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Chapter 12 – Governing Capital, Labor and Nature in a Changing World

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This chapter attempts a broad analytical compass for surveying the main actors, institutions and instruments governing our world. 'Governance' is a relatively new but increasingly ubiquitous expression used in this context. Governance may be understood as a mode of exercise of power organized around multiple dispersed sites in which transnational networks of public and private actors and interests, as well as national and local actors, are represented in varying strengths and combinations. This chapter endeavors to unpack the meanings and practices of governance broadly in relation to actors and instruments (who governs and how?) subjects and objects (who and what is governed?), and effects (with what consequences?). Governance raises similar questions across many contexts. Accordingly, this chapter maps the trajectories of governance in five broad fields, i.e. finance, investment, trade, labor

and environment to clarify three key sets of transversal questions: 1) what is the nature of the institutional shift to governance, how do the institutions relate to one another, how uniform or coherent are these shifts and relationships? 2) which regulative instruments and processes have come to embody the rule of governance, how do they converge or diverge in different areas? 3) what are the likely future trends and implications?

6 **Summary** (2 pages)

7 This chapter attempts a broad analytical compass for surveying the main actors, institutions and instruments governing our world. 'Governance' is a relatively new but increasingly ubiquitous expression used in this context. Governance may be understood as a mode of exercise of power organized around multiple dispersed sites in which transnational networks of public and private actors and interests, as well as national and local actors, are represented in varying strengths and combinations. This chapter endeavors to unpack the meanings and practices of governance broadly in relation to actors and instruments (who governs and how?) subjects and objects (who and what is governed?), and effects (with what consequences?).

8 Governance generates similar issues and questions across many comparable contexts. Accordingly we map its trajectories in five broad fields, i.e. finance, investment, trade, labor and environment, focusing on the following key dimensions: 1) actors and institutions (who governs, how is governance structured?); 2) normative principles and goals (for whom, in whose name, to what end?); 3) knowledge, instruments, and tools (how is governance carried out?); 4. subjects and targets (who and what are 'governed', how are they defined and formed?); 5. publics and forms of participation (with whom? who can contest? who is accountable and to whom?); 6. consequences and outcomes (with what effects? for whom?). Three key transversal questions are sought to be clarified across all five domains: 1) what is the nature of the institutional shift to governance, how do the institutions relate to one another, how uniform or coherent are these shifts and relationships? 2) which regulative instruments and processes have come to embody the rule of governance, how do they converge or diverge in different areas? 3) what are the likely future trends and implications?

9 This chapter remains work in progress, as such it is premature to distinguish or summarize its findings. Much of what follows hence remains preliminary, and subject to further reflection and discussion. The fact that the turn to governance is coeval if not conjoined to profound changes in the meaning and nature of government, as well as its aims, capacities, and modalities of intervention, has had

significant implications. The role of states in the economic sphere has, in particular, been transformed, with welfare objectives yielding to the demands of competitive economic openness. Policies for 'competitive advantage' rather than 'comparative advantage' lay greater emphasis on promoting and preserving an investor-friendly macro-economic and public expenditure environment, jettisoning strategic economic or industrial objectives for more relational ones, and replacing macro-level regulation (e.g. industrial policy) with micro-economic forms of intervention. While public investments in, health, education, and so on have lost out, services formerly undertaken by governments have been displaced to private entities or the voluntary sector; there has also been a general increase in governments all over the world "contracting" out services to private or quasi-private agencies. There have been parallel shifts in the regulatory sphere with the states' regulatory powers, otherwise a touchstone of sovereignty, increasingly negotiated with transnational private actors and international financial institutions (IFIs), and placed under external jurisdictions. Regulatory shifts also have reinforcing epistemic and information effects which can naturalize the turn from government to governance.

10 At the same time there are important differences of trajectory, impact, and learning across the five fields. Finance holds a special place in this chapter in as much as it has reconfigured the nature of risk and the cognitive and policy frameworks for dealing with it. The competitive pressures arising from financial deregulation have broader implications for governance and society. Yet projects and experiences of environmental governance do not suggest an unambiguous ascendancy of the market or transnational institutions, or the retreat of the state, other local institutions, or democratic accountability. Trends in labor regulation may also reflect individual state choices more than direct transnational pressures. They may also be contrary to the preferences of international organizations in the domain. Even in the controversial sphere of investment treaties, there is considerable ongoing fluidity with regard to norms, jurisdiction, and actors within and between national and international arenas.

11 1. Introduction

12 This chapter attempts a broad analytical compass for surveying the main actors, institutions and instruments governing our world. 'Governance' is an increasingly ubiquitous expression used in this

context. For centuries, governance was synonymous with government and conveyed little else of significance. From the 1980s it entered into more common, and increasingly prescriptive, usage in the context of 'corporate governance', particularly in the United States (Ocasio and Joseph 2005). During the 1990s, governance began to figure with greater frequency in World Bank reports (Moretti et Pestre 2015), accompanied by attempts to measure its various dimensions through the Worldwide Governance Indicators, launched in 1996. The IMF also began using indicators of 'good governance' in its conditional lending programs (IMF 1997). Hence, even the currently common English language meaning of governance, as "the action or fact of governing a nation, a person, an activity, one's desires", is of relatively recent origin (OED 1989, OED 2015). This chapter endeavors to unpack the meanings and practices of governance broadly in relation to actors and instruments (who governs and how?), subjects and objects (who and what is governed?), and effects (with what consequences?).

13 Governance may be understood as a mode of exercise of power organized around multiple dispersed sites in which transnational networks of public and private actors and interests, as well as national and local actors, are represented. Their representation and relative influence might vary according to domain. Governance evokes strong reactions. For many, it is a controversial political project coeval if not conjoined with neoliberalism and globalization (Dodd 2000) with arguably similar consequences for states and democratic politics. Some critics from the South view governance as part of a "post-Washington consensus" project to develop a "political-institutional framework to embed structural adjustment policies." As such it "complements rather than replaces" the policies of the so-called Washington consensus (Jayasuriya 2002: 24). For these critics, governance describes and indeed prescribes shifts in the distribution of power to the detriment of states and citizens, and in favor of markets, large corporations, and international financial institutions (IFIs) like the International Monetary Fund (IMF) and the World Bank (WB) (Scholte 1997; Ferguson and Gupta 2002). Since the 1980s, forceful calls for the retreat of 'government' have indeed paralleled the growing power of business corporations and other private market actors, and the improvisation of forms of individualized, self-representational agency associated with market actors. Much of the conventional reasoning here presumes that states and markets are distinct spheres, and that governments are liable to be unrepresentative, ineffectual or corrupt, whereas free and competitive markets, lightly regulated by independent, rule-bound regulators, offer the best guarantee of good governance. However the emphasis on governance also powerfully connotes projects to rewire and transform states internally. Whether they are described as "competition states" (Cerny 1990) or "regulatory states"

(Jayasuriya 2002), the resulting governing mechanisms typically shun strong legal provisions in favor of incentives and, on paper at least, penalties to orient business decisions (Foucault 1977: 177). For its advocates, the governance tool box increases public accountability and participation, at the expense of vertical and centralized authority. On the other hand for the critics, discourses and projects of metagovernance (i.e. the governance of governance) (Jayasuriya 2004) transform states themselves into "competitive entities" (Fougner 2006). Enmeshed in "webs of rewards and coercion" or "dialogic webs" (Braithwaite and Drahos 2000: 551-52), states become more responsive to international economic actors' efforts to "order" national "regulatory systems and social practices … consistent with their general values, goals and desires" (Braithwaite and Drahos 2000: 15-19).

14 In the economic sphere, governance describes modes of regulation of behavior that have become increasingly widespread in the last three decades. Political and technical accounts naturally generate competing claims about its genesis. For years regulation sought to control economic behavior through laws and regulations that were simple to understand and easy to enforce. As already noted, for its critics, governance can seem a political project by powerful actors to aggrandize themselves at the expense of the state (Blyth 2002). A more pragmatic view is that post-World War II methods of "command and control" regulation became increasingly ill-adapted to the more complex, interconnected world of the 1980s. Governance here represents a response to past failures and an attempt to fashion more efficient instruments of control through recursive cycle of regulative change (Ayres and Braithwaite 1992; Scott 1998; Halliday and Shaffer 2014).

15 This chapter cannot resolve this debate. It seeks instead to address three related key questions 1) what is the nature of the institutional shift to governance, how do the institutions relate to one another, how uniform or coherent are these shifts and relationships? 2) which regulative instruments and processes have come to embody the rule of governance, how do they converge or diverge in different areas? 3) what are the likely future trends and implications?

16 Governance generates similar issues and questions across many comparable contexts. Accordingly this chapter maps its trajectories in five broad fields, i.e. finance, investment, trade, labor and environment, in regard to each of which it addresses the following key dimensions: 1) actors and institutions (who governs, how is governance structured?); 2) normative principles and goals (for whom, in whose name, to what end?); 3) knowledge, instruments, and tools (how is governance carried out?); 4. subjects and targets (who and what are 'governed', how are they defined and formed?); 5.

publics and forms of participation (with whom? who can contest? who is accountable and to whom?); 6. distributive and other consequences and outcomes (with what effects? for whom?).

17 By addressing who governs what and how in our respective fields, we try to overcome the dangers of naturalizing the 'neo-liberal' turn from government to 'governance' to describe all forms of rule, authority and power (Bourdieu 1987; Rist 2002). Finance also holds a special place in this chapter in as much as it has reconfigured not merely the nature of risk, but as importantly, the cognitive and policy framework for dealing with it (Maurer 1999). As such it holds implications for governance in all the fields surveyed here including the environment.

18 2. The Rise of Global Governance

19 The nature, scope, and methods of economic regulation have undergone vast changes since the 1980s. The role of states has, in particular, been transformed in the process, with welfare and distributional objectives yielding to the demands of competitive economic openness. The policy framework corresponding to 'competitive advantage' replacing 'comparative advantage' as a goal of public policy has meant a greater emphasis on promoting and preserving an investor-friendly macro-economic and public expenditure environment, jettisoning strategic economic or industrial objectives for more relational ones, and replacing macro-level regulation (e.g. industrial policy) with micro-economic forms of intervention (Cerny 1990: 260). While public investments in health, education, and so on have lost out, services formerly undertaken by governments have been displaced to private entities or the voluntary sector; there has also been a general increase in governments all over the world "contracting" out services to private or quasi-private agencies (Cooley and Spruyt 2010; Scahill 2011). There have been parallel shifts in the regulatory sphere with the states' regulatory powers, otherwise a touchstone of sovereignty, increasingly negotiated with transnational private actors and international financial institutions (IFIs), and placed under external jurisdictions (Halliday and Carruthers 2009; Carruthers 2016). Regulatory shifts also produce epistemic effects, for example through the privileging of contractual knowledge,' that can be self-reinforcing (Mallard and Sgard 2016).

20 However contentious its origins, governance is not reducible to the simple transmission and implementation of preformed templates and prescriptions. Hence we begin my mapping out the main governing actors, institutions, and forums in the five areas surveyed in this chapter. This section focuses on two broad features characteristic of modern governance: a relative fragmentation of power and authority especially in the last three decades, and its dense concentration at particular sites (Hansen and Stepputat 2001; Butler 2015) which are also often nodes of accumulation of capital and wealth. On surface these features may seem complementary: as large business, associations, lobbies, and interest groups become more powerful, they may fragment the authority of nation-states and redistribute power in ways that mirror and reinforce inequalities of income and wealth (Piketty 2015; Cafaggi and Pistor 2015; Büthe 2013). Fragmentation may also enhance larger, better-resourced or networked private actors to mobilize, channel, and diffuse knowledge, 'best practices', policy instruments, and so on (Lascoumes and Le Gales 2007), as well as advance contractual associations between regulatory bodies and their targets of regulation. Yet the regulative fields in these five areas also suggest without tensions and differences.

21 ## 2.1 Finance

22 Under the Bretton Woods system (1945-1971), international capital markets were severely curtailed. Wary of the destabilizing impact of short-term capital flows, the original IMF Articles of Agreement prioritized currency stability over capital mobility. At first fixed exchange rates and capital controls restricted the range and riskiness of financial transactions (Eichengreen 1996; Helleiner 1993). However the growth of offshore banking and accumulating current account imbalances placed great strain on fixed exchange rates and the capital controls that had held them in place. They also intensified destabilizing speculation against coordinated attempts to realign exchange rates or limit their movement, hence prefiguring both the onset of generalized floating and the parallel expansion of international capital flows (Adams, Mathieson and Schinasi 1999; Giry-Deloison and Masson 1988). This initial momentum gained further acceleration as a result of the 1970s oil shocks. The intensification of cross-border capital flows weakened governments' capacity for independent monetary policies, while the slower but unmistakable internationalization of debt markets narrowed their room for fiscal policy. The effectiveness of nation-based regulation of financial markets was also brought into question by the increase in cross-border risk relationships, whether by weakening the disciplinary capacity of statutory regulatory regimes, transnational actors' capacity for evasion, or encouraging a regulatory 'race to the bottom' (Cerny 1994: 328).

23 These broad changes affecting the financial and regulatory landscape were not purely systemic, spontaneous, or 'market'-driven. UK banking regulations enabled London's emergence as a major off-shore banking center in the 1960s and the accumulation of foreign currency balances overseas. Competing changes to US regulations in the 1970s allowed US-owned banks to lend abroad. In retrospect these were the thin end of a deregulatory wedge that unfolded to more overtly ideological and political initiatives under the Thatcher and Reagan administrations to lift capital controls and free up banks and financial markets (Boyer 1996; Helleiner 1996; Loriaux 1997; Mishra 1996; Blyth 2002; Dezalay and Garth 2002). Despite a change of governments meanwhile in both countries, financial deregulation continued uninterrupted during the 1990s and 2000s. For example, the Gramm-Leach-Bliley Act (1999) repealing the 1933 Glass-Steagall Act (barring institutions 'engaged principally' in banking from underwriting or dealing in securities) was passed under the Clinton administration. It represented a monumental piece of deregulation and the culmination of decades of lobbying efforts from the financial industry (Sherman 2009). But the ground for it was laid in the late-1980s when the Federal Reserve under successive Republican administrations allowed bank affiliates to underwrite an expanding variety of securities, including mortgage-backed securities and consumer finance assets.

24 Historically, normative priorities and legal norms have been set by powerful countries. Financial regulations are no exception. Norms and practices of liberal, Anglo-American financial market governance diffused around the world through two complementary processes: hegemonic and isomorphic diffusion (DiMaggio and Powell 1983). Pressures from international financial institutions not surprisingly lent momentum to deregulatory efforts which led, in turn, to enhancing their authority vis-à-vis states. For example transnational regulations prescribed by the Basel Committee on Banking Supervision have served as important vehicles for financial de-regulation. The Basel Agreements of 1988 (Basel I) and 2004 (Basel II) were ambitious attempts to harmonize minimum capital reserve requirements and to promote a unified model of financial regulation in the developed world, in particular, the U.S. and Europe (Crouch and Streeck 1997; Hollingsworth, Schmitter and Streeck 1994). Since the late 1980s, the transposition of principles and practices defined by the Basel Committee has led to major regulatory changes in both Europe and the U.S.A. The three banking directives of 1993 (93/6/EEC), 2000 (2000/12/EC) and 2006 (2006/48/EC and 2006/49/EC) made the capital adequacy of European investments firms and credit institutions more responsive to their credit exposure and business activities. The overall effect of Basel accords on financialization is hard to measure accurately. But to the extent that Basel accords allowed banks to use their own internal risk

management systems to assess their compliance with capital rules, Basel accords made it easier for large banks to take more investment risks, resulting in more financialization (Hardie 2012: 136). From the early 1980s, European regulators also increasingly used US norms and standards in the context of internationalization, securitization, and deregulation: the European Commission in particular became the epistemic agent of neoliberal orthodoxy (Abdelal 2010). Neoliberal textbook ideas such as rational expectations and the efficient market hypothesis, and deregulatory policy prescriptions based on them travelled from Chicago to Brussels to inform European economic policy (Blyth 2002; Majone 1994). By the late 1980s, the European Commission's decision to form a monetary union and its adoption of the Maastricht Treaty (December 1991) had come to emblematize this conversion and lent unstoppable momentum to the liberalization of capital markets (Aglietta and Brand 2013:42).

25 The liberalization of capital markets are bound up with and have reinforced ideologies of "shareholder value," in doing so transforming meanings of "performance" and notions of "value" including in some rather unpredictable ways (Fligstein and Shin 2007). Conventional managerial presumptions notwithstanding, even profitability could have little bearing sometimes on stock market valuations. Nevertheless fears of leveraged buyouts of firms that stock markets judged were "underperforming" and "undervalued" reconfigured risks, incentives and objectives in the private sector, including of large industrial firms, transforming their structures, organizational and employment practices, relationship with local communities, and so on (Ho 2009). One of the first acts of many new, not infrequently private equity, owners of asset-rich companies was to delist them from the stock market. This offers an ironical illustration of stock market evaluations as an alternative reality in which even its principal beneficiaries held brief or suspended belief.

26 However, ideology or external shocks and pressures cannot by themselves explain the turn towards deregulation or the adoption of Anglo-American financial governance practices. The resistance of continental European countries to what many perceived to be hegemonic US attempts to restrict the scope for independent national financial regulation underline the intimate connections between regulation, financial markets, industrial and employment structures, and corporate goals. Basel norms are conventionally understood to be about banking stability. But in Germany, by affecting the ability of its banks to lend freely and at their discretion, Basel II capital adequacy norms, in particular, were feared to pose a direct threat to its model of 'Rhine capitalism' and the social model it represented, in particular the 'Mittelstand' -- i.e. the network of small and medium companies -- that lay at its heart, for whom bank loans

had long been an indispensable source of finance for investment (Kruck 2011, p. 11). Still, the same was not true in France, with its more consolidated industrial structure and bank lending. Despite public statements opposing Basel capital adequacy norms, the French government, the large French banks it represented, and even the governing socialists backed efforts by the Jacques Delors-led European Commission to promote greater financialization of the French economy (Langohr and Langohr 2008: 195). Thus, despite the controversies, Anglo-American practices of financial market governance made headway and became hegemonic in mutually reinforcing ways—in the end transnational governance mechanisms and regulations expanded to occupy spaces vacated by governments in Washington, London, Paris and Brussels, this norm spreading subsequently around the world through mechanisms of vertical and horizontal state-to-state diffusion.

27 Financial levers in the form of multilateral lending and structural adjustment programs have also contributed to privatize the economy, and forced states to retrench on health, education, social and welfare services and infrastructure, which instead, have increasingly fallen in the hands of private equity firms among other private sector entities. International financial institutions, notably the IMF and the World Bank, played a crucial role in the spread of neo-liberal ideas to the non-European world. Indeed, until recently the main impact of deregulation was felt in the developing world where, in varying degrees, the opening up of trade, abolition of price controls, privatization, and the rolling back of the state took the form of a 'shock therapy' imposed from outside by the IMF and World Bank at the behest or with active support from powerful Western states. In 1972, the United States declared opposition to capital controls and its intention to lift controls by the end of 1974. The US then turned its efforts to freeing up capital flows in other parts of the world (Best 2014:61). Pinochet's Chile was notoriously the first candidate (Silva 1997) for the shock therapy proposed by the ‘Chicago boys’ (Dezalay and Garth 2002) who used the IMF and World Bank as forums for transmitting de-regulation as an antidote to left wing development agendas. By the early 1980s, other South American countries, many burdened by debts contracted in the 1970s which had become unsustainable in the wake of a sharp rise in US interest rates, were forced to follow suit (Johnson 1995). In the 1980s, stabilization and structural adjustment programs also became pervasive in Africa (Noorbakhsh and Paloni 1999). At this time, the economic performance of African countries was compared unfavorably to countries in Asia and Latin America and used as a rationale to adopt programs that sought to foster development by eliminating economic bottlenecks that were thought to hinder efficiency (Konadu-Agyemang 2000).

28 Apart from unrelenting pressure from Washington, developing countries found a redoubtable champion of neo-liberal policies in the Bretton-Woods institutions, particularly the IMF. Several explanations may be ventured for why the Bretton-Woods institutions took on this role, but an important 'institutional effect' is worth emphasizing here, notably their expanded surveillance responsibilities under conditions of free capital mobility and destabilizing speculation. Rather than pursuing this surveillance role passively or in a precautionary mode, in the 1990s the IMF, in particular, emerged as a champion of capital account liberalization (Shaffer and Waibel 2016:307-11) which, had its efforts succeeded, would have greatly increased its own policy influence over the affected countries. Its efforts may well have achieved greater success had it not been for the 1997 East Asian crisis which demonstrated the perils of financial openness and justified moves by developing countries such as Malaysia to restrict capital outflows.

29 ## 2.2. Investment

30 International investment protection is governed by two actors: states which enter into investment treaties; and arbitrators who resolve disputes about the interpretation and application of those treaties. While the opening of international capital markets was driven by active state and business lobbying through de-regulation, holders of capital investing abroad actively sought legal protection for their investments. Early attempts to protect overseas investments took a multilateral path, but efforts to formulate a multilateral investment treaty failed because capital exporting and capital importing states were unable to agree on common standards. Starting in the 1959 and continuing in the 1960s, 1970s and 1980s, states changed strategy and began entering into bilateral investment treaties instead. Although this process started slowly, it accelerated rapidly in the 1990s with the number of bilateral investment treaties worldwide rising from around 385 to around 2000. In 1998, attempts to negotiate a Multilateral Investment Agreement under the auspices of the OECD failed, which again focused attention on bilateral investment treaties, which continued to rise in numbers (Van Harten, 2007). There are now more than 3200 international investment agreements worldwide (UNCTAD, 2016). Furthermore, states have shifted their treaty-making practice away from bilateral investment treaties towards plurilateral and mega-regional free trade agreements with investment obligations. An early example of this approach is the North American Free Trade Agreement (NAFTA), which was entered into by the United States, Canada and Mexico. More recently, 15 states including the United States entered into the Trans-Pacific Partnership Agreement (TPP), though it is yet to enter into force. The United States and the European Union are currently negotiating the Transatlantic Trade and Investment Partnership

(TTIP), while ASEAN and six states in the Asia Pacific, including China, are negotiating the Regional Comprehensive Economic Partnership (RCEP). While none of these count as a multilateral treaty for the world, the US, Europe and China are clearly using these mega-regional agreements to compete with each other in setting the standards that they hope will be adopted by the rest of the world.

31 The rise of investment treaties has also lead to a boom in the demand for private arbitration. Indeed, investment treaties are agreements that are entered into by two or more states and usually have two main features. First, on a substantive level, the treaty parties accept certain obligations with respect to how they treat foreign investors coming from the other treaty party. The states usually accept obligations to not expropriate the foreign investment without paying adequate compensation, to not discriminate against the foreign investor in favor of their own nationals (national treatment) or other foreign nationals (most favored nation treatment), and to treat foreign investors fairly and equitably. Second, on a procedural level, investment treaties usually provide two forms of dispute resolution. The states may undertake state-to-state arbitration to resolve any disputes about the interpretation or application of the treaty. Investors may also bring investor-state arbitral claims if they believe that they have suffered damage as a result of the state in which they invested having violated the substantive treatment obligations set out above (Roberts, 2014). The most unusual feature of investment treaties is that they permit investors, who are non-state actors, to bring arbitral claims directly against states before ad hoc arbitral tribunals – in this regard, investment treaties have been likened to human rights treaties like the European Convention on Human Rights (Douglas, 2003; Roberts, 2010 and 2013; Paparinskis, 2013), but unlike that Convention, investors can usually bring claims without having to first exhaust local remedies and the investor helps to select the arbitrators who will resolve the dispute. The main justification for this procedural innovation is that it permits investment disputes to be depoliticized (Shihata, 1986; Paparinskis, 2010): previously, if a foreign investor believed that it had been mistreated by the host state, it had to bring the dispute before the host state's domestic courts or rely on its home state to take up its case on the international stage (this is called diplomatic protection). Investment-treaty arbitration was intended to permit investors to bring their claims directly before and independent and impartial international tribunal so that they were no longer subject to the political whims of the home or host state. Still, if foreign investors are granted procedural rights to enforce substantive investment treaty protections (Douglas, 2003; Roberts, 2015), investment treaties do not usually impose obligations on foreign investors in terms of how they treat the host state or their workers or other individuals within that state. Host states cannot generally bring arbitral claims against

the foreign investor, though sometimes they can raise limited counterclaims. Workers, individuals and NGOs cannot use investment treaties to bring claims against foreign investors. All of these other claims are left to be resolved by the domestic courts of the host state.

32 This system results in governance through arbitration (Van Harten, 2007), whereby states have agreed to bypass domestic courts and privilege the reliance on private networks of international arbitration firms and judges. This form of "contracting out" a key element of sovereign authority – e.g. judicial power – is all the more important that historically, investment treaties have been short and vague, which means that they left many issues unaddressed or their terms may be interpreted in many ways. As a result, investment treaties have passed considerable interpretive authority to arbitral tribunals which are tasked with interpreting and applying their terms in the context of resolving a particular dispute (Roberts, 2010). This system grew in a specific context: first, the aborted essay to impose international arbitration in the interwar period, with the establishment of the International Chamber of Commerce (ICC) in Paris; and second, the successful effort by the U.S. arbitration movement and the New York business community, together with European law professors gathered around the ICC, to promote international commercial arbitration in the oil disputes that followed the process of decolonization and the stream of nationalizations of oil companies by newly independent states (Dezalay and Garth 2016): the success of the New York Convention in 1958, which considerably enhanced the enforceability of international commercial arbitration, was a product of this alliance. Thus, even if in theory, there is no system of hierarchy or precedent between investment treaty tribunals and arbitral awards, in practice, however, a de facto body of precedent has emerged because tribunals in one case often refer extensively to awards from other cases (Kaufmann-Kohler, 2007) and because of the tight grouping of the "arbitration community", sometimes refered to as the "arbitration mafia" (Dezalay and Garth 1996). This means that a body of investment treaty jurisprudence is emerging and that investment treaty tribunals are important actors in this governance regime. Thus, as in the case of financial regulation, in which IFIs have used the turn toward financial de-regulation to claim more power over regulation of national macro-economic policy, the multiplication of investment treaties and arbitral awards has reinforced the judicial authority of transnational private networks of arbitration professionals, leading to a type of governance that is even more informal and less open to public scrutiny than the operation of Washington-based IFIs (Dezalay and Garth 1996).

33 As a result of this informality and opacity, investment treaties are often understood as protecting investors and thus being a form of global governance for foreign investors. When states started entering into investment treaties, their explicit rationale was that the main motivation of the capital exporting state (like the United States or Germany) for entering into investment treaties was to secure protections for their foreign investors who were operating abroad; that the main motivation for the capital importing state (like Argentina or Pakistan) was to attract foreign investment at reasonable rates of return; and that the main rationale provided by private actors in favor of investment treaties was that before a foreign investment is made, a host state may have incentives to treat foreign investors well in order to encourage the investment, but, after the investment has been made, they may have an incentive to seek unfair rents from that investment, such as by expropriating the investment without paying compensation. Because it is often not easy for investors to relocate after they have invested by, for instance, digging a mine, investment treaties are meant to provide a way for states to bind themselves so that they are not tempted to treat foreign investors unfairly after they have invested (Guzman, 1998). One of the problems raised about investment treaties is that it is not clear whether they actually promote foreign investment, which is the main goal of capital importing states. Some studies find a positive effect on investment flows, some studies find no such positive effects, and some note that reliably tracking bilateral investment flows and attributing differences to investment treaties is fraught with methodological difficulties (see, e.g., Salacuse & Sullivan, 2005 and Yackee, 2010). Without this justification, many argue that investment treaties serve no purpose or impose obligations on states without providing tangible benefits. Another concern raised about investment treaties is that they were originally designed to protect against clear violations of investors' rights – such as direct expropriation of a mine without compensation – but that these actions are no longer common.

34 ## 2.3. Trade

35 Global trade governance may be defined as encompassing all attempts to manage, resolve, or supersede conflicts of interest in international product markets, and in a broad sense to regulate or order such markets and bring about welfare-enhancing cooperation. Developments in global trade governance over the course of the last 2-3 decades, moreover, have involved "the reallocation of authority upward, downward, and sideways" (Hooghe and Marks 2003:233), thus illustrating the full spectrum of changes entailed in contemporary understandings of governance.

36 To examine the causes and consequence of these developments, it is useful to distinguish between the traditional "at the border" trade barriers (most centrally tariffs and import quotas) and the new behind-the-border issues that have increasingly been governed at the international level conjointly with, or even entirely through, trade institutions. These "trade-plus" issues include standards and regulations (Grieco 1990; Yarbrough and Yarbrough 1992; Mattli 2003; Büthe and Mattli 2011), government procurement (Arrowsmith and Anderson 2011; Rickard 2015), competition policy (Büthe 2014; Bradford and Büthe 2015), services (Hoekman and Braga 1997; Shingal 2015), exchange rates (Copelovitch and Pevehouse 2014), investments (Büthe and Milner 2008), labor rights (Mosley 2011), and even more broadly human rights (Aaronson 2014) and the environment (Esty and Geradin 1997; Barkin 2014; Zeng and Eastin 2007) (though cf. Schreurs and Economy 1997).

37 Traditional core trade issues at first glance may seem like an example of an issue area where governments have decided *against*—or have successfully resisted demands for—the shift from government to governance and the associated shifts in authority. The agreement to replace quantitative restrictions (such as import quotas) with tariffs, for instance, was achieved through strictly inter-governmental bargaining—and for most countries already during the GATT (Deardorff and Stern 1985; Goldin and van der Mensbrugghe 1997). Negotiating maximally permissible tariff levels in bilateral, minilateral, or multilateral trade agreements has similarly remained a governmental prerogative, and once such agreements have been struck, compliance with any such changes in trade governance is ultimately still up to each national government.

38 Closer inspection, however, reveals subtle, yet significant deviations from the ideal-typical notions of state sovereignty even with regard to the traditional core trade issues. Under GATT and WTO, the principal-supplier prerogative in tariff negotiations might be said to have amounted to a case of product-specific horizontal ("sideways") delegation from the smaller and less trade-intensive to the larger and more trade-intensive economies (see Steinberg 2002): Under this procedural rule, the major importers and the major exporters of a given product conduct the primary negotiations, and the tariff reductions agreed by them (for said product) then get multilateralized to all GATT/WTO member states. Preferential trade agreements, which are usually negotiated among a small group of countries (often just two countries bilaterally) entail less delegation: Many PTAs contain most-favored-nation (MFN) clauses, which commit the signatories to grant to each other the most favorable terms granted to any other trading partner, including in separate PTAs. MFN, however, only applies to favorable terms granted by one of the signatory states to *its* other PTA partners in exercise of its

sovereign public authority. In that sense, the *de facto* shift in further trade liberalization from the global multilateral trade regime of GATT/WTO to PTAs that cover a smaller number of countries but often go much deeper constituted something of a shift of trade (negotiation) governance authority "back" to individual national governments.

39 At the same time, the shift from the GATT to the WTO in 1994 involved a substantial strengthening of the dispute settlement mechanism (DSM) for the multilateral trade regime—part of a broader trend toward the "legalization" of international relations (Goldstein *et al.* 2001) and often mirrored by the establishment of third-party DSM provisions in PTAs (Allee and Elsig 2015). This element of the legalization of international trade governance empowers designated panels of trade law experts to issue *binding* decisions in disputes that arise under a trade agreement, if the parties cannot resolve the disputes amongst themselves. It constitutes an upward shift of authority (and thus also increases the binding-ness of the negotiated commitments).

40 Notwithstanding the importance of the changes discussed above, the extent and visibility of the changes in trade-related global governance is even greater beyond the traditional core issues of tariffs and quotas. Some of the "behind-the-border" trade-related issues, such as the treatment of foreign investments, labor rights, and the environment, are discussed in separate sections of this chapter and some, such as human rights, in entirely separate chapters of the IPSP Report. This section will therefore focus on trade-related regulatory governance of products and services, as well as the governance of competition law and policy as a trade-related issue.

41 As Steven Vogel (1996) famously pointed out, "freer markets" seem to require "more rules." Concretely, a market economy requires a legal and regulatory framework to help market participants reduce information asymmetries (Akerlof 1970), overcome time inconsistency (Kydland and Prescott 1977)—and to inhibit lying, cheating, and stealing, which in the short terms is a strikingly efficient way to acquire assets *for those who can get away with it*, but inhibits investments and accumulation (Hough and Grier 2015). These rules may also allow socio-economic actors to turn paralyzing uncertainty into calculable risk, though the ability to do so might be illusionary (Blyth 2010). And when governments engage in economic liberalization—i.e., when they reduce the role of the state in the economy and no longer direct economic activity (as governments in large parts of the world did until at least the 1980s and into the 1990s)—they actually need, Vogel argues, to put a stronger legal and regulatory framework in place for markets to work well.

42 Governments apparently agree, including with regard to the international integration (and in that sense liberalization) of markets. And they do not see the creation of market regulations as a purely domestic issue that each country should or can address independently. As research on the political consequences of economic interdependence has shown since the 1970s, market integration increases a country's stake in the laws and policies of its neighbors, creating both the potential for increased conflict and greater incentives for cooperation (Keohane and Nye 1972; Ruggie 1983). Consequently, governments now—often but by no means always at the urging of domestic or transnational commercial or societal actors—address a large and growing number of "trade-related" issues via the international trade regime. Specifically, the GATT/WTO and especially PTAs now contain numerous commitments to undertake certain steps and refrain from others. The international trade regime thus shapes domestic policymaking and constrains governments' ability to regulate markets as each separately at any particular moment see fit.

43 One example concerns technical standards, which can be critical to having a market in the first place, e.g., because they define comparable and compatible products (Yarbrough and Yarbrough 1992:92f; Spruyt 2001; Balleisen 2014), and which often help achieve important public policy objectives such as consumer protection (David Vogel 1995) and workplace safety (Cheit 1990), at times even without the need for government regulations that make them binding (Morrison and Webb 2004). Here, the TBT-Agreement of the WTO—which is an integral part of the treaty that created the WTO and thus binding on all WTO member states (Marceau and Trachtman 2002)—and similar provisions in many PTAs oblige national and sub-national public authorities to use *international standards* as the technical basis for any regulatory measures that make implementation or compliance with the standard de jure or de facto binding (provided that an international standard exists that can achieve the public policy objectives in question). However, neither the TBT-Agreement nor corresponding provisions in PTAs contain or create standard-setting procedures for the vast array of traded products that might need such standards to enable market exchange or to prevent or reduce negative externalities such as inadvertently putting users at risk. Rather, the TBT-Agreement recognizes two transnational, *non-governmental* organizations, the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC) as sources of "international standards"—and leaves it open whether other standards bodies might also be considered sources of international standards for WTO purposes. The TBT-Agreement thus radically changed the status of ISO and IEC, greatly empowering the mostly private-sector experts who in the two long-standing organizations' "technical committees"

may develop and revise the actual ISO and IEC standards (Büthe and Mattli 2011:esp. ch.6). Given their status under international trade law, many of these standards now determine market access, which has given the non-governmental ISO/IEC and the private-sector technical experts they assemble a powerful role in the new global trade governance.

44 Similarly, for the sensitive issue of food safety (Ansell and Vogel 2006; Gaughan 2004; Liu 2010), the SPS-Agreement of the WTO obliges governments to give deference to the international food safety standards of the Codex Alimentarius Commission (Marceau and Trachtman 2002; Büthe 2008). The "Codex" organization is formally a joint venture of two international organizations (the World Health Organization and the Food and Agriculture Organization). It may be more accurately described, however, as a hybrid public-private body, since the majority of the experts who wield power over global trade by developing its standards also come from the private sector—and often from the very food industry whose products are to be regulated—albeit here as part of national delegations appointed by the Codex member governments (Avery, Drake, and Lang 1993; Veggeland and Borgen 2005; Büthe 2009).

45 The changes sketched above are important and have the force of international trade law behind them. But arguably even bigger changes have occurred elsewhere; the rise of transnational private regulation and the increasing prevalence of non-governmental technical experts in shaping the rules for global markets is not limited to regulatory bodies empowered by governments. For objectives as diverse as organic agriculture, environmentally sustainable timber logging and industrial practices, "fair trade" (which is concerned with the distribution of gains from trade, particularly the share received by local producers, workers, and artisans in developing countries), and the prevention of child labor, "entrepreneurial" (Green 2014) private actors have sought and often gained regulatory authority through the creation of standards, often accompanied by certification schemes (e.g., Auld 2014; Djelic and Sahlin-Andersson 2006; Reed, Utting, and Mukherjee-Reed 2012; Peters *et al.* 2009). These private transnational rules and certificates also and increasingly *de facto* govern foreign products' access to national and international markets and in that sense have become an important part of trade-relate regulatory governance.

46 A final, yet again distinctive example of trade-related changes in regulatory governance comes from the realm of competition law and policy, which is supposed to safeguard market competition against anti-competitive behavior (also known as "antitrust") and often includes requirements for regulatory approval of mergers and

acquisitions. Here, we see the beginnings of a trade-related "horizontal" shift of regulatory authority toward trans-governmental networks.

47 Some have long suggested that there is a theoretically necessary connection between trade and competition policy as a meta-regulatory regime [REF]. Empirically, there certainly was a close connection between trade policy and the adoption of the original national-level competition laws in Canada and the United States in the late 19th century; the Havana Charter for the ill-fated International Trade Organization in the immediate aftermath of World War II included a competition policy chapter; and the founding treaties of the European Community included competition rules in its framework for the governance of the integrated (later: "common") market (see Büthe 2014:213-215 for a more detailed historical sketch). In subsequent decades, however, the idea of a multilateral competition regime in the context of GATT, as well as various specific proposals in the late 1990s and early 2000s for adding a competition chapter to the WTO treaty (or drawing up an add-on agreement akin to TBT and SPS) proved controversial, and all proposals for such a change have so far failed.

48 The failure of proposals for a multilateral regime under the umbrella of the WTO, however, seems not to have deterred the forging of closer connections between trade and competition regimes, including an increasing integration of competition law and policy into the international trade regime. Since 1990, the number of countries with a domestic competition law has grown astonishingly, from some thirty to more than 130 today, and new research finds the institutionalization of trade openness to have been an important conduit for this diffusion process (Büthe and Minhas 2015). Moreover, more than two thirds of the PTAs signed since 1990 have included competition provisions, many of them including provisions for transgovernmental regulatory cooperation between competition enforcement agencies, which is also emerging as a key objective of some 170 bilateral agreements about competition law and policy, mostly signed in very recent years.

49 The changes in the global trade regime, sketched above, have decisively shifted rule- and decision-making—up, down, and sideways—from domestic politics and traditional inter-governmental institutions. National governments, internationally representing their respective states as (largely) unitary actors thanks to strictly observed domestic political and policy hierarchies, have been replaced by a complex web of "governance" institutions, ranging from "trans-governmental" networks of specialized government officials working directly with their counterparts abroad without much regard for the traditional constraints of international diplomacy

(Keohane and Nye 2001 (1977); Slaughter 2004; Eberlein and Newman 2008), to hybrid public-private bodies, such as the Codex Alimentarius Commission, where private sector employees occupy many of the seats and provide most of the technical expertise on the nominally governmental delegations (Büthe and Harris 2011), to entirely government-recognized non-governmental transnational bodies, such as the International Electrotechnical Commission, IEC (Büthe 2010a) or the International Organization for Standardization, ISO (Büthe and Mattli 2011; Murphy and Yates 2008), to civil society-driven or private-sector-driven transnational bodies clamoring for regulatory influence in global markets (Auld 2014).

50 ## 2.4. Labor

51 As financial de-regulation and the opening of capital markets got underway, economies have experienced a historic shift in the distribution of power and resources, with labor's share of income declining since the 1980s while wealth inequalities within many countries have surged (Piketty 2015). If governance and financialization are interwoven processes, one key question is how and to what extent have changes in the modes of financial regulation reconfigured the balance of power and responsibilities between firms and states, between capital and labor, and between socio-economic groups. The correlation between financial austerity programs and a worsening of labor conditions (with the most vulnerable populations, like women, the elderly, and the youth being driven out of traditional labor markets to take part-time jobs or stay unemployed) has lead critics to trace these trends to the financialization of the economy (Krippner 2005): "structural reforms" imposed by the IMF and the World Bank in the developing world, and by the national governments and the EU Commission in Europe, significantly undermined public investment, caused a massive transfer of resources from the middle class to wealthier groups, increased gender inequalities, and reduced rates of social mobility (Piketty 2015). As a rule, those who depended most from state subsidies got hurt.

52 Still, different contexts of transition (post-socialism vs post-colonialism) are fundamental to understand differences in the actors, instruments and results of "shock therapies" in Eastern Europe and Africa. In African contexts, for example, structural adjustment programmes had significant negative consequences for human welfare from the time of their adoption (Logie and Woodroffe 1993). In Ghana, for example, the implementation of structural adjustment programs led to significant cuts in the public sector workforce and state expenditures on public services and imposition of user fees for health and education, which led to reduced access to health and educational services. At the same time, an estimated 80,000%

devaluation occurred in Ghana's currency, which contributed to a four-fold increase in Ghana's total debt between 1980 and 1995 and increase in external debt as a percentage of GDP from approximately 32% to 95% during this same period (Konadu-Agyemang 2000).

53 By contrast, for rich countries and their citizenry, the distributive effects of policy changes have become clear only recently. While the direction of policy changes was unmistakeable, they were implemented rather incrementally over a twenty-year period. Hence for years, rich western states were able to absorb the consequences of deregulation and opening up. Public borrowing compensated for declining revenues (Streeck 2014), to an extent loose monetary policies and debt-financed increases in consumption compensated for falling public and private investment and lower incomes. Welfare systems also helped countries cushion the effects of layoffs necessitated by the reduction in industrial trade barriers (Esping-Andersen 1996). However even in the West, the distributive consequences of policy choices made in the 1980s have become increasingly clear, particularly since the onset of the financial crisis in 2008, which has had its most dramatic effects in Southern Europe, with skyrocketing rates of unemployment and part-time labor for the youth and women.

54 Labor regulation has traditionally been the province of national governments, but national governments have rarely operated in isolation in this domain: in addition to national governments, other relevant actors in the labor field are domestic trade unions, employer associations, multinational companies, and NGOs. National trade unions have historically pushed for protective measures for workers (e.g. working-time limits, minimum wages, employment protection legislation, unemployment benefits, etc.), which they have obtained either negotiating collectively with firms and employer associations, or by lobbying for legislative intervention by governments. Frequently, legislative intervention has taken the form of "bargained laws" which have ratified and given general applicability to the outcomes of collective bargaining between unions and employers. Alternatively labor law has provided a procedural framework for bargaining (or "social dialogue") between unions and employers, delegating to them the task of giving concrete regulatory expression to general policy goals (e.g. ensuring adequate levels of health and safety in working places) (Blainpain 2007, Hepple and Veneziani 2009). In brief, the role of private sector actors such as trade unions and employer associations has always been of paramount importance in the field of labor regulation. Still, the extent to which "corporatist" policy-making was (and to a large extent still is in Continental countries) an institutionalized feature of these countries' social model may be one distinctive trait of Continental European and Scandinavian countries when compared with Anglo-

American countries. In corporatist countries national governments have often been willing to share their policy-making prerogatives with the "social partners" (trade unions and employer associations) in the labor and social domains, i.e. they have involved private actors representing labor and capital in the conception and execution of public policy (Baccaro 2014, Berger 1981, Lehmbruch and Schmitter 1982). Empirical research has shown that corporatist societies are less unequal than non-corporatist ones while having comparable macroeconomic performance with regard to growth and employment (Hicks 1988, Kenworthy 2002, Wallerstein 1999).

55 At the international level, labor regulation was strongly influenced by the corporatist model, as illustrated by the governance structure of the most important institutions at the global level, i.e. the International Labour Organization (ILO): the UN agency in charge of labor standards. Established in 1919 as part of the Versailles Peace Treaty, the ILO was the Western countries' response to the "red scare" (Cox 1973: 102). After the Bolshevik revolution, the Western powers offered corporatism as an institutional alternative to communism to disgruntled workers who were mobilizing in various European countries. The ILO survived the collapse of the League of Nations; after World War II it became a specialized agency of the United Nations. Today, the ILO is the only international organization to incorporate private actors in its governance structure: its governing body is composed of governments, trade unions, and employer associations, although the activities of the ILO are supported by a large bureaucratic structure, the International Labour Office, with headquarters in Geneva and field offices in various countries and regions. The mandate of the ILO is extremely vast: the preamble of the ILO constitution states that the goal of the organization is to produce the conditions for "universal and lasting peace" by bringing about "social justice"; specifically, by removing "injustice, hardship, and privation" in conditions of work, which "produce unrest so great that the peace and harmony of the world are imperilled." The preamble of the ILO Constitution states explicitly that "the failure of any nation to adopt human conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries." In other words, the problem of labor standards in an open economy is conceptualized by the ILO Constitution as a prisoner's dilemma-type of game, in which defection by some participants forces other participants also to defect. To obviate this situation, universal adoption and application of labor standards by as many countries as possible is required. International labor regulation has thus aimed to protect states that want to implement generous protections for their workers from unfair competition from states that draw a trade advantage from minimization of labor costs and of protective standards: in the interwar period, the ILO's first director multiplied initiatives to

convince states to pass legislation limiting legal work-time to a 8 hours a day. The 1944 Philadelphia Declaration which gave the ILO a new foundation and *élan* after WWII, added that the "fundamental objective" of the ILO is to ensure that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity." It goes on to say that the ILO has "a responsibility … to examine and consider *all international economic and financial policies and measures* in the light of this fundamental objective" (emphasis ours).

56 Since the 1980s, labor regulation (including those introduced for discussion by the ILO) has also been affected by the emergence of new "knowledge" about the effects of labor standards and by a more upbeat assessment of the benefits of free capital and labor markets. First, research in macroeconomics and in labor economics has identified labor rigidities (such as employment protection legislation, unemployment insurance, national or industry-level collective bargaining) as responsible for increasing the non-accelerating inflation rate of unemployment (NAIRU) and has recommended institutional deregulation as a way to rekindle employment creation in sluggish European labor markets (Layard, Nickell and Jackman 2005, Nickell, Nunziata and Ochel 2005). Second, labor regulation has increasingly been regarded as responsible not only for reduced labor market efficiency but also for the inequitable allocation of job and income opportunities across different types of workers. Some economists have produced a new discourse associating the protection of workers with the creation of a dualism of "insiders" and "outsiders" (Boeri 2011, Lindbeck and Snower 1988, Saint-Paul 2002). The insiders are privileged workers (generally male and mature) with access to good wages, stable jobs and good working conditions. They rely on institutional protections such as employment protection legislation and rigid industry-level wage bargaining to insulate themselves from competition for their jobs and thus condemn the outsiders (predominantly young and/or female) to more precarious working conditions than they would have if the institutional protections were relaxed. Similar arguments have also been produced with regard to developing countries. For example, it has been argued that in developing countries excessive labor regulation leads to a rationing of formal jobs, and pushes workers in the informal economy, which thus has a tendency to expand. A less regulated labor market would equalize conditions between the formal and the informal sectors of the economy (Frölich et al. 2014, Heckman and Pagés 2000).

57 Such analyses have had wide import (IMF 2003, OECD 1994). Within the ILO, the 2000s have seen the launch of its Decent Work agenda (ILO 1999). The notion of "Decent Work" was never precisely

defined, but its emphasis on dignity, equality, fair income, and safe working conditions evoke a flexible and negotiable combination of rights and protections. Referring to "work" rather than "labor" was also an important rhetorical innovation for the ILO, as "work" includes all kinds of labor market exchanges in which no formal, let alone stable, employment relations is involved. By proclaiming that its mandate was decent "work" the ILO implicitly signaled that with its past focus on formal employment it had unduly neglected workers in the informal economy, the majority of which were in poor countries (Baccaro and Mele 2012). The critical reassessment of the role of labor institutions and regulation was significantly accompanied by a rethinking of the effectiveness of state action in the labor field. For advocates of this new approach, the regulatory problems facing states and international organizations are too complex, interrelated and diverse to be effectively dealt with by bureaucratic organizations through the imposition of rigid standards: it would thus be preferable to shift to a more "experimentalist" mode of governance in which public actors set the broad parameters of public policy but then leave both the concrete elaboration of goals and the search of the most effective means to partnerships between firms and civil society actors at the local level, while simultaneously helping to develop quantifiable indicators of performance, to circulate information about best practices, and to facilitate organizational learning (Sabel, O'Rourke and Fung 2000). As a result, if traditional labor regulation has generally been directed at restricting employer discretion and in so doing has sought to strengthen the bargaining position of workers against firms, the new labor prescriptions have often been grounded on the assumption that firms have a desire to improve working conditions, either because they care about corporate social responsibility or because corporate social responsibility pays off in commercial terms, i.e. gives firms access to ethically-conscious customers who are willing to pay a price premium for goods manufactured in compliance with labor standards, or elicit worker motivation and commitment, thus increasing productivity (Elliott and Freeman 2003, Vogel 2005). For example, a corporate social responsibility initiative such as the UN's Global Compact encourages companies to behave responsibly and publicizes their initiatives (Ruggie 2008).

58 ## 2.5. Environment

59 The environmental domain is somewhat different from the other domains discussed above in that nation states have retained more control over environmental governance than in other domains, while at the same time, there are calls for international and supra national environmental governance mechanisms and bodies (Bulkeley 2005). Indeed, there are many 'environments' and many environmental questions that are relevant at different scales and across levels such

that no one model could fit all situations. They run from very local preoccupations to the most global ones, each implying different actors, different types of solutions, different epistemic and ethical values. They run from pollution prevention to protection of flora, fauna or biodiversity, to management of air and (river and ocean) waters, from urban milieus to global climate change, from engineering work and industrial norms to adaptation and consumption – and they all imply quite diverse forms of government (Bulkeley, 2005; Dingwerth, 2008; Jordan & O'Riordan, 2004; Shove & Walker, 2010). Environmental changes that have tangible, locally experienced impacts like air, water and noise pollution tend to be tied to various forms of spatial regulation: national, state and local pollution laws, for example. For other environmental changes that have less tangible local impacts like climate change and some long distance pollutants (acid rain), there have been increasing demands for regional or global regulations and importantly, cooperation across national boundaries (Vaccaro 2007): this has been manifest most recently in the calls by natural scientists for supra-national global governance bodies to regulate so-called 'planetary boundaries'-- environmental changes across a range of domains from atmosphere to biodiversity that are believed to require global action (Steffen et al., 2015).

60 In contrast to what happened in the field of finance, which saw a convergence between Washington, London, Paris and Brussels, resistance to US-led moves against environmental regulation was greater, keeping environmental regulation more tied to place rather than markets (Pestre 2008). There was no convergence mechanism – the main reason being that it was impossible to disconnect environment from local public spaces and politics (Swyngedouw, 2005). First, Reagan's victories in the 1980s, as far as environmental protection went, was a victory *à la Pyrrhus* even in the United States. Indeed, the Reagan administration tried to transpose to the environment what it did in other fields (finance especially), that is to say, to let market forces operate on their own and according to their own logic. This led to the development of "cap and trade" instruments for industrial pollutants (legal authorities defining a ceiling on pollution, say in sulphur or CO2, pollution rights being then auctioned and bought by companies on various financial markets) and associated "carbon markets", but in 1988 President George H.W. Bush was forced to retreat when faced with an environmental movement stronger than ever before (in the US as elsewhere). The Reagan administration won discursively, notably through 'economic instruments' and 'cap and trade mechanisms'; but de facto none of these instruments were widely used, in the US as in Europe (the only real exception is with climate change), and nation states remain central even today as far as environmental decisions are concerned, including in the US (Pestre 2008, 2016). Second, confronted to the

attempt to apply "Reaganomics" to the environmental field, Europe did not capitulate and went on through 'social-democratic' kinds of government to suggest or impose stronger norms or regulations on companies (for car engines' emissions, for energy production, through fiscal advantages for new less polluting technologies, the regulation of genetically modified agricultural products and other issues). That explains the pivotal role of Europeans in the 1980s, 1990s and 2000s in environmental matters – which contrasts in the long run with the quite frequent refusal of US administrations to back international treaties.

61 Furthermore, industry, multinational corporations and national governments became invested in regulating the environment across borders as trade and legal agreements increasingly globalized (Cashore, 2002). Historically, it is important to contrast the 1970s and 80s – the period during which business resisted action in favor of environmental protection, whatever its modes (strongly in the US, in a more open way in Europe) – from the late 1980s, the 90s and 2000s, when corporations acted more in line with what they were then doing in finance, investments, and labor regulations. Up to the late 1980s, companies tried to trivialize the consequences of local threats – and environmentalists were described as extremists, but around 1988-92, major business unions like the International Chamber of Commerce (ICC) drastically changed their historical positions and claimed the environment to be their business – just as they did for "social responsibility" in labor relations. They started to publicly show their good will, to collaborate with NGOs – but also to define their own rules, and their own procedures; basically they fought for voluntary engagements, engagements that should be made public and monitored by 'independent' audits (Forsyth, 2005). By tackling the problem from the management side, these strategies were said to be more 'efficient' and 'cost-effective' (Bennett, 2000). Major multinational companies decided to seize the environmental question and manage it in their own way in the years preceding Rio, via the International Chamber of Commerce and later the World Business Council on Sustainable Development (WBCSD). That was due to (1) the renewal of environmental contestation, the multiplication of "affairs" and "scandals" – which led, among managers and people advising companies on their public image, to the idea that *people have become green and participative*, and there was no other way than to act accordingly (at least publicly); (2) the new power of business, the fact that they had won a new form of supremacy at global level – and that they could not go on simply opposing the new educated 'civil society' that defended the environment (Pestre 2008, 2016). It was better to try and attract them into their orbit, propose a new common future based on

‘shared governance’, and to save the planet. In brief, this was a major shift and a strategic move by business actors to embrace environmental concerns on their own terms.

62 At last, in addition to business, scientists and state regulators, international organizations established prior to the 1980s played (and still play) a key role in defining the management and governance of environments, often in coordination with technical experts and scientists (Newell, 2012, Sending and Neumann 2016). Of equal importance for the global governance of environmental matters, was the rise of engaged scientists and citizen groups within these IOs who were concerned about the ecological effects of capitalist and socialist economies alike. Scientists have been especially important in setting the agenda, bringing to bear expert knowledge and models to show how environment was at threat (Bäckstrand, 2003). Calculating the harm done to the environment is indeed a long-lasting technical task that always has to be redone and that implies tens of thousands of highly-trained specialists (Hulme, 2011). Of most significance was the focus on ‘natural’ environment as the object of regulation. Indeed, environment often refers to, or implies (forms of), *commons* whose precise destructions are not easy to detect (Bakker, 2007). Rather than humans and human populations framed as needing regulation, the environment itself has been placed as the central object of regulation. Showing what environmental issues are, evaluating them thanks to various disciplines (and sometimes complex technical tools like models and satellites) is thus a prerequisite (Hulme, 2010): the management and protection of the environment could not be left ‘to the market’ alone. Unsurprisingly then, but of most significance, the focus was put on ‘the environment’ as the obvious object of regulation -- on ‘nature’, ‘resources’ or ‘physical and biological dimensions’. This applies to climate change – panel 1 of the International Panel on Climate Change (IPCC) for example – or to the state of the biosphere among many other environmental questions such as air and water pollution. UNEP, UNESCO and international scientific organizations (IUCN, ICSU, SCOPE) were central in setting up many of these environmental governance institutions at the turn of the 1960s and 70s. Rather than humans and human populations that might need ways of regulating their relations between themselves and their ‘circumfusa’ (as was said in the late 18th Century), the environment as an *independent material entity* has been placed as the sole, central object of regulation. This explains the particular importance of expertise in the natural sciences in this field, and the intensity of the battle around it (who might pay for the consequences depends on the knowledge produced).

63 Still, even though the involvement of natural scientists in universities and in NGOs, in expert committees and in so-called civil society organizations, has been crucial for resolving environmental questions, it is true only up to a point. In many ways, it has not been scientific uncertainty alone that opened up space for suggestions of diametrically opposed solutions to the same environmental problems: in official settings (state administration or IOs), the link with the political sphere was mainly mediated by economic experts who imposed a specific view of the environmental questions in various IFIs – a move that was institutionalized around 1970. In the OECD for example, environmental questions were withdrawn from the scientific division (that had created the unit) and put under the leadership of economists. OECD was instrumental in proposing new rules as soon as 1970, such as guidelines, voluntary agreements (first proposed in 1976 for investment policies of MNE [AJN2] in the global South); they were conceived as tools to organize global forms of regulation that would bypass enforceable, state-based measures. Similarly, the World Bank was essential in standardizing the practices of Environmental Impact Assessments for (Northern investment) projects in the South (Moretti and Pestre 2014). This trend is quite clear in the functioning of the IPCC through the hierarchy of its three panels which prioritize economic and technical evaluations while confining social science evaluations to the margins (Dahan Dalmedico and Guillemot 2008). Finally, this trend may be most visible in the international organizations which are favored by business interests: most notably the WTO and its arbitrage tribunal, which has tried to impose its rules over those framed by nation-states and international treaties (as far as environment is concerned) and has gone against, on several occasions, the treaties signed by states (like the Montreal Protocol or the Kyoto Protocol).

64 The result of this increasing importance of economic actors in international organizations is that, even though the protection of environments often appears in conflict with industrial development and growth, since the 1980s, most regulatory institutions and international organizations have claimed that these policy objectives could be rendered compatible with industry via, *inter alia*, 'economic instruments', 'sustainable development' or 'green technologies' that are all supposed to solve the problem of environmental impacts from for example, extraction of resources and industrial waste. This tension has been reinforced since the 1980s and 90s, by economic globalization, which has promoted the new autonomy of business and finance vis-à-vis the political sphere -- which nevertheless remains *central* in environmental management -- and the promotion of 'the global' as the proper scale for environmental action – a construction that deserves to be considered carefully (Bulkeley, 2005; Hulme, 2010; Mahony, 2014).

65 # 3. Regulating Private Actors

66 As the previous section showed, the move from government to governance has had profound implications in the domain of social knowledge because of the type of actors that have been associated with the rise of 'governance' – and the type of experts who promoted the shift from one model to the other. Modern states have been major producers and facilitators of knowledge, and arguably for the first few decades after the Second World War, the principal ones. In the economic and financial spheres this involved states wresting greater autonomy from large entrenched businesses, notably banks, and groups and interests. The latter's efforts to gain intellectual influence did not cease, but a diversity of approaches reflected contending political and social pressures in the domain of knowledge. In the last 30 or 40 years, structural adjustment programmes have hollowed out university research and education in many developing countries, while in the richer countries changes affecting priorities, funding, accountability, and incentives have, together with epistemic shifts, filtered some of this diversity within individual disciplines if not necessarily in the social sciences as a whole (Dezalay and Garth 2002). One upshot of this is a closer articulation between knowledge and the demands of governance, and consequently a shift in what knowledge counts as useful, important, or authoritative, and where and how it is produced, validated, and disseminated (Mallard 2014). This section explores the operational instruments of governance, and the calculative devices and forms of authority mobilized to regulate the behavior of private actors (e.g. multinational companies, banks, private investors, etc.) before moving, in the next section, to their effects on regulation of public actors (notably states). The focus is on policy instruments, legal boilerplates (Gulati and Scott 2013) and contractual provisions that have become standard in commercial contracts, investment treaties, etc.; 2) the pricing techniques that are part of what Annelise Riles (2011) calls "collateral knowledge," which are typically used to finalize contractual exchanges, as well as all the forms of calculation or "calculative devices" (Callon and Muniesa 2005) used by states, international organizations or international arbitration experts; and 3) the "contractual knowledge" produced by and about the authoritative institutions in charge of legalizing market transactions, from the moment negotiations open to the moment when disputes erupt and contracting parties seek litigation or arbitration (Mallard and Sgard 2016:9).

67 ## 3.1. Finance

68 The changing forms of financial market regulation and the redistribution of regulatory roles between the public and private sectors were led by a series of innovations in the regulatory field signifying a move away from statutory legal codes and the adoption of more flexible, "risk-sensitive" rules. Statutory regulations in finance conventionally involved static provisions applicable to the whole sector, for example in the case of banks separating banking and investment, restricting scale or overseas operations, licensing entry, etc. In contrast, for the promoters of flexible regulations, modulating the intensity of regulation across sectors and contexts of exchange would make regulation more effective and reduce incentives to evade regulatory requirement.

69 The debate about risk-sensitive regulation coalesced around private indicators as regulatory instruments. Instead of defining the scope of permissible and impermissible transactions, financial regulators have increasingly relied on indicators of risk to modulate regulatory requirements. The adoption of lighter and risk-sensitive regulation may have enhanced the overall risk exposure of financial systems. Changes in regulative practices also shaped technologies of risk information and evaluation. From the 1970s, an infrastructure of international knowledge producers consolidated, with private firms (e.g. credit rating agencies) and international organizations (e.g. IMF experts) becoming important suppliers of risk expertise. Since the return to (mostly) floating exchange rates and (generally) free capital movements, this shift in the IMF's production of risk assessments corresponded to its enhanced monitoring and surveillance role in relation to developing countries' macro-economic policies. As soon became evident, the practice known as "governance by indicators" created interdependencies between regulators and the producers of yardsticks, indexes, and ratings (Davis et al 2012), some of which are increasingly in the hands of US (private) actors (Krisch 2005). A prominent instance of governance with indicators has been public regulators' reliance on private credit ratings.

70 Regulatory provisions affecting institutional lending and investment illustrate the changing balance between public and private regulation of financial markets. In Europe and the developing world after the Second World War, many central banks and governments adopted varying degrees of directed lending policies affecting the distribution of institutional credit between the public and private sectors as well as within them. Directed lending policies could be motivated by several objectives, their impact on asset quality and financial market stability could also often be indirect (Balachandran 1998). The deregulation of institutional lending and investment since the 1970s has seen an increased reliance on ratings as private risk-based technologies of public regulation. Historically credit rating agencies emerged to provide, for a fee, financial market information to

investors who, unlike say the big banks, lacked the means to produce their own information: already in the 1930s, US regulators began to enjoin the use of public ratings by banks and investment firms that did not devise or were unwilling to share their own internal ratings (Carruthers 2016). After the war, with the retrenchment of international capital transfers, strict capital controls, and the virtual elimination of systemic risk, regulatory demand for ratings remained sluggish. But in the mid-1970s ratings made their way back into regulatory provisions. In 1975, the Securities and Exchange Commission (SEC) began using ratings to regulate capital-adequacy norms for broker dealers. Instead of stipulating fixed, industry-level capital requirements, ratings began to be used to vary capital reserve requirements according to the nature of the credit risk. Rating-driven capital requirements reduced the overall density of regulation for debt instruments in the investment-grade sector. Since the 1980s ratings have been incorporated into a broader variety of contexts in the United States and the European Union. Sometimes this could be opportunistic or symbolic: for instance, deployed as a test of national banks' qualifications to establish financial subsidiaries following the 1999 repeal of the Glass-Steagall Act, ratings became a rationale for dismantling a centerpiece of the New Deal regulatory framework. But regulators also used ratings as risk-sensitive restrictions on the types of investments which financial institutions are permitted to issue or make. For instance, pension funds and insurance companies can only hold AAA investments. Regulators use rating-based formulas when computing differential disclosure requirements: the SEC requires a financial institution with risky investments to disclose more information about its operation in its quarterly reports than a firm with a lower-risk profile, as measured by CRAs (Crockett et al. 2003: 7). Ratings were also adopted to determine the eligibility of securities for central bank accommodation of private sector bonds. Finally, ratings serve as triggers in private contracts between actors operating outside the regulatory network of public exchanges: for example bilateral contracts in over the counter (OTC) derivatives markets embed the legal conditions of an OTC transaction with respect to the terms of the contract and settlement. The International Swaps and Derivatives Association (ISDA) uses rating triggers to force borrowers to post additional collateral if they fail to maintain their rating. Here ratings are not an instrument of deregulation but an instrument of self or own regulatory oversight and compliance in a previously unregulated industry.

71 This move toward de-regulation and the increased production of ratings and ad hoc assessments by both public (the IMF) and private (CRAs) bodies is not without problems. As far as CRAs are concerned, many critics point to the fact that credit ratings possess little intrinsic informational value (Partnoy 1999). They have failed to forecast defaults (Rona-Tas and Hiss 2011, Pénet 2015). They often

fail to spot a build-up in uncertainties and are prone to lowering ratings during a crisis, thus aggravating uncertainties and their effects (Ferri, Liu and Stiglitz 1999). Market prices have been argued to be superior to ratings for purposes of regulatory determination (Partnoy 2002). Recently, banks and investment funds have distanced themselves from CRAs by bolstering their internal expertise in the face of increasing uncertainty. However regulators continue to use rating-implied formulas to compute capital reserve requirements and banks continue to rely on them to determine the risk weight of their exposures. Ratings remain in use to determine eligible securities for central banks' open market operations. In other words, despite their limited informational value, progress towards reducing the regulatory importance of ratings has been limited thanks to regulators' reliance upon them, and the substantial coordination role ratings play in orchestrating the activities of dozens of domestic and international regulatory agencies. For regulators, ratings are useful les for their informational value, more as tools of governance offering a technical instrumentality to operate a shift from government to governance. Even if private actors reduce their reliance on ratings for making investment decisions, the regulatory use of ratings may still shape investment decisions. In this scenario ratings cease simply to be an assessment of creditworthiness. Instead, they function as governance mechanisms by setting standards for investing institutions.

72 ### 3.2. Investment

73 As said above, investment treaties mostly bind states' ability to adopt new policy in a way that would be detrimental to the interests of foreign capital holders. Thus, they target mostly the behavior of public authorities, which is why we move to the analysis of the instruments they created to the next section. However, even though investor-state disputes can usually only be initiated by investors, it is becoming more common for investment treaties to permit states to bring counterclaims against investors, though these counterclaims usually have to be related to the underlying dispute. If this approach is expanded, the asymmetrical nature of investor-state arbitration whereby claims can only be made by investors against states would be rendered more symmetrical as claims could be made in both directions. But as will be explored in the last section, this trend is only emerging. Thus, it is widely believed that the regulation of foreign private investments (the way they are oriented, secured, or monitored) takes place outside the realm of hard law (e.g. investment treaties and arbitration awards): it is done in a very 'soft' manner by private consulting firms as well as law firms (big multinationals like Baker and McKenzie), think tanks (like the Washington-based Peterson International Economic Institute) as well international organizations like the OECD, which advise countries on the

‘soundness’ of their investments abroad. In recent years, multilateral coordination against money laundering through forums such as the G-20, entities coalesced around the “rule of law” and “transparency” frameworks developed as part of the World Bank and IMF’s anti-corruption initiatives in the 1990s (Mehrpouya and Djelic 2015). As part of their anti-money laundering agendas, entities like the Financial Action Task Force (FATF) and the IMF have promoted “financial transparency” measures and banking reforms that extend the reach of reporting requirements like those promoted by the OECD . With the rise of counter-terrorism financing (CTF) campaigns after 2001, “financial transparency” regulations have gained teeth to a point it is doubtful whether they represent only a form of ‘soft law’ even with respect tothe transnational legal order regulating foreign investment (Biersteker 2009). The difference between the 1980s and the 2000s is particularly striking in this regard. is striking. As several recent instances suggest, the rapid creation of a global system of financial monitoring of financial transactions associated with foreign investment is indeed a major change in how the US has exercised power with respect to international investment transactions especially when they flow through US jurisdiction (Zarate 2013). The use of the sanctions mechanism to regulate investment has now expanded to cover nuclear proliferation. The resulting increase in ‘demand’ for expertise on financial transparency and compliance has enabled entities like the OECD and FATF to step forward, thereby helping to produce in the sphere of transnational banking regulation, convergence effects analogous to those produced by transnational expertise on countries’ economic policies (Mallard 2017).

74 ### 3.3. Trade

75 How have the changes in international trade governance highlighted in section 2.3 affected private actors? The increasing legalization of the international trade regime as well as the shift of international regulatory authority from intergovernmental to trans-governmental and transnational institutions have varied greatly in form and extent (see, e.g., Abbott and Snidal 2009; Koremenos 2007). But even though both changes are based on formal inter-governmental agreements that, as such, establish rights and obligations only for the signatory states (unlike the increasingly controversial investor-state arbitration provisions in the bilateral investment treaties discussed in section 3.2, which create transnational rights for private actors), these changes in the global trade regime have also brought indirect yet very palatable changes for private actors.

76 By rendering violations of trade agreements more easily detectable and punishable, the judicialization of the multilateral trade regime, which was a key component of the shift from GATT to WTO (Shell

1995; Zangl 2008) rendered the international integration of markets beneficial to competitive producers and—at least in markets with effective competition among producers—to consumers (Bagwell and Staiger 2010).[4] The shift of regulatory authority to the transnational level, with supranational overtones in the TBT- and SPS-Agreements of the WTO, has brought similar benefits, at least for internationally competitive producers (the benefits of the SPS-Agreement for consumers remain contested). At the same time, these developments constrained uncompetitive and rent-seeking producers' ability to gain protection from their home governments through the traditional instruments of trade policy [REF]. The use of the non-tariff barriers (NTBs), insofar as they are covered by the WTO through the TBT- and SPS-Agreements, the Agreement on Government Procurement, etc., also declined [REF]. And to the extent that stronger dispute settlement provisions in the many PTAs that include more far-reaching constraints on the use of NTB are effective, the institutionalization of trade openness should have more generally decreased the availability of protectionist measures.

77 Producers, however, have in many cases proven quite innovative in protecting their market shares and/or supra-competitive profits from the increased foreign competition that the institutionalization of trade openness was supposed to bring. One response to (the threat of) greater foreign competition has been to lobby governments for the imposition of NTB that are not (yet) prohibited by existing trade agreements. And indeed, non-tariff barriers to trade have not only become more visible as tariff levels have declined, they also have become more numerous and more diverse (Baldwin 2000)[REF]. Genuinely *political*-economic analyses of international trade thus have provided increasing support for Bhagwati's (1988) concern that there may be something like a "law of constant protection," according to which international agreements to open markets to more foreign competition result only in temporary increases in openness, followed by reversion to a comparable level of protection by other, often novel means. And research on the politics of trade shows that the use of new NTBs is particularly common in trading states with political institutions that ensure a high level of responsiveness to the private sector (Ehrlich 2007; Kono 2006), even though democracies generally are more likely to sign agreements that constrain their own use of then-recognized trade barriers (Mansfield and Milner 2012), consistent with the view that trade openness is beneficial to consumer-voters, even in developing countries (Milner and Kubota 2005).

78 Of course, calling on governments to protect them from the vagaries of the market is not the only possible response to institutionalized economic openness by firms that fear increased competition. As long as the competitors in a newly internationally integrated market are

similarly competitive, so that all of them experience substantial uncertainty about their likely market shares and profitability if they in fact competed, then economic openness creates both incentives and opportunities for *transnational private protection* (Büthe and Minhas 2015): The formation of price-fixing or market-sharing cartels or other collusive anti-competitive conduct becomes under these conditions a "rational business strategy" (Connor and Lande 2012). And the scale and geographic scope of the discovered international cartels suggests that firms are well aware of such opportunities to avoid the full consequences of economic globalization, though given the ongoing global diffusion of competition law, increasing enforcement cooperation, and changes such as the introduction of leniency programs for cartel participants who defect, is inherently very difficult to ascertain whether the massive increase in known international cartels is indicative of real increases in anticompetitive behavior or "just" a consequence of increased enforcement (see, e.g., Connor 2015).

79 Private actors are not just the targets of global trade governance and hence affected by the changes sketched above. Among the most striking changes in trade-related regulatory governance has been the creation and proliferation of transnational bodies where private actors serve as rule-makers and/or -enforcers. Participation in governance, however, tends to be costly, whereas corresponding benefits are unlikely for atomistic consumers or other stakeholders without a commercial interest. Beyond issues where civil society stakeholders are already well-organized and/or have intensive quasi-ideological preferences (human rights and some environmental issues seem much more likely to be in this category than characteristics of typical consumer goods), we therefore generally find that the rise of transnational private regulation tends to empower or strengthen commercial actors vis-à-vis others—though the extent of the resulting distributional issues surely depends upon extent to which private regulatory power is embedded in public oversight.

80 ### 3.4. Labor

81 Most international labor regulation associated with the ILO system affects firms indirectly by modifying the laws and the implementation practices of states. However, increasingly labor regulation also relies on private initiatives set up by multinational firms or industry consortia. Beginning with the early 1990s, some of the global buyers (e.g. Nike) have been targeted by NGOs which have exposed blatant labor right violations (for example, the use of child labor) by some of their suppliers. The mobilization of ethically conscious consumers in the Global North and of human rights NGOs has pushed global brands to introduce private monitoring systems of

labor conditions in global supply chains as part of corporate social responsibility programs. In other cases, similar initiatives have been adopted in the absence of civil society mobilizations because they have become the right thing to do ("institutional isomorphism"). Corporate codes of conducts generally make reference to the ILO's fundamental principles and rights at work, and company monitors generally check the compliance of suppliers with national labor laws and the corporate codes through site visits; but a major problem is the credibility of private monitoring reports. For this purpose, several consortia have been created to ensure independent monitoring, with mixed results. The most complete evaluation of private monitoring has been produced by Locke and his collaborators (2013), who have analyzed the internal monitoring activities and reports of three large brands in footwear, apparel, and electronics. Their conclusion is that private monitoring has limited effectiveness, and that outcomes do not improve over time. In particular, freedom of association (i.e. the right of workers to join unions of their own choosing) is generally not respected. The threat of sanctions against violators (for example, the cancellation of commercial contracts) has a limited effect of deterrence since companies continue to source from efficient suppliers (such as Chinese ones) even when there is evidence of non-compliance. In addition, private monitoring does not address the root causes of labor violations, especially excessive overtime and the non-respect of the rights of contract workers. These violations are ultimately the result of the sourcing policies of the brands themselves, which impose tight deadlines on suppliers together with meager profit margins, thus creating strong incentives for suppliers to squeeze their workers.

82 These pitfalls equally affect the instruments put in place by the ILO to assess "corporate responsibility." The problem of the ILO is that the only tool at its disposal to pursue this goal is its ability to persuade member countries to voluntarily adopt and apply standards, but it cannot rely on either coercive power or financial incentives (such as conditionality associated with aid programs administered by the World Bank or with loans granted by the IMF) to do so (Maupain 2013). In contrast to the IMF, which can clearly exert "surveillance" on the macro-economic policies of debtor countries, the ILO lacks monitoring functions. The fact that the ILO has engaged in (limited) monitoring of supply chains is an exception that confirms the rule: the first program in this area was the Better Factories Cambodia project (Ang et al. 2012, Oka 2015, Polaski 2006). In the early 2000s the ILO was asked by the US government (which financed the project) to officially inspect and certify working conditions in Cambodia's apparel industry. Cambodia's access to the US market was made contingent on positive results achieved in these monitoring inspections. The Cambodia project went on to become one of the most internationally-renown ILO projects. The program

was continued even after the abolition of the Multi-Fiber Agreement in 2005, which eliminated the commercial incentive linked to market access. The Cambodian government decided to issue export licenses only to companies that passed the ILO inspections. Although Better Factories was later replicated in other countries, such as Jordan, Lesotho, and Viet Nam, in collaboration with the International Finance Corporation (IFC), the financial arm of the World Bank (these programs are known as ILO/IFC "Better Work" programs), this approach has remained the exception rather than the rule within the ILO. Furthermore, in addition to the ILO system, global labor regulation also relies on private monitoring systems, which compete with the ILOs' jurisdiction. The relevant actors are in this case: global brands and buyers, local suppliers, industry consortia, and NGOs (Gereffi, Humphrey and Sturgeon 2005, Locke 2013, Seidman 2007). Ethically conscious consumers in the Global North and human rights NGOs have pushed global brands to introduce systems aimed to privately monitor labor conditions in global supply chains as part of corporate social responsibility programs.

83 Furthermore, although the ILO system and the system of private monitoring intersect in some points and suffer from the same limitations, they represent different and often competing approaches to regulation in the labor field. The notions of effectiveness, accountability, and justice are different in the private governance system than in the ILO system. First, accountability in private codes is limited to purely commercial accountability: suppliers are required to abide by the provision of the company code of conduct as part of their commercial liability towards the buyer. The notion of democratic accountability to workers, for example by favoring the formation of free trade unions, is generally not contemplated by private governance systems. Effectiveness is operationalized as reduction of the number of workplace violations. However, the use of standardized scorecards for plant evaluation has generated various attempts to "game" the system by suppliers and better scores do not necessarily translate into better performance (Locke 2013). Justice remains subordinated to the bottom-line: companies may genuinely be committed to being socially responsible; certainly they are willing to spend millions of dollars setting up and running internal inspection systems. However, the ultimate goal remains profitability and this may explain why there is limited evidence of brands dropping suppliers in case of labor violations.

84 ### 3.5. Environment

85 In the field of environment, there are *many* different instruments devised by *many* different kinds of actors; and the solutions are quite diverse in nature and in scale. Here, we review the instruments

binding private actors, while in the next subsection on the environment, we review the (quite traditional) instruments, which have been adopted by states to agree on common limits placed on economic development on behalf of environmental protection. In fact, since the 1990s, the most central instruments for protecting environments are *green management rules* on the one side, and *audits* on the other. These instruments started in the late 1980s, exploded in the 1990s before being extended to "green finance" in the 2000s. This developed when most people, in OECD and UNEP for example, said that it would be more efficient to internalize environmental protection from the start, at the moment of production, rather than at the end of the pipe. Business associations (the ICC or the WBCSD) became fervent advocates of this solution just before Rio. No doubt the point is well taken but concrete rules remain in the sole hands of managers and auditors – *le secret des affaires* which leave limited room for publicly divulging solutions and results. As already noted, the private sector, since the late 1980s, has moved to endorse the protection of the environment as one of its main goals, thus trying to reduce the contradictions between economic growth and the protection of nature. This meant promoting voluntary approaches (against public regulations *as against* economic instruments) – sometimes using the vocabulary of 'contract' – and internalizing environmental questions into the management of firms; it also meant the development of niche markets (via 'sustainability' labels for example (Bailis & Baka, 2011)) and a pro-active, public oriented kind of action (Perkins, 2009).

86 The need of free trade has been central in the setting up of such international bodies and rules. For chemicals, for example, whose production is quickly changing (high rate of innovation), whose diffusion is quite large and whose effects are dispersed and not easy to trace, regulation has remained weak and very sensitive to industrial lobbying and threats. These voluntary industry-level engagements were to be based on guidelines (there were many, some quite loose) and audits were to be the sole monitoring process of results (and auditing companies were many, in competition and belonging to the same world); management was revised to include environmental considerations (the ISO 14000 series was made public in the second half of the 1990s) and energy savings and recycling were put central stage (according to the new slogan 'Pollution Prevention Pays'). It is therefore not a surprise if many industrial agreements defining the technical qualities of products and processes have thus been designed since the late 1970s in cooperation between states (notably the EU) and companies – the World Bank and other multilateral organizations having later rendered them 'international' (Moretti and Pestre 2014). For energy production, transport, paper pulp or mechanical industries for example, the most common examples are the Best Available

Technologies (BAT) that define the processes considered less dangerous for the environment. Their definition, always conflictual, brought together scientific and company experts to define and standardize vocabulary, assessment techniques, comparisons between processes, rankings, etc. The Best Available Techniques are often used as a proxy for Environmental Impact Assessments. OECD and the World Bank made them international (as conditionality on loans for example); they could be contested but that is hard work for social movements to bypass the authority of these norms that dictate 'the best technical solutions' – whatever that means. Still, voluntary engagements are not real contracts, there are no arbitration tribunals and no private (business-led) authorities that would be autonomous and regulate environmental conflicts. Only legislations by states are locally enforceable. Globally, there remains a vacuum of power to enforce agreed upon standards and targets, the Kyoto Protocol being an excellent case in point (Parks & Roberts, 2010). The UNFCCC has no formal regulatory authority, and as such, the Kyoto Protocol, like its predecessor, the Paris Agreement (2015) rely upon legal provisions created at the nation state scale for their enforcement.

87 In order to incentivize the private sector to follow the voluntary rules, public authorities and business consortia relied on well-organized public campaigns (with distribution of environmental awards created by business for example), or the creation of many labels and certification schemes (which remain in the hands of companies themselves). In so doing, they have anticipated the innovations made since the 2000s by major global companies in conjunction with certain NGOs (WWF notably), states of the global South and, sometimes, local populations, to set environmental quality standards for agricultural products: the Round Tables for palm oil, soya, etc. being the most well-known examples (Bailis & Baka, 2011; Fairhead, Leach, & Scoones, 2012; Fortin, 2013; Ponte, 2013). We generally talk of 'soft law' (Abbot and Snidal 2001) in that context, and the leading role is in the hands of multinationals, as local populations have no real power and states are only secondary: in those "Round Tables" which set up the norms that makes a soya or a palm oil 'sustainable', one could talk of voluntary engagements, as they are often devised in response to public campaigns or to anticipate risks of regulations by political authority. These instruments are not that different from the creation of environmental friendly certifications, which, like the ratings used to govern private behaviors in the financial field, or the certification mechanisms in the field of labor and "corporate social responsibility," are based on the idea that the protection of the environment can be made via the market power of dedicated consumers who are in part buying the environmental credentials of the service or product in question. Environmental labeling started in the 1970 with the bio or

organic labels but exploded in the 1990s when companies changed their approach, promoted voluntary engagements and declared environment to be their business, with the Forest Stewardship Council label for a sustainable management of forests (Klooster, 2005), Marine Stewardship Council label among a host of others (Boström & Hallström, 2010). Since then, labeling has expanded to many industrial sectors (including mining), it implies certifications that are quite diverse in quality and which seem, in some cases, not so far from blatant "greenwashing." As with many of these tools and instruments, it is impossible to talk about a 'general form of accountability'. Because rules of accountability are privately defined and are quite varied, and because audits are closed black boxes and are not so open to counter-expertise, attempting to judge them against a universal criteria or standard is impossible.

88 Another important trend in the production of instruments used to regulate corporate conduct in the environmental field is the move towards valuing environments based on the services they provide (Carpenter et al., 2009) and the adverse results that industrialization may have on non-corporate actors. There has been an expansion of contemporary large consultancy firms, *bureau*, *conseils* and rating bodies that value the 'services' rendered by ecosystems. They notably employ biologists and economists and are central for the compensation schemes developed for large projects (dams, airports, etc.). Banks (or more often offers) of assets are created (they rely on environmental rehabilitation projects performed by certain developers on the ground, generally in places far distant from the developments in question) and these assets could be bought to compensate destructions elsewhere – which pose fascinating epistemic and ethical questions. It is nevertheless important to realize that frames and norms are essentially in the hands of states or regional authorities – and that 'markets', contrary to what is often said, are only used marginally as 'technical' tools in the environmental domain. Instead, economists have tended to favor other economic instruments, namely taxes to integrate environmental externalities into the price structure of goods and services like electricity generation; cap and trade schemes (legal authorities defining a ceiling on pollution, say in sulphur or CO2, pollution rights being then auctioned and bought by companies on various financial markets); and cost-benefit analysis. Many of these instruments are based on the view that environmental degradation is a 'negative externality' that has to be integrated into the *frais généraux* of the company. And it has been like that for two centuries: in early 19th Century France, a line for compensation of damages regularly appears in book records of polluting companies (Fressoz). With financial risk, the sheer existence of the firm might be at stake (that would be quite exceptional with environmental risks). In contrast, with environment, 'risk' appears in risk assessment and

management, where the aim is for an expert body or government to determine the health or environmental consequences on populations of the diffusion of particular products (Bennett, 2000, Bailis & Baka, 2011).

89 In the environmental domain, it is therefore important to recognize that first, states remain the only body capable of enforcing standards and norms, and second, that by framing environment as an externality, robs the private sector of a crucial incentive to self regulate. Thus, as environment is not at the heart of business, but on its external margins, each firm manages the problem in its own way. Environmental assessment relies on epidemiology, clinical and toxicological studies and, in a second phase only, mobilizes economic experts who compute, largely through cost-benefit analysis, how costly the environmental protection will be in terms of economic or industrial growth: such calculation will end up determining the political willingness to impose new rules or norms or not, as politicians and corporate managers often assume that we cannot save the environment or even health at any cost. Environmental damage is, in any case, not a risk faced by the company when doing business (except if it loses market shares as a result of the reputational effect of its environmental policies), but rather, a public risk due to industrialization: in this formulation, 'environmental risk' is external to the firm – it is not a systemic risk internally linked to business itself. At worst, for the company, it is a matter of image and brand if attacked by NGOs for destroying environment in too scandalous a way, but the company will not endanger its future if it does not protect the environment.

90 As in the previous fields, what is striking and distinctive around environment, is the piling of tools, the variety of criteria and expert certifications that are available, and the non-systemic nature of the whole thing. That is not innocent and has been theorized by managers and other gurus of business around 1990: that variety leaves open the possibility to contest results one dislikes, to delay action by asking for more studies and expert work, and to choose, when action is decided, the means one prefers and that most satisfy one needs. The success of climate change deniers in the United States is perhaps one of the most well-known examples of such manipulation (Oreskes and Conway 2010). The battle for privileging economic instruments over what was called 'control and command' legal frameworks has been fought *sans répit* since the 1970s by economists, IOs like OECD, but above all think tanks like Heritage or Enterprise. De facto these tools are not dominant, they are not as obviously superior (as said by economic theory), they have specific side effects (identified mainly by victims or NGOs), and their promotion has a heavy ideological component (promoting market forces).

4. Regulating Public Actors

92 Global governance is not just about abolishing public regulation: it also about changing how regulations binding public authorities are drawn, and which kinds of instruments and forms of legitimacy are claimed to impose limits on state sovereignty. We describe such instruments in each field.

93 ## 4.1. Finance

94 It is a truism that creditors are more powerful than debtors. Equally needless to stress, they do not hold all the cards. On the one hand, neoliberal governance in finance has been about shuffling the deck in favour of creditors. Conditional lending is the key instrument to regulate the behavior of public borrowers, though the creditor states and international lending institutions who negotiate the conditionalities may not be the sole or even principal lenders – since the internationalization of private capital markets of the 1980s, private lenders usually have a higher stake in the game. Conditional lending extrapolates or adapts principles of sound lending to the conditions of sovereign borrowers: it is the activity of making the provision of financial resources contingent on a set of policy conditions that the country recipient must consent before aid disbursement. Loan conditionalities tie loans to policy conditions for borrowing governments. Conditionalities can be assessed with respect to the substantive demands, i.e. the actual conditions, or the instruments used to support them (Babb and Carruthers 2008). Conditions can be ex-post or ex-ante, i.e. loans may be made against the promise of meeting conditions, or fulfilling the conditions may be a precondition for disbursing the loan. Promises are monitored through periodic assessments. Ex-ante conditionality is coercive to the extent lending can cease if countries do not deliver on their promises. Ex-post conditionality may be more coercive and may partake the nature of 'hard law' (Abbot and Snidal 2000). It does not also preclude continuous monitoring of set performance targets. On the other hand, is the pithy 'old saying' most famously paraphrased by Keynes: 'owe your banker £1000 and you are at his mercy; owe him £1 million and the position is reversed' (Keynes 2013, vol. XXIV: 258). Neoliberal governance in the sphere of finance may hence be thought of as a ceaseless effort, neither equal nor equally feasible or successful at all times and in all places, to push back against this reckoning as far as possible to its logical limit or constraint, i.e. until the only large borrower left with any power to hold creditors at its mercy would be the one who would protect or bail them out when loans to other large borrowers began to sour.

95 Conditionality programs have consequences for debtors. Borrowing countries typically have limited bargaining power in negotiations, and the impact of the conditions also often exceed the duration of the loan. Conditionalities are justified by the risk of sovereign lending, yet sometimes enhance it. Pioneered by nineteenth century private lenders and lenders' clubs such as the London-based Corporation of Foreign Bondholders, conditionalities in loan contracts effectively collateralized public policy in lieu of tangible collateral assets or revenues (Flores Zendejas 2016). The model of conditional lending that lenders' clubs aspired to was perhaps most closely realized in colonial loans and guarantees which entailed conditionalities accompanied by close monitoring. Particularly since the 1980s multilateral lending institutions, rich states and their institutions, and private creditors have increasingly acted in concert in relation to sovereign borrowers to greatly reduce borrowers' room for manoeuvre. This is reflected in the IMF's increasing adoption of a surveillance role in its addition to its role as a crisis manager" (Mallard and Sgard 2016:34). The IMF interpreted this role into producing assessments of thethe debt servicing capacity of low income countries–an activity not unlike credit rating gencies in sovereign bond markets, together with a "vulnerability" index (Best 2014:143). The new role that the IMF staff projected for itself after Bretton Woods thus lead to the multiplication of ad hoc judgments about sovereign credit-worthiness with implications also for private investment decisions (Nelson 2016).

96 The 1980s Latin American debt crisis offers a useful point of entry to study the variety of tools of legal redress that communities of lenders have invented to keep indebted countries within the lending game. Latin American countries were the first developing countries to return to international capital markets after the Second World War. Yet within less than a decade of the Latin American turn to private borrowing, a combination of overlending, declining export revenues, and a steep hike in US interest rates had plunged them into a debt crisis. As countries burdened with debt for facing a downturn in export revenues turned to the IMF, stabilization and structural adjustment plans became vehicles for expanding the use of conditionalities for implementing neo-liberal reforms. In the wake of the 1997 East Asian crisis, conditionality programs expanded to include institutional policies in the judicial sphere (Best 2014; Halliday and Carruthers 2009) In a paradoxical way, the "failure" of conditionality comforted both its promoters and critics: whereas the failure of World Bank and IMF programmes in sub-Saharan Africa in the 1980s, which led to a decline in investment, exports and real-per-capita income as well as an increase persistence in poverty, had been recognized clearly as a of failure, "with the Asian crisis, the question of what kind of failure this represented was itself the subject of contestation" within the IMF and World Bank (Best 2014:75).

97 Such expanded conditionality programs are no longer confined to developing countries. They now forman accepted feature of debt restructuring and austerity packages in the Eurozone, notably to Greece, Portugal, and Ireland. Conditionality procedures, terms, and practices have consequently grown more diverse and complex.

98 Overall, conditionality is a powerful, yet flawed mechanism of governance of sovereign crisis. It yields controversial results, in no small part because it is ideologically biased and because international organizations often do not act independently from sovereign interests: as suggested by realist theories of power, which have traditionally emphasized the role of national interests on the formation of IOs' preferences (Cox, et al. 1973; Haas 1964), practices of conditionality by international organizations like the IMF have to be assessed against a broader set of factors like diplomacy, geopolitical interests, and systemic risk (Stone 2002, 2004). Although sovereign defaults and debt restructuring have been on the rise since the 1980s, international law on sovereign debt remains notoriously underdeveloped. After failed attempts to create a "Sovereign debt Restructuring Mechanism" (Krueger 2002), no comprehensive framework of debt resolution exist in the sovereign sector, in contrast to the private sector, where companies can now reorganize in the shadow of global corporate insolvency frameworks, thanks to the gradual process of codification of bankruptcy law (Halliday and Carruthers 2009). Conditional lending is an imperfect governance mechanism that calls for broader, more comprehensive frameworks.

99 ### 4.2. Investment

100 The two most important instruments used to regulate public actors in the investment treaty sphere are investment treaties, which impose obligations on host states, and investment treaty awards, which are made by investment treaty arbitral tribunals in the context of resolving a specific dispute about the interpretation or application of the investment treaty. Here, we do not place attention on the UNSC resolutions that bind all states and private actors in their investment decisions, if the latter impose limits on the states' or companies ability to invest in a country's economy: what we have already described below is sufficient in the context of this chapter, and we leave to other chapters the task of assessing the role of sanctions in the regulation of state conduct.

101 In terms of treaties, in addition to various mega-regional free trade agreements with investment obligations (like NAFTA, TPP and the RCEP), the 3200 international investment agreements which have been signed up to this day represent a complex spaghetti bowl of bilateral, plurilateral and regional agreements, which now makes up a

“global” system despite the absence of a single, overarching multilateral treaty. Indeed, even though the vast majority of these treaties were bilateral, this dense web of investment treaties began to be understood as a global system for several reasons (Schill, 2009). First, many of the investment treaties contain similar substantive terms, so they are often bilateral in form but somewhat multilateral in substance. Second, most of the investment treaties contained “most favored nation” clauses, which permit investors under one treaty to gain the benefit of any more favorable provisions in any other treaties entered into by the state in which they have invested. Third, these investment treaties are subject to interpretation by investment treaty arbitral tribunals, which often interpret provisions in one treaty by reference to arbitral awards issued under other treaties.

102 In terms of arbitral awards, governance through arbitration is a key element of the investment treaty system. However, the investment treaty system does not have a supreme court or an appellate body and one arbitral tribunal is not required to follow the decisions of any other tribunal through a formal doctrine of percent. This has meant that arbitral tribunals have interpreted the same provisions in different ways. In some controversial cases, different tribunals have even ruled on the same facts in different ways, leading to concerns about inconsistency and conflicting decisions (Franck, 2005; Van Harten, 2007). For instance, in two cases against the Czech Republic arising out of the same facts, one tribunal found no liability and the other found liability and awarded the investor USD$350 million. In practice, however, a de facto body of precedent has emerged because tribunals in one case often refer extensively to awards from other cases (Kaufmann-Kohler, 2007). This does not always create consistency, however, as on some key issues, such as whether the most favored nations clause applies to dispute resolution, investment treaty tribunals have split between two or more approaches. Indeed, even if, under international law, any subsequent agreements and practice of the treaty parties can be taken into consideration when interpreting a treaty (VCLT, article 31(3); Roberts, 2010; Gordon & Pohl, 2015), it is not clear that a subsequent interpretation of the treaty parties would be binding on investment treaty tribunals.

103 Still, the power of states to negotiate and enter into treaties, and arbitral tribunals to interpret and apply these treaties, should be understood as an iterative dialogue (Roberts, 2010; UNCTAD, 2011). After tribunals interpret treaties, treaty parties have the power to confirm, reject or qualify these interpretations by leaving the treaty terms the same or changing them in their next rounds of treaty negotiations. This can be seen most clearly in the evolution of US investment treaties which include specific changes that confirm or reject the reasoning given in particular investment treaty awards. In

a series of early NAFTA cases, the NAFTA treaty parties became concerned that some investment arbitral tribunals were interpreting some of the vague language of investment treaties in broad ways that were beyond what treaty parties believed that they had agreed to. The treaty parties responded by adopting interpretations of the investment treaty through the Free Trade Commission (FTC). The FTC is made up of cabinet level representatives of the NAFTA states. It has the power to provide interpretations of NAFTA and the treaty expressly provides that these are binding on investor-state tribunals. Despite some initial controversy about the effect of these interpretations on ongoing cases, arbitral tribunals now generally interpret NAFTA in light of these FTC interpretations. Given this, many newer-style investment treaties contain a clause like NAFTA's FTC provision that expressly gives the treaty parties the power to adopt interpretations that bind arbitral tribunals interpreting that treaty. Investment treaty law is thus being developed through interactions between states and investment treaty tribunals. But not all states have the resources to follow investment treaty awards and engage in this iterative law making process. These states often leave their investment treaties as is or cut and paste them from the agreements of other states, like the United States (Gordon & Pohl, 2015).

104 ### 4.3. Trade

105 Recent trends in international trade governance, highlighted in section 2.3, have not only changed who governs private actors (and how), they also have affected who governs governments in global product markets. Here, we distinguish between two kinds of developments, both prompted by changes in trade governance: changes for governments vis-à-vis each other and changes for governments vis-à-vis private actors.

106 The "rule of law" is often understood as an antidote to the rule of force or fist. Since ancient times, courts (including political rulers who derived their legitimacy in large part from their ability to adjudicate conflicts of interest due to their ability to enforce judgments within their realm) have been called upon to decide on the basis of general principles that are overtly blind to political or social status and thus prevent the "resolution" of conflicts through the use of force (Shapiro 1981).[5] And indeed, recent research shows that restricting the ability of political, social, religious or economic elites to influence the exercise of power in courts (i.e., ensuring the rule of law), is very beneficial [REF].

107 Accordingly, the judicialization of the global trade regime, through which public authorities have sought to make binding commitments to each other, was initially often portrayed as generally benefitting

weak states vis-à-vis strong, powerful states and thus as something of a progressive corrective to long-standing biases [REF]. Such optimism was tempered by the recognition that formal-legal international institutions that seem to empower the weak might operate in the shadow of a possible resort to "informal governance" that favors the powerful (Stone 2011) (see alsoHéritier and Eckert 2008). Even more disconcertingly, early empirical studies of the WTO dispute settlement mechanism suggested that the judicialization of trade relations in fact disproportionately benefitted rich and powerful countries (Bown 2004; Esserman and Howse 2003).

108 "Realist" observers of the politics of international economic relations were hardly surprised by the finding that judicialization benefits the powerful. They had long pointed out that it is disproportionately powerful states that write international law, including transnational law-like rules that govern international commerce (Krasner 1991; Drezner 2007). Moreover, pursuing one's interests through legal institutions, from the local to the international level, requires resources, including specialized expertise, money, and time. Given the costliness of the legal instruments, developing countries rarely used the dispute settlement mechanism (DSM) during the WTO's first decade (Busch and Reinhardt 2003; Kim 2008; Shaffer 2003).

109 The broader institutional context of law and courts, however, appears to have a large impact on how constraining resource constraints really are, as illustrated by the vast differences in "access to justice" among otherwise very similar countries in the World Justice Project's multi-dimensional comparative analysis of the rule of law.[6] Newer research suggest that this general insight from the study of legal institutions also applies to the judicial elements of the global trade regime: Developing countries appear to be quite able to "learn" how to use those institutions, and once they have gained a quite modest amount of experience, they seem able to use the WTO's DSM to their own advantage (Davis and Bermeo 2009).

110 Similar questions have been raised about other elements of the transformation of global trade governance sketched in 2.3. In the realm of technical standard-setting, it is of course mostly private sector firms that are the key actors, rather than governments, but here, too, access to conducive institutions (institutions that are what Büthe and Mattli (2011) call "complementarity") seems to allow even firms from small, poor, or (by the traditional metrics) less powerful countries to exercise substantial influence if the stakes are sufficiently high for them to make the initial investment in learning-through-participation.

111 For the explosive growth of bilateral and minilateral agreements on competition law and policy—an intriguing transgovernmental development (see Waverman, Comanor, and Goto 1997; Petrie 2015)—the shortage of data so far makes it impossible to draw firm conclusions about the consequences of those trends for public actors, but it seems likely that it will follow a similar trajectory to the judicial elements of core trade governance regime: Initially primarily benefitting advanced industrialized countries but with learning opportunities for developing countries that may even out the benefits over time.

112 Turning to the effect of changes in trade governance on the relationship between public and private actors, we note some parallels to the trajectory of the social science scholarship on the regulation of public actors, discussed above: initial optimism about the progressive nature of transnational regulatory governance, which soon gave way to concerns about potentially severe downsides, followed by a more differentiated view that recognizes the tremendous variance in outcomes and has begun to provide a better understanding of conditional effects.

113 The rise of transnational private regulation was initially at least in part an attempt to overcome limitations of traditional national regulatory regimes, especially when traditional international (Dashwood 1983; Raustiala 1997) and even newer trans-governmental forms of regulatory cooperation (Slaughter 2004: 36-64) were unavailable or ineffective. Transnational private regulation was under these conditions initially seen as a great way to overcome the inability or unwillingness of public (i.e., governmental) regulation to address and minimize negative externalities—and possibly achieve broader regulatory policy objectives—in global markets. It promised to lead to less costly (but equally effective) or even better regulations, as well as give regulated firms a stake not just in the content of the standards and regulations but also in their implementation, reducing the need for, or cost of, enforcement (Haufler 2001). And it even seemed to offer opportunities for the participation by non-commercial stakeholders, who are often already marginalized in domestic regulatory decision-making but usually entirely excluded from direct participation in intergovernmental regulatory cooperation (Cashore, Auld, and Newsom 2004).

114 Subsequent research, more focused on the political consequences, however, has called this optimistic view into question. Creating and maintaining truly self-regulatory (or genuinely democratic) and effective regulatory institutions at the transnational level is terribly difficult. Even though private actors face a range of market and non-market incentives to comply with nominally voluntary standards (Büthe 2010c), careful analyses of private actors' practices, after

they ostensibly committed to various transnational private regulatory regimes, have in numerous cases found no more than sham compliance, if any implementation at all (Locke 2013). And often—and some would argue inevitably—transnational private regulatory bodies appear to be dominated by commercial stakeholders, with few and weak mechanisms for taking the interests of other stakeholders into account, so that even full compliance with private standards leads to outcomes that are skewed toward the interests of commercial actors (Mayer and Gereffi 2010). The rise of transnational economic regulation thus tends to have long-lasting *political* distributional implications, further empowering the private sector vis-à-vis other societal interests (Cafaggi and Pistor 2015).

115 For those who adopt a zero-sum view of power, this trend toward empowering commercial, private-sector actors has also—by necessity—meant a loss of power of states or governments in the governance of trade and trade-related issues. Indeed, one prominent concern about the rise of transnational regulation is that it undermines the centrality of states as the only reliably legitimate political institutions for a political community to make collective decisions [REF]. Yet, while there are potentially serious consequences that flow from replacing the state as the primary site of political contestation over market regulation (more properly discussed in the next section), a zero-sum view is not only unnecessary but misleading. The above changes in global trade governance have—in many though not quite all countries—taken place in the context of longer-term processes of state formation and technological change that have generally enormously enhanced governments' territorial control, both at and behind the border (Thomson and Krasner 1989). And if we adopt—or suitably adapt—to the realm of transnational regulation Abbott, Genschel, Snidal and Zangl's notion of "orchestration" (2015) we may see states allowing, encouraging, and sometime outright creating transnational fora of governance (while retaining a certain level of control), in areas where states no longer have the capability or do not want to afford themselves, as potentially congenial ways of supplementing and enhancing states' ability to regulate—suggesting a positive-sum view of the shift from governments to governance.

116 ### 4.4. Labor

117 As argued above, the governance system centering on the ILO aims at modifying the laws and practices of states and in so doing at addressing the prisoner's dilemma inherent in labor regulation in an open international economy. However, the main problem of the ILO is that it only has its own ability to persuade, but lacks either coercion or financial incentives to elicit adoption of labor standards by public actors (Maupain 2013). The constitution of the ILO does

not provide the organization with hard law instruments that member states would be obliged to comply with. The regulatory instruments produced by the ILO in the direction of states are essentially of two kinds: conventions and recommendations. Conventions become part of the corpus of national legal norms, i.e. are obligatory for all citizens in a country, if (and only if) a country ratifies them. Differently from conventions, recommendations are not obligatory (and do not have to be ratified by member states) and are intended to guide national and international policy as well as judicial adjudication at the national level.

118 Member states have to be persuaded to ratify conventions. Once they do, the ILO has no independent implementation capacities but relies on the countries' own implementation capacities. Still, the ILO's reporting system for the application of conventions is highly developed. Countries that have ratified a particular convention are requested to submit periodic reports to the ILO illustrating the measures they have taken to "give effect" to the provisions of the convention in question (Art. 22 of the ILO Constitution). Each country produces as many reports as it has ratified conventions. These reports are commented upon in writing by a Committee of Experts which evaluates whether national legislation and practice are in line with the regulatory provisions of the relevant conventions. In this way the Committee of Experts seeks to nudge ratifying states into modify domestic laws and practices. Even a member state which has not ratified a particular convention has nonetheless the obligation to report on "the matters dealt with in [it], showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention … and stating the difficulties which prevent or delay the ratification of such Convention' (Art. 19, paragraph 5(e)). This constitutional provision has provided the basis for a new reporting mechanism built around the Declaration of Fundamental Principles and Rights adopted in 1998 (see *infra*). In addition, a semi-judicial body, the Committee on Freedom of Association, examines complaints about violations of freedom of association whether or not the country in question has ratified the relevant conventions (i.e. Convention 87 of 1948 on Freedom of Association and Protection of the Right to Organize, and Convention 98 of 1949 on the Right to Organize and Collective Bargaining). Complaints can be lodged by each of the tripartite constituents, including from foreign countries, and by international associations of unions and employers. The committee's awards have been used to chastise anti-union policies such as those of Thatcher's Britain or Reagan's USA or in recent years of Columbia.

119 A serious attempt to strengthen the ILO's regulatory "teeth" was made in the 1990s as a part of the debate on the "social clause" in trade agreements (Leary 1996). Essentially, respect of core ILO

conventions would become a condition for market access, and violations would trigger retaliatory trade measures. Not surprisingly, the Southern countries were strongly opposed to this proposal (which they saw as ill-disguised protectionism) and they managed to block it. In 1996 the World Trade Organization (WTO)'s Ministerial Conference in Singapore declared the WTO incompetent to deal with labor standards and stated officially that that the ILO had an exclusive mandate in this domain (Singapore Declaration). In the intention of many developing countries, asserting that only the ILO had exclusive competence for labor standards was not intended to increase the effectiveness of the ILO but only to make sure that nothing substantive would be done in the area of international labor standards. Indeed, the standards included in ILO conventions are neither particularly detailed nor especially rigid. However, they cover very specific issues concerning conditions of work in various industries, health and safety, provisions for vocational training, wage-setting provisions, social security, etc., and many of them are arguably obsolete. They frequently contain subsidiarity clauses which devolve regulatory authority to the national level. Sometimes they simply require national authorities to introduce a national policy on a particular issue (as in the case of the worst forms of child labor). Other times conventions offer regulators different options to choose from. Very often conventions make room for consultations or negotiations with the "social partners" (unions and employers) at the national level. For instance, the ILO followed up on the Singapore Declaration and in 1998 adopted a Declaration of Fundamental Principles and Rights at Work, whereby all ILO member countries confirmed their commitment to freedom of association and collective bargaining, non-discrimination, the prohibition of child labor, and the prohibition of forced labor. The Declaration introduced an important distinction between 'principles' and 'rights'. Principles are embedded in the ILO constitution and therefore all states must uphold them by virtue of their membership in the ILO, whether or not they have ratified the relevant conventions. Rights are spelled out in detail in the relevant conventions and associated jurisprudence, and give rise to precise legal obligations. Unlike rights, principles indicate a goal and a direction, but leave member states free to implement them as they see fit.

120 Defenders see the Singapore Declaration as a positive development which marks the transition from understanding standards as constraining the actor's self-interest to reconceptualizing them as legal devices that help actors achieve a more enlightened notion of their own self-interest (Langille 2005). The adoption of the Declaration did not fundamentally alter the ILO's *modus operandi*, which remained procedural and focused on fostering tripartism at the national and international level. While this procedural approach permits in principle to adapt labor standards to the economic

conditions and level of development of countries, as presumably the regulatory provisions the actors agree on are commensurate to the level of economic and social development, its regulatory effectiveness is limited by a series of shortcomings that have become increasingly visible in the post-cold war and post-globalization era. Critics see the transition from rights to principles as a debasement of the ILO standards, since member states are no longer required to abide by the conventions' precise legal definitions and obligations (Alston 2004). This allows countries like the US, which has not ratified most ILO core conventions, and which has several problems particularly in the domain of freedom of association and collective bargaining, to take the moral high ground vis-à-vis developing countries. This move has not encouraged governments to ratify the ILO's conventions: the ILO's record of ratifications of conventions has never been particularly impressive, as between the early 1960s and the late 1980s the ILO introduced approximately two conventions per year on average, but less than 13 countries on average ratified these conventions within five years from their approval. The trend has not picked up, and even when a convention is ratified (which tends to happen when the regulatory provision of a country are already in line with the convention to begin with), the ILO has to rely on the implementation capacities of member states, and these are limited particularly, but not exclusively, in developing countries.

121 Furthermore, the regulatory model of the ILO continues to rely on state-level actors and capacities and as such has trouble adjusting to the restructuring of production (and trade) in global supply chains. In global supply chains, production is spread across different countries: at the top of the chain there is either a global brand (e.g., Nike or HP) or a global buyer. Production is carried out in developing countries by local suppliers and the scope of manufacturing activities largely escapes the regulatory capacities of national actors. Even when developing country governments have the capacity to implement labor standards, they often refrain from doing so for fear of losing their business to other countries. Beginning with the early 1990s, under pressure from consumer organizations, many global buyers have implemented their own private monitoring systems, as discussed in the previous section. This problem of fit between the scales of problems and solutions may not be apparent to all members of the ILO. Indeed, one part of the ILO bureaucracy (international civil servants with a legal background) considers that the organization is efficient if it regularly produces labor treaties (conventions or recommendations) that are widely ratified by member states. Application is possibly less important than ratification. The more economically-oriented part of the Office bureaucracy is instead more concerned with employment creation, with the possible trade-off between labor standards and jobs, and with the need to adapt solutions to the scale of problems. Thus, the

criteria of performance, accountability, efficiency, and justice of the ILO system remain mostly implicit, in the sense that they have not been explicitly defined, and they are not entirely shared by all members of the organization.

122 One of the problems, and perhaps the main problem of the ILO, is that its constituents often have very different views of what can be considered a just, or simply acceptable outcome. In particular, employers seem adamant that the role of the ILO should be purely symbolic and or procedural, leaving local actors free to come up with their own solutions to regulatory problems. Southern governments often share the employers' view and seek to limit the imposition of standards through ILO conventions. Unions instead generally push for universal standards independent of level of development, and they often justify their demands by appealing to universal human rights. Northern governments are generally better disposed towards standards than Southern ones. It seems fair to say, however, that the level of active involvement of government representatives is lower than the involvement of union and employer representatives (Baccaro and Mele 2012). At the same time, the ILO prizes itself for providing a forum where all these constituents meet and negotiate labor standards, even though there are no requirements for trade unions and employer associations mandated by their country to be internally democratic at the national level. The ILO considers itself accountable because its policies are explicitly approved by its constituents: workers' representatives, employers' representatives, and governments. Along these lines, lack of accountability is the main critique that ILO members raise against NGOs, which are accused of only representing themselves, and this argument is often used to justify the formal exclusion of NGOs from the ILO governance system. Thus, as far as ILO notion of justice is procedural and linked to the notion of accountability. Policies that have been duly authorized and approved by accountable constituents can be considered fair. The Organization sometimes refers in its official documents to "social justice" in substantive terms, but what exactly counts as social justice has never been explicitly defined because of the difficulty of finding and imposing a consensus to the variety of constituents.

123 4.5. Environment

124 Public authorities do not fall outside the realm of environmental governance, even if the private sector has been the prime target of environmental regulation. First there are a great number of *international treaties* mainly devised through the UN system (notably UNEP) and signed by many states, which agree to set goals and standards in the field of environmental protection. The latter mainly started to be devised in the 1970s. We could contrast the

Convention on International Trade in Endangered Species (1973), the Montreal Protocol (about the use of CFCs in 1987), the Kyoto Protocol (1997) and (if that could be described as a Treaty), the Paris COP 21 Agreement on climate change (2015). Rules, accountability and efficiency differ *profoundly* from one to the next. They vary from mere texts (this might be largely the case with COP 21 'agreement') to quite controlled arrangements (in the case of the Montreal agreement -- largely because alternative products were developed by chemical companies like Du Pont and older products could be phased out) to arrangements that are easily bypassed (for CITES) or that serve (also) other ends (the UN REDD+ program for the protection of forests and mitigation of carbon emissions also functions as development aid). Second, many nation states own or control very large areas of territory and resources, particularly forests, water ways, and mineral resources. As a result, they need to create rules to regulate extraction from these territories or are themselves subject to global treaties such as those mentioned.

125 At the more 'global' level, these environmental treaties have been strongly shaped by the definition of the 'environment' produced by biophysical science and abstract models of the world that seek to measure, deconstruct and thus understand the world (Hulme, 2010, 2011). A very important and innovative instrument in the field of environment has been the kind of cooperation between states and scientists started under the IPCC, although the cooperation between science and states for the understanding and administration of nature can be traced back to the Enlightenment and colonial times when the ambition of so-called natural philosophers was to catalogue, collect and concentrate different species from around the globe into taxonomies, museums and living collections like botanical gardens (Dresner, 2008; Dryzek, 2013). With the IPCC, the emphasis has turned towards putting the pieces together in synthetic conceptual and computer models so that the interaction of different parts, or the consequences of interactions, can be better predicted. The modeling environment was crucial, in that the level of resolution and the level of understanding of atmospheric circulation were very coarse grained. Global Circulation Models (GCMs) were developed first beginning in the 1980s as atmospheric scientists began to notice long-term effects of industrial emissions. They sought to understand how emissions in one place might influence other places, but the models were dependent on available data sources and also the abilities to create relationships on certain scales. The technical capabilities to work at more fine grained scales was not (but perhaps could not be) developed and this was a crucial part of why climate change became a 'global' problem. In return, the data available and the constraints of the modeling environment itself have been complicit in producing the idea that climate change is 'global' (Eriksen, Nightingale, & Eakin, 2015; Mahony, 2014). This has meant

that models could not capture dynamics in small or regional areas, but rather only at the macro (global) scale. This meant that the understanding of climate change that emerged was all at the global scale, simultaneously creating the problem as 'global' and restricting our understanding of it to the global level. Now, modeling is hampered by the underlying GCM platform: regional models have proven nearly impossible to 'downscale' and if modelers start over and build regional models, they cannot be easily integrated with global models.

126 A quite different set of instruments binding public actors has been designed at the regional level, through the many regional treaties or arrangements that have been adopted since the 1990s (Pestre 2008). They are more numerous in Europe, where they are often strictly enforced and have led to spectacular environmental improvements (acid rain, Baltic or North Sea agreements, the Rhine or Danube programs of restoration, etc.). Those strict forms of 'control and command' are put into practice when problems are not difficult to identify, can be solved by local action, and affect large segments of populations -- notably middle-classes of the global North. We could consider under this category the making of norms and the definition of public thresholds for local pollutions, quality of waters, sanitary risks, etc. – something essential at the boundary between health and environment questions. Those still tend to be defined at national or regional levels (EU for example) – even if regular international exchanges have been common since WWII. These treaties contrast sharply with situations in the global South (Gulf of Guinea, for example) where attempts at regional cooperation have been met with limited success. The Transboundary Haze Agreement in southeast Asian, for example, has been severely hampered by lack of clear authority by nation states over dispersed, diverse and often poor and oppressed small holders whose combined actions (burning small forest plots for cultivation) have contributed to regional haze problems (Tsing, 2005). Here we want to be clear we are not placing blame on the poor for failing to comply with environmental regulation. Rather, environmental problems originate in poverty, lack of accountable and effective authorities at different levels of government and lack of other options for people on the ground such that the formation of shared norms and desires for environmental protection are not achieved (Peet & Watts, 2004).

127 In political societies governed by elections, politicians have to act when protests are major or when major industrial accidents happen. Still, when the problem is global and complex in nature, as with climate change, or when protests are weak, there remains the possibility of not really acting (beyond discursive moves). International economic competition requires companies to avoid weakening one's own industry and it is rare to have a product ready

to replace the one that is faulty (CFCs being a good counter example). As a result, historically speaking, products were rarely withdrawn when no replacement was available, especially when evaluations have been done by committees of interested parties – thus undermining independent evaluations. The possibility of not acting at the global level explains why climate change negotiations and agreements have had minor practical consequences whereas regional agreements around European rivers like the Rhine led to surprising results. At the national or regional level, definitions of norms and thresholds are never disconnected from industrial production requirements: in France for example, company, state and professional experts, as well as elected representatives and local associations (NGOs) have met for more than a century in committees to discuss these things together – which does not mean there are no clear hierarchies between them, but also means there are few critics external to the process of evaluation.

128

5. Consequences and Implications

129 This last section describes the consequences of the new global governance arrangements in the five fields under consideration, before moving to analyze and anticipate on future trends that may affect the regulation of each field.

130

5.1. Finance

131 Governance mechanisms in finance, whether national or global, are more complex than government mechanisms. Making regulation risk-sensitive and expecting calculative compliance complicates the process of devising and implementing regulations. Scholars working in the tradition of the French schools of conventions and regulation have also highlighted the protracted accounting conflicts surrounding the application of complex regulatory requirements (Boltanski and Chiapello 2005; Boltanski and Thévenot 2006; Thévenot, Moody and Lafaye 2000). This is evidenced in the growing length of financial regulations since the breakdown of Bretton Woods. Regulatory complexity here stems from the fact that governance impels private actors to reconfigure demonstrations of accountability towards a fragmented network of public and private actors rather than towards a public centrality (Porter 1992, 1996; Strathern 2000). The problem of regulatory complexity is thus

directly related to the problem of compliance: the drive towards flexibility in governance rules brought about an ever increasing complexity in law, and an increasing ability to leave the law in the books rather than translate it into practices (Power 1997). As Espeland and Vannebo (2007) explain, calculative compliance increases the risk that market actors will seek to interpret complex legal standards in creative ways. For instance, before the 2008 crisis, mutual fund managers were often accused of using securitizations as an efficient accounting strategy to window-dress financial statements in order to insulate themselves from a rating downgrade and/or higher regulatory scrutiny. Window-dressing and 'creative accounting' do not always represent fraud or evasion—such arbitrages are to be expected in any regulatory regime where accountability entails a mechanical compliance process—they instead manifest rational adaptation to calculative accountability. Rule gaming and regulatory arbitrage by actors confronting complex regulatory requirements can indeed be quite commonplace (Cerny 1994). More complex regulations also encourage private actors to arbitrage legal standards, leading to a race to the bottom in regulatory standards.

132 Furthermore, the trend toward private regulation (by financial giants) and deregulation in capital exporting states (and re-regulation in capital importing states subject to conditional lending) has increased the private sector's and creditor states' ability to profit from their domination over borrowing states. We use the example of the Greek crisis to illustrate this point, but other crises could be mentioned: as Aglietta and Brand (2013:76) write, it is fascinating to see that the mechanisms that were responsible for the speculative attacks against the British pound, the Italian lira and the French franc in 1992 and 1993 were exactly the same as those that were responsible for the attacks against the ability of Greece, Italy to issue bonds at low interest rates. When financial markets put conventional beliefs to the test – for instance, a debtor country's ability to repay its debt –, and when they succeed in provoking panics, there is then no other way to stop market actors from bringing a country down to its knees than to organize a coordinated responses with allied public and private authorities: even the passing of austerity packages, as was demanded of Greece, could not in itself convince market speculation from stopping the downward spiral: speculators inferred from the anticipated failure of such austerity packages to bring Greece back on a growth path, that deflation would continue to aggravate budgetary deficits (as happened in the case of 2010 Greece), and therefore aggravate attacks on the belief that Greece would not eventually default on its debt obligations (Aglietta and Brand 2013:79). In the absence of cooperation between Central banks to fight speculative attacks at the European level, these attacks could drain all the of liquidity, as banks would need to

reevaluate the value of their collaterals (usually comprised of government bonds), as well as that of other banks (and thus question the ability of certain banks to resist the devaluation of assets suffered as a result of the crisis). This perverse cycle meant that the whole inter-bank system of credit could suddenly cease to function, thereby provoking a huge liquidity crisis. And here was a big difference between the response of the Europeans to the crisis in the 1930s and in the 2010s: the central banks substituted themselves to private banks in the summer of 2008 when the latter no longer loaned each other because of a climate of generalized suspicion (with the risk that all payments to reimburse credits would be suspended with no end in sight); and the European Central Bank later adopted the policy of quantitative easing, which consisted in expanding the amount of currency available to buy bonds and other liquidities exchanged on financial markets (Aglietta and Brand 2013:117). For the European Central Bank, this required discontinuing their reliance on private forms of regulation, like credit ratings (Pénet and Mallard 2011).

133 In general, these recent developments in practices of conditionality cast serious doubts as to whether conditionality continues to fulfill a useful role. Structural reforms have no obvious economic purposes and do not increase the immediate solvency of the country. Moreover, aspects of the broader neoliberal agenda have not delivered their anticipated results: countries that have removed restrictions on capital inflows are more likely to incur costs associated with economic volatility and financial crises, while austerity measures that seek to limit the size of the state, including through privatization of government functions, generate significant welfare costs that may exceed any benefits gained from such policies (Ostry, Loungani and Furceri 2016). Both capital market openness and austerity may also have significant distributional consequences and are associated with increasing income inequality, which may undercut the growth that such policies were intended to produce (Ostry, Loungani and Furceri 2016). Studies of the performance of IMF structural adjustment programs yield mixed results. Some find that strict adherence to IMF conditionality helps solve balance of payments problems and tends to increase economic performance (Noorbakhsh and Paloni 2001). Conditionality also appears to work better when the issuing organization acts independently on the basis of solid evaluation (Blustein 2015). In the case of Greece, Portugal, and Ireland “The Troika” (EC, ECB, IMF) pursued cross-conditionality (when multiple international organizations design conditionality programs) causing much confusion since organizations with separate and often conflicting goals injected their own interests into conditionality lending frameworks, resulting in decreased program clarity and integrity. But others find that conditionality reduces growth rates (Dreher 2006; Przeworski and Vreeland 2000).

134 Critical studies find that structural reforms do not increase the immediate solvency of the country while their long-term effects are dubious (Stiglitz 2002). A factor detrimental to overall performance is the paucity of policy options, as conditionality takes a more narrow meaning and at the same time becomes more granular: concerning Greece, European leaders continue to favor granular measures (thousands of pages on how to cut Greek budget) rather than stop gap measures absorbing uncertainty once and for all. When dozens of conditions are forced upon the country, then, there are lower prospect of enforcement, and the monitoring of compliance becomes costly for lenders and borrowers alike. Overall, disciplinary governance, through continuous surveillance and calculative accountability, which have replaced the point-in-time auditing and mechanical compliance typical under a statutory (government) regime, means that market actors depend in their daily activity on the legal expertise provided by teams of lawyers. As Riles remarked (2011), it has become nearly impossible for large financial institutions to conduct complex investment transactions without the mediation of a team of lawyers, and the same is true for public actors. This expertise may take the form of producing requisite documents, and assessment of contractual duties, which increase the coordination costs, leading to the 'rule of lawyers' rather than the 'rule of law'.

135 Another practical problem is that conditionality is typically presented as the only possibility, as conditionality typically includes the levers that the government controls: public spending, interest rate and money supply. But in the case of Greece, the menu of available policy reform can be quite narrow: European countries did not control monetary policy and could not adjust exchange rate. The European crisis showed that when alternative levers are unavailable (monetary policies, exchange rate), conditionality rests predominantly on austerity measures (Pénet and Mallard 2011). Absent alternative levers of public action, conditionality became narrowly concerned with public spending. This absence of flexibility, combined with the fact that the issues facing Greece's ability to reimburse its debt (the sustainability of its debt) were not adequately assessed by European institutions as well as by credit rating agencies (Aglietta and Brand 2013:144), meant that markets did not see any other solution than austerity to the problem of solvability.

136 Initially a protection against sovereign immunity, conditionality has too often evolved into a mechanism to force adoption of doctrinal changes, which is sometimes out of synch with the latest developments in economic thinking, or with observed realities. The utilitarian and ideological components of conditionality programs are hard to distinguish, and in many cases, doctrinal ambitions may undermine the prospect of debt servicing, like in the case of Greece.

In so doing, they might not only fail to address the problem at stake, but change the nature of the problem itself. That was the case of Greece, where "austerity measures" turned a national solvency crisis into a European liquidity crisis (Aglietta and Brand 2013:147-48).

137 One add-on is that the shift from government to governance has created a paucity of instruments of action during times of crisis. Some crucial questions could no longer be debated in 2008-2012. One of them was: how do we lend in the last resort? One striking development of European governance of sovereign uncertainty is that there was no specific instrument for Eurozone countries to deal with a major crisis. This reveals another facet of governance: not only governance means the weakening of the capacity of the state to regulate (which increases the likelihood of crisis) but it also means the increasing vulnerability of countries to crisis events. The state loses twice. This situation is specific to Europe where the project of governance has been carried through to a point where it lacks established mechanisms for a coordinated crisis response. At the same time, the same trend may be observed as far as the IMF and developing countries are concerned: another casualty of the increased IMF focus on producing country evaluations and ad hoc "structural adjustement" programs is that the Washington institution has paid less attention to its role as guarantor of the financial stability of the whole financial system. The ad hoc character of IMF lending decisions (Nelson 2014), often resulting from an inadequate understanding of a country's institutional responses to its program, has institutional characteristics, , has deepened in recent years, a good examplebeing its decision to extend a credit line to Greece despite its negative evaluation of the country's ability to repay its debt. This has also blurred its ability to signal effectively to financial markets. In this sense, the international legal framework established by the IMF seems incapable of producing regularity and predictability during times of crisis.

138 To the extent the neoliberal governance rhetoric of enhancing choice paid heed to risk, it offloaded risk on to insurance or financial markets, and then, when the later could no longer function, on the public actors themselves during times of crisis. Some of this risk was involuntary, especially for smaller, more vulnerable actors, whether workers or small entrepreneurs, for whom it came with the possibility of little sustained reward. But risk also became a systemic feature, as larger actors embraced risk which functioned as a motor for financial innovation and boosting returns. By the free-wheeling standards of the 2000s, 'casino capitalism' in the 1980s when Susan Strange coined the expression, described a world of slot machines (Strange 1986, Sinn 2010), but one in which the dice were loaded: as the 2008 crisis demonstrated, while risk incentives and rewards remained high and private, the systemic consequences of risk were

costly and public. Private losses were socialized and transferred to the public balance sheet as governments were forced to bail out banks and financial institutions even at the cost of taking on vast amounts of debt. Countries with large exposures to external debt, including in the form of private commercial borrowings, paid a particularly high price in the form of additional fiscal burdens, cutbacks in welfare spending, and austerity programmes to finance bailout packages favouring creditors. Deregulation, austerity measures followed by the sudden crisis and the socialization of losses, and then the adoption of more austerity measures led to increased income and wealth inequalities, cuts in welfare funding, and in many cases an absolute increase in poverty. Large private actors are thus the clear winners of deregulation and financialisation. Private firms benefitted from the transfer of public activities to private hands, while states lost important sources of tax revenues. The double movement of private transfer of public resources and public safety net for overexposed banks and other private lenders has had huge distributional effects. Thus while the financial crisis signaled the return of governments, it did not, for all that, mean the end of neoliberal governance (Mirowski 2013). Meanwhile efforts to re-regulate finance and hold financial actors accountable have made unimpressive headway (Levitin 2013), while the capacity of states to boost welfare or even infrastructure funding to counter the enduring effects of the crisis remain shrouded in doubt. In the conclusion of this chapter, we return to larger questions about the future of governance.

139 ## 5.2. Investment

140 As discussed above, since 2001 the international legal environment in which private investors and states make investment decisions abroad has been transformed by an increasingly complex "sanctions regime" (Biersteker 2009), which has legal teeth. We do not expand on this below, as the regulation of terrorism- or proliferation-finance occupies a place at the intersection of "economic" and "security" logics, which is beyond the confines of this chapter. Instead, we focus here on the concerns raised about the investment treaty system. One such concern is that, if a foreign investor initiates an investor-state claim under an investment treaty, the dispute is typically heard by an ad hoc arbitral tribunal instead of a national or international court (Van Harten, 2007), and that arbitrators might have an actual or perceived bias in favor of ruling for foreign investors, particularly on jurisdictional questions, as only foreign investors can bring arbitral claims and thus create "repeat business" in the field it (Van Harten, 2007). Investment treaty tribunals differ from international courts in important ways, as the arbitrators are typically selected by the disputing parties (the investor and the host state) rather than the treaty parties and they are selected ad hoc for a single case rather

than being appointed for a longer term and given security of tenure: the claims are usually heard by a panel of three arbitrators where one arbitrator is selected by the claimant investor, one is selected by the respondent state, and the chairperson is appointed by agreement of the disputing parties or the party-appointed arbitrators, or by an appointing institution – the arbitral panel is appointed to hear that case only and disbands after the claim is resolved. Lawyers working for major international firms like Freshfields have played a very important role in helping to create and expand such an investment treaty system. Investment treaties and tribunals thus involve a shift of power from state judicial institutions to private law firms, which is beneficial to the multinational law firms which specialize in arbitration disputes (Dezalay and Garth 1996; Transnational Institute, 2012), and which may, indeed, have a pro-business bias. An associated concern leveled at these lawyers relates to the tendency of many of them to wear two hats: being counsel for investors or states in one case and being an arbitrator resolving investor-state claims in another case. This practice has created concerns about conflicts of interest, namely that these individuals may be tempted to rule one way as an arbitrator so as to help, or not harm, their case in another dispute in which they are counsel (Corporate Europe Observatory & the Transnational Institute, 2012). Some recent investment treaty proposals are seeking to eliminate this conflict of interest problem by requiring investment arbitrators not to take on work as counsel in other cases. "For example, this proposal to eliminate double hatting has been made by the European Union in the Transatlantic Trade and Investment Partnership (TTIP) negotiations (EU Proposal, 2015). However, for the most part, investment treaties do not impose such a rule of law".and double hatting has been a common practice of many investment treaty lawyers.

141 Another concern raised is that the investment treaty system uses a system of private dispute resolution to resolve important issues of public concern. (Van Harten, 2007). International commercial arbitration usually involves private law disputes about contracts between two private parties or between a private party and a state acting in a private capacity. By contrast, investment treaty arbitrations involve claims by foreign investors against states often for acts undertaken in their public capacity. For example, Philip Morris challenged Australia's decision to introduce tobacco plain packaging and Vattenfall challenged Germany's decision to phase out nuclear power. Still, it is important to distinguish between investors bringing claims and investors being successful in the claims that they have brought. For instance, Australia successfully defended the claim against Philip Morris. But states can still be required to spend considerable amounts defending their regulatory measures. Australia is reported to have spent around $40 million defending the

Philip Morris case and the average amount spent on legal fees in investor-state disputes is $8 million. (Corporate Europe Observatory & the Transnational Institute, 2012). If a state is successful, it is likely to receive some of this money back in a costs award. Then, as in the case of finance, we can see that the new multilateral regime made by the myriad of investment amount of money involved in defending these claims continues to raise concerns.

142 In terms of substance, investment treaties are undergoing a clear process of transition from being mainly protective of foreign investors to also seeking to protect state sovereignty. In terms of procedure, new proposals are on the table to address some of the perceived inadequacies of investor-state arbitration, but no one proposal has yet to gain significant momentum. Older-style investment treaties tended to be very protective of foreign investors and to provide few express protections for state sovereignty (Alvarez, 2010; Vandevelde, 2009). This is because they were typically based on models developed by capital exporting states which, in entering into agreements with capital importing states, only really cared about protecting their investors abroad. These capital exporting states did not worry that they would also be sued by foreign investors. The North American Free Trade Agreement (NAFTA) was unusual because it included investment treaty protections in a treaty between three states – Canada, Mexico, and the United States – including two developed states. One result of this was that Canada and the United States begun to be sued by each others' investors. This was the beginning of developed states starting to realize that they had interests as both capital exporters and capital importers. The result of this was that Canada and the United States revised their model investment treaties to strike a better balance between investment protection and state sovereignty. (2012 US Model BIT; 2004 Canadian Model BIT). For instance, they began including clauses to the effect that, except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations. Many other developed states have now been respondents in investor-state claims, including Germany over its decision to phase out nuclear power and Australia over its introduction of tobacco plain packaging. This has led to more and more developed states, and now an increasing number of developing states, adopting newer-style investment treaties that are more balanced, and provide more protections for state sovereignty, than the earlier-style investment treaties. (Alvarez, 2010; Vandevelde, 2009). This is particularly evident in provisions that aim to protect the regulatory autonomy of host states. For instance, the TPP provides that "Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare

objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances." (Annex 9-B). Similarly, the EU proposal in the TTIP negotiations provides that the investment protections "shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity" (Article 2).

143 As a result of this shift, we observe new trends in how capital exporting states have reinterpreted the purpose of investment treaties. It is often thought that the object and purpose of investment treaties is to protect foreign investors and foreign investment. Indeed, many of the more recent cases concern challenges to general regulatory measures, such as environmental legislation, that investors claim amounts to indirect expropriation because it reduces their profit or to unfair, inequitable, or discriminatory treatment. These newer-style cases are often more controversial than the older-style cases of direct expropriations, as they not only plan a voluntary curtailment of domestic judicial power through reliance on arbitration (as planned by most investment treaties), but also involuntary curtailment of domestic legislative power. To prevent such abuse of the investment system, some states, like Canada, have revised the name of their model investment treaties to be agreements on the "Promotion and Protection of Investments" (2004 Canadian Model BIT). In so doing, developed states who also take the role of capital importing states (rather than exclusively that of capital exporting states) have challenged the view that the object and purpose of investment treaties is to protect foreign investors and foreign investment: this reduction, so they claim, involves a confusion between means and ends and too narrow a focus on economic goals. Instead, the object and purpose of investment treaties should be understood as promoting social welfare or encouraging sustainable development (van Aaken, 2014; van Aaken & Lehmann, 2013; Bonnitcha, 2014; Roberts, 2015). Investment treaties protect foreign investors as a means to the end of increasing the economic development of home and host states, rather than as an end in and of itself. By creating protections for foreign investors, investment treaties are meant to encourage efficient investments, which should result in greater economic returns to the host state (in the form of increased investments) and the home state (in the form of increased returns through taxation). States should be understood as trying to maximize the social welfare of their citizens and residents. This requires them to strike an appropriate balance between economic goals (like increasing foreign investment and tax revenues) and non-economic goals (like protecting human rights, health and the environment) (van Aaken, 2014; van Aaken & Lehmann, 2013;

Bonnitcha, 2014; Roberts, 2015). That is why states typically accept investment obligations but assert their continued right to regulate for public welfare goals, like environmental protection.

144 The multifaceted nature of the object and purpose of investment treaties is captured in some of the preambles of recent treaties. For instance, the 2012 US Model BIT includes language about "desiring to promote greater economic cooperation" between the treaty parties, recognizing that protections of foreign investors will "stimulate the flow of private capital and the economic development" of the treaty parties, "agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards," but "desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights." Furthermore, one option for reform that has been considered is the introduction of obligations on foreign investors or a widening of the ability of host states to be able to bring counterclaims against foreign investors. Another novel mechanism for protecting public welfare was adopted in the Chinese Australia Free Trade Agreement. (Roberts & Braddock, 2016). ChAFTA provides that, "Measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim" by an investor. (Article 9.11). If an investor challenges a regulatory measure, the respondent state is permitted to issue a "public welfare notice" specifying why it believes that the measure falls within this exception. (Article 9.11). The arbitration proceedings are then suspended and a 90-day consultation period with the other treaty party is triggered. If the treaty parties agree that the challenged measure fits within the scope of the carve-out, the decision is binding on any investor-state tribunal and any decision or award issued by such a tribunal must be consistent with that decision. (Article 9.18).

145 Additionally, one problem with investment treaty arbitration starting out its life as a form of private dispute resolution is that the pleadings, hearings and sometimes the awards were typically confidential. NGOs and civil society objected to this lack of transparency and various reforms have been undertaken. Newer-style investment treaties may now permit interested third parties to intervene as amicus and investment treaty awards are usually made public. However, the cases and documents are typically not as public as if they were occurring in a public domestic court or international tribunal. Some exceptions exist, such as NAFTA, where the treaty parties have agreed to a much stronger regime of transparency (NAFTA Free Trade Commission, 2001). To address this concern, states are continuing to look for reforms to improve the fairness and

efficiency of this system. One potential reform that is gaining a lot of attention is the European Union's proposal to establish a permanent investment treaty court and an appellate body in the TTIP negotiations with the United States. The proposal also prevents arbitrators from double hatting as counsel. This proposal would have the advantage of having arbitrators being selected by the treaty parties and given security of tenure, so that they would not have to rely on ad hoc reappointment by the disputing parties. The removal of double hatting helps to protect against conflicts of interest. The appellate mechanism would also permit greater consistency to develop because differences in interpretations could be resolved by appeal. The EU has already agreed to Free Trade Agreements containing this procedural innovation with Canada and Vietnam. However, the United States has expressed skepticism about this proposal in the context of the TTIP negotiations. It is not yet clear whether this proposal will gain broader traction. Even if it does, the model is awkward because it could result in multiple investment courts and appellate bodies under different treaties, instead of having a single, overarching court and appellate body for multiple treaties. Another proposal currently being considered by UNCITRAL is to have a new convention that establishes a multilateral court and/or appellate body that states could sign onto and that would then apply to all of their existing investment treaties. (Kaufmann-Kohler and Michele Potestà, 2016).

146 ### 5.3. Trade

147 How might we think more generally about the changes in global trade governance—in particular the rise of "trade-related" regulatory governance, including the growing prominence of both trans-governmental regulatory cooperation and transnational private regulation, all of which has occurred in the context of the legalization of the global trade regime—and what are the broader implications for social progress?

148 One way to think about the changes in recent years is to put them into a larger historical perspective. Not only inter-governmental, but also trans-governmental and transnational non-governmental ordering and rule-making goes back at least to the late 19th century (Murphy 1994). To be sure, the importance of what Rosenau and Czempiel (1992) called "governance without government" has grown by an order of magnitude since then, but this change has occurred in the context of other developments that have, in many countries, actually increased state control over the territory, at last "at the border" (Thomson and Krasner 1989).

149 At the same time, the transformation of trade governance examined in this chapter has occurred in context of national governments no longer being able or willing to regulate markets that extend far beyond the borders of their jurisdiction (Cutler, Haufler, and Porter 1999; Hall and Biersteker 2002), resulting in various forms of trans-governmental and transnational forms of governance in an attempt to keep up with the globalization of economic activity (Gourevitch 1999; Kahler and Lake 2003) or production/value chains (Gereffi, Humphrey, and Sturgeon 2005). This applies to changes that have been largely driven by governments, such as the delegation of regulatory authority to private bodies such as the ISO and IEC in the TBT-Agreement (Büthe and Mattli 2011:esp. ch.6) and to hybrid public-private bodies such as the Codex Alimentarius Commission for food safety standards (Büthe 2009). It also applies to changes driven by civil society activists or even broad social movements—or initiated by firms or business associations to head off the development of more onerous standards or certification schemes by civil society groups (Cafaggi 2011; Green 2014) as well as governance initiatives of somewhat murky origins (Bartley 2003). To the extent that new forms of governance help governments overcome those limitations of their nation-state-based regulatory capabilities in global markets, we may conclude—at least as long as the activities and the impact of trans-governmental networks and transnational private actors continue to be conditioned by public institutions at the domestic level (Risse-Kappen 1995)—that the new forms of governance indeed complement and augment, rather than undermine, traditional public authority (Büthe 2010b; Abbott *et al.* 2015).

150 Nonetheless, the transformation of global governance of economic matters has been such that it has prompted even the staunchest defender of the primacy of states, Kenneth Waltz, to acknowledge that real change is taking place (1999). And these changes have real effects on decision-making processes—as well as on the resulting substantive decisions, given that conflicts over governance institutions are often conflicts over policy "once removed," (Kahler and Lake 2009:253). As a consequence, both the procedural and the output legitimacy of transnational and global governance has been regularly and sometimes severely challenged.[7]

151 Some of the concerns that have led social scientists to question the legitimacy of the new forms of governance might be alleviated by recognizing that trans-governmental and transnational governance can in fact strengthen rather than undermine the ability of states to govern trade-related issues, even if somewhat more indirectly, as discussed above. And concerns about the marginalization of various societal interests (harking back to Kaiser 1969), may be counteracted by the introduction of administrative law procedures

at the inter- and transnational level (Kingsbury, Krisch, and Stewart 2005), though the extent to which such safeguards make a difference beyond the purely procedural depends upon the ability of marginalized interests to use such procedures to truly have a voice in the process (Mattli and Büthe 2005).

152 Harder to overcome is the problem that a shift of the regulatory authority traditionally associated with the modern state "upward, downward, and sideways" (Hooghe and Marks 2003:233) reduces the centrality of the state as the site of political contestation over priorities, trade-offs, and the distribution of costs and benefits. Social science scholarship on state formation in the West suggests that such contestation has often been important in that it has led stakeholders to build institutions for interest representation and has contributed to the formation of a political community at the national level (e.g., Skocpol 1992; Caporaso 1996; Boix 2015). Since many states around the world are far from consolidated as political communities (and even a number of Western countries face centrifugal political demands, Jolly 2015), reducing the political importance of the state could hasten or altogether cause the breakdown of political order in numerous, in some cases even resulting in failed states.

153 What all of this means for social progress is not as obvious as it might seem. To a large extent, the implications surely depend on the political context: For those who live in a country with a repressive or kleptocratic ruler (Levi 1988), it may actually be a shift of regulatory authority that truly reduces the power of the state over its citizens that holds the greatest promise for social progress. By contrast, for those who live in highly liberal-democratic regimes, social progress should be best assured by international regimes that retain a central position for their governments—or assure the full range of stakeholders of voice and influence in regulatory governance at the inter- or transnational level.

154 The challenges inherent in any attempt to establish such inclusive forms of transnational self-governance is schematically illustrated in Figure 1, adapted from Büthe (2010c).

155

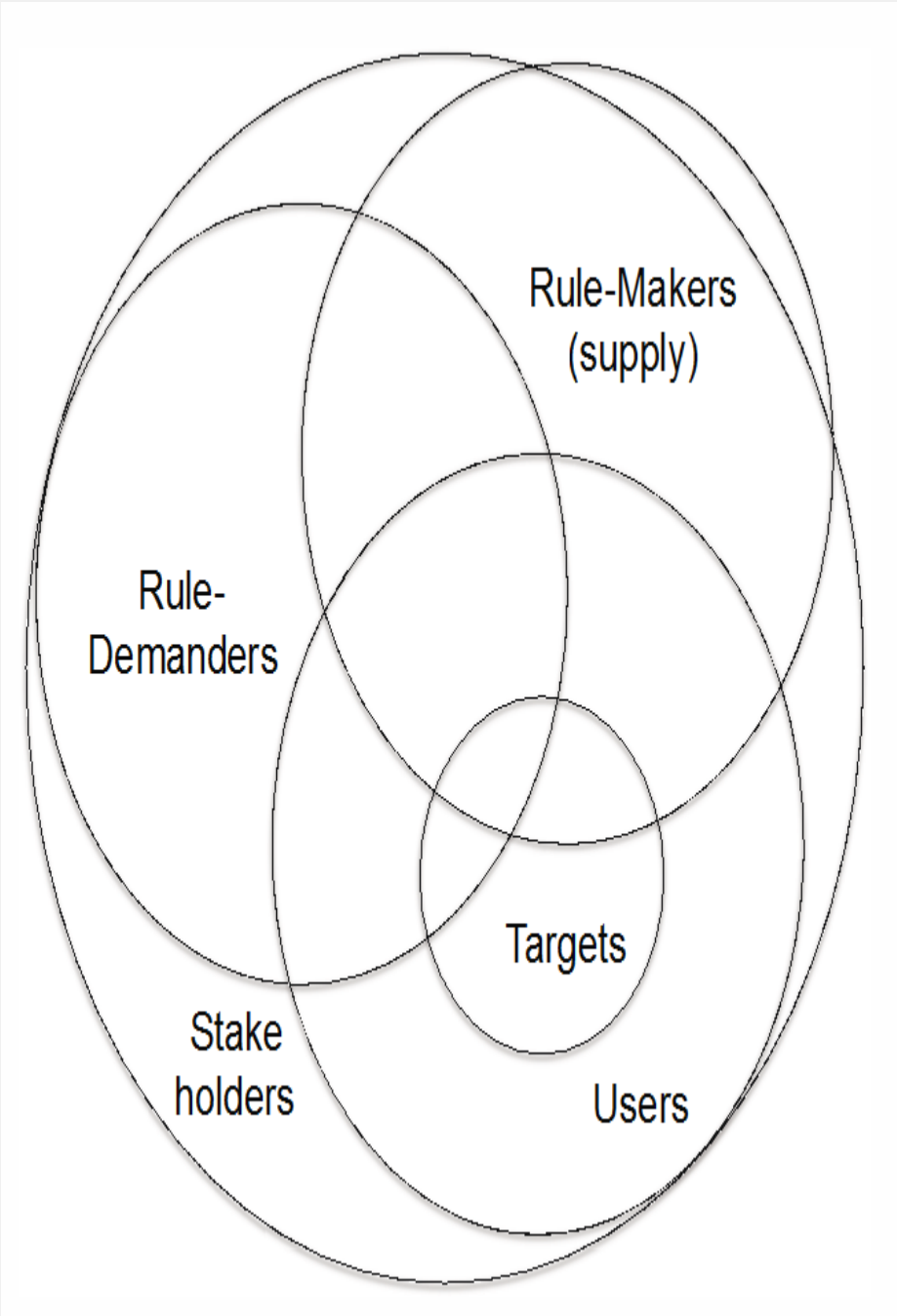

Figure 1
Multi-Stakeholder Model of Regulatory Governance

156 The figure distinguishes four subsets of stakeholders. The first set, called the "Rule-Demanders" in Figure 1, consists of socio-political actors who either overtly call for, or value, the regulatory measure to the point where they are willing to give credit or pay some cost for its provision. The second set, called "Rule-Makers" in Figure 1, consists of the actors who write, maintain, and disseminate such a measure. The third set, here labeled the "Users," comprises all who actually or potentially, directly or indirectly make use of the regulatory measure in question. If a regulation requires, for instance, that producer and retailer provide certain information about a product, such as the

nutritional value or caloric intake of a serving of a food product, then this group would include consumers who will use the information in their purchasing decisions, competing producers who use it as a benchmark, public health officials who will use the regulation to collect data in a consistent manner, etc. The fourth and final set, which by definition is a subset of the third, consists of those who can, through their actions, affect the extent to which they themselves (or an object over which they have some influence) meets the demand of, complies with, or implements the regulatory measure.[8]

157 Any of these particular sets of stakeholders may more or less overlap, with important implications for the relationships of power among them.[9] Ideal-typical "self-regulation," for instance, entails complete overlap of all four subsets. The greater the extent to which the rule-makers and the targets of the rules do *not* coincide (assuming that preferences meaningfully diverge), the more does the supply of regulatory measures entail an exercise of power. Specifically, power will matter more, the more the targets of the rules are excluded from rule-making or (looking at it from the other direction) the more the set of rule-makers extends beyond the users and especially the targets of the rules. And regardless of whether "third parties" benefit from the rules or are negatively affected by them, the extent to which such passive stakeholders are excluded from the rule-making process determines how much governance diverges from an the ideal-typical notion that all who are affected by a decision should have a voice in the decision-making.

158 ### 5.4. Labor

159 It is difficult to assess the impact of regulation in the labor field. If hard measures are used as benchmark, such as growth of real wages, trends of the wage share of GDP, or patterns of wage and income inequality, the situation does not seem particularly encouraging. There has been a generalized shift away from wage labor and in favor of profits in the functional distribution of income in the past 20 to 30 years, which implies that real wage growth has lagged productivity growth in most countries, both developed and developing (ILO 2009, OECD 2008). The causes of this phenomenon are debated: for some, the primary cause is the relative decline in the price of capital goods (Karabarbounis and Neiman 2014); others emphasize instead the declining bargaining power of workers and trade unions and the weakening of labor institutions (Stockhammer 2013). Other notable trends are the very limited growth of real wages (ILO 2015), the generalized decline of trade union density everywhere (Avdagic and Baccaro 2014, ILO 2008), and the generalized increase of income inequality (OECD 2011). The lines of causality are difficult to assess and it is not clear to what extent the shortcomings of global labor governance have contributed to these trends. At the very least, it can

be stated that labor regulation has not been able to counter them. As argued above, the best empirical assessment of private monitoring has concluded that its impact on improving company outcomes can be considered negligible (Locke 2013).

160 With specific regard to the ILO, the ability of this organization to encourage ratification and application of its labor conventions by member states has been declining for some time (Baccaro and Mele 2012, Maupain 2013, Standing 2008). The ILO model aims to prevent a race to the bottom by promoting the universal adoption by countries, both developed and developing, of minimum labor standards, but the main obstacle is that it can neither coerce nor financially incentivize countries to ratify its labor conventions, but can only rely on persuasion. After the collapse of Communism two phenomena have limited the willingness of countries to ratify (and, a fortiori, implement) the ILO standards: first, some Southern countries (India and China foremost among them) have seen in the attempt to implement international labor standards a veiled threat of protectionism aimed at depriving developing countries of their most important source of comparative advantage: low relative labor costs, and have actively opposed international regulation. Second, the employer constituency within the ILO has systematically boycotted attempts by this organization to increase its regulatory effectiveness (Baccaro 2015). With regard to symbolic measures of impact, however, the ILO's record looks a bit better: references to the ILO's strategy of Decent work have been incorporated in policy documents of all the major international policy-making agencies, and the expression "Decent work" counted 490,000 Google hits at the time of writing.

161 The period post-1990 has also seen the failure of the model of private governance of labor, centering on the initiatives of multinational companies. Responding to the mobilizations of concerned consumers in rich countries and human rights NGOs, major global brands have set up private monitoring systems in an attempt to improve the compliance of local suppliers with norms of corporate social responsibility as expressed in corporate codes of conduct. Despite vast sums of money spent to set-up and man these private systems, results are deceptive: it seems that some of the most important problems of non-compliance in global supply chains are due to the commercial practices of the brands themselves. These impose tight deadlines and meager margins on their suppliers, de facto encouraging labor exploitation. In addition, freedom of association and collective bargaining plays a very limited role in corporate codes of conduct. These seem inspired by a "unitarist" view of the employment relationship according to which there is no fundamental conflict between the interests of labor and those of capital (Kaufman 2004) and it is sufficient to rely on the benevolence

of firms and managers and on appropriate management techniques to address regulatory problems. In contrast with these views, recent empirical research comes to the conclusion that if one is serious about the respect of international labor standards, private initiatives have to be accompanied by a strengthening of state capacities (Locke 2013).

162 The most important challenges for the future in the labor field are two: first, there is a need to strengthen the implementation capacities of an international actor like the ILO. This can be done in various ways, for example by giving the ILO a key role in the certification of working conditions at either the company or even the country level (Baccaro and Mele 2012). Alternatively, a form of conditionality linking trade access to the certified respect of international labor standards (known as "social clause") should be introduced (Maupain 2013). Both proposals are extremely politically controversial and have been rejected before. Key Northern and Southern governments need to realize that the current globalization regime is politically fragile and needs to be strengthened by a serious attempt to embedding it in protective institutions. The second challenge has to do with trends in real wages and labor institutions at the country level. In addition, there is a need to reassess the "knowledge" on the effects of labor market institutions and to come to a better appreciation of their contribution to macroeconomic stability. An argument can be made that the stagnation of real wages has contributed to the excess of savings internationally and through this channel to the current situation of "secular stagnation" characterizing most advanced countries (Summers 2014). The decline of real wages and the excess of savings can be traced back to the decline of trade unions and to the weakening of protective institutions (Baccaro and Pontusson 2016).

163 5.5. Environment

164 In the environmental domain, we see somewhat specific trends compared to other domains. On the one hand, as discussed above, we have seen a push towards certification, labeling and auditing as mechanisms of regulation that mirror those promoted through neoliberal ideologies in other domains. On the other hand, we also see the profound impact of the environmental movement in making environmental concerns mainstream and something that is given at least token consideration if not a factor that transforms the practices of individuals, institutions, industries and nation states. As a result of these two parallel trends, in environmental regulation, we see both a tendency to carry on with 'business as usual', with some industries waiting for proof of environmental damage before changing their practices; and attempts at instituting environmental safeguards before major problems are revealed. In many respects, the latter

trend has been driven by mistakes made in the past. Oil companies, for example, prefer licensing their ships in Denmark and other countries with strong industrial and environmental regulations to avoid costly and publicly damaging ocean oil spills rather than saving money by licensing their tankers in countries with fewer regulations (and fewer taxes). However, to assume that the significant shift we can observe in prevention over remediation is only due to past mistakes is problematic. Rather, there is a society-wide increase in environmental concern that is reflected in the increase in preventative practices and regulations (Dryzek, 2013). It must be noted, of course, that such concerns have not led to radical changes in practice (carbon emissions, for example) nor have they been extended to all types of environmental concern, chemical production and mining being excellent examples of the latter.

165 At a more fine grained scale, environmental policy as a whole, provides an illuminating example of the statutory versus disciplinary regulation debate. The costs of cleaning up polluted environments, through the United States Environmental Protection Agency's Super Fund sites, for example, has helped push a variety of state and non state actors to take environmental impacts into account at the beginning of projects rather after the fact. At the same time, many industries attempt to manipulate statutory laws through interpretation of standards and avoidance of reporting in order to by-pass regulations. The enforcement of laws and penalties for violations depend upon the ability to prove that environmental impacts have occurred. For some kinds of environmental damages such as loss of biodiversity or atmospheric contamination, linking practices of individual firms or industries to observed impacts can be extremely difficult, offering a further opportunity for avoidance of environmental laws. This illustrates a common problem of regulatory capacity and creative accounting in disciplinary environmental policies (e.g. cap-and-trade policies) and in finance (Ellerman 2003; Goulder and Parry 2008).

166 Last but not least, the move towards transboundary and international cooperation in environmental governance (Bulkeley, 2005), as outlined above, has had a multifaceted but too often limited binding power. Prior to the 1990s, at the national level, environment, and particularly resource extraction, was regulated by sector (forestry, water, grazing, agriculture, etc.), with sectoral designations continuing to profoundly shape environmental governance both in terms of the actors involved, and in terms of the science brought to bear. But beginning in the 1990s there was a move at the sub-national level towards regulation of ecosystems framed in terms of 'watersheds', 'corridors' and other territorial designations intended to capture the interconnected environmental processes and sectors within those territories (Purdon, 2003). The move towards

ecosystem management, however, has been important in reshaping the inter-connected and multi-level logic of regulation. Foresters, water experts, wildlife biologists, etc were all forced to cooperate together to devise integrated management plans for territories held by the US Forest Service, for example, or under SSI designations (areas of Special Scientific Interest) in the EU. Today, this push towards integrated management is increasing, not least driven by the specter of climate change (McLaughlin, 2011). But as mentioned above, the dominance of modeling within climate science is still overwhelming, showing the limits of calls for more integration of different disciplines and different kinds of data. The scientists involved in producing the idea of 'planetary boundaries' (limits within key ecosystem processes that cannot be crossed without serious threat to the earth as a whole) (Steffen et al., 2015), are also calling for supra national governance bodies that will have statutory authority over nation states. It remains to be seen how much political traction such calls can garner, but it is overall a disturbing trend in environmental governance. Most people in favor of such measures take a profoundly anthropocentric stance such that they are concerned about protecting environmental processes for human well being, while at the same time, they remain astonishingly ignorant of social and political science which present a number of cautionary tales for democracy, authority and indeed, governance that draw into question the viability of such regulatory bodies.

167

6. Conclusion

168 **TBC**

169 **References**

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537 [4] Newer work in economics also identifies other, more complex sources of trade openness-related welfare gains (see, e.g., Ossa 2011).

538 [5] For illustrative examples of political rulers legitimated by their rule-of-law regimes, see Babylonian king Hamurabi, author of one of the earliest surviving codes of law, which inter alia contained provisions for the equal treatment of the citizen; the biblical kind Solomon; and Roman emperor Augustus who—after sweeping military campaigns in which he was hardly shy about the use of force—established a reign of peace and rule of law.

539 [6] See http://worldjusticeproject.org. On the multi-dimensional character of the rule of law, see Haggard and Tiede (2011).

540 [7] See, for example, from a variety of perspectives, Keohane (2003), Zürn (2004), Joerges (2004), and Bernstein and Cashore (2007).

541 [8] Not all regulatory measures seek to bring about a behavioral adaptation. Researchers usually hope, for instance, that the application of a scientific measurement standard to a given object will not affect the behavior of the measured object or even person. It thus is possible that this subset is empty.

542 [9] Moreover, there are good reasons to expect that, for many regulatory measures, the group of stakeholders is even broader.