

REGULATING GLOBAL CORPORATE CAPITALISM

This analysis of how multilevel networked governance has superseded the liberal system of interdependent states focuses on the role of law in mediating power and shows how lawyers have shaped the main features of capitalism, especially the transnational corporation. It covers the main institutions regulating the world economy, including the World Bank, the IMF, the WTO and a myriad of other bodies. The book introduces the reader to key regulatory arenas: corporate governance; competition policy; investment protection; anti-corruption rules; corporate codes and corporate liability; international taxation, tax avoidance–evasion and the campaign to combat them; the offshore finance system; international financial regulation and its contribution to the financial crisis; trade rules and their interaction with standards, especially for food safety and environmental protection; the regulation of key services (telecommunications and finance); intellectual property; and the tensions between exclusive private rights and emergent forms of common and collective property in knowledge.

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PREFACE

I will not attempt to provide an extensive introduction to this book, but I hope the detailed outline and chapter and section headings provide the reader with a map of the topics covered. However, some explanation of the structure, format and approach may be helpful here. The book attempts to provide an account and analysis of some of the main conceptual and institutional forms which have shaped the development of international corporate capitalism over the past century and a half. The focus is on the legal, institutional and regulatory forms, although the analysis is in terms of their development as a historical social process and within a political and economic framework. I focus on law not only because it is my main field, but also because law mediates power in capitalist society. Examining actual legal rules and institutions, providing this is done in their socio-economic context and in historical perspective, enables analysis to go beyond the abstract generalizations of some versions of social and political theory, and indeed helps to contextualize and evaluate those various theories. My aim is to give sufficient detail for an adequate understanding, and at the same time to locate the various theories and viewpoints, including my own, which have tried to rationalize these developments.

Indeed, my main method has been to immerse myself in the detail, while using as a guide some initial perspectives, which have been developed, revised and refined as the work proceeded. In that sense, the methodology was one of immanent critique. Although this sounds deliberate and strategic, in practice I have been in many ways moving through a dimly lit landscape, which only gradually became more clearly illuminated. Yet, to my surprise, most of my initial intuitions have taken increasingly solid form in this process, even some ideas of which I had been doubtful, or which were only semi-formulated. Perhaps this is because, although I have long had an interest in social theory, I have also been highly sceptical about abstract theorizing. The attempt to impose one's ideas on the world is a pointless and sometimes dangerous exercise, whether conducted by

the armchair academic or the political activist, or a combination of the two.

Thus, although the book is presented as a logical sequence, its writing did not unfold in that way. The first chapter, providing a general overview of what I understand to be the main contours and dynamics of contemporary global economic governance, resulted from earlier work on the main substantive topics, and has been continually revised. The next two chapters trace the historical development of the international system, over the past two centuries in particular, including a discussion of the main ideas about internationalism and international law and the key institutions in that historical context. I hope that they will be helpful to those without a background in international law, as well as to international law and international relations students and specialists. Their aim is to go beyond generalizations about globalization and deterritorialization, and examine in more detail the shift from the system of interdependent states of classical liberalism, to the more complex and fragmented system of interacting jurisdictions described today as multilevel or networked governance.

The six succeeding and substantive chapters give an account, again in historical perspective, of the shaping of the main legal and institutional forms of corporate capitalism, and of their internationalization, and of current issues and controversies. They are written to be substantially free-standing, so that readers can decide which (if any) of the specific areas are of interest, although there are of course interrelationships, which are indicated by cross-referencing. Chapter 4 examines the large corporation, the key institution which fundamentally changed the capitalist economy and society from the market economy of the nineteenth century to the corporatist capitalism of the twentieth, and its transnationalization and further transformation into the corporate networks of post-industrial capitalism. It also deals with antitrust and competition regulation, which emerged in the USA as a populist reaction to oligopoly, but became a means to manage and legitimize it, and with the internationalization of competition regulation in the second half of the twentieth century, and its current international coordination through informal expert communities. Chapter 5 discusses the dual processes of business regulation: the facilitation of corporate transnationalization through liberalization of capital controls and protection of international investment, counterpointed by growing regulation by both home and host states and the emergence of regulatory networks. It includes discussion of the international spread of anti-corruption measures, transnational liability litigation against corporations, regional frameworks, the rapid emergence

of international investment adjudication, and also of corporate codes and the corporate social responsibility movement.

Chapter 6 deals with taxation, which both constitutes and defines the state and its separation from the private economy, especially the income tax which has been central to the legitimization of the increasingly high levels of taxation and state expenditure in the main capitalist states, while the much lower levels of tax revenues in colonial and post-colonial countries have contributed to their dependency. The bulk of the chapter examines the emergence of international coordination of business taxation and of avoidance and evasion, the important roles of tax havens and the offshore system, and the more recent attempts to reassert more effective international tax cooperation. Chapter 7 considers the key sphere of finance and especially its international liberalization, which contrary to common belief was accompanied by an enormous growth of formalized regulation, loosely coordinated internationally. However, this regulation has taken forms which have stimulated and supported financialization, including the emergence of extraordinary levels of trading in complex instruments, and increasing financial fragility and banking failures, culminating in the 2007–8 crisis. The chapter explains the main forms of regulation and its complex coordination through public–private networks, shows how they contributed to the crisis, and analyses the main proposals for regulatory reform and ideas for a more radical reorganization of finance.

Chapter 8 examines the World Trade Organization (WTO), beginning with an account of its emergence from the General Agreement on Tariffs and Trade (GATT), and then an analysis both of the WTO itself and of its role as a central node in international regulatory networks. This includes discussion of the tensions between politics and science in setting and applying technical standards for food, the interactions of trade rules with national and international environmental protection regulation, the impact of the Services agreement especially in relation to the key areas of telecommunications and finance, and the debates about the ‘right to regulate’. The last part of the chapter considers the debates about the ‘constitutionalization’ of the WTO and its relationships with human rights norms, and surveys the operation of its important system of adjudication. Chapter 9 analyses the international expansion of the private-property paradigm of intellectual property rights due largely to pressures from key industries, but also traces the emergence of alternative models of shared or common property such as ‘open source’, and forms of collective property such as ethical brands, and geographical indications.

The final chapter draws the material together and uses it to put forward my own perspectives on the role of law and lawyers in global economic governance, in the context of an evaluation and critique of some of the main viewpoints of others which I consider important. I suggest that lawyers have played a key part in creating the key institutions of corporatist capitalism, as they work at the interface of the public and private in mediating social action and conflict, and because their techniques and practices of formulating and interpreting concepts and norms which are inherently malleable and indeterminate provide the flexibility to manage these complex interactions. These techniques have also been central both to the construction of the classical liberal system of interdependent states, and its gradual fragmentation and the transition to networked regulation and global governance. Some readers may prefer to jump straight to this concluding chapter, which again supplies cross-references to relevant material in the earlier chapters.

Thus, the book is both broad and relatively detailed, even though the substantive chapters offer only an overview of what are in my view the main issues of each field, which some specialists may find insufficient. Inevitably, some topics are only briefly mentioned or not dealt with at all. Perhaps the most significant omission is the lack of a chapter on environmental regulation, especially the climate change emissions-trading regime, which raises central questions about regulation of the high-energy economy.

To make it easier for readers to follow the general argument, detailed accounts of a number of specific points and issues are given in footnotes, some of which are in consequence quite long. I hope that readers will find this helpful rather than irritating, and the presentation of these detailed 'asides' as footnotes rather than endnotes should make it easier to decide how much detail to read. For the growing number of students, researchers and others interested in international business and economic regulation and governance, I hope I have provided an overview account and analysis that is both interesting and challenging.

Parts of some of these chapters draw on previously published work of mine, which has been cited where appropriate. An earlier version of Chapter 1 was delivered as a paper at the Hart Workshop in June 2006, then at a workshop at Oñati, and was published in an edited collection of papers from that workshop as 'Regulatory Networks and Multi-Level Global Governance', in Olaf Dilling, Martin Herberg and Gerd Winter (eds.), *Responsible Business: Self-Governance and the Law in Transnational Economic Transactions* (Oxford: Hart, 2008), pp. 315–41.

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This book has had a long gestation period. I first sketched it out in the mid-1980s, but what was intended to be one chapter turned into a book of its own, *International Business Taxation* (1992). My move to Lancaster University meant new challenges and less time for research, although in the mid-1990s I benefited from a grant from the Leverhulme Foundation to conduct some research into financial market regulation, in which I was greatly assisted by Jason Haines. My teaching and research shifted towards the tensions between the rights being granted to corporations, in bilateral investment treaties and the proposed Multilateral Agreement on Investment (MAI), and the revived movement for codes of corporate social responsibility, in connection with which I benefited from working with Ruth Mayne and her colleagues in the Oxfam–GB Policy and Research department, Nick Mabey and others. I subsequently became involved with the Tax Justice Network, in which John Christensen was instrumental; and I have learned much from working as an adviser on international tax issues with him and others, notably Bruno Gurtner, Jim Henry, Richard Murphy, Nick Shaxson, Prem Sikka and David Spencer. I also ventured into the fascinating field of intellectual property rights (IPRs), and examined aspects of the considerable impact of the creation of the WTO. A kind of connecting thread between all these developments was provided by the fashionable debates about globalization, and the role in it of law and of lawyers. Then the publication of the challenging and influential book by John Braithwaite and Peter Drahos, *Global Business Regulation* (2000), showed that it was possible to write a synthesis and overview which could also deal with substantive aspects in sufficient depth.

The opportunity to make my own attempt at such a synthesis came when I was fortunate enough to be awarded a research fellowship by the Economic and Social Research Council (ESRC) for a research programme on Regulatory Networks and Global Governance (Award RES-000-27-0117) for three years from 2004. I owe a great debt especially to those

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Along the way I have benefited enormously from interaction with many others. It is probably invidious to mention individual names, since there will inevitably be some omissions, but I feel that some specific debts should be acknowledged. Probably the greatest influence on the succeeding pages has been that of David Campbell, although our discussions have included often vehement disagreements, they have equally often been conducted in the most pleasant of contexts, usually country walks or memorable meals. Equally challenging to my thinking have been my discussions, from a different perspective but with a similar Marxist heritage, with Jane Kelsey, who is perhaps unusual in combining vehement conviction with strict technical rigour. I greatly benefited from a month’s stay in early 2004 at RegNet in Canberra, specifically in the Centre for Tax System Integrity directed by Valerie Braithwaite, and where John Braithwaite, Peter Drahos, Peter Grabosky and their colleagues, as well as others such as Neil Gunningham, have created an unparalleled centre of socio-legal research. A visit to Dar es Salaam and Nairobi provided an opportunity

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Oñati, July 2010

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ABBREVIATIONS AND ACRONYMS

AB	Appellate Body (of the WTO)
ABS	access and benefit sharing
ABT	Agreement on Basic Telecommunications
ACJ	Andean Court of Justice
ACP	African, Caribbean and Pacific
ACTA	Anti-Counterfeiting Trade Agreement
AML	anti-money laundering
AoA	Agreement on Agriculture
APA	Advanced Pricing Agreement
ASCAP	American Society of Composers, Authors and Publishers
ASEAN	Association of Southeast Asian Nations
ATCA	Alien Tort Claims Act
BCBS	Basel Committee on Banking Supervision
BCCI	Bank for Credit and Commerce International
BIS	Bank for International Settlements
BIT	bilateral investment treaty
CAFC	Court of Appeal for the Federal Circuit
CAP	Common Agricultural Policy
CARICOM	Caribbean Community
CDO	Collateralized Debt Obligation
CDS	credit default swap
CEO	chief executive officer
CERDS	Charter of Economic Rights and Duties of States
CFA	Committee on Fiscal Affairs (of the OECD)
CFC	Controlled Foreign Corporation
CFIUS	Committee on Foreign Investment in the United States
CFT	countering financing of terrorism
CGIAR	Consultative Group on International Agricultural Research
CIA	Central Intelligence Agency
CIIME	Committee on International Investment and Multinational Enterprise
CITES	Convention on International Trade in Endangered Species

Codex	Codex Alimentarius Commission
CRA	credit-rating agency
CRO	collective rights organization
CSR	corporate social responsibility
CUTS	Consumer Unity & Trust Society
DG	Directorate-General
DGComp	Directorate-General for Competition
DMCA	Digital Millennium Copyright Act
DRM	digital rights management
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EAC	East African Community
EC	European Community
ECAI	external credit assessment institution
ECJ	European Court of Justice
ECN	European Competition Network
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
ECT	Energy Charter Treaty
EEC	European Economic Community
EPC	European Patent Convention
EPO	European Patent Office
EPZ	Export Processing Zone
EST	expressed sequence tag
ETUC	European Trade Union Confederation
EU	European Union
FAO	Food and Agriculture Organization
FATF	Financial Action Task Force
FCPA	Foreign Corrupt Practices Act
FDI	foreign direct investment
FIU	Financial Intelligence Unit
FLOSS	free <i>libre</i> open-source software
FoC	flags of convenience
FSA	Financial Services Authority
FSF	Financial Stability Forum
FTC	Fair Trade Commission
GAAP	Generally Accepted Accounting Principles
GAO	General Accounting Office
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product

LIST OF ABBREVIATIONS AND ACRONYMS

xxvii

GI	geographical indication
GM	genetically modified
GPL	General Public Licence
GSP	generalized system of preferences
HGP	human genome project
HNWI	high net worth individual
IAIS	International Association of Insurance Supervisors
IARC	International Agricultural Research Centre
IASB	International Accounting Standards Board
IASC	International Accounting Standards Committee
IATA	International Air Transport Association
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICN	International Competition Network
ICSID	International Centre for the Settlement of Investment Disputes
IDA	International Development Association
IETF	Internet Engineering Task Force
IFI	international financial institution
IGO	intergovernmental organization
IIA	international investment agreement
ILO	International Labour Organization
IMF	International Monetary Fund
INGO	international non-governmental organization
IO	international organization
IOSCO	International Organization of Securities Commissions
IP	intellectual property
IPIC	(Treaty on) Intellectual Property in Integrated Circuits
IPPC	International Plant Protection Convention
IPR	intellectual property right
IRS	Internal Revenue Service
ISDA	International Swaps and Derivatives Association
ISO	International Standards Organization
ISP	internet service provider
ITF	International Transport Federation
ITO	International Trade Organization
IT-PGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
ITU	International Telecommunications Union
LLR	lender of last resort
LTCM	Long-Term Credit Management

MA	Market Access
M&A	merger and acquisition
MAI	multilateral agreement on investment
MAP	mutual agreement procedure
MEA	multilateral environmental agreement
MERCOSUR	Mercado Común del Sur (Southern Common Market)
MFA	Multi-Fibre Agreement
MFN	most-favoured-nation (treatment)
MLAT	mutual legal assistance treaty
MNE	multinational enterprise
MOU	memorandum of understanding
NAAEC	North American Agreement on Environmental Cooperation
NAALC	North American Agreement on Labor Cooperation
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NCI	National Cancer Institute
NGO	non-governmental organization
NIC	newly industrializing country
NIEO	New International Economic Order
NIH	National Institutes of Health
NLFT	no-less-favourable treatment
NT	National Treatment
NTB	non-tariff barrier
OECD	Organization for Economic Cooperation and Development
OFC	offshore financial centre
OGBS	Offshore Group of Banking Supervisors
OHCHR	Office of the High Commissioner for Human Rights
OTC	over the counter
PBR	plant breeders' right
PCT	Patent Cooperation Treaty
PE	permanent establishment
PPMs	processes and production methods
PRO	Public Records Office
PTA	preferential trade agreement
R&D	research and development
RBP	restrictive business practices
ROSC	Report on Observance of Standards and Codes
SCM	Subsidies and Countervailing Measures
SEC	Securities and Exchange Commission
SEZ	special economic zone

LIST OF ABBREVIATIONS AND ACRONYMS

xxix

SMTA	Standard Material Transfer Agreement
SPS	(agreement on) Sanitary and Phytosanitary Measures
SPV	special purpose vehicle
TBT	(agreement on) Technical Barriers to Trade
TI	Transparency International
TIEA	tax information exchange agreement
TNC	transnational corporation
TPM	technological protection measure
TRIMs	(agreement on) Trade-Related Investment Measures
TRIPs	(agreement on) Trade-Related Intellectual Property Rights
TUAC	Trade Union Advisory Committee
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
United Nations HCHR	United Nations High Commissioner for Human Rights
UNIDO	United Nations Industrial Development Organization
United Nations ODC	United Nations Office on Drugs and Crime
UPOV	Union internationale pour la protection des obtentions végétales (Union for the Protection of New Varieties of Plants)
UR	Uruguay Round
US	United States
USA	United States of America
USPTO	United States Patent and Trademark Office
USSR	Union of Soviet Socialist Republics
USTR	United States Trade Representative
VaR	value at risk
VCLT	Vienna Convention on the Law of Treaties
WB	World Bank
WIPO	World Intellectual Property Organization
WIR	World Investment Report
WTO	World Trade Organization