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Regulating Multinational Corporations—Trends, Challenges and Opportunities.

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ABSTRACT:

In prior work, I suggested the way in which private enterprises have been developing coherent systems of governance that draw on but are autonomous of law and state based legal systems. In this essay I suggest the challenges to the erection of a similar coherent system of legal regulation by or through states. This essay has two objectives. The first is to examine the difficulties of current approaches to use law and legal frameworks to manage MNEs through law. The second is to examine the way that current contradictions impede efforts act developing coherent regulatory models and on that basis to sketch out alternatives beyond the quite limited and repetitive discursive approaches to the regulations of MNEs through law. The fundamental impediment to the legal regulation of the MNE, then, may well be the conceptual cage within which this use of regulation is constrained. As long as the "problem" of MNEs is understood as an institutional problem, that is as a problem of managing something that can be conceived at some level of generality as an institution, an appropriate regulatory response will be elusive. And it will be elusive precisely because the object of regulation cannot focus on the regulation of an object (the MNE as enterprise), but the management of a system (production chains beyond and within the state). For that enterprise, the traditional tools available to states and exercised on "things" will continue to increasingly elaborate legal interventions produce failure.

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"*And there was war in heaven*."[1]

THE ONCE ORDERLY ARRANGEMENT OF PUBLIC AND PRIVATE POWER, of domestic and international law, and of the institutions through which these arrangements were realized,[2] have been upended by the extraordinary success of the very system through which these arrangements were structured, and the structures legitimated in political, economic and legal theory.[3] In place of the state, increasingly the production chain serves as a basis for collective governance.[4] In its place, domestic and institutional actors—individuals, economic enterprises, civil society actors, states, public international organizations, and the hybrids emerging from the institutional couplings of these actors—now engage in a world order marked by fracture, fluidity, permeability and polycentricity.[5] This world governance order is characterized by a stable universe of objects of regulation around which governance systems multiply, and in which law is one of several systems of governance that impact the organization of human and communal activity. It is a governance order in which regional integration might well supplant both the state and global integration.

And yet, much of the current discourse, and the premises that mark the parameters of much of what passes for public policy and its regulatory agendas continue to indulge beliefs solidified after 1945. That discourse is centered on the traditional presumptions that sustain the ideology of the state system as one has come to understand this somewhat frayed concept after 1945. That system presumes a dynamic population bound to static and stable states and the international organizations that reflect their communal consensus, and in which law is situated at the center of the system.

Nowhere is this basic contradiction, a contradiction between policy "truth" and operational "facts" more evident than in the legal and public policy context in which the public regulation of multinational corporations (MNEs) is considered,[6] and especially in

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[1] Rev. 12:7.

[2] See, e.g., Philiip Alcott, *The Health of Nations: Society and Law Beyond the State* (Cambridge, 2002), § 14.53.

[3] See, e.g., Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements* (Harvard University Press, 1995); Larry Catá Backer "Governance Without Government: An Overview," in *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* 87-123 (Günther Handl, Joachim Zekoll, Peer Zumbansen, editors, Leiden, Netherlands & Boston, MA: Martinus Nijhoff, 2012).

[4] See, e.g., Peter Dicken, *Global Shift: Reshaping the Global Economic Map of the 21st Century* (4th ed.; London: Sage, 2003)

[5] See, Larry Catá Backer, "The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity," 17(2) *Tilburg Law Review* 177-199 (2012).

[6] I will use the Organization for Economic Cooperation and Development (OECD) definition of a MNE: companies or other entities established in more than one state that coordinate their operations in various ways. OECD Guidelines for Multinational Enterprises Guideline I (Concepts and Principles § 4) (Paris: OECD, 2011). I avoid the old issue of terminology here but note that global discourse is divided among those who view the appropriate term as transnational corporation (TNC) rather than multinational corporations, which to the minds of some must refer to enterprises that represent the joint investment of several states.

recent efforts to institutionalize, through law, an architecture for the regulation of the economic, social, cultural and human rights effects of economic activity.[7] On the one hand, public institutions and important elements of civil society invest substantial effort in the construction of an international legal architecture for the regulation of at least some of the effects of the operation of multinational enterprises.[8] Private governance and self-regulation is viewed as a threat to the social and political order.[9][10] On the other hand, private actors have increasingly turned to a variety of self-regulatory or private governance structures in order to manage significant aspects of their operations,[11] some recognized in international norms.[12] Public actors also have sought to manage private regulatory governance through interventions in private markets.[13] Private actors have been recruited to serve as governmental substitutes in weak governance or conflict zones.[14] From a regulatory perspective, the central organizing premise of each is the international business *enterprise* and its regulation.[15] And that focus has been at the center of much discussion in the 20th century. Yet, it is hardly clear that a focus on enterprises can be useful in managing the effects of production chains, in which the enterprise is de-centered and the process of production becomes central to the organization of economic activity. Production chains may suggest *systems*[16] rather than enterprises with respect to which the techniques of traditional state-based law may be

[7] See, e.g., Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge, 2012); Larry Catá Backer, Realizing Socio-Economic Rights Under Emerging Global Regulatory Frameworks: The Potential Impact of Privatization and the Role of Companies in China and India, *The George Washington International Law Review* 45(4):615-680 (2013).

[8] See, e.g., David Kinley and Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law," *Virginia Journal of International Law* 44(4):931-1023 (2004); Surya Deva, "Human Rights Violations By Multinational Corporations and International Law: Where from Here?," *Connecticut Journal of International Law* 19:1-57 (2003).

[9] See, e.g., Richard Falk, *Predatory Globalization: A Critique* (Polity Press, 1999).

[10] See, e.g., Janet Dine, *The Governance of Corporate Groups* (Cambridge University Press, 2000); Jennifer A. Zerk, *Multinationals And Corporate Social Responsibility: Limitations And Opportunities In International Law* (Cambridge, 2006).

[11] Gunther Teubner, "Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct," 18 *Indiana Journal of Global Legal Studies* 18:617 (2011).

[12] John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: Norton, 2013).

[13] Especially through sovereign wealth funds; see e.g., Larry Catá Backer, "Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets," *American University International Law Review* 29(1):1-121 (2013).

[14] See, e.g., OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones (Paris: OECD Publishing, 2006). Available http://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf.

[15] See, e.g., Phillip I. Blumberg, Kurt A. Strasser, Nicholas L. Georgakopoulo, and Eric J. Gouvin, *The Law of Corporate Groups: Jurisdiction, Practice and Procedure* (2nd ed., New York: Aspen 2007); Jean J. du Plessis, Bernhard Großfeld, Ingo Saenger, and Otto Sandrock, "An Overview of German Business or Enterprise Law and the One-Tier and Two-Tier Board Systems Contrasted," in *German Corporate Governance in International and European Context* (Jean J. du Plessis, B. Großfeld, C. Luttermann and I. Saenger, eds., Berlin: Springer Verlag, 2012), p. 1-14.

[16] Edo Andriesse, Niels Breerepoot, Bram van Helvoirt, and Guus (A.C.M.) van Westen, "Business Systems, Value Chains and Inclusive Regional Developments in Southeast Asia," in *Value Chains, Social Inclusion, and Economic Development: Contrasting Theories and Development* 151-177 (A.H.J. (Bert) Helmsing, Sietze Vellema, eds., New York: Routledge, 2011).

ineffective.[17] Yet the focus of developments remains grounded in both enterprise and state-based legal regimes. A powerful example is the controversy over the value of focusing on the elaboration of a comprehensive treaty for business and human rights.[18]

It is in this context that one may usefully consider the legal challenges relevant to the proliferation of multinational corporations. In prior work, I suggested the way in which private enterprises have been developing coherent systems of governance that draw on but are autonomous of law and state based legal systems.[19] In this essay I suggest the challenges to the erection of a similar coherent system of legal regulation by or through states. This essay has two objectives. The first is to examine the difficulties of current approaches to use law and legal frameworks to manage MNEs through law. The second is to examine the way that current contradictions impede efforts act developing coherent regulatory models and on that basis to sketch out alternatives beyond the quite limited and repetitive discursive approaches to the regulations of MNEs through law. The fundamental impediment to the legal regulation of the MNE, then, may well be the conceptual cage within which this use of regulation is constrained. As long as the "problem" of MNEs is understood as an institutional problem, that is as a problem of managing something that can be conceived at some level of generality as an institution, an appropriate regulatory response will be elusive. And it will be elusive precisely because the object of regulation cannot focus on the *regulation of an object* (the MNE as enterprise), but the *management of a system* (production chains beyond and within the state). For that enterprise, the traditional tools available to states and exercised on "things" will continue to increasingly elaborate legal interventions produce failure.

THE CHALLENGES OF CURRENT APPROACHES.

Law faces a substantially high hurdle to its effectiveness as a means for the regulation of MNEs, or, for that matter, for the management of cross border macro-economic policy. That hurdle touches on the fundamental character of law as the authoritative pronouncement of states, effective therein, and nowhere else without the permission (sometimes coercively obtained) by another sovereign into whose territory this law is projected and incorporated in one form or another. An excellent example of the later is the agreement by Bangladesh to a series of changes to its domestic legal order in the wake of the Rana Plaza factory building collapse of 2013.[20] The effect of this reality of

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[17] "Indeed, it may be better to view the MNE as a productive system which can take a multiplicity of forms ranging from a highly integrated hierarchy of jointly held entities to a loose network of coordinated economic collaborators." Peter T. Muchlinski, *Multinational Enterprises & the Law* (2nd ed., Oxford, 2007), p. 33. See also Gunther Teubner, "The many head Hydra: Networks as Higher Order Collective Actors," in *Corporate Control and Accountability* (Oxford: Clarendon Press, 1993), p. 41.

[18] See, John G. Ruggie, Commentary: Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors. Institute for Human Rights and Business (Sept. 9, 2014), available http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html.

[19] See Larry Catá Backer, "Multinational Corporations as Objects and Sources of Transnational Regulation," ILSA Journal Of International & Comparative Law 14:499-523 (2008).

[20] See, Joint statement by European Commission/HRVP and US agencies on the Second Anniversary of the Rana Plaza disaster in Bangladesh, Brussels, 24 April 2015 (Sustainability Compact for Bangladesh). Available http://europa.eu/rapid/press-release_STATEMENT-15-4849_en.htm.

territorial constraints is well known—law tends to become a commodity, a transaction cost, or a factor in the production wealth through production chains, however organized. That character assumes a larger role precisely because of its locational effects—but again that relationship tends to upend the traditional relationship between states—and their governmental architecture—and the economic systems within which they now form a part. MNEs will choose states because they provide resources (including labor resources), markets (consumers) or something else of value (legal certainty, efficiency, protection of wealth, etc.).[21] Thus states offering strong property rights protection, including intellectual property, and a useful enterprise organization law (corporate, partnership, joint venture, securities law, for example) become important sites for the location of at least portions of production chains; but so does the site of natural resources or manufacturing capacity or cheap labor or proximity to consumer markets.[22] And some aspects of business central to MNEs, for example, the standards of business that are central to the negotiation and interpretation of commercial contract have become detached from the state.[23]

It is only within this conceptual framework that one can understand the inevitable failures of state based legal efforts to manage or control multinational enterprises, or through the proxy of managing macro-economic policy, of regulating production chains. Law can make a state more or less attractive to production chains.[24] On the other hand, the wealth and productive or consumptive capacity of states may make law less of a factor in determining the locational value of a state (and thus the need for production chains to absorb the costs of conforming to local law).[25] Within these constraints states can engage in a short set of somewhat predictable techniques. These include exporting domestic legal orders (usually on the backs of an actor that forms part of global production chains), managing inbound investment, regulating taxation, and competition law and technology transfer rules. Each of these will be briefly considered in turn in light of the overall constraints of the territorially based state system sitting beneath the emerging system of global production chains.

Weaker states, states that are on the lower end of supply and production chains, states that have little by way of wealth or resources. These states generally do not think in

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[21] John H. Dunning, "Location and the Multinational Enterprise: A Neglected Factor?," *Journal of International Business Studies* 29:45 (1998); Klaus E. Meyer, Ram Mudambi, and Rajneesh Narula, "Multinational Enterprises and Local Contexts: The Opportunities and Challenges of Multiple Embeddedness," *Journal of Management Studies* 48(2):235–252 (2011).

[22] See Peter T. Muchlinski, "Law and the Analysis of the International Oil Industry," in *The International Oil Industry: An Interdisciplinary Perspective* (Judith A. Rees and Peter R. Odell, eds., London: MacMillan, 1987, p.142.

[23] See, e.g., in Dan Wielsch, "Global Law's Toolbox: How Standards Form Contracts," in *Regulatory Competition in Contract Law and Dispute Resolution* 71-110 (Horst Eidenmüller, ed., Hart Publishing, 2013)

[24] Certainly that is the view of the World Bank and its good governance campaigns grounded on voice and accountability, political stability and the absence of violence, government effectiveness, regulatory quality, rule of law, and corruption control systems. See, e.g., World Bank, Worldwide Governance Indicators, available http://info.worldbank.org/governance/wgi/index.aspx#home.

[25] See, e.g., Amanda Perrry Kessaris, "Finding and Facing Facts About Legal Systems and Foreign Direct Investment in South Asia," *Legal Studies* 23:649 (2003).

terms of the exportation of their domestic legal orders.[26] They worry about the extent to which their own domestic legal orders will be reduced to a residual role in the establishment of rule of law, superseded with respect to specific actors and those with whom they engager in economic activity, by the domestic legal orders of other states. Extraterritoriality of domestic law tends to be the privilege of the states in which the controlling or pinnacle enterprises of global production chains tend to be situated. And, indeed, it has been the United States,[27] and the Member States of the European Union[28] that have tended to indulge extraterritoriality more than most, and it is the principles and legal cultures of those states that civil society actors wish to internationalize when they advance arguments about the value of extraterritoriality as a legal response to globalization in the context of a state based global political order.[29]

Yet extraterritoriality takes a number of forms. One is the so-called effects test under which the courts of one state may seek to assert jurisdiction over activity or entities resident or occurring in another on the basis of the "effects" of that entity or those activities back in the home state.[30] Another is the so-called "Brussels Effect," the power by dint of the value of domestic consumer and financial markets, to promulgate regulations that become entrenched in the legal frameworks of other states.[31] But extraterritoriality has the aroma of neo-colonialism and hegemonism.[32] To mitigate these arguments, extraterritoriality has come to be clothed increasingly in the robes of internationalist projects. These structure extraterritorial projections solely to advance international law and norms.[33] And a variant of this is to project international norms extraterritorially, even though those norms would not be applied domestically.[34] A fundamental difficulty, of course is that there is no single coherent version of "international law" applicable in all states. The difficulty, of course, is that these international norms, domesticated within the legal orders of the projecting state, tend to

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[26] More powerful states have the ability to resist, and reject, such projections of domestic legal orders of foreign states. See, e.g., . The result, of course, is greater variation in the "law" applicable to conduct.

[27] Most famously, the Foreign Corrupt Practices Act, of 1977 (FCPA) (15 U.S.C. § 78dd-1, et seq.) (accounting transparency requirements and interdiction of bribery of foreign officials).

[28] See, e.g., David J. Gerber, "The Extraterritorial Application of the German Antitrust Laws," *American Journal of International Law* 77:756 (1983). Well known examples include

[29] See, e.g., Daniel Augenstein and David Kinley, "When Human Rights 'Responsibilities' become 'Duties': The Extra Territorial Obligations of states that Bind Corporations," in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* 271-294 (Surya Deva and David Bilchitz, eds., Cambridge University Press, 2013).

[30] This has been most effective developed by the United States through its antitrust law. See, e.g., F. Hoffmann-La Roche v. Empagran, S.A., 542 U.S. 155 (2004); U.S. v. Alcoa, 148 F.2d 416 (1945).

[31] See Anu Bradford, "The Brussels Effect," *Northwestern University Law Review* 107(1):1 (2012).

[32] Cf. Upendra D. Acharya, "Globalization and Hegemony Shift: Are States Merely Agents of Corporate Capitalism?," *Boston College Law Review* 54(3):937'969 (2013).

[33] See, e.g., Sara Seck, "Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations," *Trade, Law and Development* 3(1):164-202 (2011) But see Makau Mutua and Antony Anghie, "What is TWAIL?," *ASIL, Proceedings of the Annual Meeting* 94:31-40 (2000) who start their essay by asserting that the "regime of international law is illegitimate. It is a predatory system that reproduces and sustains the plunder and subordination of the Third World by the West. Ibid., p. 31.

[34] See Sara Seck, Emerging Market Multinational Home States, Extractive Industries, and the Inside/Outside Problem, Law at the End of the Day, July 2, 2015, available http://lcbackerblog.blogspot.com/2015/07/sara-seck-on-emerging-market.html.

reflect the policy choices of the projecting state. Not every state has transposed every norm of international law represented by treaty into their domestic legal orders. The United States, for example, has been reluctant to incorporate the International Covenant on Economic, Social and Cultural Rights. China, on the other hand, has been less willing to attach a Western interpretation of the International Covenant on Civil and Political Rights. And it is precisely the imbalance of power that makes legal variation a potentially powerful weapon for projecting domestic policy outward as law.[35]

Legal incoherence follows where there is a wide variation in the extent to which international law is domesticated, or domestic law projected outward. That variation is sometimes is carried out indirectly, by imposing obligations on domestic enterprises operating abroad (or through controlled subordinate enterprises) that form part of global production chains). This produces a third variation of extraterritoriality—the extension of disclosure regimes to the activities of a production chain that can be tied, in some manner defined by the law of the exporting state, to an entity or operation resident within its territory. There are two fundamental problems in this context. The first is that while there is a movement toward compliance with international accounting standards, no such standards exist for social, environmental and human rights related reporting. The second is that much of this reporting reflects a large chasm between the fundamental legal standard of corporate operation—shareholder or enterprise wealth maximization, with that underlying much of the movement toward social, environmental and human rights reporting, stakeholder welfare maximization. That chasm is not likely to be bridged any time soon. Moreover, disclosure regimes target enterprises; they do not target the production chains within which these enterprises may operate. Disclosure regimes are market enhancing to the extent that they supply consumers and investors with the information necessary to make whatever values based decisions they like. But such disclosure regimes have met with fierce resistance and might be thwarted by the fundamental rules of the very political systems which produced them, especially in the United States.[36] Lastly, efforts at producing something like enterprise liability have to

[35] Certainly the most powerful states have already made it clear, in the context of rebuilding a global financial regulatory architecture after 2007, that projection of their consensus norms, developed as standards, incorporated in arrangements between FSB states and others. "Policies agreed by the FSB are not legally binding, nor are they intended to replace the normal national and regional regulatory process. Instead, the FSB acts as a coordinating body, to drive forward the policy agenda to strengthen financial stability. It operates by moral suasion and peer pressure, to set internationally agreed policies and minimum standards that its members commit to implement at national level." Financial Stability Board, What We Do, available http://www.financialstabilityboard.org/what-we-do/ . Discussed in Larry Catá Backer, "Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order," *Indiana Journal of Global Legal Studies* 18(2):751-802 (2011)

[36] Thus in the United States the Dodd-Frank Wall Street Reform and Consumer Protection Act () requires the Securities and Exchange Commission to issue regulations requiring corporate disclosure of the sourcing of certain rare minerals originating in African conflict zones. In National Association of Manufacturers v. Securities and Exchange Commission, No. 13-5252 (slip op. D.C. Cir., April 14, 2014), opinion on rehearing No. 13-5252 (slip op., D.C. Cir., August 18, 2015) available http://www.cadc.uscourts.gov/internet/opinions.nsf/7677C9E435244EC985257EA50054F3D4/$file/13-5252-1568402.pdf, the District of Columbia Circuit Court of Appeals determined that such regulations constituted unconstitutionally compelled commercial speech, thus violating the First Amendment of the U.S: Constitution.

date borne little fruit. They have, however, attracted the attention of civil society actors, academics and those with the political ambition to undermine the current structures of corporate law, one based on enterprise welfare maximization and the protection of the autonomy of enterprise legal personality.

The promises and constraints of extraterritoriality set the pattern for the other more significant forms of efforts by states to manage MNEs through law. In each case, every state effort bumps up against its borders. And borders tend to affect the aggregate amalgam of law that may be applied within its territory. As we have seen, extraterritoriality may extend the application of law, but the price is steep. Law extraterritorially applied may have no effect within the home state; the law projected outward may extend no further than the enterprises or activities through which the law applies. The application of this law depends on the ability of home states to enforce and of host states to resist. What is produced is a surfeit of law and very little order.

For host states the result is the naturalization of multiple legal orders within its territory. For enterprises the ability to use these legal regimes strategically in determining where and how to place its operations. This is well illustrated in the efforts, over the last generation to develop legal regimes to control inbound investment. Between the 1970s and today, most states have moved from legal regimes quite hostile and suspicious of inbound foreign investment, to one in which states reserve the right to review and condition such investment to sectorial exclusions and screening laws.[37] However, even these have fallen beneath the harmonizing effects of bilateral and multilateral investment treaty regimes[38] which tend to reflect the norms developed by OECD states.[39] Some states, like China,[40] had preferred to create Special Economic Zones within their borders where one set of rules applies and connections with global production chains were encouraged, while sealing off other parts of the national territory. Indeed, just as developed states have been the most aggressive sources of extraterritorial law projection into host states, so developed states have appeared to be at the forefront, through multilateral institutions like the OECD, of efforts, now quite successful, for reducing barriers to inbound foreign investment and for the construction of rules under which such inbound investment is managed. It is in this respect, at least, that states might be understood as having been most effective in constructing a global legal regime within which something like a global free movement of capital may occur and in influencing the

[37] Development. however, remains an important consideration for some states. See, e.g., José Antonio Ocampo and Joseph Stiglitz (eds.), *Capital Market Liberalization and Development* (Oxford, 2008); Welber Barral (ed.), *Direito e Desenvolvimento: Análise da ordem jurídica brasileira sob a ótica de desenvolvimento* (São Paolo: Editora Singular, 2005).

[38] See, e.g., Jeswald W. Salacuse & Nicholas P. Sullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain," *Harvard International Law Journal* 46: 67, 76 (2005)

[39] See, e.g., OECD, Code of Liberalization of Capital Movements (2013) ("framework for countries progressively to remove barriers to the movement of capital, while providing flexibility to cope with situations of economic and financial instability." Id. Foreword, p. 3).

[40] See, e.g., Douglas Zhihua Zeng (ed.), Building Engines for Growth and Competitiveness in China: Experience with Special Economic Zones and Industrial Clusters (Washington, D.C.; World Bank Publications, 2010).

substance of the legal rules managing those investments.[41] The rules are coherent to the extent that, in the aggregate, they point to a set of substantially similar rules grounded in the same presumptions—that restrictions on investment ought to be reduced but may be permitted on a sectorial or investor review basis and that the substantive rules of those investments may be affected by home and host states rules.

Indeed, for states that participate in global production chains on its lower rungs, the problem is not so much the construction of legal barriers to FDI, but the development of rules for the encouragement of FDI. The functional result is similar to that of extraterritorial application of foreign law. In both cases, a host state creates pockets of legal regimes in which the domestic legal order may not apply, or may not apply completely. These enhanced benefit regimes may be implemented through bilateral investment treaties or in arrangements with specific enterprises. In recent years, these measures to encourage investment have, to some extent, been dampened by most favored nation and equal treatment rules in many bilateral investment treaties.

The uses of competition (antitrust) law, taxation, and technology transfer rules have substantial parallels to efforts to encourage extraterritoriality and the erection of barriers to inbound investment. Competition law rules have been increasingly used to project national control up the production chain. They are most potent when they can be used to hold up a transnational business combination subject to the regulatory approval of any one of the states whose competition law regimes is invoked. They tend to be most useful to the more powerful states or states that sit at convergence points of global production chains. Three principal actors are the United States, China and the Member States of the European Union. But it is only triggered on an acquisition or divestiture of operations.

Taxation regimes expose the problems of developing coherent rules for the taxation of production chains and of determining where and what may be produced (and taxed) within each jurisdiction touched by a production chain. This is particularly problematic where the autonomy of enterprises in production chains must be respected but in which they may collude to reduce the reporting of taxable income by managing the accounting treatment of transactions among them. Moreover, the need to protect revenue—by states and enterprises in transnational production chains—create the current interest in so called tax havens, and the development of rules for their regulation, and sometimes their suppression.

Technology transfer rules work in favor of host states with little power but with substantial locational advantages that enhance their bargaining power. They serve, like more generalized control rules for inbound FDI as a means of bargaining with, and to that extent, managing the relationships between inbound investors and host states. In each case, these legal regimes seek to extend national power to manage enterprises in production chains. But neither work toward the effective construction of legal regimes that produce coherent and global standards for MNE conduct. And indeed, in the case of

[41] See, e.g., John B. Goodman and Louis W. Pauly, "The Obsolescence of Capital Controls?: Economic Management in an Age of Global Market," *World Politics* 46(1):50-82 (1993).

technology transfer rules, like those of impediments to inbound FDI, the rules have appeared to provide little benefit.

STOCK TAKING: FROM CONTRADICTION TO COHERENCE?

Taken together, the forms of law making described above nicely describes the contents of the "legal toolkit" of nations. States, and international organizations, have been quite energetic in using the available resources from out of their toolkits, to the extent of their interests and power. This appears to have produced more not less law as states try to manage MNEs or the effects of the activities in which they engage. States are producing more law, even as the great structures of societally based governance regimes evolve and assert a growing power to influence the consensus on the framework for judging and disciplining business behavior within production chains producing polycentric rather than state-centered governance.[42] But where does that leave the state in relation to the MNE? More importantly, where does that leave law, as an enterprise of state and the state system, in relation to MNEs?

Considered in the aggregate, national, and to some extent international, legal regimes suggest both the contradictions and the resulting incoherence of use of law to regulate or manage MNEs. The "legal toolkit" of nations suggests the structural constraints in law-based regulation of MNEs. The structural constraints in turn reflect the core premises that give the state system its coherence, legitimacy and authority. Thus contradiction produces paradox. These contradictions are neither ameliorated nor resolved by the proliferation of law produced by states, or the international law frameworks that serve to internationalize national law. But the contradictions are exacerbated by the ideology of the state order through which these law making projects proliferate.[43] What appears to be produced is not anything like a cohesive legal regime for the regulation of MNEs, but more like a competition for advantage among states that effectively accelerate a change in the character of law to one better understood as a commodity or transaction cost to be measured against the benefit of placing some portion of a production chain within that territory.[44] But what is desired is something more comprehensive and coordinated. The efforts, spearheaded to success by Ecuador in 2014, to induce the international community to *consider* the possibility of negotiating a comprehensive treaty on business and human rights transposed into the national legal

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[42] See, e.g., Mark B. Taylor, "The Ruggie Framework: Polycentric Regulation and the Implications for Corporate Social Responsibility," *Nordic Journal of Applied Ethics* 5(1):9-30 (2011); Jamie Darin Prenkert and Scott J. Shackelford, "Business, Human Rights, and the Promise of Polycentricity," *Vanderbilt Journal of Transnational Law* 47:451-500 (2014).

[43] Discussed in Larry Catá Backer, On the Tension between Public and Private Governance in the Emerging Transnational Legal Order: State Ideology and Corporation in Polycentric Asymmetric Global Orders (April 16, 2012). Available at SSRN: http://ssrn.com/abstract=2038103.

[44] The notion is a substantially expanded version of the older idea of regulatory competition, but now understood from the perspective of the consumer rather than the producer. See, e.g., Horst Eidenmüller, "Regulatory Competition in Contract Law and Dispute Resolution," in *Regulatory Competition in Contract Law and Dispute Resolution* 1-10 (Horst Eidenmüller, ed., Hart Publishing, 2013) ("law has become a commodity in many parts of the world and in relation to many different topics" Ibid., p. 1).

orders of states suggests both the promise and the aspirational nature of efforts to use law to manage MNEs.[45]

The reasons for this state of affairs may be usefully divided into four distinct categories. These suggest the challenges for coherent law making, for the moment difficult to surmount, a state-centered global legal-political system very much set in its ways around which the global production-centered processes they collectively set in motion is changing the world around them.

1. Legislative efforts at the national and international level target the wrong object. Legislative policy is, like many other areas of policy formulation, a prisoner of its own history.[46] Current policy for MNE regulation is no exception. What drives this regulation are t some extent the well remembered scandals of the 1970s involving MNE complicity on regime changes in Latin America, and the 1980s strategic use of corporate legal personality to protect aggregate enterprise assets in the wake of tragedies like that in Bhopal, India. These presuppose, like most law proceedings thereafter, at both the national and international level, that regulation must target entities as their object. And not just any sort of entities, but more often than not entities operating in corporate form that sit atop sometimes complex networks of interrelated companies that together produce and "enterprise" that "games" law—and the state. Yet such an approach tends to mistarget regulatory object, even as it proves incapable of reaching the enterp`rise across production chains.[47] Regulating "MNEs" should be understood as a proxy for the regulation of the effects of global production and value chains. The lawyer and policy analyst tends to treat value and production chains as of use only in the realms of the economist. Still, it is the effects of production chains rather than the forms through which it is organized that ought to organize structures of legal regimes if what is meant to be managed are rights and obligations that ought to be vested in the participants in these chains from its beginnings in resource gathering, to its end in consumption of end products. International efforts have recently nodded in this direction; so has the OECD. But these have not influenced law as much as it ought. As long as states target "things" rather than "processes" or "systems" their mis-targeting will invariably produce disappointing and evadable results.

2. *Coordinating Legislative efforts will remain difficult because of a continuing fundamental fracture in the basic remises and objectives of MNE regulation.* MNE regulation reflects in large part the fractured state of basic policy about both the basic principles of any such regulatory approach and its normative objectives. That fracture, of course, has been well reflected in the inability of international public organizations to build a unified approach to principles and objectives of human rights. Since the 1970s, and continuing with new life today, state have divided among those who believe that their

[45] Discussed in Larry Catá Backer, Considering a Treaty on Corporations and Human Rights: Mostly Failures But With a Glimmer of Success, Coalition for Peace & Ethics Working Paper 6/1 (June 2015).
[46] Cf., Richard E. Neustadt and Ernest R. May, *Thinking in Time: The Uses of History for Decision-Makers* (New York: Free press, 1986).
[47] A useful conceptual discussion in Fleur E. Johns, "The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory," *Melbourne University Law Review* 19:893-923)1994).

role is to enhance and protect the economic, social and cultural rights of their citizens and those who believe that their role is to enhance the political and civil rights of their citizens. The former maintain that law is a means of providing a necessary floor of protection of economic, social and cultural rights, whose flourishing make it possible to develop robust and authentic political and civil rights. The later take the reverse view. And even among these distinct camps there are variations. These fundamental differences have a deep impact on policy and on the thrust of legal regimes, especially those that might affect MNEs.[48] The United States, for example, may favor information and disclosure based regimes with a large ambit for public choice and may resist any move that might require a move from shareholder or enterprise wealth maximization policy; China may favor control regimes in which more specific obligations are imposed and resist transparency regimes.

3. The legal structures of international law itself make coordination and legal discipline among states difficult. Law making itself involves a tremendous expenditure of public capital; in democratic societies that capital may be limited and must be distributed among a host of issues that states face. But the legal structures of international law itself makes coordination much more "expensive" in terms of institutional costs, with sometimes elusive value for the political forces that must incur those expenses within states. For many states, international law and law making remains an obligation of states that require transposition into the domestic legal order in order to give rise to legal rights and obligations. Even in states where international agreements become part of the domestic legal order on ratification, there is no mechanism for ensuring uniform adoption. States have long been in the habit of including reservations, sometimes substantial, in their ratification of treaties. And, of course, there is no central mechanism for developing uniform interpretation and application of international law even when transposed into the domestic legal orders of states. Nor is there any legal means of forcing states to ratify and adopt treaties. The United States has refused to transpose the provisions of the International Covenant on Economic, Social and Political Rights into domestic law. The argument usually turns on the greater protections of American constitutional law. The Chinese apply the principles of the International Covenant on Civil and Political Rights within the constitutional parameters of the People's Republic. Beyond a few principles that have taken decades to embrace, there is little by way of legal discipline for international coordination of national law. And indeed, frustration has produced a large literature extolling the virtues of bottom up or organic or societally sourced law and norm making through international mechanisms and into domestic legal orders as a more effective way of coordinating the development of more uniform approaches to regulation.[49] Overcoming the structural constraints of international law may well be a necessary re-condition to increasing the viability of responses to MNE production systems through law.

4. In the face of governance gaps that are the inevitable product of the structure of law making within and among states, alternative governance structures emerge. Systems

[48] Discussed in Larry Catá Backer, "Realizing Socio-Economic Rights," supra.
[49] See, e.g., Janet K. Levitt, "Bottom Up International Lawmaking: Reflections on the New Haven School of International Law," Yale Journal of International Law 32:393-420 (2007).

cannot endure gaps in their governance. Predictability, certainty, and coherence are basic premises of operating systems—whether denominated law, governance or something else. These systems are autonomous or networked, comprehensive of functionally differentiated.[50] Their form and structure is in part a reflection of the field of systems within which they must operate.[51] Societally based systems, systems of governance of both MNEs as entities and as components of production chain systems have emerged to fill the gaps left by the inevitable fracture of legal efforts, through states and the international system that reflects state-centered political ideology to regulate through law. In the face of these efforts, states have reverted to traditional methods to deploy law as the principal instrument of regulation—the use of public and economic power to drive consensus about basic principles of MNE governance through soft law and policy developments, through standard setting, undertaken or overseen by smaller alignments of powerful states. The Financial Stability Board of the G-20; the OECD, even the construction of a Trans-Pacific Partnership and related "regional" trade regimes, herald the tactics of these new forms of organic, bottom up and coercive discipline eventually manifested in law.

CONCLUSION—CUTTING THE GORDIAN KNOT.

Like the scorpion in the ancient fable,[52] the state cannot overcome its nature. It will sting the frog that carries it across the river and plunge them both their deaths. But if that is the case, it is becoming more apparent that the scorpion either will have a choose a different floating device, become accustomed to life on one side of the land divided by the river, or cease to be itself. And perhaps it is that something else that the state must become if it is to participate meaningfully, through law, in the management of the behaviors of the production chains in which MNEs operate.[53]

States as norm makers developing standards and "soft" law that is hardened in societal space (the OECD's Guidelines for Multinational Enterprise structures), projections of law norms through private investment and assertions of shareholder power (Norway's pioneering approach through its sovereign wealth fund), and the construction of more comprehensive (through for the moment not very transparent) rules of production among states in which production chains are located (the coordination of efforts in TPP for example), may point to the new modes of action through which law and the state may

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[50] Consider the rise of international framework agreements between MNEs and global unión federations. Discussed in Dimitris Stevis, *International framework agreements and global social dialogue: Parameters and prospects* (International Labour Organization, 2010) available http://www.ilo.int/wcmsp5/groups/public/@ed_emp/documents/publication/wcms_122176.pdf.

[51] Cf., Niklas Luhmann, "The Autopoiesis of Social Systems." Pp. 172-92 in *Sociocybernetic Paradoxes: Observation, Control and Evolution of Self-Steering Systems* 172-192 (F. Geyer and J. Van d. Zeuwen, eds., London: Sage, 1986).

[52] A scorpion asks a frog to take him across a river with an assurance that the scorpion will not sting the frog. Half way across the river the scorpion stings the frog. As he dies, the frog asks why he was stung, dooming them both to which the scorpion replied, "it is my nature." See also, William A Borst, *The Scorpion and the Frog: A Natural Conspiracy* (Xlibris, Corp., 2004).

[53] See, e.g., John Cantwell, John H. Dunning, and Sarianna M. Lundan, "An evolutionary approach to understanding international business activity: The co-evolution of MNEs and the institutional environment," *Journal of International Business Studies* 41:567–586 (2010).

play a significant role in the disciplining of MNEs. Together these emerging responses to the challenge of MNEs in production chains may not so much reject the current law and legal framework as absorb it within the larger project of emerging extra-legal governance systems to manage process, systems and the entities through which they operate.