rules through business practices, contractual arrangements or
private dispute resolution mechanisms such as informal bargaining and
retaliation or international commercial arbitration. They may also supply
their own standards for conduct or operations (e.g. wage rates, worker
safety, environmental practices) when local regulations either do not exist
or do not require such standards. In some circumstances, corporations
may elect to ‘internationalize’ certain standards to multiple jurisdictions
for corporate convenience or efficiency even when not required to do
so. Some examples might include a situation where the benefits of using
uniform manufacturing standards outweigh the potential benefits of tak-
ing advantage of lower standards in jurisdictions that would otherwise
permit them or where common labour or production standards facilitate
efficiency amongst corporate buyers and sellers, such as in the case of the
ISO 9000 standards.

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. Now, if the
transnational regulatory and social welfare effects of corporate decisions
and actions are similar to the effects produced by ‘public’ regulatory insti-

tutions, then an important challenge for the global governance regime
would be finding ways of opening the decisions and actions of corporate
regulatory institutions to greater transparency and the kinds of politi-
cal debate and contestation to which ‘public’ regulatory institutions are
subject.

Generally, policy-makers and activists seeking to influence ‘public’ gov-
ernance institutions focus on the mechanisms by which these institutions
are themselves governed. They expect the internal authority structures,
decision-making processes and deliberative procedures of regulatory bod-
ies to have a significant impact on the policy outcomes they produce.
The legal regime that is addressed most directly to the structure and
decision-making 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
decision-making and power within corporations. ‘Corporate governance’
is generally understood to be about the relationship between sharehold-
ers and managers within an individual firm and the allocation of power,
rights, duties and decisional authority 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. In fact, we might find that corporate law functions not unlike other so-called ‘constitutional’ regimes such as EU law or the global trade regime – shaping behaviour not only within corporations but also amongst the state actors and international institutions that contribute to the complex transnational regulatory regime through which we are governed globally. Where national corporate governance rules shape corporate decision-making in the global governance arena, we might expect changes in those rules to influence the global governance effects of that decision-making.

National corporate governance rules that require labour representation on the executive boards of corporations, such as the co-determination right in Germany, provide a well-known and suggestive example. In a recent study, Mark Roe, in his book *Political Determinants of Corporate Governance*, argues that corporate governance rules such as co-determination rights, taken together with a pro-labour political culture in Germany, have had a significant impact on executive compensation schemes and the types of other incentives shareholders of German companies have been able to make available to corporate management to encourage profit-maximizing behaviour. As a consequence, Roe argues that German managers are more likely than their US counterparts, who do not have labour representation on their executive boards and do not have a pro-labour political culture, to take actions that will expand the firm and protect workers’ jobs even at the expense of the firm’s competitive position in the market and shareholder value. If this is true within Germany, it does not seem a stretch to imagine that the presence of labour representatives on corporate boards might also affect corporate decisions in areas such as executive and worker compensation and benefits, worker tenure and workplace safety in the other jurisdictions where German corporations do business. If the decisions and actions of companies from rich, developed countries like Germany play a significant role in setting labour policies, wage rates and worker safety standards around the globe, then corporate governance rules mandating worker representation on corporate boards, like co-determination in Germany,

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3 Ibid., pp. 71–2.
might well affect corporate decision-making on issues of significance
to workers and thereby influence the global welfare of workers more
generally.

Of course, mandating labour representation on corporate boards might
not be good policy or necessarily lead to better social welfare outcomes
globally. Labour representation might turn out to be ineffective or we
might find that labour representatives on executive boards in rich coun-
tries, fearing foreign competition from low wage labour, make deci-
sions that protect their welfare at the expense of foreign workers. The
important point here is to recognize that national corporate governance
policies do produce global governance effects and that a better under-
standing of those effects could provide new avenues for academics and
policy-makers to shape transnational regulatory policy and global social
welfare.

Governance rules regarding management representation in the context
of foreign corporate investment in developing countries provide another
example of how national governance rules might shape transnational
social welfare and policy. When multinational corporations invest in
developing countries by establishing operations there, many developing
countries require that these foreign companies secure a local minority
interest partner in the local operating entity. A typical structure might
involve a foreign parent company setting up a local subsidiary and offer-
ing a minority interest, say 40 per cent, to the local partner or to the
government of the developing country itself. Under local corporate gov-
ernance law, this structure typically would give the local investors access to
the decision-making process of the local subsidiary but not to the parent
company. Similarly, in most corporate governance regimes where multi-
national parent corporations are incorporated, a local minority share-
holder in a subsidiary would have no standing to challenge the actions of
the parent corporation, because the minority shareholder is not a share-
holder of the parent corporation. This is true notwithstanding the fact
that most policy decisions regarding the subsidiary’s operations will, for all
practical purposes, be made by the foreign parent, including decisions on
such matters as the frequency or amount of capital investment, dividends
and profit distributions, whether to open or close a plant, and worker
safety and environmental standards. It becomes immediately apparent
that lack of input by local interests in the decision-making processes of
parent companies might have significant consequences not only for the
local partners but also for the developing country and those in society
affected by the operations of multinational corporations.
This situation might be altered in various ways through changes in corporate governance rules. Corporate statutes in the home jurisdictions of parent companies might be changed to give minority interests in foreign subsidiaries some right of access to information to participate in decision-making or to sue the managers of the parent companies for negligent decisions producing adverse effects on foreign subsidiaries. Developing countries might adopt rules requiring foreign parent corporations, as a condition of investment, to give minority shareholders some input into management decisions at the parent level that affect local subsidiaries. All these legal mechanisms might open new channels for local interests to affect the parent’s decision-making.

Of course, each legal mechanism might also produce more adverse consequences than it alleviates. And, there may be ways through other regulatory means to effect similar results with fewer bad effects. Corporate governance is not necessarily the best or most appropriate way to address the possible inequalities between multinational corporations and developing countries. At the same time, if we acknowledge that corporations have a significant governance impact on health, safety, the environment, wage rates and economic development in developing countries, then it would seem irresponsible not also to recognize that we might alter the balance of power between parent companies and local subsidiaries, and between multinational corporations and developing countries, by changes in the corporate governance rules that give local interests in the developing country more voice in corporate decision-making. Such an acknowledgment adds to the transparency of the regulatory effects of corporate decisions under the existing corporate governance frameworks and opens the possibility for contestation and political engagements about the costs as well as the benefits of those frameworks.

In short, corporate governance rules that affect representation on executive boards can shape the kinds of decisions corporations make and the global effects of those decisions. The examples that follow suggest how global governance and social welfare can be also be shaped by corporate governance rules that have nothing to do with representation in management decisions.

Take, for example, corporate governance rules regarding the fiduciary duties of managers to their corporations. Let us imagine that a large multinational corporation called World Corp has decided to build a manufacturing plant in a small developing country called Bandu. Let us imagine further that Utopia, the large, rich, developed country where World Corp is incorporated, has adopted a corporate governance rule insulating
corporate managers from liability for all claims arising from losses to the corporation resulting from business judgments not involving gross negligence, wilful malfeasance or a conflict of interest. As a consequence, corporate managers of Zutopian corporations know that, for all intents and purposes, they will be insulated from liability to shareholders for business decisions, even if those decisions result in significant losses to the corporation, so long as the decisions do not involve conflicts of interest or self-dealing on the part of the managers.

Imagine further that World Corp’s new plant, as part of normal manufacturing processes, will generate significant amounts of industrial wastewater. For a variety of reasons — perhaps lack of resources or to attract foreign investment — the Bandu government has not yet passed any regulations regarding the disposal of wastewater from manufacturing plants. Under the domestic law of Zutopia, the wastewater from World Corp’s plant would be deemed ‘toxic’ and require special processing for disposal if the plant were located in Zutopia. However, to date, the environmental regulation of Zutopia has not been interpreted by Zutopian courts to apply to the foreign operations of companies incorporated there.

Under these circumstances, the board of World Corp might reasonably conclude that dumping the plant’s toxic wastewater directly into a nearby river that serves as the water supply for the region would not violate Bandu law and probably would not violate Zutopian law. The boards of directors might well also reasonably determine that avoiding wastewater treatment in the plant would reduce costs and increase profitability. Though the

4 In the US, the home jurisdiction of most of the world’s largest multinational enterprises, the corporate governance regimes of every state provide a remedy to shareholders for corporate losses that result from self-dealing and diversion of corporate funds on the part of corporate managers (breaches of the duty of loyalty) but insulate managers from liability for negligent errors in business judgment, incompetence and mistake regardless of the size of the loss (breaches of duty of care). This practice of insulating managers from all but the most egregious breaches of duty of care is most often expressed in the application of the so-called ‘business judgment’ rule. While the exact parameters of the business judgment rule vary from state to state, it generally provides a presumption that managers have acted in good faith and with the best interest of the corporation in mind in respect of all corporate decisions and actions not involving a conflict of interest or other self-dealing. This presumption makes it significantly more difficult for shareholders to succeed in a challenge to a corporate decision or action as a breach of the managers’ duty of care. One important effect of this rule of corporate governance is to shift the risk of loss resulting from management error, bad business decisions and incompetence onto shareholders and perhaps society more broadly. It is commonly asserted, however, that this risk-shifting is justified because the business judgment rule insures that managers are not unduly or inefficiently deterred by the threat of personal liability from taking risks that maximize shareholder wealth and ultimately social wealth.
possibility of tort liability in Bandu for harm from toxic wastewater disposal exists, the risks and possible damages seem relatively small. A tort suit in Zutopian courts for harms caused by disposal of toxic wastewater in Bandu might be possible, but significant obstacles regarding jurisdiction, distance and expense may limit the practical likelihood of these suits arising in response to any but the most catastrophic of harms.

After determining that the overall legal risk of corporate liability for not treating the plant’s wastewater is likely to be very small, the attention of the board of directors of World Corp might turn to assessing the likelihood of personal liability to the corporation if the board’s decision not to treat the plant’s wastewater did in fact result in substantial losses to the corporation. This assessment would turn, in large part, on the corporate governance rules of Zutopia. If Zutopia, for example, had a corporate governance rule of strict personal liability for business decisions by board members that resulted in death or significant harm to human health, the board of World Corp would be substantially less willing to approve the dumping of untreated toxic wastewater into the water supply in Bandu. If the rule in Zutopia was personal liability for negligent business decisions resulting in a loss to the corporation, World Corp’s board might still be more reluctant to make such a decision, assuming the risks of the toxic wastewater were reasonably well known, and common practice in the industry in developed countries, including Zutopia, was to process the wastewater before disposal. If Zutopia’s rule is the business judgment rule, it seems reasonable for the board to conclude that its members would be immune from personal liability for their decision on wastewater disposal regardless of the size of any resulting loss to the corporation. This is because the board could reasonably assert its good faith belief that its cost saving decision was in the best interest of shareholders at the time it was made, did not appear to violate applicable law and did not involve a conflict of interest. Even if the board were found to be negligent in respect of its decision to abstain from all wastewater treatment at its plant in Bandu, it would still avoid liability under the corporate governance regime in Zutopia.

We can now begin to see how the regulatory and social welfare effects of corporate governance rules play out in the transnational context. The lack of government regulation in Bandu of toxic wastewater disposal and Zutopia’s unwillingness to extend its environmental regulation to foreign operations of Zutopian corporations, combined with Zutopia’s rules insulating managers from liability for negligent business decisions, enable a corporate decision not to treat wastewater in the Bandu plant. Of course, the fact that this decision could be made without legal liability does not
determine that it will be made. The World Corp board might adopt high, modest, low or no wastewater treatment standards for reasons of corporate efficiency, convenience or humanitarian concern. The key point here is that, in circumstances where there are few or no state-created regulatory standards, decisions made by companies like World Corp would produce a de facto rule on wastewater for Bandu with all of the attendant social welfare effects. We also can see that as transnational corporations contribute to the de facto regulatory regime for things such as environmental safety through their business decisions and actions, an important part of their decision-making calculus might include the consequences under the fiduciary principles of the corporate governance rules in their home jurisdictions for making a decision abroad that results in substantial loss to the corporation. Thus, changes in the fiduciary duty rules might well result in changes in the kinds of decisions corporations make and consequent changes in the regulatory and social welfare effects of those decisions.

Deciding whether, as a matter of global policy, changes to the fiduciary duty rules in some rich, developed countries in the hope of improving social welfare conditions in some poor, developing countries is a good idea would require a complex analysis of the expected national and global welfare benefits of such changes versus the national and global welfare costs, as well as a sophisticated understanding of corporate behaviour and regulatory strategy. Such an analysis would inevitably pit national sovereignty concerns against global welfare ones, and require transnational political dialogue and engagement of the type rarely seen in the context of what might traditionally have been understood to be a national regulatory issue like corporate governance. Yet, once the transnational regulatory and social welfare effects of national corporate governance regimes are on the table for analysis by scholars and policy-makers, it becomes difficult for advocates to support the status quo regime without at least attempting to address its potential global downsides. Thus, what was once an issue of national policy becomes one of global policy and what was once an issue involving the interests of shareholders and managers becomes one involving the interests of a much broader global community. It might be the case that the current regime of fiduciary duty rules in the developed world is ‘optimal’ from the standpoint of global social welfare, but at least exploring its effects through a focus on corporate decision-making subjects those effects to broader political debate and possible contestation.

Corporate governance rules affecting the power of corporate managers to defend against hostile takeovers by third parties in developing countries provide another example of a corporate governance regime with
significant global governance effects. Some development economists have argued that the ability of developing countries to capture gains from trade for national development through reinvestment is in no small measure affected by industry concentration and local control. From this insight, some have suggested the importance of promoting large, locally owned ‘national firms’ as a development strategy.

The basic argument is that countries with large, concentrated industries will be able to capture a larger share of the gains from trade than countries with more diffuse or disaggregated firms and industries. As one might imagine, firm and industry size and concentration is often significantly higher in rich, developed countries than in developing countries in almost every industry sector. If these theorists are correct regarding allocation of gains from trade, it would be critical for industries in developing economies to achieve a certain size and concentration before entering the competitive global economy if they hope to obtain a reasonable share of the gains from global trading.

Development policy-makers influenced by these ideas have sought to encourage the development of national firms through the use of tariff and subsidy programmes, antitrust law, preferential tax policy and other national regulatory efforts. Traditionally, less emphasis has been placed on corporate governance rules in the development context, though they are also significant determinants of the size, ownership and global competitiveness of firms.

By contrast, a strict neo-liberal prescription for economic development would encourage early opening of developing country markets to global competition through the abolition of trade barriers and other practices that support local industry, and a shift to export-led industrial growth capitalized by foreign direct investment. The corporate governance analogue to this development programme is often a package of ‘best practice’ corporate governance rules that, among other things, do not permit restrictions on markets for ‘change of control’ of local companies. Advocates of this corporate governance regime argue that rules that permit corporate managers to resist hostile takeover, like trade barriers, promote inefficiency, discourage innovation, facilitate corruption and entrench non-performing management to the detriment of shareholders and economic growth more broadly.

If a developing country as a matter of policy sought to develop and retain national firms and industry concentration to compete and extract gains from trade more effectively in the global economy, in addition or as an alternative to tariff and subsidy policy, antitrust rules and tax policy,
it might make sense not to adopt corporate governance rules that permit hostile takeovers, at least by foreign investors. Permitting hostile takeovers may result in foreign rather than domestic ownership of emerging firms—whenever local firms begin to reach a size that could affect the competitive position of foreign firms in the global market, they would be acquired by foreign competitors. The rules may also result in reducing local firms into franchise supply subsidiaries of larger foreign parents, thereby limiting proprietary local knowledge and skills development and the likelihood of spin-off entrepreneurship and significant capital reinvestment in local operations.

In addition, corporate governance rules, like those regarding markets for change of control, by shaping the ownership, size and bargaining power of firms, may affect the content of firm decisions as well as the regulatory and social welfare effects of such decisions. For example, locally owned national firms might have more of a stake in things like the quality of the local environment, the strength of the local economy, the education and training of local labour pools and national economic development through capital reinvestment than foreign owned firms or subsidiaries of foreign parent companies. Weaker, more dependent local firms may, in turn, lead to weaker local regulators who must balance the risk of alienating foreign interests against local policy concerns. Over time, weaker regulation and government oversight might lead to increased economic and regulatory power by foreign firms, which, in turn might lead to even weaker local regulators and deteriorating social welfare.

Of course, before deciding on a policy with regard to corporate governance and hostile takeovers, one would need to consider the possible risks of limiting markets for change of control. Such risks might include reduced foreign investment, capital shortages, management corruption, underperforming assets and slower growth. It is also possible that a prohibition on both foreign and domestic hostile takeovers may limit the efficient consolidation of local companies and thereby slow the development of national firms. What is important to see here is that governance rules regarding, in this case, markets for change of control, can affect the size, structure, development and goals of corporate actors, the bargaining power of those corporate actors vis-à-vis other corporate actors in the global economy, and the economic and regulatory bargaining power of the states in which those corporate actors are located.

Given the potential magnitude of these effects, it is worth thinking about why the neo-liberal regime of 'best practice' corporate governance has not met with more resistance in developing countries or transitional
economies in recent years. One possible explanation is the near-total dominance of the neo-liberal view of the transnational economic sphere as a vast, relatively unregulated globalized market in which the efficient allocation of resources and gains from trade will be most effectively accomplished by the mostly unimpeded workings of market forces. At least at the level of theory, one should expect that the relatively unimpeded play of competitive forces among private actors in a marketplace so large as to preclude effective domination or exclusion of competitive market entrants should result in increased global welfare. In other words, if competition is nearly perfect in large markets such as the US or the EU, one should expect an even more perfect competitive situation in the larger, less regulated global economy. From this perspective, the best national regulatory strategy would be to get out of the imperfect local market and into the more perfect global market as soon as possible. A substantial regulatory step in this direction is to eschew all idiosyncratic or protectionist regulations, tariffs, subsidies and administrative practices and adopt 'best practice' regulatory frameworks that facilitate the operation of global market forces and the laws of comparative advantage.

This image of the transnational economic sphere differs quite dramatically from the one I have suggested here. Far from being a single, deregulated space of mostly unimpeded competition, the transnational economic sphere is characterized by multiple, overlapping and sometimes contradictory regulatory regimes, complex and multilayered market segmentation and dramatic variations in power and market dominance among nation-states and corporate actors. In such circumstances, one might expect many more, rather than fewer, market failures in the transnational sphere than in large, relatively integrated markets like the US or the EU. Further, in the neo-liberal conception of the transnational economy, competition among private economic actors acting largely in the absence of public regulation results in an efficient allocation of resources and gains from trade. By contrast, in the conception of transnational economic life drawn here, corporations are not only market competitors but active regulators shaping and creating transnational regulation. As such, there is no reason to think corporations would be any less likely to regulate in ways designed to entrench their market advantages to the detriment of competition than local, national or transnational 'public' regulators. In such circumstances, the need for identifying means like corporate governance rules for shaping the content and effects of corporate regulatory power seems particularly acute, even if the goal were a desire to facilitate the functioning of competitive markets.
In light of the global governance effects of corporate activity, there would seem to be more at stake than ideological or theoretical confusion if international lawyers, academics and policy-makers continue to treat corporate actors as 'the regulated' or 'the governed' and nation-states or intergovernmental institutions as 'the regulators' or 'the governors'. Such incomplete or counterfactual characterizations may well result in significant misunderstandings about the way the transnational regulatory regime actually functions and consequent mistakes in policymaking with perhaps disastrous effects on global social welfare. Indeed, the transnational legal order can only really be understood if we examine the ways in which 'private' corporate action (or inaction) and 'public' state or institutional action (or inaction) constitute, transform and interact with each other to create a transnational governance regime. Looking at the legal rules alone only gives us part of the story. To get a fuller picture of global governance, we must begin to map the decisions of corporate actors with the same attention, specificity and rigour that international lawyers and academics have applied to state activity. Mapping the cumulative effects of corporate activity may well be as significant to understanding the actual functioning of the transnational regulatory regime as mapping the national, regional and transnational legal rules themselves.

At the same time, however, the power and regulatory impact of transnational corporation decision-making notwithstanding, our exploration of the impact of national corporate governance regimes on that power and decision-making suggests that corporations, as legal institutions, might be more susceptible to regulatory intervention through national law than is frequently supposed in the literature about corporate regulation and globalization. It seems worth exploring further whether corporate governance rules designed to affect generally the structure and methods of corporate decision-making might provide a fruitful site for intervention by activists and progressive policy-makers to supplement more traditional means of regulating corporate conduct such as labour standards or environmental regulations. If, for example, it could be demonstrated that fiduciary duty rules have a significant impact on corporate decision-making regarding worker safety or environmental standards in developing countries, it seems possible to imagine that it might be more efficacious and efficient to seek to change the fiduciary duty rules in the relatively few home jurisdictions of most transnational corporations than to seek to obtain worker safety or environmental regulation in developing countries across the globe.
As international scholars and policy-makers of transnational governance, we have much to learn from the ways in which transnational corporations engage, strategize, manage, shape and exploit the complex, multiple, overlapping layers of local, national, regional and international regulation that comprise the transnational regulatory regime. Many years as a transnational corporate lawyer taught me that, while corporations frequently complain about the lack of clarity and regulatory consistency in the transnational regime, they do not, as a whole, seem to suffer in varied, complex, ever-changing regulatory environments. Rather, much of transnational business ‘success’ is measured by how well companies negotiate the constraints and opportunities of these environments, and much of business ‘strategy’ is about the management or arbitrage of differences between regulatory jurisdictions to business advantage. We transnational scholars often despair at a global governance regime that seems to lack a constitutional or institutional framework to order what looks to many of us like chaos. In my experience, transnational corporations view the same backdrop of regulatory complexity, contradiction and multiplicity not as a problem but as a fact to be engaged with and strategized as they pursue their profit-making purposes. Perhaps, if we as transnational scholars could begin to see the decentralized and non-harmonized complexity of the global governance regime as a terrain filled not only with obstacles and pitfalls but also with benefits and opportunities for the pursuit of our political and social welfare purposes, we might greatly enhance our creativity and effectiveness in shaping global power for the public good.