

## 24 From Non-State Regulation to Governance? Shifting the Site of Contestation

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Chapter 1 provided an account of the problematic of non-state regulation. It included a distinction of three types of non-state regulatory initiatives, an analysis of how they approach the regulatory function and tend to contribute to the promotion of development, along with an evaluation of their effectiveness as regulatory mechanisms. The chapter also suggested that the potential of such initiatives might be enhanced if they were to work more closely with states and intergovernmental organizations (IGOs), as this might facilitate a transition to harder law.

This chapter takes up this question of a potential transition to harder law. It begins by first delineating the key feature of the notion of governance as a form of regulatory strategy and then by examining how given instances of such a strategy are likely to be contested. Next, three strategic models of governance are distinguished, based upon different economic development strategies that states might adopt. The prospect of these different models generating harder forms of law that will contribute to development is then explored by examining some illustrative cases. The chapter concludes with some reflections on the constraints that structures place on regulatory reform efforts and the on-going North-South tension within such efforts.

### THE NOTION OF GOVERNANCE

Chapter 1 provided a preliminary account of the notion of governance, characterizing it as a strategy by which states (and IGOs) simultaneously withdraw from a command and control model of regulation and adopt a decentralized approach. In this approach, private actors, especially firms and non-governmental organizations (NGOs), are brought into the regulatory process, as states relinquish their complete control to take on more of a steering role. A difference in practice was also noted between the domestic and international realms. In particular, the failure of states and IGOs to actively steer and support the activities on non-state regulatory initiatives in the international realm (an 'orchestration deficit') was noted (Abbott and Snidal 2009).

The promise of governance vis-à-vis simple non-state regulation is that state involvement can induce higher standards, more widespread participation in (high standard) schemes by business, and more effective monitoring and enforcement. In order to examine such claims more fruitfully, we first look at the formal nature of governance as a regulatory strategy and then examine how the practice governance is likely to vary based upon the context in which it is practised.

### Governance as a Form of Regulatory Strategy

### *Tools and tactics*

One approach to understanding governance is through the notion of soft law. The concept of soft law arises first in the analysis of international law where it is employed in contradistinction to the hard law that states characteristically use in the domestic realm. Abbott and Snidal (2000) distinguish soft law from hard law on the basis of three basic dimensions of legalization, namely, obligation, precision and delegation. They argue that, in a given regime, achievement of all the different dimensions of legalization can occur along a gradient. In examining different cases, they express this variation by distinguishing high, medium and low levels of attainment with capital letters, small letters and dashes respectively. Thus, hard law, characterized by strong obligations, high precision and strong delegation would be indicated as [O,P,D], whereas a soft law regime with moderate obligation, high precision and low delegation would be expressed as [o,P,-]. Particular situational features will lead actors to agree to different types of soft law arrangements. Key situational features would include the types of issues involved (for example, security, trade), power differentials between states, and so on.

This treatment of soft law in the analysis of conventional international law can easily be expanded to include governance. This can be done by merely extending the analysis of state involvement in regulatory initiatives to include policy activities that do not involve legalization (for example, providing material resources, moral support, and so on). If we indicate such support with an asterisk, then state involvement with a non-state regime that only entails only material and moral support (without any form of legalization) would be designed as [\*,\*,\*]. Similarly, state involvement in a voluntary co-regulatory rule-setting regime might be of the form [o,P,\*]. These different forms of governance arrangements can be understood as tools and can be used tactically in different situations.

### *Strategies of governance*

When incorporating non-state actors into regulatory processes, states and IGOs can adopt different strategies. While not offering a precise definition, Abbott and Snidal (2009) provide an important distinction between directive and facilitative approaches to orchestration. Three key features seem to distinguish these approaches. First, the formal purpose of directive orchestration is to guide regulatory activity. A facilitative approach, by contrast, would imply that states largely leave the substance of the regulatory process up to private actors. Second, in terms of tools and tactics, a directive approach will be open to employing different forms of (soft law) legalization, whereas a facilitative approach will restrict itself to material and moral support. Third, as regards function, a directive approach will be more inclined to use governance as a means to strengthening legalization, including the transition to hard law. A facilitative approach, by contrast, would not contribute in this way.

### **Governance as a Site of Contestation**

An analysis of the practice of governance, of course, cannot be based on knowledge of the available tools and strategies alone. It is also necessary to identify the purposes for which states (and IGOs) seek to employ governance and the conditions under which this occurs. Critical international political economy perspectives frame these questions in terms of how historic structures set the context in which actors make decisions (Cox 1987). The change in three key forms of historic structures over the last several decades provides the current decision-making context. In the realm of production, there has been a shift from a Fordist model to a post-Fordist model of accumulation (Lipietz 1987). The second area of structural change has involved a shift from a Keynesian welfare state to a Schumpeterian workfare state (Jessop 1994). The third area of change has entailed a shift in the international state system from a liberal international order to a neoliberal order (Cox 1987).

Cox (1987) argues, following Gramsci, that a particular form of state can be characterized by the nature of the dominant coalition of social actors (historic bloc) and that decisions will tend to reflect the interests of these actors. Similarly, a particular form of international state system would be characterized by the interests of the dominant coalition of states. Of course, the ability of a state (or IGOs) to pursue a specific course of action may be constrained (or enhanced) by the forms of other structures. For their part, actors who are not among the dominant coalition of forces (or states) can choose to resist or engage with their opponents in order to mollify their policies and practices or even attempt to develop more radical alternatives.

These dynamics of the exercise of structural power and resistance can take place outside of the state in civil society and the economic realm. This is how non-state regulation works, with civil society actors trying to regulate firms on the basis of their ability to organize sympathetic consumers and investors. When non-state regulatory initiatives are incorporated into governance regimes, resistance does not cease. Rather it is shifted to a new site as the state comes into play.

States (and IGOs) will develop governance strategies based upon particular types of economic development models that reflect the interests of the actors that constitute their basis of support. The ability of states (IGOs) to implement their governance strategies will be conditioned by the nature of other structures, as well as the ability of opponents to marshal forces and develop counterstrategies (see Chapter 2). To the degree that they face opposition states (and their supporters) may need to make concessions, for example, by modifying their policies, incorporating a wider range of actors in the policy-making process, by making changes to institutional forms, and so on.

### **THREE STRATEGIC MODELS OF GOVERNANCE**

In what follows we distinguish three strategic models of governance. These models indicate how the types of governance strategies and tactics that states (and

international regimes) are likely to adopt follow from their pursuit of specific economic development strategies, which favour the interests of particular social groups (typically partners in a dominant coalition).

### Neoliberal Governance

This model, characterized by its commitment to a neoliberal model of economic development, will be pursued by states (and international regimes) in which political parties (and states) with strong ties to corporate interests are dominant. Neoliberal economic theory underpins this model by attributing to corporations a dominant role in the economy as the primary generators of growth, wealth and jobs. As the ability of corporations to fulfil this role is closely linked to competitiveness and constant innovation, business regulation needs to provide them with maximum flexibility in their pursuit of profits. The political theory tradition which best justifies this model is protective democracy, which allows only minimal roles for the state in guiding the economy and which tends to see political democracy primarily in an instrumental light (see Table 24.1).<sup>1</sup>

*Table 24.1* Models of governance

Model Features	Neoliberal	Embedded liberal	Alter-globalization
Normative goals	<ul style="list-style-type: none"> <li>• Economic freedom</li> </ul>	<ul style="list-style-type: none"> <li>• Economic freedom</li> <li>• Social protection</li> </ul>	<ul style="list-style-type: none"> <li>• Redistribution of social power</li> </ul>
Political theory	<ul style="list-style-type: none"> <li>• Protective democracy</li> </ul>	<ul style="list-style-type: none"> <li>• Developmental democracy</li> </ul>	<ul style="list-style-type: none"> <li>• Deliberative Democracy</li> </ul>
Model of business regulation	<ul style="list-style-type: none"> <li>• Corporate social responsibility</li> </ul>	<ul style="list-style-type: none"> <li>• Corporate accountability</li> </ul>	<ul style="list-style-type: none"> <li>• Social economy</li> </ul>
Approach to orchestration	<ul style="list-style-type: none"> <li>• Facilitative</li> </ul>	<ul style="list-style-type: none"> <li>• Directive</li> <li>• Facilitative</li> </ul>	<ul style="list-style-type: none"> <li>• Directive</li> <li>• Facilitative</li> </ul>
Preferred regulatory forms	<ul style="list-style-type: none"> <li>• Business self-regulation</li> <li>• Business co-regulation</li> </ul>	<ul style="list-style-type: none"> <li>• Joint regulation</li> <li>• Joint co-regulation</li> </ul>	<ul style="list-style-type: none"> <li>• Civil regulation</li> <li>• Civil co-regulation</li> </ul>
Development model	<ul style="list-style-type: none"> <li>• Market-led growth</li> </ul>	<ul style="list-style-type: none"> <li>• Market-led growth</li> <li>• State-led growth</li> </ul>	<ul style="list-style-type: none"> <li>• Social and solidarity economy</li> </ul>

*Source:* Compiled by the author.

This model will favour a facilitative approach to orchestration, preferring solutions at the bottom end of the hard law-governance spectrum. It will not be fixated

<sup>1</sup> The form of political democracy provides an indication of the type of civil society actors that will be supportive of a given model.

exclusively on [\*,\*,\*] options, however, as solutions involving soft law may be more efficacious in addressing specific problems (for example, concerns about labour rights, product safety, and so on). For this reason, initiatives with high precision might be perfectly acceptable as long as there is little or no delegation, for example, [o,P,\*], or initiatives with some delegation might be acceptable, if there is very little precision or obligation, for example, [-,-,d]. Practically, this model will favour initiatives which do not involve a full range of regulatory tasks, that is, rule setting and reporting initiatives over certification initiatives.

This model aligns with the understanding of corporate social responsibility (CSR) detailed in Chapters 1 and 2. It incorporates civil society actors primarily as consultants in business self-regulatory or co-regulatory initiatives. It also allows for facilitative orchestration of joint civil-business initiatives insofar as they have very low (or no) delegation features. This model does not facilitate the transition to harder forms of legalization, ‘ratcheting up’, in areas such as labour rights, environmental standards, and so on.

### **Embedded Liberalism**

The basic goal of this model is to re-establish the type of social compromise characteristic of welfare states and the post-Second World War international economic order. In the latter case, this involved combining a liberal trade regime while with provisions to allow (Northern) countries to defend their welfare programmes (Ruggie 1982). Advocates acknowledge that the original post-war project did not adequately incorporate Southern states in the formation of the original compromise, which is something a revised model needs to do (Lang 2006). The political theory tradition which best serves to justify this model is developmental democracy.

In forging a compromise between economic growth and social protection, an embedded liberalism model will take a directive approach to orchestration. Strategically, this model will also adopt facilitative orchestration to support capacity building of civil and joint civil-business initiatives. In terms of tools and tactics, it will support initiatives that have stronger delegation components (and greater precision). Practically, this means that it will favour certification programmes over rule setting and reporting initiatives (which do not have delegation components).

This model of governance maps most closely onto the corporate accountability model of business regulation developed in Chapters 1 and 2. It encourages substantive participation by civil society actors, not just as consumers but as active participants in different aspects of civil and joint civil business initiatives (for example, decision making in rule setting, implementation, monitoring, and so on). This model does encourage the transition to hard(er) forms of legalization including hard law. By restraining corporate power, the model may have the potential also to free up space for social economy actors and even facilitate an alter-globalization model.

Conversely, it may also have the potential to squeeze out social economy alternatives (see Chapter 22 in this volume).

### **Alter-Globalization**

While this model supports the social protection and redistributive functions of the state, its more fundamental goal is to transform power relations in the social, economic and political realms so as to provide for more equitable opportunities for participation in all these arenas. In the economic realm, this translates into support for a social and solidarity economy. Deliberative democracy is the normative political theory tradition which most closely corresponds to this model of governance (Pleyers 2010; Mukherjee Reed and Reed 2009)

This model will employ directive orchestration in the service of promoting a social and solidarity economy, especially for the provision of market access. It will also adopt a facilitative orchestration strategy to support capacity building of civil regulatory initiatives (and participation by social economy actors in these initiatives). This model will promote civil regulatory (and co-regulatory) initiatives, but will be reluctant to support joint civil-business initiatives and tripartite co-regulation (because of the ability of corporations to distort the deliberative process).<sup>2</sup> This model may support a range of soft law alternatives, but will favour initiatives with a full range of regulatory functions (that is, certification schemes), especially those which provide for strong delegation.

In adopting a social economy approach to business regulation (as elaborated in Chapter 1), this model will promote the active participation by civil society in the regulatory process, not only as consumers, but also as citizens, investors and producers across a range of activities (in rule-setting, monitoring, and so on). This model will encourage the development of hard(er) forms of legalization to support the social economy, including the transition to hard law.

### **GOVERNANCE AND DEVELOPMENT**

Having distinguished different strategic models of governance, we can examine how they function. Unfortunately, the relative paucity of orchestration efforts by states and IGOs in the international realm means that we can only offer some initial reflections on what might be some representative cases. Our purpose in doing this is: (i) to illustrate that non-state and co-regulatory initiatives are incorporated into governance schemes in quite different ways and for quite different purposes; (ii) to indicate why some types of governance schemes are more likely to succeed; and (iii) to show how the form of development impact, especially with regard to marginalized groups in the South, is likely to vary across governance models.

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<sup>2</sup> Corporations will, of course, need to be engaged, but on the basis of commercial relations, not in decision-making discourses about standard setting.

## Neoliberalism

One of the most obvious examples of this model involves the International Organization for Standardization (ISO). (see Chapter 5) In this model, states and IGOs largely employ facilitative orchestration to support a business dominated NGO, which promotes the interests of industry, especially large Northern corporations. While state agencies have a formal role in the decision-making structures of the NGO, they do not set the rule-setting agenda. States and IGOs, however, may play a very active role in promulgating and even mandating ISO standards, such as the practice of the General Agreement on Tariffs and Trade/World Trade Organization (GATT/WTO) which requires member countries to meet ISO technical standards. The ISO adopts a mix of tools, depending on the issues at hand and the interests of business. While technical standards may have a great deal of precision, in the areas of management and the environment, there has been a reliance on much softer, process standards. In recent years, especially as it has moved to the development of social and environmental standards, the ISO has been challenged and its legitimacy has been called into question. In response to such challenges, it has felt forced to engage stakeholder groups more actively. This was most notable with the development of the ISO 26000 (see Chapter 2). Critics would argue, however, that despite a greater role by stakeholder groups in consultation, business interests were able to shape the final form of the standards according to their interests.

State and IGO facilitation of the ISO, especially its management and environmental standards, has been very successful in that the ISO standards meet the basic policy objectives of dominant states and IGOs (especially the international financial institutions/IFIs), of providing some degree of legitimacy for firms, while maintaining flexibility. Its advocates tend to measure success in terms of the generation of outputs (standards) and outcomes (high degrees of participation by firms). In recent decades, the ISO has generated a range of new standards which help to legitimate a neoliberal global economy (for example, the ISO 9000 quality management standards and ISO 14000 environmental standards) and which have been widely adopted by industry. The success of the neoliberal governance model in this case is relatively easy to explain as the interests of the dominant states and the dominant IGOs (namely the IFIs, which are largely controlled by the dominant states) line up with interests of business (which dominates decision making in the ISO).

ISO standards support a neoliberal model of economic development in which Southern countries tend to be incorporated in the global economy on the basis of comparative economic advantage (for example, in agriculture, resource extraction industries and labour-intensive industries). As Woods points out in Chapter 5, ISO standards typically serve to incorporate Southern states into the global economy largely on the basis of the interests of Northern corporations. This means that they tend to conventionalize production (favouring larger firms over alternative forms of

production), facilitate the informalization of labour, rather than supporting unions and associations of small producers, and do not promote hard environmental targets.

### **Embedded Liberalism**

Several initiatives examined in this volume display significant features of embedded liberal governance, one of which is the Extractive Industries Transparency Initiative (EITI) (see Chapter 14 in this volume). One key feature that marks this as an embedded liberal model is strong directive orchestration displayed by states, most notably the United Kingdom and Norway, as well as support from major IGOs such as the World Bank and the International Monetary Fund (IMF). Third, the initiative does seek to develop relatively significant soft law measures, with international bodies also offering material incentives for participation. The initiative incorporates a wide range of stakeholders, from civil society, industry, states and IGOs.

As Kantz documents in Chapter 14, the success of this governance model has been limited, with only 11 compliant members out of 53 resource rich countries. There are two broad factors that help account for its limited success. The first of these is the fact that the initiative does not line up with the interests of key dominant states, most notably the United States and China. The support that other states offer, even that of the United Kingdom, is only partial (in that, unlike Norway, it does not intend to become compliant to the agreement). Without support from these states, there is little incentive for Southern states to sign on (many of whom see it as neocolonial in nature). Second, the initiative does not line up well with the industry interests. While there have been interests from some firms in taking a lead position, key features (especially those that threaten confidentially agreements) that advocates want to include in the initiative are opposed by most major firms (many of which are headquartered in dominant states).

The development impact of this initiative is dependent entirely upon promoting greater transparency by corporations and states. It does not seek to advocate with states for any particular development model. Nor does it seek to alter other practices of corporations (for example, with respect to labour rights, environmental standards, and so on). It places its hope in the fact that a more transparent government will be more responsive to its citizens. Its provisions of citizen engagement in monitoring provide the potential for the development of a more vibrant civil society. It is not clear the extent to which marginalized groups are incorporated into monitoring or encouraged to become more actively engaged in civil society as a result of the initiative.

### **Alternative Globalization**

There are few examples of alter-globalization governance schemes, especially at the transnational level. Fair trade, while a somewhat ambiguous and contested example, is the best known case, but governance schemes here occur only at the national and



subnational level. The goals of such schemes are to support the development of fair trade as an alternative trade network composed of cooperatives of small producers in the South and supportive social economy actors further up the chain (in the North and South). In the North, it is possible to conceive of alter-governance schemes as consisting of moral support (for example, the promotion of fair trade towns and cities) and policy support (for example, public purchasing policies by municipalities). The degree to which different towns and cities are committed to an alter-globalization model (as to a corporate accountability model), however, is a bit dubious.<sup>3</sup> Models which have a more distinct alter-globalization commitment are provided by Southern states, best exemplified perhaps in the recently adopted decree on the Brazilian System of Fair Trade and Solidarity Trade (WFTO 2011).

The effectiveness of this governance model has been limited so far, for a variety of reasons. First, few non-state-regulation schemes that promote alter-globalization have yet to emerge which states can build upon and support (as much of the energy in the alter-globalization movement has gone into resistance). Second, although committed to operating at different levels, the alter-globalization movement has primarily focused its activities at the local level. Third, it is difficult for states, even those with strong support for popular sectors, to actively promote an alternative globalization agenda (as they also feel the need to attract foreign capital to generate jobs). Fourth, those states that are committed do not have the political influence in the international state system to effectively promote transnational schemes (and may be restricted in their efforts to do so by neoliberal trade agreements and related policies). There is, however, strong domestic support for promoting such models in a variety of countries, and the potential for regional governance initiatives in the South.

While Fairtrade International (FLO) often measures success in terms of sales and extra income, alter-globalization governance schemes will highlight the transformative effects of fair trade. While the data is still limited, there are some indications that participation by small producers in Fair Trade has several important impacts beyond increased income and organizational capacity building. These include improvements in gender relations, the development of denser networks of social economy actors, and greater social and political involvement, including in the formal political realm (Fretel and Roca 2010; see also Chapters 20, 21, 22 and 23 in this volume).

## CONCLUSION

At the beginning of the chapter we raised the question as to whether the adoption of a governance approach to regulation might better facilitate efforts by non-state actors to inject their concerns about development into the regulatory realm. Subsequently, we tried to indicate that posing the question in this way is too vague and we delineated

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<sup>3</sup> Due to its varied practice (see Chapter 22), support for fair trade can come from advocates of neoliberal, corporate accountability and alter-globalization models.

three strategic models of governance which provided a framework for better understanding the conditions under which non-state actors might inject their concerns into governance arrangements (including the desire to promote hard law). In doing this, we highlighted the constraints that structures place upon efforts to intervene in the regulatory process. If civil society actors wish to be successful in their endeavours at promoting regulatory change which better facilitates development, then the strategies that they adopt in their struggles over specific issues must facilitate structural change over time. In reflecting upon the conditions for successful regulatory interventions in Chapter 2, Utting identifies several such strategic approaches. By way of conclusion, there is a specific aspect of structural change that we wish to highlight here, as it not only raises an important strategic question, but also points to an unresolved tension within civil society efforts to promote regulatory reform, beyond the general problem of fragmentation that Utting speaks of in Chapter 2.

Recent efforts by civil society actors to intervene in the regulation of business have commonly been interpreted as a new Polanyian project designed to re-embed what is now a global economy back into society. The original project, most closely associated with the emergence of the welfare state, was not limited to changes in the form of state, however. As Ruggie (1982) points out, with the establishment of the Bretton Woods system, it also extended embedded liberalism into the international state system. This latter project of re-embedding, however, was never really completed, as the compromise of a liberal trade regime and social protection programmes in Northern states did not extend to the peoples of the South in any tangible way. Indeed, some critics argue that the viability of the Northern welfare states was underwritten by the very absence of similar states in the South (Lang 2006).

If a new Polanyian project is necessary, this will require new forms of state and a new international state system. There has been much discussion, of course, about what form these new structures should take, especially a new state system. These questions underlie the contributions to this collection, some of which are more explicit than others in asking what role non-state actors can play in facilitating this process. There is another question of structural change, however, that arises in our contemporary challenge to re-embed the economy in society.

This question, which is at the heart of the alter-globalization movement, is whether there is also a need for another structural change, namely a new form of production. While the call for a social and solidarity economy is often seen primarily as a normative question (indicating a preference for traditional production or more control over the work process and surplus), it is potentially also a key strategic one. In the latter case, what is at issue is whether purely political interventions by states and the international state system are capable of re-embedding a global capitalist economy (in all societies around the globe), or whether it is necessary to develop alternative economic arrangements to curb the power of large corporations (and to ensure sustainable livelihoods for rural populations in the South). Given the inadequacy of

the first embedded liberalism project for people in the South, it may be completely rationale for them to feel the need to pursue a different approach to re-embedding the economy this time around (at least in their own countries and regions).

This is not just an abstract concern. It is a problem that arises at a very concrete level within Fairtrade, for example, in the debate over ‘mainstreaming’. While some have argued that pursuing a corporate accountability strategy by encouraging participation by large agro-food corporations and large agricultural estates can actually help to create space for social economy actors, this is not necessarily the case. Another possibility is that it might squeeze small producer organizations out of fair trade (and reduce them to subsistence farming or working as informal labour on agricultural estates). This concern is strongly felt by Southern producer organizations, so much so that it threatens to divide the fair trade movement (see Chapters 22 and 23), especially as many Northern NGOs do not seem able to understand the urgency of their concern.

Beyond the concrete strategic question, disagreement over this issue seems to point to some sort of on-going divide between Northern and Southern civil society actors. Further evidence of such a rift may be indicated by the number of chapters in this collection that note a failure of regulatory schemes initiated by Northern actors to become embedded in the South. To the degree such a divide exists, it seems to raise two substantial challenges for civil society actors in the North, who have tended to dominate the non-state regulatory agenda setting. The first of these involves the ability of Northern civil society actors (especially NGOs) to truly appreciate the different historical experience of Southern actors (especially in their relationships with corporations and states) and to understand and respect their aspirations (a point made forcefully in Chapter 23 by Smith and Vanderhoff Boersma). The second challenge, also highlighted by several contributors to this collection, is to develop truly democratic structures in regulatory initiatives and social movements, ones which neutralize power-differential between actors, and provide for appropriate and effective representation by (and across) Southern actors, who bear most of the risk in the decisions that are made.

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