

Private Regimes and Legitimacy

The Politics of Self-Regulation in Liner Shipping and International Standardization

by

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Submitted to the Department of Political Science
in Partial Fulfillment of the Requirements
for the Degree of

Doctor of Philosophy in Political Science

at the

Massachusetts Institute of Technology

February 1998

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Abstract

What is the potential of private governance in the global economy? This dissertation contributes to an emerging literature on a phenomenon sometimes termed a "private regime." Broadly defined, such a regime involves the appropriation of certain governance functions by private organizations, an alternative to both unbridled markets and government regulation. Given current trends towards privatization and transnational mobilization, private regimes could conceivably emerge in a wide array of issue-areas and sectors. This possibility raises several questions: What kind of private regimes will emerge, and how will they operate? What issues will they raise in a world of competitive, sovereign states, and how will these issues affect their viability as forms of governance?

To address these questions, the dissertation conceptualizes private regimes as international manifestations of industry self-regulation, a phenomenon that has seen more attention in the study of domestic political economy. Using this domestic literature as a springboard, the study identifies major forms of self-regulation, and explores their manifestations and potential implications in the international context. Then it focuses on two cases, liner shipping and the International Organization for Standardization (ISO), to examine in detail these implications, and especially the relationship of private regimes to governments and other stakeholders. The study finds that the spectrum of governance in the global economy is indeed wider than commonly recognized: Interpenetration among national economies transnationalizes domestic rationales for self-regulation. At the same time, private regimes raise the same issues as domestic forms of self-regulation, including problems of accountability and legitimacy. Though the international context of private regimes complicates the resolution of these issues, they constrain the development of private regimes in important ways. Depending on the degree to which other stakeholders mobilize, private regimes face the challenge of legitimating both their functional goals and their organizational structures.

Thesis Supervisor: Nazli Choucri
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Acknowledgements

I wish to thank the members of my committee, Professors Nazli Choucri, Eugene Skolnikoff, and Kenneth Oye, for all the guidance they have given me as I have labored this project. I am especially indebted to my advisor, Nazli Choucri, who has patiently helped me move forward despite all the twists and turns I have taken. Without her advice and help on all aspects of the project, this dissertation would never have been completed. I would also like to thank the practitioners who helped steer my research in the right direction, including Mary McKiel at EPA, Mary Saunders at NIST, and Norine Kennedy at USCIB. Finally, I would like to thank my parents and my wife Victoria. Their support and encouragement over the years have been critically important.

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PART I
INTRODUCTION

CHAPTER ONE

PRIVATE REGIMES IN THE GLOBAL ECONOMY

In 1984, after years of Congressional debate, President Reagan signed into law a piece of legislation known as the United States Shipping Act of 1984. Reviewing the new legislation shortly after its passage, two participants in its creation commented:

That the Shipping Act of 1984 should have occurred at all is noteworthy. Measured by any current political yardstick it is unusual, perhaps unique, legislation. Its philosophy and approach is almost diametrically at odds with the recent and more highly publicized "deregulation" statutes affecting the U.S. domestic airline, trucking, and railroad industries. The new Shipping Act provides ocean common carriers operating in foreign commerce with more, not less antitrust immunity for their joint activities, include collective ratemaking.¹

To anyone unfamiliar with ocean shipping, these remarks provoke several questions: Just what kind of regulation was taking place in ocean shipping? Why was shipping treated differently by policy-makers? And what is the broader significance of this particular case of regulation?

The answers emerge as part of a wider analysis of the global regime that has managed much of the shipping industry for the last one hundred years. This regime has been based on regulation by non-governmental associations of shipping lines, an example of what might be called a "private regime." In general terms, a private regime can be defined as a legally-sanctioned appropriation of governance functions by an officially non-governmental organization. It represents a form of self-regulation, a phenomenon that has been recognized and studied in domestic politics, and is now becoming a salient issue in the international arena as well.

Private Regimes as Alternative Governance

Recent years have seen a renewed interest among policy-makers and scholars in the international role of non-governmental organizations (NGO's), including business groups as

¹ Stanley O. Sher and John A. DeVerno, "Maritime Reform: The players are the same but the rules are changed," *American Shipper*, April 1984, p. 11-22.

well as other interests. Though the focus of research has often been on NGO participation in intergovernmental fora such as United Nations agencies and conferences, scholars interested in globalization and transnationalization have also begun to note the potential importance of more private arrangements. Cutler, Rosenau, and Wapner all discuss such arrangements, and point to diverse examples such as commercial arbitration regimes, transnational credit rating agencies, and environmental campaigns to reform corporate behavior.² Susan Strange argues that the diffusion of authority from states to other actors is radically altering the global system.³ A few scholars have completed more focused studies: Tony Porter has analyzed private regimes in global financial markets, and Virginia Haufler has studied such regimes in international risks insurance.⁴ These private regimes do not necessarily exclude governments as participants, but governments do not play the formally privileged and ultimately decisive role that they play in intergovernmental organizations.

Current trends in the global political economy suggest that private governance mechanisms could emerge in a wide array of issue-areas and sectors. The accelerating growth of interdependence and transnationalization has increased the need for effective governance mechanisms, even as the efficacy of governments and their organizations have come under increasing scrutiny. At the same time, the forces of transnationalization have also enhanced the capacities of private groups to take their own initiatives, applying their frequently superior expertise to transnational problems of regulatory management.

These trends point to the possibility that a kind of "downward functionalism" might emerge in some issue-areas: International governance could develop not only through the growth of supranational government, but also through the expansion of privately-driven regulatory mechanisms. In many cases, these mechanisms could evolve from the transnationalization of self-regulatory schemes that have thus far operated mainly in the domestic context. In other cases, they could emerge from the need to address problems that are unique to the international system, such as multiple currencies. In either situation, they represent an alternative to both unbridled markets and government regulation, an alternative that could be tempting to beleaguered governments as well as private groups eager to manage their own collective problems.

² A. Claire Cutler, "Global Capitalism and Liberal Myths," *Millenium*, Volume 24, 3, pp. 377-397; James Rosenau, "Governance in the Twenty-First Century," *Global Governance*, Vol. 1, No. 1, Winter 1995, p. 13; Paul Wapner, "Politics Beyond the State: Environmental Activism and World Civic Politics," *World Politics*, Vol. 47, April 1995, pp. 311-340.

³ Susan Strange, *The Retreat of the State*, Cambridge, England: Cambridge University Press, 1996.

⁴ Tony Porter, *States, Markets, and Regimes in Global Finance*, New York: St. Martin's Press, 1993; Virginia Haufler, *Dangerous Commerce: Insurance and the Management of International Risk*, Ithaca, New York: Cornell University Press, 1997.

Issues and Questions

But the notion of a private regime raises important issues. First, of course, there is the central concern of those who study cooperation, whether it be among governments or firms: How can cooperative organizations resolve the internal challenges that come with the effort to manage an issue-area collectively? How can they come to satisfactory agreements, and ensure compliance among the cooperating parties? This issue has driven a good deal of theorizing in the field of international relations, and it is also a key question in theories of interfirm collaboration.

Another important concern is especially fundamental to the issue of cooperation among firms: The problem of accountability. This problem stems from the fact that a self-regulatory arrangement can have significant impacts on a broad set of stakeholders. While the problem of accountability emerges in the governmental sphere as well (and is an important issue in the study of public administration), it is all the more salient the more removed the regulatory organization is from the realm of the governmental processes that are meant to provide democratic control or at least oversight in the public interest. The more distant these controls are, the less certain we can be that the opportunities for abuse inherent in many self-regulatory arrangements are not exploited.

The challenge of self-regulation, then, is to reap its advantages while controlling its potential abuses. The question thus arises: How do governments and other stakeholders respond to self-regulation? In what ways do governments supervise or regulate such arrangements, and how do other stakeholders mobilize and deal with them? These questions have been addressed in the domestic literature on self-regulation, but they have not been studied in the international context. Yet the answer could affect not only the role that such initiatives might play in the global economy, but ultimately also our normative evaluation of what that role should be.

In the global arena, the issue of self-regulation is infused with additional complexities. The opportunities and constraints faced by various stakeholders are different from those in the domestic arena, and some groups may be better than others at mobilizing, lobbying, and building transnational alliances. Moreover, governments may have differing approaches to the monitoring and control of self-regulation, stemming from ideological conflicts and other political and economic rivalries. At a more fundamental level, the very notion of private governance challenges the traditionally privileged status of the state in international affairs.

Overview of the Study

To investigate the potential role of private regimes in the international system, and particularly the responses of governments and other stakeholders, this study adopts a two-stage approach. The first stage consists of a theoretical and empirical overview, while the second stage undertakes two detailed case analyses. The dissertation is a focused

exploration: Since only a few studies of private regimes as such exist, the goal is less to test a preconceived hypothesis than to clarify the concept and its context, and develop propositions about what dimensions will be important for analyzing and evaluating private regimes as they evolve over time.

Theoretical and Empirical Overview

The first stage, Part II of the dissertation, begins by reviewing the general issue of self-regulation as it emerges in the domestic literature on the subject. **Chapter Two** situates the concept of self-regulation in related areas of study, such as corporatism, private interest government, and the recent wave of theorizing on interfirm collaboration.⁵ It then identifies several major types of self-regulation, their main difficulties, and different ways of redressing these problems. Among the types of collective management one can find in liberal democracies are various means of facilitating commerce (e.g. industrial standards-setting), the management of price and supply (e.g. cartelization), and the development of codes of conduct (e.g. regulation of advertising). A given self-regulatory organization can perform one or more of these functions, as well as others.

All these forms of self-regulation provide collective benefits for the participants. Some benefits stem from the regulation itself, such as the lower transaction costs provided by uniform standards, or the stable profits provided by price management. Others stem from the deflection of government intervention, such as the reduction of consumer or environmental regulation promoted by voluntary corporate initiatives to address problems of safety, health, or environment.

But many forms of self-regulation also affect a multitude of stakeholders outside the circle of those initiating the regulation. Some of these effects are beneficial, promoting the overall health of an industry or serving the public interest in other ways. Other effects are more dubious, potentially harming other stakeholders within an industry as well as the wider public. In some cases, self-regulatory schemes have an especially obvious potential for abuse, as the well-known example of price cartels illustrates. But standards-development also presents the possibility of problems, because standards can have an enormous effect on the way markets work. The issue is one of accountability, and it has been addressed in several ways, including the application of measures to preserve competition, the imposition of government oversight, and the establishment of broader stakeholder participation.

Following this general discussion of self-regulation, **Chapter Three** begins to investigate the more uncharted realm of international self-regulation. A major source of

⁵ Wolfgang Streeck and Philippe C. Schmitter (Editors), *Private Interest Government: Beyond Market and State*, London: Sage Publications Ltd., 1985; Mark Granovetter, "Business Groups," in Neil J. Smelser and Richard Swedberg (Editors), *The Handbook of Economic Sociology*, Princeton: Princeton University Press, 1994.

such initiatives is likely to be the expansion of domestic efforts: As we have noted, the growth of interdependence and interpenetration among national economies should transnationalize the domestic rationales for self-regulation, as well as the capacities to implement it. Empirically, this process is confirmed by the numerous examples of private regimes that surface upon closer investigation. In the area of price management, both international shipping and aviation have long histories of price-fixing, while the De Beers diamond cartel represents perhaps the tightest management of an international market. The standards area has seen the rising importance of non-governmental bodies, including the International Organization for Standardization (ISO) and its partner the International Electrotechnical Commission (IEC), the International Accounting Standards Committee (IASC), and the Internet Engineering Task Force (IETF).

Though most mainstream theories of international relations provide few specific propositions about these private regimes, they indicate important factors to consider in an analysis of such regimes. These are explored in **Chapter Four**. Both the power-political calculations emphasized by realist theories and the dynamics of cooperation explored by liberal theories can open or close niches for private regimes. Private cartels, for instance, could conceivably thrive in the service of governments' mercantilistic goals, or alternatively, succumb to successful intergovernmental cooperation on anti-trust policy. Standards bodies might find themselves supported by intergovernmental efforts to promote trade, or in another scenario, stifled by nationalistic concerns about relative power and advantage.

Theories of global politics and transnational relations provide more direct insights into the behavior of private actors in the international system, including their sources of leverage and their relationship to states. The critical role of networking, expertise, and mass mobilization, for example, emerges out of studies of non-governmental participation in both intergovernmental regimes and more private initiatives.⁶ These works yield propositions about when different modes of accountability emerge, whether they are based on competition, government supervision, or countervailing power. The studies of Porter and Haufler lay the groundwork more specifically for research on private regimes. Their analyses of finance and insurance delineate the emergence and maintenance of such regimes in two important issue-areas, and discuss their contribution to global governance.

Most of these studies maintain as a chief motivating concern the issue of achieving international cooperation. This issue is of course central in the study of international

⁶ Peter Willetts, Peter, *Pressure Groups in the Global System*, New York: St. Martin's Press, 1982; Andrew Hurrell and Benedict Kingsbury, *The International Politics of the Environment*, New York: Oxford University Press, 1992; Risse-Kappen, Thomas (Editor), *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions*, Cambridge, England: Cambridge University Press, 1995.

relations, an emphasis driven by the manifest difficulties of cooperation in an anarchic system of sovereign nation-states. At the same time, an exclusive emphasis on the internal dynamics of regimes neglects an issue that may be particularly important for more private arrangements: As we have seen, such arrangements are inherently controversial, and this raises the question of their external relations, their broader political context. Do private regimes, like domestic self-regulatory arrangements, raise the same kinds of controversies, and if so, how are they resolved?

Chapter Four completes the theoretical and empirical overview by outlining an eclectic framework for analyzing these questions. The framework assumes, for example, that while interest groups can have a significant influence on states, states are more than an aggregation of interest groups' efforts. In addition, actors are assumed to be rational, but they are also capable of miscalculation and misperception, and "learning" can be an important explanatory factor. The framework is designed to avoid either precluding or privileging the influence of particular factors deemed important by theories of international relations and political economy, thereby remaining open to a variety of explanatory variables.

Case Analyses

To develop more specific hypotheses about private regimes, Parts III and IV of the dissertation undertake detailed analyses of two cases. Both cases are international versions of familiar types of self-regulation, one involving the management of price and supply, and the other involving the development of standards and codes of conduct. In addition, both are long-standing regimes which have been officially approved by virtually all governments. And finally, both are broadly multinational and involve economically significant activities that affect a multitude of stakeholders. These aspects of the cases make them useful additions to the case material on private regimes.

Part III (**Chapters Five and Six**) analyzes the case of liner shipping, already noted above. This sector of ocean shipping has been regulated by a system of cartels, known as "liner conferences," that regulate schedules, rates, and other terms of service. First organized over one hundred years ago, liner conferences have enjoyed continuous official sanction even as they have been scrutinized for abuses of power. The history of the conference system is rife with controversy and conflict among the various players involved, including governments, shipping lines, and shippers (the users of shipping services).

Historically, a main source of controversy has been the mismatch of governmental approaches to controlling and supervising conferences. While European governments have typically preferred a more hands-off approach based on the exercise of countervailing power by shippers, the U.S. government has taken a more interventionary approach involving supervision by the Federal Maritime Commission. This mismatch has frequently sparked clashes and mutual suspicion regarding the various measures taken by each side.

Recent years, however, have seen the emergence of new transnational coalitions and significant shifts in governmental policy. The Europeans, in particular, have implemented a major policy transformation in favor of closer scrutiny of conferences. The fault lines today are less among nations (i.e. between Europe and the U.S.) and more between the shipping lines on one side, and governments and shipper organizations on the other. Conferences are now on the defensive, as shippers pursue their interests transnationally and governments converge on more stringent policies.

Part IV of the study (**Chapters Seven and Eight**) analyzes a non-governmental international standards body, the International Organization for Standardization (ISO). Founded nearly fifty years ago, this organization develops international standards across a wide range of economic sectors; ISO standards include paper sizes, film speed codes, and freight container dimensions. Since the 1980's, ISO has significantly raised its profile by developing two sets of economy-wide management standards, one for quality management and one for environmental management.

This expansion of activities has prompted many of the same kinds of questions that have surrounded the conference system, involving the legitimacy of certain types of private mechanisms, and the compatibility of different governmental approaches. In Europe and Japan, governments have an intimate relationship with voluntary standards bodies, whereas in the U.S., standards activities in the international as well as domestic arena have been more clearly private. This mismatch of approaches has led to differing ideas about the scope of ISO standards, and to problems of cross-national recognition for various national certification schemes.

But ISO also differs greatly in character from the liner conference system. Unlike the secretive and exclusive conferences, ISO has emphasized broad participation and consensus, going beyond the level required to make a voluntary standard stick. Though the recent management standards have provoked criticisms that certain interests have been neglected, ISO has made efforts to address these criticisms, and to reach out to stakeholders that are likely to have difficulties in achieving effective representation.

Conclusion

Part V of the dissertation, the conclusion, presents some initial propositions about private regimes, their viability in the international system, and their broader implications. **Chapter Nine** focuses on the regimes themselves, and the responses of governments and other stakeholders. It lays out two broad sets of observations and hypotheses. The first begins with the simple one that private regimes exist: Supporting the arguments of the nascent literature on private regimes, the empirical overview and the case analyses suggest that the visible trends in the global political economy are indeed creating the potential for private regimes to play a role in that system. The puzzle of the 1984 Shipping Act is explained by the fact that the regulation taking place was a *private transnational* regime, a regulatory arrangement that already satisfied part of the rationale for deregulation (smaller

government) and, moreover, had international aspects that distinguished it from many other cases of regulation.

At the same time, the distinction between private and public is hardly dichotomous: There is a spectrum of governance that includes wholly private arrangements but also more hybrid regimes that often look more like intergovernmental organizations. While liner conferences are mostly private, for example, ISO is in many ways quasi-governmental despite its officially non-governmental status. Just across the thin line between public and private are organizations like the International Labor Organization, an intergovernmental organization with a tri-partite representational structure that includes business and labor groups as well as governments.

The second set of observations focuses on the broader political context of private regimes. Not only do geopolitical and competitive dynamics influence the way in which governments respond to private regimes, but in addition, the issue of accountability emerges as a critical factor, just as it does for domestic self-regulatory arrangements. The cases of shipping and standardization suggest that private regimes can become embroiled in battles about their power. One way to make sense of these battles is to hypothesize that private regimes face important challenges of legitimacy, one involving the validity of a regime's basic functions, and the other involving the legitimacy of its institutional structure.

The validity of a regime's functions concerns the activities undertaken by the regime, the type of collective good it provides. The key issue here is the perceived relationship between these activities and the public interest. The general benefits of uniform standards, for example, are obvious, whereas the net gains from price and supply management have been continually questioned. Though ISO and the conference system may both at times have benefited from the mercantilistic calculations of governments, the reduction of governmental support based on such motives has threatened the conference system much more. The general legitimacy of ISO's basic purpose is simply better established, enjoying support from virtually all governments.

The institutional legitimacy of a private regime encompasses issues of equity, representation, and tradition. ISO's "international" structure, consisting of one and only one member from each nation, makes the organization more isomorphic to the traditional structure of the nation-state system, allowing it to borrow from that system's broadly recognized legitimacy. Coupled with the additional (though perhaps less ubiquitously accepted) legitimacy of its more open and transparent processes, this quasi-governmental legitimacy has allowed ISO to entrench itself in the international system more securely than liner conferences.

At the same time, ISO's institutional structure has presented certain dilemmas. Its emphasis on broad consensus has made its standards-development process too slow, particularly for certain kinds of standards. Moreover, its basic organization along "international" rather than "transnational" lines, in the sense that its voting members are

national bodies rather than interest groups, firms, or individuals, has had representational effects that some groups consider distortionary.

The degree to which these legitimacy “variables” present challenges for private regimes may be affected by another variable. This conditioning or contingency variable is the extent of stakeholder mobilization in a given issue-area. The case of shipping is particularly revealing: During the post-war years, there has been a steady increase in shipper mobilization which has gradually put more and more pressure on the liner regime. A recently-forged transcontinental coalition has helped put the regime in a position where its survival may be in jeopardy. The mobilization of stakeholders is by no means necessarily complete, and the possibility that some interests are underrepresented is an important normative issue. But the key point for now is that the broader political context imposes complex constraints on both the role that private regimes can play and the institutional forms they take.

Chapter Ten contemplates the broader significance of the study, particularly its implications for understanding the evolving role of the state in the global economy. At least with regard to the liberal democracies that emerge as the main players in both shipping and standardization, the study supports the views of scholars who argue that states are beginning to surrender a certain amount of control to commercial processes.⁷ The very notion of private governance implies an involvement by public authorities that is less direct and exclusive. At the same time, however, the cases of shipping and standardization seem to underscore the fact that states are still crucial even where commercial processes are encroaching: Though states may be surrendering direct control in some issue-areas, that surrender may come with important conditions that involve the imposition of accountability on the private sector.

The shipping case, for example, suggests that states might impose accountability through competitive markets. Liberalization, in other words, can constitute not only a retreat by the state, but also a state-imposed surrender by private groups of private control. As the history of American anti-trust policy suggests, and as Steven Vogel has argued,⁸ liberalization does not necessarily entail the end of regulation. A renewed emphasis on liberalizing the world economy could entail the emergence, eventually, of a global program of anti-trust enforcement involving considerable government activism.

The two cases also point to the potential role of states as guarantors of certain procedural principles that are likewise designed to promote accountability. Again, states step back from their traditionally direct and exclusive control over international matters,

⁷ Mark W. Zacher, with Brent A. Sutton, *Governing Global Networks: International Regimes for Transportation and Communications*, Cambridge, England: Cambridge University Press, 1996; Cutler, *op. cit.*, in note 2.

⁸ Steven Vogel, *Freer Markets, More Rules*, Ithaca, NY: Cornell University Press, 1996.

allowing more private regimes to emerge in some areas. But again, states impose another form of control, in this case involving measures to promote participation and representation of other stakeholders in those regimes. For a given state, the chief concern may still be the interests of its own firms and citizens, but the manner in which it protects those interests is different from the means traditionally highlighted.

Both of these roles of the state are likely to be supported by private groups. Though the forces of globalization are often spoken of as a monolith of changes rolling over the state, these forces are in fact likely to include many conflicting interests and drives. In the ensuing battles over various issues, states will be in prime position to mediate among contending forces, and many private groups are as likely as ever to seek the support of states in their struggles.

PART II
THEORETICAL AND EMPIRICAL BACKGROUND

CHAPTER TWO

THE PHENOMENON OF SELF-REGULATION

The notion of a private regime places into the global arena an issue that has seen more attention in the study of domestic political economy: The phenomenon of self-regulation by private actors. Self-regulation occurs when the private sector itself imposes some kind of order on its activities through formal or informal rules, standards, or other kinds of regulations. Though the term "self-regulation" is sometimes used to refer to self-restraint exercised by individual firms acting on their own, the concept that is more relevant here involves collective self-regulation achieved through joint decisions, or in other words, a self-regulatory regime.

The extent to which self-regulation occurs will obviously vary from country to country, but in many liberal democracies, the development of industry standards is often carried out privately, as are related accreditation and certification activities. In certain kinds of markets, self-regulation can involve elaborate controls on the way the market operates, as is the case with most futures and stock exchanges. Some industries have even gone so far as to regulate prices and production, though extensive restraints on market forces are generally suspect in capitalist societies. In this chapter, I examine the concept of self-regulation, investigate its various forms, and discuss the issues it raises and the means used to address them. Three broad literatures are immediately relevant: The literature on interfirm collaboration in general, the literature on corporatistic notions of private interest government, and, finally, a less theoretical literature focusing on specific forms of self-regulation.

Private Sector Collaboration

As a form of interfirm collaboration, self-regulation fits neatly into a broad class of phenomena that is drawing increasing attention from economists, sociologists, and political scientists. This class of phenomena includes a variety of arrangements among market actors that go beyond the traditional neoclassical ideal of atomistic competition. They have been conceptualized as social networks,¹ business groups,² learning-by-monitoring,³

¹ Walter W. Powell and Laurel Smith-Doerr, "Networks and Economic Life," in Neil J. Smelser and Richard Swedberg (Editors), *The Handbook of Economic Sociology*, Princeton, NJ: Princeton University Press, 1994.

strategic alliances, and sector organizations.⁴ Many of these conceptions appear to overlap; some of the emerging terms may even be synonymous. At the same time, their analytical fuzziness does not obscure the fact that there are important differences among them, differences that will be more precisely documented as the study of these varieties of interfirm collaboration advances.

Some of the approaches to these phenomena proceed from the traditional assumptions of neoclassical economics, analyzing them as rational solutions to problems of efficiency. Oliver Williamson's work is a well-known example of this "New Institutional Economics." Others argue that understanding the various collaborative arrangements often requires the application of sociological concepts that are not in the toolbox of neoclassical economics. Mark Granovetter is a leading proponent of this view, sometimes termed the "New Economic Sociology." For our purposes, the key point about these phenomena and their relevant scholarly perspectives is that they represent forms of cooperation that are seen not as subversions of an ideal, but as integral components of functioning markets. They are part and parcel of a market order.

Do all variants of interfirm collaboration represent forms of self-regulation? The answer depends on how strictly one defines self-regulation. In one sense, any kind of coordination among a group of firms is self-regulation. In another sense, only those forms of coordination that represent the collective management of an entire market or sector qualify as self-regulation. For example, a strategic alliance that allows a group of firms to compete more effectively against other firms in a market might represent self-regulation in the former sense, but not the latter. On the other hand, an industry trade association or other sector-wide organization that makes decisions for an entire sector is clearly self-regulatory in the latter sense as well. This stricter form of self-regulation is not just a matter of coordination per se, but of a broader suppression of competitive processes in favor of collective management. In short, it is a form of governance, distinct from government only in that the actors are private and the means of management do not include coercive authority.

² Mark Granovetter, "Business Groups," in Neil J. Smelser and Richard Swedberg (Editors), *The Handbook of Economic Sociology*, Princeton: Princeton University Press, 1994.

³ Sabel, Charles, "Learning by Monitoring," in Neil J. Smelser and Richard Swedberg (Editors), *The Handbook of Economic Sociology*, Princeton, NJ: Princeton University Press, 1994.

⁴ Michael H. Best, *The New Competition: Institutions of Industrial Restructuring*, Cambridge, MA: Harvard University Press, 1990.

Self-Regulation As Governance

Focusing on governance connects the notion of self-regulation to literatures addressing specifically the idea of private governance. This idea has been studied by a number of scholars interested in regulatory issues and corporatistic arrangements. In a 1985 volume edited by Wolfgang Streeck and Philippe Schmitter, several scholars examine forms of governance they refer to fairly interchangeably as “private interest government” and “self-regulation.”⁵ More recently, Ian Ayres and John Braithwaite argue for a policy approach they call “responsive regulation,” which flexibly combines government regulation and various forms of self-regulation.⁶

As a system of ordering behavior, Streeck and Schmitter point out in their introductory chapter, private interest government is an alternative to societal orders imposed by three other mechanisms: Government, market, and community.⁷ As such, it is related to corporatism, in which private organizations acting on behalf of functionally-defined interests like labor and capital negotiate pacts that replace market mechanisms. As we shall see, self-regulation seeks to address the same kinds of problems for which corporatism is often recommended, including governmental inadequacies such as lack of expertise or legitimacy, and market failures such as destructive competition or harmful externalities.

At the same time, the concept of self-regulation is broader than corporatism in that the latter is usually conceptualized as an ordering mechanism that, even if private, nevertheless relies on the active involvement of the state. Discussing the phenomenon of business self-regulation, van Waarden states that “whenever such forms of self-regulation involve the state to a greater or lesser extent, one can speak of corporatist arrangements where the private and the public sphere are interwoven.”⁸ These arrangements typically entail exclusive representational monopolies with state-delegated power to enforce agreements. As Jacek puts it, they serve as “agents of public policy.”⁹

⁵ Wolfgang Streeck and Philippe C. Schmitter (Editors), *Private Interest Government: Beyond Market and State*, London: Sage Publications Ltd., 1985.

⁶ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford: Oxford University Press, 1992.

⁷ Streeck and Schmitter, 1985.

⁸ Frans van Waarden, “Varieties of collective self-regulation of business: the example of the Dutch dairy industry,” in Streeck and Schmitter (Editors), *Private Interest Government*, 1985, p. 197.

⁹ Henry J. Jacek, “The Functions of Associations as Agents of Public Policy,” in Alberto Martinelli (Editor), *International Markets and Global Firms: A Comparative Study of Organized Business in the Chemical Industry*, London, England: Sage Publications

Thus, corporatism might be thought of as a special case of a broader concept of self-regulation, with the latter including arrangements in which the power of enforcement and control stems entirely from the private regulators themselves, the state remaining uninvolved. As such, self-regulation can emerge entirely at the initiative of private groups, putting the state in a *reactive* role vis-à-vis their efforts. This mode of self-regulation is slightly different from the corporatistic notion of private interest government conceived by Streeck and Schmitter: "To turn into private-interest governments, associations need to be supplied with more and stronger authority than they can possibly mobilize themselves on a voluntary basis."¹⁰ With a broader conceptualization of self-regulation, the issue of how involved the state is becomes an important dimension of variance that might be related not only to the authority needs of self-regulatory organizations, but to other variables as well.

As a form of governance that transcends the state/market dichotomy, self-regulation is also related to the normative notion of "associative democracy" formulated by Cohen and Rogers,¹¹ in which private associations are harnessed to serve various needs of democratic governance. Among the functions such groups can have is the provision of alternative forms of governance that redress governmental inadequacies such as lack of expertise, inability to monitor compliance, and inability to achieve cooperative solutions. The focus of associative democracy is to create and mold an "associative environment" that promotes democracy, a concern that is highly relevant, as we shall see, to the issue of self-regulation.

Forms of Self-Regulation

What are some general forms of self-regulation? A perusal of the literatures that address the topic reveals several broad categories. Two are standards-setting efforts that regulate specific characteristics of products or processes, and another two are more behaviorally-oriented efforts that regulate the way firms' operate and compete. A given self-regulatory organization, typically an engineering society or a trade association, might perform several different types of regulation, as well as various non-regulatory functions. In this section, I briefly introduce each category, setting the stage for a deeper analysis of the motives behind self-regulation and the issues it raises.

Uniformity and Compatibility Standards

In many countries, and especially the United States, private groups often set

Ltd,1991.

¹⁰ Streeck and Schmitter, 1985, p. 25.

¹¹ Joshua Cohen and Joel Rogers, "Secondary Associations and Democratic Governance," *Politics and Society*, Vol. 20, No. 4, December 1992, pp. 393-472.

standards that ensure the uniformity and compatibility of products and processes. These standards might specify the characteristics of a product or group of products in such a way that they are interchangeable in various ways. They might also specify a test procedure to ensure that results are comparable. Such standards are countless in industry and daily life; they are so fundamental, in fact, that they are often taken completely for granted. A simple example might be the 8 ½ by 11 standard for paper, or the standards that allow most electrical plugs to fit into most wall outlets. Another example, hinting at the potential controversy of compatibility standards, might be the standards that allow one brand of VCR to couple with another brand of television set.

Quality and Safety Standards

Private standard-setting bodies also set standards for more performance-related characteristics such as the quality of a product or its safety. Quality standards, for example, might establish certain dimensions of performance along which products can be arrayed and compared, while safety standards might set certain minimum levels that products must meet. Again, such standards are ubiquitous. A well-known example is the set of standards developed and maintained by Underwriters' Laboratories (UL); its seal of approval is a familiar emblem on electrical equipment.

Conduct Codes

Self-regulatory efforts often focus on the behavior of firms as well as the actual products they make. For some service sectors, these efforts are analogous to quality and safety standards for products, establishing minimum levels of knowledge and competency on the part of the service providers. The codes established by various professional societies are a well-known example. In addition, conduct codes can also regulate the behavior of industry members vis-à-vis each other. Self-regulated markets such as futures and stock exchanges include provisions in their rules and regulations that are supposed to protect their members from deceit and manipulation by other members. Finally, codes of conduct can address broader societal issues such as environmental impacts and community values, as when, for example, an industry association develops a procedure for the proper disposal of hazardous waste, or a code for appropriate advertising.

Price and Supply Management

A controversial form of self-regulation involves the management of price and supply through cartels of some kind. Under certain circumstances, firms in an industry prefer to coordinate prices, production, and/or investment rather than allowing individual firms to determine them wholly in response to competitive markets. Though all self-regulatory efforts essentially involve replacing competition in a given area with collective decision-making, the management of price and supply probably goes the furthest in restraining market dynamics. In the past, such cartels were common phenomena,

especially in countries like Germany and Japan. But even more recently, cartel-like arrangements have operated legally in certain sectors, including the milk-marketing sector in Britain and the trucking sector in the United States.¹² Corporatistic wage-bargaining, too, represents an effort to manage labor markets in precisely this way.

Industry Motives

Why do industries or industry associations decide to implement self-regulatory arrangements? Though the answer is obvious in many cases, there are in fact a variety of motives, and a given form of self-regulation can serve several motives at once. Some of these motives involve benefits accruing directly from the regulation itself, while others involve secondary benefits reaped from the effects of the regulation on government policy or public opinion.

Reducing Transaction Costs

One general motive that involves direct benefits is the reduction of the various costs that can be associated with commercial transactions, a motive adumbrated by the field of study known as transactions-costs economics. Pioneered by Ronald Coase in the 1930's and revived by Williamson in the 1970's, this approach focuses on the manifold implications of transaction costs for firm behavior and economic efficiency. Though the approach usually analyzes why individual firms might merge their operations, it can also clarify other organizational innovations, including many self-regulatory efforts. Abolafia applies the approach to futures exchange regulation and shows how "self-regulation reduces the risk inherent in market transactions by circumscribing the possible behavior of one's competitors."¹³ In essence, the rules of conduct established by the exchanges promote mutual trust and other requisites for the smooth functioning of their markets.¹⁴ The same logic applies to other types of self-regulated markets, including stock exchanges and the insurance market managed by Lloyd's of London.

¹² Wyn Grant, "Private organizations as agents of public policy: the case of milk marketing in Britain," Streeck and Schmitter (Editors), *Private Interest Government*, 1985, p. 182; Charles A. Taff, *Commercial motor transport*, Sixth Edition, Centreville, Maryland: Cornell Maritime Press, 1980.

¹³ Mitchel Y. Abolafia, "Self-Regulation as Market Maintenance: An Organization Perspective," in Roger G. Noll (Editor), *Regulatory Policy and the Social Sciences*, Berkeley, CA: University of California Press, 1985, p. 340.

¹⁴ Neil Gunningham, "Private Ordering, Self-Regulation and Futures Markets: A Comparative Study of Informal Social Control," *Law and Policy*, Vol. 13, No. 4, October 1991, p. 303.

The reduction of transaction costs is also one of the major motivations for standardization efforts. Established standards for uniformity, compatibility, quality, and safety all facilitate transactions by promoting interchangeability of products and reducing information costs. For new and unfamiliar products, standards of quality and safety can greatly increase buyer acceptance and demand. Though an industry's willingness and ability to cooperate on standards depends on the structure of the industry and other factors,¹⁵ drawing up standards collectively rather than allowing the market to settle on them can help avoid fragmented standards that reduce these benefits.

Pre-empting Government Regulation

Another major motive for self-regulation, but one that involves more indirect benefits, is the desire to avoid intrusive government regulation. Leidy has argued that self-regulation can be a tactic for indirectly influencing the political process to defuse a regulatory threat.¹⁶ Though industries are sometimes able to capture governmental regulation and employ it to their benefit,¹⁷ the political uncertainties of this strategy may make it too risky in many cases, and industries are often eager to reduce or eliminate intervention by what they see as bureaucratic and less knowledgeable government agencies.

Industries can be willing to go quite far to mitigate such intervention. In the wake of sharp criticisms of its self-regulatory arrangements, the National Association of Securities Dealers (NASD) recently sought to demonstrate its commitment to effective self-regulation by creating a separate regulatory arm and appointing a former government regulator to head it.¹⁸ Similarly, Lloyd's of London has instituted significant reforms to head off the threat of government intervention that emerged out of the market's recent crises.¹⁹

¹⁵ Gerald Brock, "Competition, Standards and Self-Regulation in the Computer Industry," in Richard E. Caves and Marc J. Roberts (Editors), *Regulating the Product: Quality and Variety*, Cambridge, MA: Ballinger Publishing Company, 1975.

¹⁶ Michael P. Leidy, "Rent dissipation through self-regulation: The social cost of monopoly under threat of reform," *Public Choice*, Vol. 80, No. 1-2, July 1994, p. 105-28.

¹⁷ George J. Stigler, "The theory of economic regulation," *Bell Journal of Economics and Management Science*, Vol. 2, No. 1, Spring 1971.

¹⁸ Andrew Osterland, "Bitter medicine," *Financial World*, 165(10), July 8, 1996, pp. 30.

¹⁹ Kimberley A. Strassel, "Lloyd's Begins Broad Review of Regulation," *Wall Street Journal*, November 1, 1996, p. A7A.

These preemptive self-regulatory initiatives are often directed at the broader public as well as government regulators, constituting general campaigns to bolster an industry's image or reputation. The codes established by various professional societies and the emergence of voluntary environmental and advertising standards, for example, are all motivated at least partly by the desire to manage how an industry is perceived by the public. A favorable public image not only improves an industry's dealings with the public, but can also affect its relations with government.

Stabilizing Markets and Rationalizing Production

A third motive for self-regulation is the desire to stabilize markets and/or rationalize production and investment. This is one of the goals behind the cartels that control price and capacity in some industries. Such cartels can promote "orderly markets" in industries where unrestrained competition might have negative effects such as instability of prices and output (as in some commodity markets) or uneven provision of services (as in some transportation sectors). Both standardized products and conduct codes can also serve this motive by making coordination among firms easier, and by controlling entry into a market by other firms. Moreover, the collective setting of standards can itself be a way of rationalizing investment by eliminating the instability and wasted investment caused by the standards wars that can erupt in the absence of cooperation.

Rent Seeking

The desire to stabilize markets and rationalize production can be closely linked to a more dubious motive: The achievement of higher profits through the restriction of competition. Price-cartels represent an obvious opportunity for elevating prices to extract more rent from customers, and again, standardized products and conduct codes can facilitate such efforts by enabling coordination and control over entry. As we shall see, the fact that this motive can be interwoven with more benign motives is an important issue in self-regulation.

Promoting Bureaucratic Interests

Yet another motive that should be mentioned involves not the industry members themselves, but the actual organizations that implement self-regulatory initiatives. Like many bureaucracies, such organizations and their staff often have a perspective that is slightly different from the perspective of the firms they represent. Though this perspective can allow such organizations to identify industry problems better than the firms, it can also include the desire to protect and expand the importance of the organization itself.

Enforcing Self-Regulation

Though the enforcement of self-regulation can be difficult in the absence of government-delegated authority, self-regulatory organizations do have ways of monitoring compliance and limiting defection. Cartels present a particularly strong temptation to chisel, but historically, many industries have succeeded in holding them together, and the chances of success are improved if the cartel does not need to fear legal prosecution. With regard to standard-setting, market power can be a formidable tool for making a standard stick: Once it is adopted by a large enough part of the industry, the rest must usually follow.

A self-regulatory organization that controls access to a market or provides important services obviously has considerable leverage as well. Futures and stock exchanges, along with trade and professional associations, often rely on such leverage. An additional and often critical element of many self-regulatory efforts is a system of certification or accreditation. Such a system monitors performance and compels compliance by giving a public stamp of approval to those firms that meet the regulation being enforced.

As the notion of private interest government suggests, the enforcement of self-regulation is sometimes bolstered by governments. Governments can accept certain private sector standards as official standards, either by making them enforceable as law or by imposing them on suppliers to the government, an important customer for many industries. The courts, too, can play a role in strengthening private standards by using such standards as benchmarks for what is generally accepted as adequate industry performance. As an environmental lawyer points out, this means that “it may be possible for plaintiffs in environmental products liability or toxic tort cases to bind companies to these voluntary standards even where the company has no affiliation with the standards-making organizations.”²⁰

The Public Interest

As the quote above suggests, self-regulation potentially affects a wider circle of stakeholders than the self-regulators themselves, which raises an important policy question: Is self-regulation beneficial or harmful for these other stakeholders, and for society as a whole? To evaluate a given instance of self-regulation from this perspective, one must make a judgement about two issues. First, is some kind of collective management necessary at all? And second, is it appropriate that this management should be undertaken by the private sector rather than by government?

²⁰ Joseph G. Manta, “The Effect of Private Sector Self-Regulation on Litigation,” *The Metropolitan Corporate Counsel*, July 1996, p. 14.

Potential Benefits of Self-Regulation

Many of the benefits that motivate self-regulatory initiatives clearly accrue to a wider circle of stakeholders. Transaction-costs economists like Williamson emphasize the efficiency-improving effects of moving some transactions out of the market, and argue that policy-makers should be less hostile towards efforts at imposing alternative forms of order. Certainly the constraints imposed on the behavior of traders in futures and stock markets often provide general benefits, bolstering the integrity and efficiency of these markets. Collective setting of industrial standards can also serve the public interest, not only by reducing transaction costs and the instability and wasted investment associated with standards-wars, but also by mitigating the problem of consumers being stranded with losing standards. To the extent that more image-related standards actually result in improved performance, such standards obviously serve the general public as well.

Even the collective regulation of prices and production is not without potential benefits for the broader public. Though the general trend during the post-war era has been towards increasingly pro-competitive policies, cartels have historically been accepted and even encouraged in many countries, including Germany and Japan.²¹ Moreover, arguments casting doubt on the tenet that price-fixing is harmful under all circumstances have persisted. Some economists have suggested that as long as there is free entry to a market, collusion on price can actually enhance economic welfare.²² Several recent editorials in the Wall Street Journal have argued that price-fixing in some industries should be tolerated rather than branded as a crime.²³ Until recently, many transportation sectors regulated prices, and some, like ocean shipping, are still trying to do so.

Notably, transaction-costs economists sometimes doubt the feasibility of long-term collusion (without merger) because the transaction-costs are prohibitive; an effective price-fixing agreement would require so much costly information and so much delicate planning for a variety of contingent events that it would hardly be worth it.²⁴ Whether or not this point convincingly dismisses the potential for price collusion, it does contribute to the second imperative of an argument for self-regulation, the justification for why the

²¹ F. M. Scherer, *Competition Policies for an Integrated World Economy*, Washington, D.C.: The Brookings Institution, 1994, Chapter 3.

²² Donald Dewey, "Information, Entry, and Welfare: The Case for Collusion," *American Economic Review*, Vol. 69, No. 4, September 1979.

²³ Holman W. Jenkins, Jr., "The 'Crime' of Price Fixing Finally Finds a Real Victim," *Wall Street Journal*, February 4, 1997, p. A19.

²⁴ Oliver E. Williamson, *Markets and Hierarchies: Analysis and Anti-Trust Implications*, New York: The Free Press, 1975, p. 240.

regulation should be private rather than public. The complexities that Williamson describes underscore the general benefits of letting those with the most expertise implement any regulations that might be necessary. These benefits are becoming more appreciated, as increasing efforts by government to delegate responsibility suggest.

Industries eager to regulate themselves obviously justify their initiatives by pointing to these general gains, and they sometimes receive exemptions from anti-trust laws to facilitate their efforts. In this way, self-regulation becomes a legally sanctioned activity even in societies like the United States, where collusive behavior is generally considered suspect. In the U.S., anti-trust exemptions have been granted in a variety of sectors, including agriculture, transportation, energy, various professions, and insurance.²⁵

A Problem of Self-Regulation: Accountability

Even when industries receive anti-trust exemptions for self-regulation, however, the controversy often continues over who is really benefiting, and at whose expense. As a few of the motives for self-regulation suggest, self-regulation carries with it the potential for abuse, and not everyone is convinced that the benefits outweigh the dangers. Numerous scholars have argued, for instance, that the transaction-costs approach is too quick to dismiss the issue of power, not only of the self-regulators vis-a-vis other stakeholders in the industry, but also among the self-regulators themselves.²⁶ As the cartel example underscores, self-regulation can create, reinforce, and utilize various forms of market power (backed up occasionally by state-delegated authority), and this power is seldom distributed evenly among stakeholders. Standards-development has a similar potential, as Rosenberg suggests:

From an antitrust viewpoint, private standards-development and certification programs are risky enterprises, since these activities ordinarily involve competitors agreeing with one another as to how certain aspects of their commercial activities will be conducted. Every standard has the potential for circumscribing some facet of commercial operations. This potential may never be realized, but it may be realized in extraordinarily profound ways.²⁷

²⁵ United States Department of Justice, *Report of the Task Group on Antitrust Immunities*, Washington, D.C.: Government Printing Office, 1977.

²⁶ Abolafia, 1985; Gregory K. Dow, "The Function of Authority in Transaction Cost Economics," *Journal of Economic Behavior and Organization*, Vol. 8, No. 1, March 1987, pp. 13-38; Roderick Martin, "The New Behaviorism: A Critique of Economics and Organization," *Human Relations*, Vol. 46, No. 9, September 1993, p. 1085.

²⁷ Ernest S. Rosenberg, "Standards and Industry Self-Regulation," *California Management Review*, Vol. 19, No. 1, Fall 1976, p. 80.

For Rosenberg and others, private standard-setting can not only raise prices, it can also stifle innovation, reduce quality, and threaten consumer safety.

The problem with self-regulation essentially stems from the same sources as its benefits. First, there is the fact that self-regulation is generally about restraining competition in some way. This restraint is beneficial with respect to inappropriate forms or expressions of competition, such as dishonest practices or inadequate attention to safety and environmental effects. But it is potentially harmful with respect to those forms of competition that are fundamental to the efficiency and dynamism of capitalism, such as competition on prices, service, and innovation. Unfortunately, it is sometimes difficult to evaluate the appropriateness of a given instance of competition, or to sort out what kind of competition is really being restrained.

Second, there is the fact that self-regulation is a form of governance that, by definition, takes place outside the realm of normal governmental processes. This aspect of self-regulation lends it certain strengths, noted above, but it also raises the problem of accountability. Though the problem of accountability is by no means absent from the governmental realm, it is all the more salient (and less understood) the more removed the regulatory mechanism is from governmental processes of democratic control. As much as we might mistrust government, it is harder to feel comfortable with the idea of private companies deciding how they will or will not compete with each other, or what standards of environmental safety are adequate.

The dilemma of self-regulation boils down to the following question: If neither the automatic accountability of competitive markets nor the public accountability implied by government obtains, how can we be sure that all the interests affected are considered in the self-regulatory process? The question is often one of representation, an issue that emerges explicitly in discussions of self-regulation. The standards-development process, for instance, has been criticized as insufficiently attentive to certain interests, especially those of consumers.²⁸ Similarly, studies of futures exchange regulation point to the problem of domination by elite groups at the expense of other groups.²⁹ Analyzing the self-regulation of advertising, Boddewyn argues that newer issues of good taste, sex-stereotyping, and portrayals of minorities require the participation of outside groups in the regulatory organization.³⁰ Havighurst sums up the problem in his discussion of accreditation

²⁸ Hemenway, David, *Industrywide Voluntary Product Standards*, Cambridge, MA: Ballinger Publishing Company, 1975; Rosenberg, 1976.

²⁹ Abolafia, 1985; Gunningham, 1991; Hemenway, 1975.

³⁰ J.J. Boddewyn, "Advertising self-regulation: organization structures in Belgium, Canada, France, and the United Kingdom," in Streeck and Schmitter (Editors), *Private Interest Government: Beyond Market and State*, London: Sage Publications Ltd, 1985, p. 39.

programs: "The actual range of interests participating in a particular program is a significant variable, however, since an accreditor might represent a full spectrum of affected interests, including consumer organizations, or instead be controlled by narrow interests at the industry's core."³¹

Solutions to the Problem of Accountability

Barring the simple solution of forbidding or ignoring self-regulation in favor of direct government regulation, several solutions have been proposed and implemented for the problem of self-regulatory accountability. One solution is to maintain accountability through competition by devising means of regulation that do not restrain the most essential forms of competition. Thus, the rules that competitors are allowed to impose are tightly circumscribed, or subject to competition from alternative sets of rules. Havighurst has suggested, for example, that accreditation groups should not be granted effective monopolies, but be subject to competition from multiple groups, all of which could themselves be subject to accreditation by another tier of accreditors.³² This approach solves the problem of private power by essentially eliminating or sharply curtailing that power. Its obvious disadvantage is that in doing so, it may also be curtailing the ability to impose an effective order. The idea of multiple accreditation tiers, for example, suggests confusion and disarray, an impression that is not relieved by Havighurst's assurances that there "are in fact numerous programs for accrediting accreditors and even some examples of accreditors that accredit accreditors of accreditors."³³

Another solution is governmental oversight, whereby the government carefully monitors the self-regulatory process to make sure that the outcomes are socially beneficial. The government might evaluate the outcomes according to certain welfare criteria, requiring the self-regulators to file specified information with the relevant agency. Alternatively, the government might try to gauge the degree to which the dominant players' interests are in harmony with the general public interest. In some cases, the government might even participate more directly in the regulatory process by serving as a representative of unorganized and absent stakeholders, a solution suggested by some observers of the standards-development process.³⁴ Governmental oversight, whether aloof or more

³¹ Clark C. Havighurst, "Foreword: The Place of Private Accrediting Among the Instruments of Government," *Law and Contemporary Problems*, Vol. 57, No. 4, Autumn 1994, p. 2.

³² Havighurst, 1995.

³³ Havighurst, 1995, p. 10.

³⁴ Rosenberg, 1976.

involved, can serve as a potent safeguard against abuse. At the same time, the potential of government oversight is limited by the general problems of government regulation: Lack of expertise, the possibility of regulatory capture, and the delays in decision-making due to increased bureaucracy.

Still another approach to the problem of private power involves the idea of countervailing power, whereby those groups that are subject to exclusion and potential exploitation are permitted to organize in an effort to increase their bargaining power. A well-known example of countervailing power is organized labor, in which a collective effort by workers can allow them to overcome the disadvantages they typically face vis-a-vis management. According to a study by Galbraith, who examined and promoted the idea of countervailing power in the early 1950's, countervailing power is a crucial response to the necessarily large and powerful economic actors of modern capitalism.³⁵

In this scenario, the self-regulatory process remains private and retains its power to restrain competition, but that power is distributed more evenly across stakeholders. Since different stakeholders have varying (and often inadequate) abilities to organize, some scholars have suggested that government should help groups organize and mobilize, thereby intervening in the process not by manipulating the actual outcomes, but by ensuring that the process itself is procedurally fair. Hemenway, for example, has suggested this approach for standards-development, arguing that governments could help organize consumers and even aid in creating a consumer-dominated standards organization.³⁶ As some scholars have pointed out, the mere willingness of government to intervene can encourage self-regulators to include multiple stakeholders.³⁷

The idea of adjusting representation is at the center of Cohen and Rogers' notion of associative democracy, in which various characteristics of the "associative environment" are manipulated, including the accountability of group leaders, the extent of group membership, and the distribution of power across groups.³⁸ At a minimum, as Galbraith argues, government should not mistakenly apply anti-trust laws to cooperative efforts that are basically attempts to balance other concentrations of private power.

The effectiveness of this approach obviously hinges on the scope and depth of stakeholder mobilization, and the ability of the government to redress any inadequacies of mobilization. It depends, too, on the maintenance of reasonably speedy and efficacious

³⁵ John Kenneth Galbraith, *American Capitalism: The Concept of Countervailing Power*, Boston, MA: Houghton Mifflin Company, 1956.

³⁶ Hemenway, 1975, p. 91.

³⁷ Ayres and Braithwaite, 1992.

³⁸ Cohen and Rogers, 1992, p. 428-430.

decision-making, an often critical problem for democratically-inclined organizations. In some cases, ensuring that an organization is both effective and free of domination by a particular group might entail *limiting* participation to create an organization that is relatively autonomous from *all* special interests; an example might be the Financial Accounting Standards Board (FASB), an organization which has just seven members, all of whom must sever completely their ties with firms or other organizations.³⁹ Cohen and Rogers also note that one objection to associative democracy is that it may be very difficult to modify patterns of group organization and behavior. Their response, however, is that groups are ultimately artifactual, "a product of opportunities and incentives that are induced by the structure of political institutions and the substance of political choices and so can be changed through public policy."⁴⁰

In any case, the advantages and disadvantages of each of the above approaches suggest that the solution applied to a specific case of self-regulation should ideally depend on the particulars of that case. As some observers have argued, an optimal solution might even involve a mix of approaches, tailored to the characteristics of the activity being regulated and the capacities of the various stakeholders. Grindley argues that standards-development should combine competitive processes and collective decision-making.⁴¹ Ayres and Braithwaite make a more general plea for "responsive regulation" that tailors degrees and forms of regulation to different industry structures.⁴²

The Politics of Self-Regulation

Actual arrangements of self-regulation will obviously depend on several additional contingencies, including such factors as interest-group dynamics, policy traditions and institutions, and prevailing beliefs about markets, competition, and the role of the state. The acceptance of self-regulation in a given sector and the corresponding modes of oversight will depend, in short, on the politics of self-regulation, an issue that takes one into the fields of political economy and public policy, and particularly the sub-field of regulatory politics.

³⁹ Paul Pacter, "Financial Accounting Standards Board," in Michael Chatfield and Richard Vangermeersch (Editors), *The History of Accounting: An International Encyclopedia*, New York: Garland, 1996.

⁴⁰ Cohen and Rogers, 1992, p. 427.

⁴¹ Peter Grindley, *Standards Strategy and Policy: Cases and Stories*, Oxford, England: Oxford University Press, 1995, p. 70.

⁴² Ayres and Braithwaite, 1992.

Approaches to regulatory politics have ranged from spare, deductive models based on rational self-interest to more complex conceptualizations incorporating an array of explanatory variables. The public choice theories that rose to prominence in the 1970's applied the methodology of neoclassical economics to government policy-making, showing how the assumption of rational self-interested behavior on the part of both the regulators and the regulated led to conclusions that defied idealistic visions of regulatory policy. Stigler's famous analysis of 1971 argued that regulatory policy tended to be captured by the regulated producers themselves, and by limiting entry into markets, ultimately ended up serving the interests of those producers rather than the interests of the broader public.⁴³ From this perspective, the governmental approval of self-regulation, and any attendant modes of oversight, are likely to reflect the industry's preferences and ability to achieve certain collective goals with less help from a government agency than the goal of limiting entry normally requires.

During the 1980's, however, several studies of regulation and economic policy-making argued that both the methodology of public choice theory and its chief conclusions were inadequate. Seeking to explain such phenomena as the wave of successful deregulation that took place in the late 1970's and the emergence of substantial environmental regulation, these studies suggested that the politics of regulation were considerably more complex than a strict economic analysis allowed. Additional factors and dynamics that had to be incorporated into the analysis included the leadership and initiative of political entrepreneurs,⁴⁴ the role of ideas,⁴⁵ the effects of various institutional structures,⁴⁶ and even the influence of altruism and public spiritedness.⁴⁷ Many of these studies were considerably more optimistic about the governmental ability to achieve effective and equitable regulatory policies; capture was still a possibility under certain circumstances, but certainly not an inevitable feature of government policy.

Another important implication of these studies, however, is that the dynamics of regulatory policy are likely to vary from case to case.⁴⁸ Different factors could be

⁴³ Stigler, 1971.

⁴⁴ James Q. Wilson (Editor), *The Politics of Regulation*, New York: Basic Books, 1980. p. 370.

⁴⁵ Martha Derthick and Paul J. Quirk, *The Politics of Deregulation*, Washington, D.C.: The Brookings Institution, 1985; Wilson, 1980, p. 393.

⁴⁶ Peter A. Hall, *Governing the Economy: The Politics of State Intervention in Britain and France*, Cambridge: Polity Press, 1986; Steven Kelman, *Making Public Policy: A Hopeful View of American Government*, New York: Basic Books, 1987.

⁴⁷ Kelman, 1987.

operative in different cases, and a full understanding of a given case requires a detailed case analysis. Notably, too, different nations are likely to handle in different ways the issues raised by self-regulation. This fact will become important as we turn to the international arena to examine transnational manifestations of self-regulation.

⁴⁸ Wilson, 1980, p. 393.

CHAPTER THREE

SELF-REGULATION IN THE INTERNATIONAL ARENA:

AN EMPIRICAL OVERVIEW

The existence of self-regulatory arrangements in the domestic realm raises an intriguing question: Does the increasing globalization of economic and social activities mean that self-regulatory arrangements could become more common in the international context as well? The growth of interdependence and interpenetration among national economies should after all transnationalize domestic rationales for self-regulation. In addition, certain features of the international system, such as multiple currencies, could necessitate new forms of self-regulation. For some kinds of governance, the motivation to establish such arrangements might even be stronger in the international context. Because government activity in the international arena faces the difficult challenge of achieving cooperation among multiple sovereign nations, impatient private groups could conceivably go ahead with their own initiatives.

International manifestations of self-regulation might be referred to as “private regimes,” in that they represent non-governmental versions of the more well-known phenomenon of intergovernmental regimes. As conceived in Chapter Two, self-regulation is a fairly institutionalized form of governance, so the transnational manifestations may be correspondingly more institutionalized than the concept of regime requires. But this more visible form of private governance is as good as any to begin investigating the phenomenon. This chapter casts a wide net across the global economy to identify examples of such private regimes, including more nascent initiatives as well as established institutions already in operation. The goal is to begin weighing the extent to which private regimes do in fact exist, and to present an empirical overview of the phenomenon.

What kind of private regimes can we identify in the global economy? As in the domestic realm, building a comprehensive catalogue of private regimes would be an enormous task because such regimes could emerge in a great variety of arenas, on scales ranging from small and relatively insignificant to vast and crucially important. Moreover, even regimes that aspire to be open and legal may seek a low profile, depending on the nature of their activities. Nevertheless, a search of the business and trade literature turns up numerous potential examples, representing cross-national versions of most of the major forms of self-regulation that we identified in Chapter Two.

Developing Standards

The establishment of widely accepted international standards is critically important for a globalized economy. In order for cross-border communications, trade, and investment to flourish, a variety of compatibilities must be arranged. Telecommunications systems must be able to connect to one another, for example, and the products manufactured in one country should be compatible with complementary products in other countries. Preferably, too, standards of quality and safety should be harmonized so that they do not become barriers to trade.

Harmonized standards are so important, in fact, that governments have played a major role in developing such standards, establishing several intergovernmental organizations for that purpose. Some of the oldest and most successful international organizations, such as the International Telecommunications Union (ITU) and the Universal Postal Union (UPU), are intergovernmental bodies that develop standards, and perform other coordinating functions, to enable various international interactions. In many areas of international standardization, governmental involvement and expertise have been of paramount importance.⁴⁹

At the same time, the expertise required to develop appropriate and successful standards is substantial, and growing more so with accelerating technological advancement. Consequently, intergovernmental standards bodies rely extensively on the active participation of private groups. In the ITU, for example, a great deal of work is done by the so-called "Recognized Private Operating Agencies" (RPOA's), which are the large telecommunications firms.⁵⁰ Since it is usually the private sector that applies standards, it is only logical that it should be closely involved.

The importance of private sector involvement has meant that some standards regimes have emerged as non-governmental bodies, distinct from those that are officially intergovernmental. Like most privately-run domestic standards groups, these bodies produce voluntary standards. Though governments sometimes incorporate or adapt the standards as official and mandatory regulations, the bodies themselves are not treaty organizations producing legally binding agreements. Moreover, though governments often participate in their activities or cooperate closely with them, governments are not necessarily the decisive players, either practically or formally.

Non-governmental international standards groups are active across a wide range of sectors. The two most important ones are the International Organization for Standardization

⁴⁹ Craig N. Murphy, *Industrial Organization and Industrial Change: Global Governance since 1850*, New York: Oxford University Press, 1994.

⁵⁰ James G. Savage, *The Politics of International Telecommunications Regulation*, Boulder, CO: Westview Press, 1989.

(ISO) and its partner, the International Electrotechnical Commission (IEC). Based in Geneva, these two organizations develop standards in virtually every field except telecommunications; some ISO standards include paper sizes, film speed codes, and freight container sizes.⁵¹ Their voting members are national standards bodies, one from each country, but the actual process of standards-development involves a vast number of experts and interested parties organized into a complex, decentralized system of committees, subcommittees, and working groups. The standards produced by ISO and IEC have contributed enormously to the global expansion of trade and investment, and they are becoming more and more important as technical barriers to trade (in other words, incompatible standards) succeed tariffs as the main obstacles to expanded trade.

Another non-governmental standards group that is becoming more and more prominent is the International Accounting Standards Committee (IASC). Founded in 1973 by professional accountancy groups in nine countries, its members now include 110 accountancy bodies in 82 countries.⁵² The IASC's role is currently expanding to address another imperative of a globalized economy, the need for harmonized accounting standards. Such standards are important for companies that have investors in multiple capital markets and want to avoid having to prepare their accounts according to different rules. They are also important for the general credibility of accounting, which is threatened if different standards repeatedly yield dramatically different results for the same company.

Whereas ISO, IEC, and IASC were founded as international bodies, some groups have evolved into international organizations from origins that were domestic. A prominent example is the American Society of Mechanical Engineers (ASME), a professional society which has been developing standards since its establishment in 1880. ASME recently changed its name to ASME International, emphasizing that it has members all over the world, and that its standards have been used in many countries besides the U.S. for decades. ASME's Boiler and Pressure Code, first published in 1914, is a famous example, but many other ASME codes are implemented worldwide. ASME representatives argue that these codes should be recognized as "International Standards" on a par with those developed by ISO and IEC.⁵³

Establishing Codes of Conduct

Private regimes focused on industry behavior appear to be a more recent phenomenon than other kinds of standards regimes. One obvious reason is that such codes

⁵¹ ISO Website, at <http://www.iso.ch/welcome.html>

⁵² Dieter Ordelheide and KPGM (Editors), TRANSAIC: Transnational Accounting, New York: Macmillan Press, Volume 2, 1995, p. 1667.

⁵³ June Ling, ASME Testimony before Science Committee Subcommittee on Technology, United States House of Representatives, June 4, 1996.

are often designed to promote regulatory relief, a function that used to be largely unnecessary in the international context. For a long time, government regulation was generally a national-level affair because the problems prompting regulation were mostly national-level problems. Though international treaties on natural resources and environment, for instance, can be traced back to the early part of this century, such agreements expanded greatly in number and scope after the 1972 United Nations Conference on the Human Environment (UNCHE) in Stockholm.⁵⁴ It was also around this time that the operations of multinational corporations emerged as an important concern.

But achieving intergovernmental agreements on regulatory problems is often difficult. The attempt to develop international codes for multinational corporations is a case in point: The considerable efforts that began in the late 1960's yielded no binding agreements, forcing governments to resort to voluntary codes of conduct. As Kline put it in 1985, such codes "have been seized upon by political authorities as a mechanism that can be used to address concerns about international business dealings in areas where binding international rules would require too great a compromise of national sovereignty."⁵⁵ In this first attempt at code development, however, much of the initiative was taken by governmental organizations and non-profit groups, while industry played more of a reactive and defensive role. In her analysis of the WHO/UNICEF code on the marketing of breast-milk substitutes, Sikkink highlights the critical role of the sponsoring organizations and transnational activist groups.⁵⁶

The latest wave of concern about the global impact of business has focused on the issue of environmental degradation as a central problem. In this more recent round of international response, industries have been more proactive players, producing codes of their own that are getting serious attention. These codes represent an attempt to establish the viability of self-regulatory alternatives to the concerted governmental regulation that could emerge from the recent wave of intergovernmental conferences. Though the impact of these codes is still unclear, some are emerging as more potent than others.

One of the more compelling codes was developed by the Chemical Manufacturing Association (CMA) in the wake of such disasters as the Bhopal accident in 1984. The chemical industry was extremely concerned about its public image and the possibility of

⁵⁴ Peter Haas, with Jan Sundgren, "Evolving International Environmental Law: Changing Practices of National Sovereignty," in Nazli Choucri (Editor), *Global Accord: Environmental Challenges and International Responses*, Cambridge, MA: MIT Press, 1993.

⁵⁵ John M. Kline, *International Codes and Multinational Business: Setting Guidelines for International Business Operations*, Westport, CT: Quorum, 1985, p. 10.

⁵⁶ Kathryn Sikkink, "Codes of conduct for transnational corporations: the case of the WHO/UNICEF code," *International Organization*, 40 (4), Autumn 1986, p. 840.

increased regulation. Since surveys showed that the public did not really distinguish among different companies, industry leaders decided that an industry-wide code was needed.⁵⁷ The result was Responsible Care, a code which requires various efforts by companies to improve pollution prevention, emergency response, community awareness, and the like. The code is mandatory for CMA members, and the CMA may revoke the membership of companies that repeatedly fail to conform. While the CMA is chiefly North American, it has numerous members overseas, and Responsible Care (or versions of it) has been adopted in many countries.

A more broadly international environmental code is being developed by ISO, an organization already discussed above. Since the 1980's, ISO has started to develop management standards specifying procedural principles and practices that are supposed to help a company achieve important goals. The most recent set of ISO management standards goes beyond ISO's usual concerns to address the broader public interest in companies' environmental policies. Though this set of standards, known as ISO 14000, stops short of specifying actual performance goals, it nevertheless requires that a company establish an elaborate system of environmental policy-development and control. Like ISO's other standards, ISO 14000 standards are voluntary, but companies can be certified as conforming to them, and the perception is growing that certification will become increasingly important in the global marketplace.

Not all private regimes directed at industry behavior are designed mainly to avoid government regulation or address broader public concerns. Like the rules and regulations enforced by futures and stock exchanges, some of the norms and codes promulgated by transnational regimes are intended partly to protect the industry from the direct consequences of misbehavior by its own members. As Haufler demonstrates in her recent book, the private regime in international insurance is designed to do just that, establishing norms for what risks are insurable.⁵⁸ In addition, codes of behavior can be designed to reduce transaction costs. ISO's first set of management standards, known as ISO 9000, focuses on quality goals, providing assurances that a supplier will deliver products of consistent quality.

Managing Price and Supply

As we have seen, one of the strongest forms of self-regulation is the control and management of market fundamentals such as price and output. In the international arena, such management occurs in the form of international cartels, historically a far from

⁵⁷ Jennifer Nash and John Ehrenfeld, "Code Green: Business Adopts Voluntary Environmental Standards," *Environment*, Volume 38, Number 1, January/February 1996, p. 19.

⁵⁸ Virginia Haufler, *Dangerous Commerce: Insurance and the Management of International Risk*, Ithaca, New York: Cornell University Press, 1997.

unfamiliar phenomenon. Many international cartels have been government-operated: Commodity agreements such as OPEC are well-known examples. But historically, too, private cartels have operated in many sectors, and before the Second World War, their activities were frequently tolerated and even supported by governments. After the war, and in the wake of several studies that publicized and criticized the extensive cartelization of the 1930's,⁵⁹ cartels were officially declared harmful and their illegality established in many countries. Though covert collusion by private firms is still rampant according to some observers,⁶⁰ open and legal private cartels have since been rarer.

Nevertheless, some of the oldest examples of international self-regulation involve precisely this kind of extensive restraint on the market. The liner sector of international shipping, for example, has been managed for over a hundred years by a complex system of cartels known as liner conferences. These cartels have controlled rates, schedules, and other aspects of the trade, and they have done so with anti-trust exemptions from virtually all governments. Though their power and control have varied over time and across different ocean trades, these cartels have been a major force in international shipping, and remain important, if controversial, today.

The commercial aspects of international aviation were for a long time regulated by a regime that also included a significant self-regulatory component: While traffic rights between nations were negotiated by governments, fares and services were regulated by the International Air Transport Association (IATA), an airlines' organization founded in 1945. Until the 1980's or so, IATA operated much like liner conferences in shipping, and like conferences, it was repeatedly granted anti-trust immunity even as challenges were leveled against its cartel-like aspects. More recently, the expansion of pro-competitive policies by governments has forced IATA to shift its emphasis from price-fixing to other activities, though it still enjoys antitrust exemption from most governments and continues consultations on fares.

An old and enduring international cartel is the famous De Beers diamond cartel, the most powerful cartel in the world. Founded by Cecil Rhodes in the late 1800's, De Beers manages an elaborate system of global distribution which precisely controls the supplies and prices of diamonds. Though De Beers mines in South Africa account for less than ten percent of the world's production, the company has been able to hold the cartel together with coercive measures that are accepted because the other cartel members know that the

⁵⁹ Wendell Berge, *Cartels: Challenge to a Free World*, Washington, D.C.: Public Affairs, 1946; George W. Stocking and Myron Watkins, *Cartels or Competition?*, New York: Twentieth Century Fund, 1948.

⁶⁰ Kurt Rudolf Mirow and Harry Maurer, *Webs of Power: International Cartels and the World Economy*, Boston: Houghton Mifflin Company, 1982; Heinrich Kronstein, *The Law of International Cartels*, Ithaca, NY: Cornell University Press, 1973.

cartel is essential for their prosperity.⁶¹ Worries in recent years that Russia might bring down the cartel have gradually diminished as it has become clear that Russia will continue to cooperate with De Beers. Notably, De Beers loaned the Russians \$1 billion to alleviate their hard currency shortage in 1990, an amount that exceeded that of any country.⁶²

Emergent Private Regimes

In addition to the private regimes that are already established and functioning in the global economy, self-regulatory arrangements have been proposed in other areas of global commerce that are seeing an increasing need for regulation. In many of these areas, governments are taking the initiative, and it is clear that coordinated governmental regulation will be crucial. Alongside these governmental efforts, however, it is possible that more privately-run initiatives will play a complementary role. Governments themselves may even encourage the private sector to address certain problems.

Bank Settlement Risk

One area that has seen a mix of proposals is international banking and finance, where several problems have become more acute as the volume of international financial transactions has mushroomed. One of these problems is settlement risk, which is the risk that only one half of a transaction is completed, leaving one of the parties in the lurch. This risk can arise from the fact that lags easily emerge between the two halves of a cross-border transaction, creating the possibility that one party fails to deliver. Settlement risk can also be caused by liquidity problems due to infrastructure that is insufficient for the growing volume of transactions.

But settlement risk is not only a problem for the individual banks exposed to it. It also entails a systemic problem: The failure of a large bank or several smaller banks could trigger a chain reaction of failures that paralyzes the global financial system. This kind of crisis has already come close to occurring several times, when large international banks such as BCCI and Barings have gone under. The possibility of such a crisis is obviously an important concern of central banks, but because they are worried about the problem of moral hazard, they have been reluctant to commit openly to bailing out banks in the event of failure. So even as the Group of Ten (G-10) central banks implement measures such as extending the operating hours of national payments systems to reduce lags, they are also asking the banks themselves to come up with supplementary solutions.⁶³

⁶¹ Deborah L. Spar, *The Cooperative Edge: The Internal Politics of International Cartels*, Ithaca, New York: Cornell University Press, 1994, Chapter Two.

⁶² Kenneth Gooding, "New setting for old partners," *Financial Times*, February 11, 1997, p. 17.

⁶³ Bank for International Settlements, "Settlement Risk in Foreign Exchange Transactions," Report prepared by the Committee on Payment and Settlement Systems of

The banks are responding to the problem of settlement risk with a variety of measures. Though some of these measures involve bilateral agreements between banks or even just steps to be taken by banks individually, others require more regime-like arrangements involving a critical mass of large banks. The so-called Group of Twenty international banks is considering the possibility of setting up a "global clearing bank" that would constitute a private link among national payments systems. This institution would guarantee "finality of payment," giving parties immediate use of received funds, and thereby reducing the lag between the two halves of a transaction.

Another possibility is some kind of multilateral netting arrangement, which would reduce the size and number of payments by netting the amounts owed through a clearinghouse. A few such systems have been established, or are in the planning stages, but according to observers, the existence of several competing systems would be less than optimal. As an analyst at the International Monetary Fund puts it, the "degree of risk reduction is a function of the number of linked counterparts and is therefore greatest when all the largest participants join the same system."⁶⁴

The same analyst notes that this dilemma extends to the relationship between a clearing bank and a netting arrangement. Though the two are in some ways complementary, since one reduces the number and size of payments and the other ensures their finality, both "require scarce funds from banks' foreign exchange trading businesses."⁶⁵ These are difficult dilemmas, but the urgency of resolving them will presumably spur serious efforts on the part of the private sector. In March of 1996, the G-10 central banks gave the private sector two years to resolve the problem, or face a solution imposed by the central banks.⁶⁶

The Internet and the World Wide Web

Both the Internet and the World Wide Web have organizations that develop standards and protocols. Though these organizations are certainly established and functioning, they are continually being challenged by the fast pace of technological change in the computer industry and the battles among big vendors competing for domination of the industry. In addition, they are struggling to reconcile their missions

the central banks of the Group of Ten countries, March 1996.

⁶⁴ Laura E. Kodres, "Foreign exchange markets: Structure and systemic risks," *Finance and Development*, Volume 33, Number 4, December 1996, pp. 22-25.

⁶⁵ Kodres, *Finance and Development*, December 1996.

⁶⁶ David Shirreff, "The fear that dares to speak its name," *Euromoney*, Issue 329, September 1996, pp. 66-72.

with the basic culture of the Internet and the Web, a culture that emphasizes maximum flexibility, freedom, and decentralization.

The main standards body for the Internet is the Internet Engineering Task Force (IETF), which describes itself as a "large open international community of network designers, operators, vendors, and researchers concerned with the evolution of the Internet architecture and the smooth operation of the Internet."⁶⁷ Like other standards bodies, the IETF develops standards through working groups specializing in different areas of concern such as the routing of messages, network management, or security and privacy. The work is carried on through mailing lists and tri-annual meetings. One recently developed standard is a redesign of the Internet Protocol, the language used to shuttle messages across the network. Known as IPng (Internet Protocol, next generation) or IPv6 (IP, version 6), the new protocol greatly increases the space for Internet addresses, easing a problem that might have restricted the growth of the Internet. It also provides better security, and more support for high-bandwidth applications.⁶⁸

The main standards group for the World Wide Web is the World Wide Web Consortium (W3C). Headquartered at MIT, the W3C consists of over 125 companies who try to achieve consensus on standards for the access and manipulation of information on the Web. The goal is to maintain compatibility between the different software programs used on the Web, so that a particular browser, for example, can access any Web page. The problem faced by the Consortium is a classic problem of private standards-setting: If one or a few companies dominate an industry and its technological advancement, it is often difficult to get full cooperation from the dominant company because it prefers to set the standards itself. This problem emerged from IBM's domination of the computer industry early in its history,⁶⁹ and it has now emerged from Netscape's dominance of the market for Web software.⁷⁰

Private Regimes: A Reality?

While this brief empirical overview leaves the full scope and specific characteristics of self-regulation in the global economy unclear, it does establish the existence of several different kinds of private regimes. Driven by the same motives that drive domestic initiatives to self-regulate, non-governmental efforts to develop standards, control conduct,

⁶⁷ IETF Home Page, Website at <http://www.ietf.cnri.reston.va.us/home.html>

⁶⁸ Emily Leinfuss, "Adapt or die: Internet standards may always be in flux," *Infoworld*, 17(45), November 6, 1996, pp. 61-66.

⁶⁹ Brock, 1975.

⁷⁰ Alessandra Bianchi, "Should Netscape control the Web?" *Inc.*, 18(17) Technology Supplement, 1996, pp. 60-70.

and manage price and supply operate in multiple sectors and issue-areas (see Table II-1). At the same time, the overview hints at dimensions of variation that could be important. Not all private regimes are getting stronger, for example, and some are clearly weakening. Moreover, while some are exclusively private efforts, others appear to have considerable government involvement. Indeed, there seem to be variations in both institutional structure and viability that require further investigation.

Table II-1**Examples of Private and Quasi-Private Regimes**

Issue-Area	Regime	Date of Origin	Focus of Activity
Liner shipping	Cartels of shipping lines ("conferences") organized by trade routes.	Late 1800's	Rates, schedules, and other terms of service.
Aviation	International Aviation Transportation Association (IATA), an organization of airlines.	1945	Fares and schedules, coordination of other aspects of service.
Diamonds	Global cartel of diamond miners and distributors, managed by De Beers of South Africa.	Late 1800's	Prices and supply of diamonds.
Industrial standards	International Organization for Standardization (ISO), an organization of national standards bodies, one from each nation.	1946	Voluntary standards in wide range of sectors.
Accounting standards	International Accounting Standards Committee (IASC), an organization of national accounting bodies.	1973	Voluntary international accounting standards.
Industrial standards	ASME International, a trade association with individual engineers as members.	Late 1800's	Voluntary standards for mechanical engineering.
The Internet	Internet Engineering Task Force (IETF).	1980's	Standards and protocols for the maintenance of the Internet.
Insurance	Cooperation among major international insurers led by Lloyds of London.	1800's	Norms and rules for insurability of international risks.

CHAPTER FOUR

THEORIES OF INTERNATIONAL RELATIONS

The diverse array of self-regulatory arrangements that cross national borders raises several basic questions. First, of course, we need to know more about how private regimes work, their internal dynamics: How do they make and enforce decisions? Second, however, there is the question of their broader political context: Does the issue of accountability emerge in the same way as it does in the domestic arena? In general, how do governments and other stakeholders respond to private regimes? These questions are likely to be complicated in the international context by a variety of factors, including the multi-jurisdictional nature of private regimes, the competitive dynamics among nations, and the vagaries of transnational mobilization.

What, then, is the current state of knowledge? What do the major theoretical approaches to international relations tell us about private regimes and the issues they raise? Many approaches have yet to focus closely on the phenomenon of private regimes. In some cases, such as that of realism, the foundational assumptions of the approach have tended to keep the focus of study on states and state-power. In other cases, such as that of the transnationalist perspectives now coming back into vogue, the approach is only just beginning to develop systematic theories about non-state actors and their activities. At this writing, only two books have been published that raise the issue of private regimes as a central concern: Tony Porter's 1993 work on global finance and Virginia Haufler's 1997 work on international insurance.⁷¹

Many approaches, however, highlight factors that must be added to the analysis of self-regulation when it is explored in the international context. They alert us to potentially important issues, and provide guidelines for examining those issues. In this chapter, we review the literature on international relations, pulling out the relevant insights, and identifying the gaps that require additional research. We begin with the most state-centric approaches, and finish with the few (and very recent) efforts to turn the spotlight squarely

⁷¹ Tony Porter, *States, Markets, and Regimes in Global Finance*, New York: St. Martin's Press, 1993; Haufler, 1997.

on private regimes. At the end of the chapter, I present a framework for analyzing private regimes which is less a theoretical model than a statement of basic assumptions upon which an eclectic theory or explanation might be built.

Realist Approaches

Realist approaches focus on the state as the basic unit of analysis, and on power as the driving force in the international system. They remind us of powerful forces likely to shape states' responses to private regimes, potentially impeding or steering the development of such regimes. These forces include the importance of various security needs to states, and their concern with relative national strength, economic as well as military. In short, realist approaches alert us to the competitive dynamics that could affect the way governments calculate the costs and benefits of private regimes.

Governments' policies on cartels, for example, could reflect precisely such competitive dynamics, differentiating between domestic cartels and more international ones. Unlike the effects of domestic cartels, the effects of international cartels are spread across multiple nations, raising the possibility that the benefits might accrue disproportionately to some nations while the costs are borne mainly by others. In the international arena, then, states' attitudes towards cartels may actually be more lenient than in the domestic sphere because such cartels can serve nationalistic goals; depending on its makeup, an international cartel can be an instrument of mercantilism.

An example of this effect is the South African government's toleration of the DeBeers diamond cartel. Though DeBeers is entirely private and was even an outspoken critic of the government's apartheid policies, its enormous economic importance for South Africa has allowed it to operate as a monopoly without interference.⁷² Similarly, it is not surprising that the recent merger of Boeing and McDonnell-Douglas faced considerably more governmental opposition in Europe than in the traditionally pro-competitive United States. In fact, despite the apparently widespread consensus among scholars and policy-makers alike that cartels are harmful, many countries grant anti-trust exemptions to a particular type of cartel, the export cartel. In the U.S., for example, such cartels are allowed to operate under the Export Trade Associations Act of 1918 (also known as the Webb-Pomerene Act) as long as they do not restrain trade within the United States.

Though standards organizations prefer to portray their work as technical and non-political, standards are not always neutral matters of coordination, and competitive dynamics have a way of intruding in this arena as well. Establishing standards for

⁷² Spar, 1994, p. 77.

equipment, for instance, can favor some manufacturers over others, sometimes to the point where the benefits of standardized equipment are overwhelmed by the costs to manufacturers in some countries, causing them to refuse to adopt common standards. Focussing on how the advantages and disadvantages of compatibility were evaluated in France, Crane has shown how a non-cooperative result obtained during the struggle among different color-television systems.⁷³ Zacher's recent analysis of telecommunications standards reveals that while states and industries usually reach agreement on interconnections between commercial enterprises, agreement on consumer electronic equipment is difficult.⁷⁴

Crane also points to issues of national prestige and security which can compound economic sources of disagreement on standards. All these governmental concerns underlie the involvement of governments in many international standards efforts. Crane deplors this intrusion of politics, and recommends the establishment of international standards organizations that are independent of government support and prohibit the participation of politicians. Such measures, she suggests, would make the standards-development process more objective, technical, and independent of national interests.⁷⁵

From a realist perspective, of course, governments are unlikely to allow any international activity to become independent of national interest considerations. In fact, such considerations underlie the strong salience in realist thought of sovereignty and its prerogatives, which include the state's traditionally tight control over its external affairs. Private regimes pose an intrinsic challenge to these traditional notions of sovereignty and state control, and like the competitive dynamics among nations, this basic tension must be kept in mind when analyzing states' responses to such regimes. States may be unwilling to tolerate private regimes at all if they regulate important activities, or they may scrutinize them very closely. But precisely because the fundamental focus of realism precludes the idea that private regimes could have any real significance, a purely realist approach would circumscribe our analysis too much.

⁷³ Rhonda J. Crane, *The Politics of International Standards: France and the Color TV War*, Norwood, NJ: ALEX Publishing Corporation, 1979.

⁷⁴ Mark W. Zacher with Brent A. Sutton, *Governing Global Networks: International Regimes for Transportation and Communications*, Cambridge, England: Cambridge University Press, 1996, p. 153.

⁷⁵ Crane, 1979, p. 92.

Liberal Approaches

Liberal approaches to international politics relax the power-political logic of realism. First, they incorporate broader conceptions of state interests to explore the possibility of international cooperation in the absence of hegemony. Regime theorists such as Keohane focus on the collective benefits that regimes can provide, and on how such regimes can be created and maintained.⁷⁶ Like realism, though, much of the early work on regimes takes the state as the fundamental unit of analysis: It applies game-theoretic tools that often require the analysis to be simplified into a state-centric model; moreover, as Zacher points out in a recent study, one important mutual interest of states is to secure and respect the political autonomy of the state.⁷⁷

A widespread criticism of regime theory has in fact focussed on the assumption of a unitary state. Strange, Milner, and Haggard and Simmons among others have pointed out that growing interdependence blurs the distinction between domestic and international politics, and that analyses of international cooperation need to integrate domestic factors.⁷⁸ This criticism has spurred the development of approaches that attempt to combine theories of internal politics with international relations theories. Spar, for example, has used the model of the commodity cartel to explore the way in which the internal characteristics of actors affect the cooperative process,⁷⁹ while other scholars are developing interactive models based on Putnam's idea of a two-level game. A prominent example of the latter is the 1993 volume, *Double-Edged Diplomacy*, edited by Evans, Jacobson, and Putnam.⁸⁰

Though these approaches relax the assumption of a unitary state, they are still fundamentally state-centric: In the two-level game, for example, the statesman is the key

⁷⁶ Robert Keohane, *After Hegemony*, Princeton: Princeton University Press, 1984.

⁷⁷ Zacher, 1996, p. 28.

⁷⁸ Susan Strange, "Cave! hic dragones: a critique of regime analysis," *International Organization*, 36 (2) Spring 1982; Helen Milner, "International Theories of Cooperation Among Nations: Strengths and Weaknesses," *World Politics*, Vol. 44, April 1992; Stephan Haggard and Beth Simmons, "Theories of international regimes," *International Organization*, Volume 41, 3, Summer 1987.

⁷⁹ Spar, 1994.

⁸⁰ Peter Evans, Harold Jacobson, and Robert Putnam (Editors), *Double-Edged Diplomacy: International Bargaining and Domestic Politics*, Berkeley: University of California Press, 1993.

player, serving as the interface between the domestic and international arenas; transnational processes are not systematically addressed. But like realism, these theories illuminate important processes bearing on the operation and regulation of private regimes, including the formation of state preferences and the dynamics of bargaining and cooperative behavior among states.

These processes may open (or close) niches for private regimes, and influence the way in which such regimes are supervised or controlled by states. Successful intergovernmental cooperation on competition policy, for example, could mitigate the mercantilistic element in national cartel policies, ultimately rendering cartels as a type of private regime more rare. The opposite effect could occur in the area of standardization, where increasing commitment to collective benefits might strengthen private efforts. Viewing the problem of telecommunications standards from a vantage point fifteen years later than Crane's, Zacher notes that protectionist approaches and tight government control may be giving way to a greater willingness to promote commerce and loosen control.⁸¹ Such a liberal shift in how governments view their interests and their role in the global economy could strengthen the role of non-governmental standards bodies, and conceivably some other kinds of private regimes as well.

Transnationalism and Global Politics

Notably, the studies in Double-Edged Diplomacy repeatedly mention the issue of transnational relations, and Evans' concluding chapter poses several questions about the interaction of private transnational alliances and two-level games: How do such alliances affect intergovernmental negotiations, and vice-versa, do intergovernmental agreements stimulate or dampen the creation of private alliances? Do governments protect transnational interests or domestic interests?⁸² These questions bring in a growing body of literature that focuses explicitly on the role of non-state actors in the international arena, and their relationship to states and inter-state processes. This literature echoes certain tenets of neofunctionalist theories, but falls most neatly into the more recent "global politics" conception of scholars such as Mansbach, Vasquez, and Rosenau. These scholars emphasize the increasing pluralism of international politics.⁸³

⁸¹ Zacher, 1996, p. 160.

⁸² Evans, in Evans, Jacobson, and Putnam, 1993, p. 419.

⁸³ Richard Mansbach and John Vasquez, *In Search of Theory: A New Paradigm for Global Politics*, New York: Columbia University Press, 1981; James Rosenau, "Governance in the Twenty-First Century," *Global Governance*, Vol. 1, No. 1, Winter 1995, p. 13.

Studies of non-governmental organizations (NGO's), for example, are exploring the participation of various kinds of groups in international organizations and conferences, and a recent revival of the transnationalist approaches of the 1970's is renewing interest in how transnational actors are able to influence states.⁸⁴ These studies are yielding clues about the emergence, operations, and impacts of non-state actors. Several factors seem to contribute, for example, to their ability to influence outcomes, including the expertise they can contribute,⁸⁵ their position in global policy networks,⁸⁶ and the institutional structures of the politics and organizations they seek to influence.⁸⁷ These insights about the influence of non-state actors are directly relevant to our understanding of private regimes and their regulation, whether it be based on competition, state supervision, or countervailing power. The difficulties of transnational organization for some types of actors suggest, for example, that the latter mode may often be controversial.

Global Governance and Private Regimes

The most recent variants of these "mixed-actor" approaches propose concepts of "global civil society" and "global governance," in which non-state actors are no longer analyzed mainly with reference to the state, but are also seen as having governance functions independently of states. Paul Wapner suggests, for instance, that non-state actors such as transnational environmental groups exert a new form of governance by manipulating "non-state levers of power," including protest, research, exposes, and joint consultations.⁸⁸ This conception of private governance approaches the notion of a private regime, sharing the idea of private actors making their own efforts to achieve collective

⁸⁴ Chiang Pei-Heng, *Non-governmental Organizations at the United Nations*, New York: Praeger Publishers, 1981; Sikkink, 1986; M.J. Peterson, "Transnational Activity, International Society and World Politics," *Millennium*, Vol. 21, No. 3, 1992; Andrew Hurrell and Benedict Kingsbury, *The International Politics of the Environment*, New York: Oxford University Press, 1992; Thomas Risse-Kappen (Editor), *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions*, Cambridge, England: Cambridge University Press, 1995.

⁸⁵ Sikkink, 1986.

⁸⁶ Christer Jönsson, *International Aviation and the Politics of Regime Change*, New York: St. Martin's Press, 1987.

⁸⁷ Risse-Kappen, 1995.

⁸⁸ Paul Wapner, "Politics Beyond the State: Environmental Activism and World Civic Politics," *World Politics*, Vol. 47, April 1995.

goods through the use of non-governmental forms of leverage. Meanwhile, Susan Strange hypothesizes in a recent book that power and authority are trickling away from states to various non-state groups and organizations, including private regime-like arrangements as well as organized criminal groups and international organizations.⁸⁹

The first scholar to use the term “private regime” appears to be Tony Porter in his 1993 study of financial market regimes. Porter sets out to explore “the relationship between the changing structure of international industries and the interstate institutions that seek to regulate these industries.”⁹⁰ He notes that one important but neglected aspect of industrial structure could be the social institutions set up by firms to organize their activities, or in other words, an industry’s private regimes. Then he analyzes the banking and securities sectors to determine whether interstate regimes are associated with strong or weak private regimes. His conclusion is that interstate regimes tend to emerge when private forms of regulation are weak. A robust private regime, in other words, can serve the same functions as an interstate regime, representing an alternative form of governance and order in the global economy.

In a 1995 article, Claire Cutler discusses how a “private international trade regime facilitates the mobility and expansion of capital.”⁹¹ This regime resolves international commercial disputes through private arbitration, in a kind of return to the medieval system in which merchants developed and enforced their own commercial laws. As Cutler argues, the “boundary between public and private authority structures and property rights has shifted over time, in response to changing historical, social, political, and economic forces.”⁹² Notably, the revival of private arbitration is supported by governments, who are actively participating in securing its general acceptance.

More recently, Virginia Haufler has analyzed the international insurance industry and found that this industry, too, has been regulated to a great extent by a private regime that has waxed and waned over the years.⁹³ The insurance regime has consisted of

⁸⁹ Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy*, New York: Cambridge University Press, 1996.

⁹⁰ Porter, 1993, p. 3.

⁹¹ A. Claire Cutler, “Global Capitalism and Liberal Myths: Dispute Settlement in Private International Trade Relations,” *Millenium*, 24 (3), 1995, p. 378.

⁹² Cutler, 1995, p. 377.

⁹³ Haufler, 1997.

explicitly designated norms and practices that not only protect insurers from opportunistic behavior on the part of customers, but also regulate and restrain the competitive behavior of the insurers themselves.⁹⁴ For example, the regime defines which risks are insurable and which are not, thereby controlling the temptation of firms to compete by taking on risks that would ultimately undermine the whole industry. Like Porter and Cutler, Haufler argues that scholars of international relations need to look more carefully at private forms of governance and their potentially increasing importance.

Issues for Further Research

In developing his concept of private regimes, Porter remarks that “there is no assumption that private regimes will or will not promote global collective welfare.”⁹⁵ Nevertheless, both Porter and Haufler seem to approach the phenomenon of private regimes with a traditional problematique in mind: The challenge of achieving cooperation and order in an anarchic world of sovereign states. This concern is at the core of much theorizing on international relations, especially regime theory, and it is driven by the well-known difficulties of achieving successful cooperation. As we saw in Chapter Two, the problem of cooperation is also a central concern among economists and sociologists interested in the general issue of interfirm collaboration. An important avenue for further research, then, is the issue of how firms create and manage their own regimes, and part of this agenda will be to add more cases to the still-miniscule set that has been investigated.

At the same time, an exclusive concern with the goal of cooperation is vulnerable to a criticism levied at one strand of the literature on interfirm collaboration, the so-called New Economics of Organization (NEO) literature. As Yarbrough and Yarbrough point out:

International relations theorists and NEO analysts share a tendency to regard the presence or onset of cooperation (along with accompanying rules and norms) as desirable, and the absence or breakdown as undesirable. Given the problem-solving approach to institutions offered by NEO, this conclusion is not surprising, though *it obviously hinges on adopting the perspective of a certain group.*⁹⁶ (*Emphasis added*)

⁹⁴ Haufler, 1997, p. 16.

⁹⁵ Porter, 1993, p. 32.

⁹⁶ Beth V. Yarbrough and Robert M. Yarbrough, *Cooperation and Governance in International Trade: The Strategic Organizational Approach*, Princeton, New Jersey: Princeton University Press, 1992, p. 129.

Other scholars, including Young, Spiro, and Haggard and Simmons, have made similar comments. Spar's study of cartels is illustrative: Its subject is a traditionally suspect form of cooperation, but Spar is interested in its potential as a model of successful cooperation, rather than its potential for abuse.

Since regime theory is an important springboard for Porter and Haufler, they tacitly import its traditional focus to develop a conception of interfirm cooperation that is apt to underscore the benefits of private regimes rather than explore their potentially adverse effects on other stakeholders. Though both of them raise the issue of cartels and their relationship to private regimes, they resolve this issue by suggesting that cartels do not really qualify as private regimes. Private regimes, they argue, perform a broader range of functions than cartels, functions that earn them a measure of legitimacy not granted to cartels. As Haufler puts it:

Oligopolies and cartels are considered illegitimate and in most countries are illegal under antitrust laws or competition policy. Private regimes, in contrast, may come to be viewed as an acceptable form of informal governance.⁹⁷

As our review of domestic self-regulatory arrangements and their transnational manifestations suggests, however, some cartels *have* in fact achieved acceptance as legitimate forms of private governance. Thus, the power of a cartel can be an issue for students of private regimes. Moreover, there is no reason to assume *a priori* that the broader range of functions carried out by other forms of interfirm collaboration are necessarily free from the dangers of abuse that characterize cartels. As we have seen, many self-regulatory arrangements raise concerns about their power and impact on other stakeholders, concerns that have led to a variety of corrective measures.

Because of their controversial nature, though, cartels may be particularly useful for analyzing the issue at the heart of this discussion: The problem of accountability. For Cutler and Strange, this issue is in fact a fundamental concern. Cutler sees private arbitration as a strategy for insulating commercial policy from democratic controls, a kind of conspiracy among political and economic elites to promote global capitalism. Strange sees the general diffusion of authority away from states as dangerously unbalanced and undemocratic, and she argues that what is needed is an "opposition," a check on the power of unaccountable groups.⁹⁸

⁹⁷ Haufler, 1997, p. 33.

⁹⁸ Cutler, 1995; Strange, 1996, p. 198.

Cutler and Strange strike a very different, and much darker, note than Porter and Haufler. Is the problem of private authority as severe as they suggest? Clearly, the emerging literature on private regimes faces several challenges that go beyond the immediate challenge of understanding the internal dynamics of such regimes. It must address the normative question of whether private regimes do or do not serve the public interest. More generally, it must explore the broader political context of private regimes: When and why do governments and other stakeholders accept the potential power of private regimes? What kind of controls, if any, are placed upon such regimes?

A Framework for Analyzing Private Regimes

Investigating the above issues, involving private power, stakeholder representation, and states' attitudes, entails applying an eclectic framework of analysis, a framework which draws on and combines different theories to generate hypotheses that specifically address the issue of private regimes. Thus, I examine the issue using the following suppositions drawn from both international relations theory and domestic theories of politics:

1. Many kinds of actors can potentially play a role in global affairs. States are likely to be crucial players, but various kinds of interest groups, firms, and even individuals can influence outcomes, not only through their domestic activities but also through transnational efforts. This element of my framework echoes the central assertions of transnationalist and "global politics" approaches, integral to which is the idea that even in the global arena, power can stem from many sources.
2. States are more than an aggregation of private interest groups' efforts. My focus on interest groups naturally makes the pluralist literature highly relevant to my topic, but I do not subscribe to the more extreme (and mostly older) versions of the pluralist approach that saw little else in politics besides the interaction of interest groups. Following Krasner, Putnam, and others, I see the state as an autonomous actor that responds to the input of interest groups but remains capable of formulating and pursuing its own objectives.⁹⁹

⁹⁹ Stephen Krasner, *Defending the National Interest: Raw Material, Investments and U.S. Foreign Policy*, Princeton, NJ: Princeton University Press, 1978; Robert Putnam, "Diplomacy and domestic politics: the logic of two-level games," *International Organization*, Volume 42, 3, Summer 1988.

3. States are not unitary actors. Governments are composed of various branches and agencies that may battle each over both domestic and foreign policy. This fragmentation opens up the possibility of transgovernmental alliances, and the emergence of what Slaughter calls "disaggregated sovereignty."¹⁰⁰ It also suggests the possibility of alliances between governmental agencies and foreign non-governmental groups.

4. The preferences and goals of actors are not given, nor are their strategies for achieving those goals necessarily optimal. Both goals and strategies are subject to change due to "learning" by the actors involved, a dynamic posited by scholars such as Young and Haas under the rubrics of "institutional bargaining" and "spillover."¹⁰¹ In other words, as Bennett and Sharpe put it, interests have an objective as well as a subjective component, and actors can misjudge their interests only to correct them later.¹⁰²

The framework implied by these assumptions falls most neatly into the liberal-pluralist tradition: Most of the theories which inspire my assumptions are grouped under this heading. At the same time, my approach clearly diverges from many of these theories on certain key points. It does not take the rational choice approach of much regime theory, nor does it contain the neofunctionalist focus on integration and supranationalism. If anything, I explore the possibilities for a kind of "downward functionalism" in which non-state actors take over certain governance functions.

Also, unlike many liberal-pluralist approaches, I do not assume that the mobilization and participation of various groups in policy-making is automatic or non-problematic: The unevenness and variance in participation levels and modes is a central theme in my research. As we have seen, the attempt to address difficult problems of international collaboration has often postponed a concern with the broader political and participatory aspects of collaborative efforts. The first step in considering such issues has been the recent interest in non-state participation. The second step is to analyze more closely the varying

¹⁰⁰ Anne-Marie Slaughter, Seminar at Center for International Studies, MIT, 1993.

¹⁰¹ Oran Young, "The Politics of International Regime Formation: Managing Natural Resources and the Environment", *International Organization*, Volume 43, 3, Summer 1989; Ernst Haas, *Beyond the Nation-State*, Stanford, California: Stanford University Press, 1964.

¹⁰² Douglas C. Bennett and Kenneth E. Sharpe, *Transnational Corporations Versus the State: The Political Economy of the Mexican Auto Industry*, Princeton, NJ: Princeton University Press, 1985, p. 82.

modes of participation and influence of different kinds of non-state groups, in relation to private as well as intergovernmental policy.

PART III

MANAGING PRICE AND SUPPLY: LINER CONFERENCES

Chapter Five

The Self-Regulation of Liner Shipping

One of the oldest examples of transnational self-regulation has involved the control of competition on market fundamentals: As we noted in Chapter Three, the liner sector of international shipping has been managed for over a hundred years by a complex system of cartels known as liner conferences. Though their power and control have varied over time and across different ocean trades, these cartels have been a major force in international shipping, an activity that is in turn crucial for the global economy and affects a multitude of different stakeholders.¹

This section of the dissertation, Part III, focuses more closely on the case of liner shipping. In this first of two chapters, Chapter Five, I introduce the liner sector and explain the operation of conferences. Then I preview the basic controversy that has marked their history, thereby setting the stage for Chapter Six, in which we focus on the responses of other stakeholders to the regime.

The Liner Sector of International Shipping

International shipping is a vast industry that carries the majority of the goods that are traded across the world's seas.² It consists of two main sectors, the "bulk" sector and the "liner" sector, which serve different kinds of shippers (importers or exporters) on different terms. In the bulk sector, bulk commodities such as oil, gas, coal, or grain are transported in ships that are either owned by the companies producing the commodity (as in the case of the oil majors), or chartered by those companies from shipowners. By volume and weight, the bulk sector carries the larger portion of the world's cargo.

¹ The international diamond cartel is stronger than shipping cartels, but controls a considerably less crucial good.

² An increasing proportion of certain commodities is carried by air, but the overall amount is still small.

Whereas the bulk sector provides service that is arranged voyage-by-voyage, the liner sector provides service that operates on regular schedules and fixed routes. It thus serves those shippers who do not want to charter ships or operate their own fleets. Consequently, liners serve many different kinds of shippers and carry a correspondingly wide range of cargo, including a variety of manufactured goods. Though the total cargo carried by volume and weight is a relatively small proportion of international shipping, the total by value is considerable; in U.S. oceanborne foreign trade, for example, liners carry only 14% by tonnage but 75% by value.³ The liner sector is critical for world trade; moreover, it is itself an \$80 billion a year industry.⁴

About half of the cargo carried by liners today is carried in standardized boxes known as "containers."⁵ Containers, which typically come in twenty or forty foot-long versions, can be transferred from ships to trains or trucks and vice-versa, facilitating "intermodal" transport that crosses both land and sea. Containerization originated in the U.S. trucking industry during the 1950's and was established in ocean shipping by an American company, Sea-Land, in the mid-1960's.

Containerization has revolutionized shipping: Some have compared its introduction to the advent of steam propulsion in the nineteenth century. Like steam propulsion, containerization has improved service dramatically. Cargo can be delivered from an inland point on one continent to an inland point on another with greater speed and lesser risk of damage. In addition, the rationalization made possible by uniform containers has reduced shipping costs while increasing service frequency.⁶ At the same time, though, the new investment in containers and related equipment has drastically increased the capital costs of an industry that was already capital-intensive, placing considerable strain on shipowners adjusting to the new technology.⁷

³ United States Department of Transportation, *MARAD '96: The Annual Report of the Maritime Administration*, May 1997, Table 13.

⁴ Anna Wilde Mathews, *Wall Street Journal*, October 29, 1996.

⁵ Drewry Shipping Consultants, *Global Container Markets: Prospects and Profitability in a High Growth Era*, 1996, p. 39.

⁶ Alan Branch, *Elements of Shipping*, London: Chapman and Hill, 1996, p. 398-400.

⁷ Bruce Farthing and Mark Brownrigg, *International Shipping*, London: Lloyds of London Press Ltd, 1997, p. 120.

Liner Conferences

Both the steam revolution and the container revolution are intimately connected to a central institution in liner shipping, the so-called "liner conference." Liner conferences are multinational organizations of liner companies that attempt to regulate and coordinate commerce in the various trades, or routes, of ocean shipping. These organizations have been ubiquitous in the liner trades since the late 1800's. Though the so-called "independent" lines that operate outside the conferences have increasingly made inroads into many trades, conferences have historically carried around 90% of the cargo moved in the liner trades. As Table III-1 illustrates, though the proportion of capacity carried by conferences and associated lines varies by trade and has clearly diminished in several important trades, the conference share has typically been high and is still significant.

The emergence of conferences is attributed to various technological and economic factors that necessitated the regulation of competition in the liner trades. In the late 19th century, the advent of the steamship made widespread regularly scheduled services possible for the first time, a boon for exporters and importers. At the same time, the economics of shipping were such that the maintenance of regular service with stable prices was very difficult if free competition reigned: High fixed-costs and the impossibility of storing "output" meant that when demand dipped, competition could drive prices below costs, putting many lines out of business and leaving a few companies that could then raise prices dramatically. This instability of prices and supply was exacerbated by the advent of steam-propulsion and larger ships, which created massive overcapacity.

The solution to this problem, arrived at by the shipping lines but repeatedly approved by governments, was a form of self-regulation: Shipping companies formed associations for coordinating service trade by trade. The basic idea was to reduce competition and avoid rate wars. In addition, cooperation among lines was justified as a means of rationalizing various other aspects of the trade. Thus, though conferences vary in the degree to which they coordinate their services, their agreements have often included such aspects as freight rates, frequency of sailings, loyalty arrangements with shippers, surcharges, and even pooling of cargo or revenue. The first conferences were started by British lines in their Indian trades, but conferences soon became a global phenomenon, and by 1980, numbered around 500 worldwide.⁸

Organizationally, conferences vary considerably, but the relationship formed by the members is a contractual one rather than a partnership or merger, an agreement which may be either written or oral but preserves, in any case, the individual identity of the cooperating

⁸ Ernst G. Frankel, *The World Shipping Industry*, New York: Croom Helm Publishers Ltd 1987, p. 15.

TABLE III-1: CARTEL SHARES ON MAJOR US TRADE ROUTES FOR SELECTED PERIODS

Period: 1968 to 1974 (Percentage shares of cargo carried)								Period
	1968	1969	1970	1971	1972	1973	1974	Average
North Atlantic Inbound								
Conference	54.2	55.5	54.7	44.5	59.4	70.1	69.1	
Rate Agreements	30.0	30.1	15.6	15.2	13.8	14.0	10.1	
Total Cartel Share	84.3	85.5	70.2	59.7	73.2	84.1	79.2	76.6
North Atlantic Outbound								
Conference	60.2	63.5	64.7	62.8	68.5	74.2	74.3	
Rate Agreements	16.7	16.6	15.7	12.4	13.5	11.0	8.7	
Total Cartel Share	76.9	80.1	80.5	75.2	82.0	85.2	83.0	80.4
Pacific Outbound								
Conference	78.9	75.0	73.2	78.7	80.6	81.3	83.8	
Rate Agreements	1.5	1.2	1.4	1.5	2.0	2.1	6.1	
Total Cartel Share	80.4	76.2	74.6	80.2	82.6	83.4	89.9	81.0
US East/South America Inbound								
Conference	82.9	98.5	98.4	99.1	97.3	97.7	98.8	96.1
US East/South America Outbound								
Conference	89.3	96.7	97.5	99.1	97.8	99.0	98.0	96.8

Period: 1984 to 1988 (Percentage shares of container capacity provided)						Period
	1984	1985	1986	1987	1988	Average
North Atlantic Inbound	81.8	75.3	74.8	61.7	51.2	69.0
North Atlantic Outbound	81.2	76.3	73.9	61.7	58.1	70.2
Far East North Pacific Inbound	64.2	86.6	75.9	62.9	61.6	70.2
Far East North Pacific Outbound	51.5	83.1	73.4	67.7	66.8	68.5

Sources:

1968-1974: United States Department of Justice, 1977.

1984-1988: Federal Maritime Commission, 1989.

lines.⁹ Usually, the members select a chairman who coordinates the activities of the conference, but actual decisions on rates and so forth are made by a vote of the members, with each member having one vote regardless of the number of ships owned. Conference decisions are usually closely-guarded secrets, unless (as in the U.S.) the law requires them to be divulged.

Since cartels can be challenged by outsiders, conferences have traditionally employed various strategies for beating back attempts by independent carriers to gain a share of the trade. Loyalty agreements with shippers, for instance, have been used to tie shippers to a conference. One such agreement is the "dual-rate contract," which offers a discount to those shippers that ship exclusively with the conference. Similarly, the "deferred rebate" gives shippers a rebate from the conference, but only after they have continued to ship exclusively with the conference for a given period of time. Historically, too, conferences have used predatory pricing to drive away competitors. Sometimes a member line's ships were designated as "fighting ships" whose job it was to undercut a competitor's rates; the member line was typically compensated for its losses by the other members.¹⁰ Today, fighting ships are rare, and the strict loyalty agreements of the past have given way to service contracts focused on volume rather than exclusivity.¹¹

Conferences are termed "open" or "closed" depending on whether outsiders are given membership upon request or only with the approval of the existing members. Conferences obviously prefer to have clear control over entry, because such control allows the collective management of more aspects of the trade, including the critical variable of capacity. In much of the world, closed conferences are the norm, but in the United States, open conferences are mandated by the government in order to mitigate the market power of conferences.

The Conference Controversy

Conference agreements have been officially sanctioned by virtually all governments as an appropriate form of self-regulation by the industry. The advantages that shipping lines reap from conferences have been deemed to have broader benefits: Reliable schedules and stable rates are obviously attractive to shippers, and a stable shipping industry has important security advantages as well. Among governments that enforce anti-trust laws, conferences have received exemptions from those laws to permit their rate-making and

⁹ Amos Herman, *Shipping Conferences*, London: Lloyds of London Press Ltd, 1983, p. 15.

¹⁰ Frankel, 1987, p. 16.

¹¹ Farthing, 1997, p. 117.

other activities. Even in the U.S., with its traditionally strict enforcement of competition rules, conferences have repeatedly been granted anti-trust exemptions.

Nevertheless, conferences have provoked controversy throughout their history. The crux of this controversy is precisely their collusive nature, their ability to build and wield market power. Some observers see conferences as little better than exploitative cartels that dictate terms of service and garner unfair profits at the expense of shippers and the consuming public. A 1977 report by the U.S. Department of Justice, for instance, saw little reason for their continued existence, suggesting that the conference system generates monopoly profits and introduces inflexibilities that might dampen world trade. The mitigation of conference power by independent operators was judged inadequate, as was their supervision by the Federal Maritime Commission.¹²

Other observers argue just as emphatically that conferences are absolutely necessary for stable and efficient liner service. In their study published in 1981, Sletmo and Williams sharply criticize the Justice Department study, marshalling a variety of evidence that they say makes it theoretically and empirically improbable that conferences are harmful. They affirm, for example, that conferences are indeed subject to considerable competition, not only from independent lines and tramps, but also from within conferences themselves. Moreover, conferences are also restrained by powerful shippers and their organizations, as well as by government intervention. These restraints are apparent in statistical evidence which shows that conference rates and market shares have declined.¹³

Both critics and defenders of conferences may be overstating their case. On the one hand, conferences are not omnipotent cartels with exclusive control over the liner trades. During the 1980's, in fact, many of the restraining forces pointed out by conference defenders were clearly operative: Conferences found themselves challenged not only by independent lines that seemed uninterested in joining conferences, but also by increases in intraconference competition. Though many factors can affect freight rates, making it difficult to evaluate what a "fair" rate should be, it is notable that in real terms, the late 1970's were a high point for container rates; in general, rates are lower today, in some cases by a considerable margin.¹⁴

¹² United States Department of Justice, Antitrust Division, *Study of the Regulated Ocean Shipping Industry*, Washington, D.C.: DOJ, 1977.

¹³ Gunnar K. Sletmo and Ernest W. Williams, *Liner Conferences in the Container Age*, New York: MacMillan Publishing Company, 1981.

¹⁴ Drewry Shipping Consultants, 1996, Figures 6.1 and 6.2.

Like all cartels, in fact, conferences can be hard to maintain. Though they have not faced the challenge of having to hide from authorities, they have had to deal with a variety of developments that have disrupted the stability of their arrangements. These developments include the rise of non-Western shipping firms with less loyalty to the conference tradition, as well as the impact of containerization, which has allowed outsiders to compete more effectively with conferences by reducing service differentials. Conferences' decision-making has sometimes been too slow and bureaucratic to be effective in today's dynamic shipping environment.

On the other hand, the defenders' argument that the weakness of conferences has become inherent may be underestimating the capacity of conferences to revamp their organizations and strategies. The early 1990's saw the regrouping of shipping lines in some trades to form "superconferences." A notable example was the Trans-Atlantic Agreement (TAA), which included several lines that had previously been independent. The TAA and its successor, the Trans-Atlantic Conference Agreement (TACA), managed to raise rates sharply, provoking a fury of protest by shippers and intense scrutiny by the European Commission and the Federal Maritime Commission. TACA has been accused of abusing its power by exercising price leadership to neutralize potential competition.¹⁵ If conferences do indeed decline, it may be as much the result of deliberate governmental policy as of changing characteristics of the industry itself.

Some of the restraints on conferences emphasized by their defenders are in fact essentially political. Both Herman and Sletmo and Williams point to the importance of shippers' organization in countervailing conference power. Clearly, the leverage of shippers is not automatic, as in a textbook market of atomistic buyers and sellers, but hinges on their success in mobilizing themselves and acting collectively. Such mobilization not only increases their leverage vis-à-vis conferences, but also their clout with governments. As we shall see in Chapter Six, increasing shipper mobilization and activism has in fact been a critical development in international shipping.

Carriers' Political Organization

Shipping lines have also organized themselves politically to defend their system. Politically, however, liner conferences are not the relevant organizational unit. Despite carriers' cooperation in various conferences, their political groupings have been built along national lines. This structure probably stems from the fact that the conferences themselves are so numerous that more aggregated bodies are needed, but since conference members are often divided on various issues, the aggregation that emerged was national rather than conference-based.

¹⁵ Philip Damas, *American Shipper*, August 1996, p. 20.

In Europe, carriers from different nations have nevertheless cooperated closely since the 1950's, when they formed the Committee of European Shipowners (CES). A few years later, the national shipowners' associations of Europe formed a Committee of European National Shipowners' Associations (CENSA), which by 1974 had absorbed the CES. CENSA was also joined by its Japanese counterparts, forming a powerful transnational coalition. Its transnational activities outside of Europe and Japan have included lobbying governments and exchanging information with other shipowners.

Despite the transnational activism of CENSA, its cooperation with American carriers appears to have been somewhat weak. Part of the reason is that American carriers have historically had a fundamentally different position in the shipping industry: During the first few decades after the Second World War, they were struggling to survive, and their political efforts may have been focussed on the battle to maintain their subsidies. Unlike the Europeans and the Japanese, they may have been less concerned with defending the conference system, perhaps partly because they were weak within the conferences.

In recent years, however, they have collaborated more in trying to fend off the competition regulators that have started putting increasing pressure on conferences. That story takes us to Chapter Six, where we explore the responses of governments and other stakeholders to the conference system by examining in more detail the political battles that have surrounded it.

Chapter Six

Responses to Liner Conferences: Policy and Politics

As we have seen, the controversy surrounding conferences stems from a critical fact about conferences and, indeed, all private regimes: The fact that they have the potential to wield power over other stakeholders. Liner conferences regulate an industry that involves a multitude of stakeholders and interests besides the actual conference members and their objectives. Shippers represent the most immediately relevant and largest group of stakeholders, and they can in turn be divided into large and small shippers. Ports and port workers can also be affected by conference decisions. Within the shipping industry itself, there are the independent operators who sail outside the conferences. Their relationship to conferences can be complex: On the one hand, they compete with the conferences for market share; on the other hand, they can shadow conference rates and thereby participate in the conference-led stabilization of the market.

In addition, though, there is the broader public interest in shipping matters, including security imperatives and the interests of consumers. These concerns are presumably represented by the state, but the state, and its various components, is likely to be pursuing a variety of goals affecting its policy on shipping. These goals could include ideological or geopolitical strivings that go beyond security concerns, as well as intragovernmental turf claims and domestic political advantages.

The variety of stakeholders motivates the core questions of this dissertation: How have these stakeholders responded to conferences and their potential power? Why have they tolerated them? What conditions have been placed on their operations? This chapter addresses these questions, exploring in detail the various governmental policies on conferences, and the evolving initiatives and tactics of shippers. Though the responses of these groups are certainly related (government policies are partly responses to shipper lobbying), we focus first on governments and then on shippers.

Governmental Responses to Liner Conferences

The problem of conferences and their potential power has been repeatedly investigated by governments almost since the formation of the first conferences. The issue has also been at the center of intergovernmental debates on shipping, including those that

have taken place in the United Nations Conference on Trade and Development (UNCTAD). In UNCTAD, as we shall see, the issue has been not only the problem of conference power vis-a-vis shippers, but also that of developed nations' shipping lines using their dominance of conferences to exclude and/or dominate developing nations' fleets.

Not surprisingly, different nations have employed different tactics in the effort to regulate conference power, reflecting the variety of interests, traditions, and resources involved. At the same time, these differing approaches have not evolved independently of each other. Governments have reacted both antagonistically and cooperatively to each other's policy moves.

The European and Japanese Approach

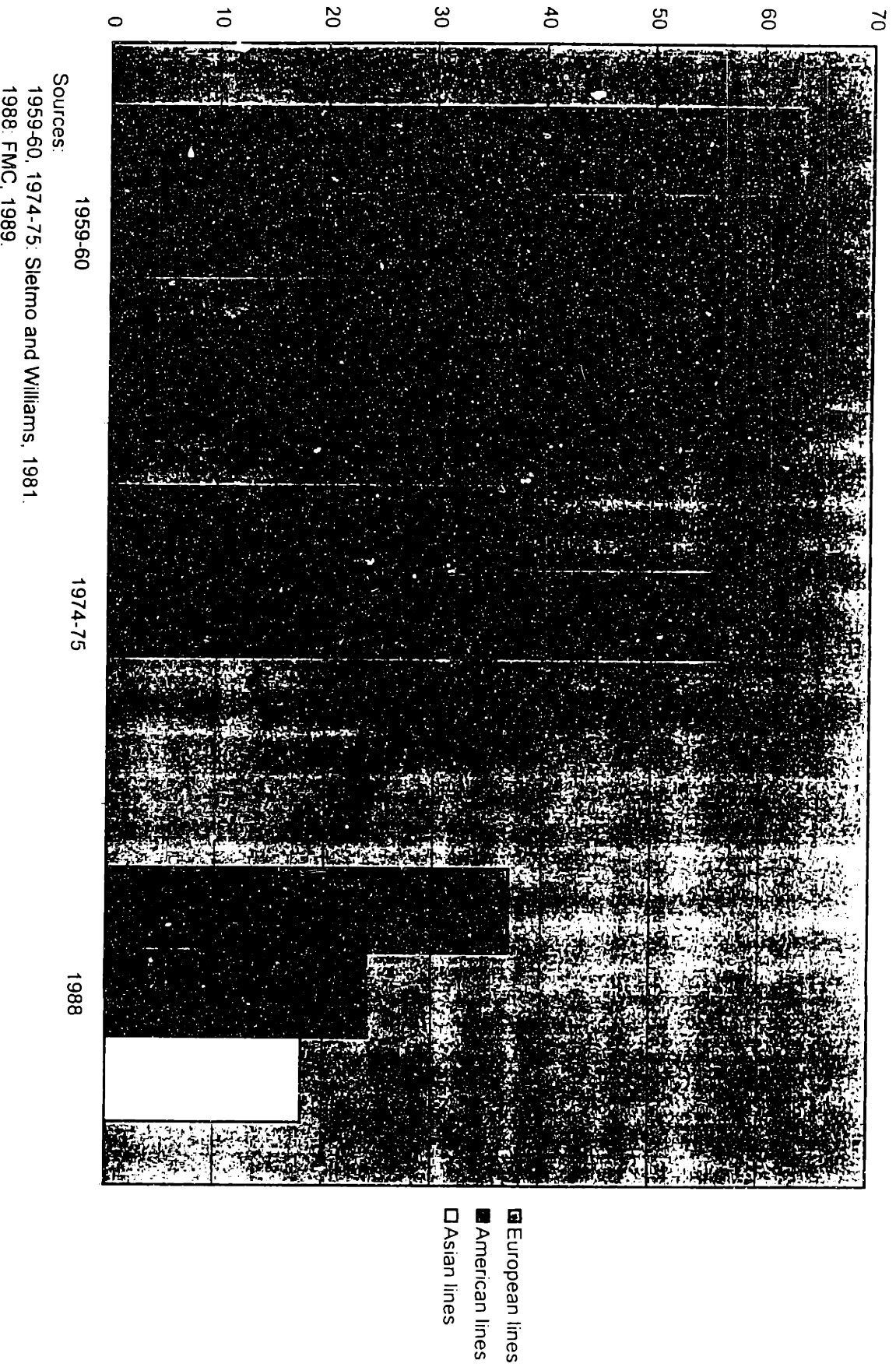
Though the different European nations and Japan have been variously positioned in the arena of international shipping, they have displayed a remarkably unified stance on liner conferences. This stance has remained unified even as it has shifted considerably, particularly in the last decade or so when the locus of shipping policy among the Europeans has moved from the national level to the European level.

For a long time, the governmental stance was one of toleration and non-interference. From the earliest inquiries into conferences such as the British Royal Commission on Shipping Rings in 1909 to more recent investigations like the Rochdale inquiry of the late 1960's, the recommended solution to conference power was the organization of countervailing power by shippers. Though there were suspicions that the solution of "bilateral monopoly" might not always leave the general public interest, or even shippers' interests, adequately represented, an apparent reluctance of governments to get involved in the details of the shipping regime tended to override such worries. Interventionist measures such as mandating open conferences or prohibiting certain loyalty agreements were deemed inimical to the proper functioning of conferences.

Notably, too, most conferences serving Europe tended to be dominated by European lines, and these lines were important and powerful industries in many European countries. Figure III-1 shows the European, American, and Asian shares of the North Atlantic trade for three different post-war periods. In 1960, European lines clearly dominated, but that dominance gave way to a more balanced distribution as the Americans and then the Asians made significant inroads.

Perhaps partly as a result of this more balanced market, the governmental stance in Europe began to change by the 1980's. Though shipping had officially come under the jurisdiction of the competition rules in the Treaty of Rome in 1974, it was not until the resurgence of European integration in the 1980's that the application of these rules to liner conferences became an issue. Conferences came under more scrutiny, less intense at first

Figure III-1: National Percentages of Capacity Among Top Ten Lines in the North Atlantic



Sources:

1959-60, 1974-75: Sletmo and Williams, 1981.
1988: FMC, 1989.

but then increasingly critical.

In 1986, EC Regulation 4056/86 was approved to permit conferences to operate despite the competition rules that made conferences technically illegal. Regulation 4056/86 granted anti-trust immunity to conferences, but this immunity was conditioned on certain rules, including the obligation to consult with shippers and maintain price transparency.¹⁶ Notably, too, the European Commission did not interpret the exemption as applying to inland rates, rendering intermodal price-fixing illegal.

In recent years, the European Commission has taken an increasingly tough approach to large conferences such as the TAA, its successor, the Trans-Atlantic Conference Agreement (TACA), and the Far Eastern Freight Conference (FEFC). These conferences have been deemed unlawful under European competition law because of such practices as capacity management, intermodal price-fixing, and general abuse of their dominant position.¹⁷ Though the conferences are fighting back fiercely, and have won appeals in the European Court of Justice as well as lower courts, European Competition Commissioner Karel Van Miert has asserted that he will continue to pursue an aggressive policy.¹⁸

In addition, the European Commission has recently developed rules for carrier consortia which suggest that the Commission would like to have such arrangements replace conferences as the main mode of cooperation among carriers. According to one observer, "the draft regulation leaves a legal door open for just about every imaginable type of carrier cooperation, as long as its members don't jointly fix rates."¹⁹ Thus, consortia members can share sailing schedules, containers, ships, port facilities, and other aspects of a trade. At the same time, the regulation that was ultimately implemented in April of 1995 imposes several conditions on consortia, including limits on market share, prohibitions on capacity management, and requirements that they consult with shippers.²⁰

¹⁶ Bruce Farthing, *International Shipping*, London: Lloyds of London Press Ltd, 1993, p. 135.

¹⁷ Elizabeth Canna, *American Shipper*, November 1994, p.17; Philip Damas, *American Shipper*, August 1996, p. 20.

¹⁸ Elizabeth Canna, *American Shipper*, April 1995, p. 10.

¹⁹ Elizabeth Canna, *American Shipper*, January 1994, p. 40-C.

²⁰ Elizabeth Canna, *American Shipper*, June 1995, p. 30.

The Japanese government, in the meantime, has continued to support the status quo in liner shipping. Historically, the Japanese policy on liner conferences has matched Europe, granting to conferences exemptions from Japan's anti-cartel laws. Like the Europeans, too, the Japanese have supported closed conferences. But the recent activism of the European Commission has not been copied by the Japanese government, at least for the time being. While the government has implied that a dismantling of the conference system by Europe and the United States might lead it to follow suit, it has also stated that it continues to support the conference system because of the stability it brings to the shipping industry.²¹

The American Approach

In increasing their regulation of conferences, the Europeans have moved closer to the more interventionist approach that has dominated American policy towards conferences. Since the so-called Alexander Committee Report, an investigation by the House Merchant Marine and Fisheries Committee headed by Joshua Alexander in 1914, the basic American policy has been to allow conferences to operate with anti-trust immunity, but to regulate them carefully so as to minimize abuses and maintain as much competition as possible.

The Shipping Act of 1916 stipulated among other things that conference agreements had to be approved by the Interstate Commerce Commission (ICC), which could also investigate any complaints that rates were unfair or "detrimental to the commerce of the United States."²² Moreover, the Act prohibited closed conferences, "fighting" ships, and the deferred rebates that were used to "tie" shippers to conferences.

As one participant and observer in international shipping notes, the 1916 Act "was the first occasion on which a governmental authority had been empowered to intervene in the basic commercial decision concerning the charge for a shipping service and the conditions on which that service was offered."²³ The U.S. government took an approach that differed sharply from that of its European and Japanese counterparts, an approach that emphasized government control and minimized the role of shippers, whose organization along European lines would in any case have been questionable under American anti-trust law.

²¹ Tony Beargie, *American Shipper*, January 1996, p. 14.

²² Quoted in Bruce Farthing, *International Shipping*, London: Lloyds of London Press Ltd, 1987, p. 107.

²³ Farthing, 1987, p. 107.

American regulators were sometimes less than zealous, though. As the job passed from the ICC to the Federal Maritime Board (FMB), the scrutiny of conferences waned. In the years immediately following the Second World War, conferences operated quite freely and often violated many of the provisions of the 1916 Act. American export markets were strong, and American leaders were also aware that the Europeans needed to reconstruct a traditionally important industry. Cafruny argues that the U.S. tolerated conferences as part of a hegemonic strategy of promoting stability in the world economy.²⁴ In addition, conferences also served the purpose of protecting American lines, which were commercially weak but politically strong. Mansfield's 1980 analysis of federal shipping regulation argues that it represents a typical case of "regulatory capture" and bureaucratic ineffectiveness.²⁵

Towards the late 1950's, however, American regulatory drives began to increase again in the wake of a challenge to the legality of the dual contract system. An independent line, Isbrandtsen, had taken the issue all the way to the Supreme Court and won a ruling in 1958 that such contracts were illegal. Spurred by this ruling and by general misgivings about the conference system and its anti-trust immunity, Congress conducted extensive inquiries into shipping from 1958 to 1961. During the hearings, European governments as well as European shipowners testified in Washington. The result of the inquiries was a 1961 amendment to the 1916 Act, known as the Bonner Act.²⁶

The Bonner Act of 1961 reaffirmed the conference system and legalized dual rate contracts. But it also replaced the Federal Maritime Board (FMB) with a new Federal Maritime Commission (FMC) that was to be purely regulatory (as opposed to partly promotional as the FMB had been) and have more power to discipline conferences. All conferences were now required to file their specific freight rates with the FMC, rather than just their general agreements, and the FMC could reject rates that it considered too high or too low.

The FMC could also reject rates that it judged to be discriminatory against American shippers, which meant that it was supposed to scrutinize rates on imports as well

²⁴ Alan W. Cafruny, *Ruling the Waves: The Political Economy of International Shipping*, Berkeley, CA: University of California Press, 1987.

²⁵ Edward Mansfield, "The Federal Maritime Commission," in James Q. Wilson (Editor), *The Politics of Regulation*, New York: Basic Books, 1980.

²⁶ Kurt Rudolf Mirow and Harry Maurer, *Webs of Power: International Cartels and the World Economy*, Boston: Houghton Mifflin Company, 1982, pp. 170-171.

as exports. The latter mandate stemmed from suspicions that conferences were practicing rate discrimination, charging higher rates on American exports than on European ones. This issue was sensitive because the U.S. was beginning to experience balance-of-payments problems, raising for the first time in the post-war era the issue of export competitiveness.

The Bonner Act remained in force for over twenty years, during which the Justice Department and the FMC both tried to control conferences, sometimes in conflicting ways. The FMC was more active than it had been before, investigating possible violations of the new shipping law and taking numerous conferences to court. According to the Justice Department and its 1977 study of the conference system, however, the FMC was still not vigilant enough. In the late 1970's, the Anti-Trust Division prosecuted seven lines operating a conference in the North Atlantic for various violations, obtaining a fine of \$6.1 million against the companies.²⁷ Significantly, though, the conference system escaped the wave of deregulation that swept over many regulated industries in the late 1970's.

Another shift in policy took place with the negotiation of the Shipping Act of 1984. This new round of legislation was a response by Congress not only to the bureaucratic dissent and turmoil caused by the existing system, but also to the need for new rules generated by technological advances that were changing shipping considerably. The most significant advance was of course containerization, whereby freight was shipped in uniform containers that could easily be transferred from ships to trains or trucks and vice-versa. Containerization, as we saw in Chapter 5, presented the possibility of intermodal pricing, or the application of a single price for a shipment going over both land and sea. Intermodal pricing was an attractive opportunity for both shippers and carriers, but its implications and legality were unclear: The FMC had started approving intermodal agreements, but this move was challenged by the Department of Justice. Clarifying amendments to the shipping legislation appeared to be necessary, and the eventual result was the 1984 Act.

The new Act pleased carriers by establishing that intermodal pricing was legal and by streamlining the FMC's review process for approving agreements. Among other things, the old "public interest" standard of approval, which had allowed the FMC to reject agreements that it deemed not "in the public interest," was replaced by a prohibition on "substantially anticompetitive agreements," a modification which removed the *per se* condemnation of the anti-trust laws.²⁸

²⁷ Mirow and Maurer, 1982, p. 166.

²⁸ Stanley O. Sher and John A. DeViermo, "Maritime Reform: The players are the same but the rules are changed," *American Shipper*, April 1984, pp. 12-13.

But the 1984 Act also contained several provisions aimed at helping shippers and balancing the additional freedoms given to carriers. One provision recognized for the first time the benefits of "shippers' associations" that negotiate contracts on behalf of smaller shippers, allowing them to get volume discounts. Such associations were now fully legal and immune from anti-trust prosecution.

Another provision was a mandate that conference members could not be prevented by their conference agreements from taking independent action on rates, a requirement that was supposed to increase competition within conferences. Carriers were initially divided on this provision, with some viewing it as potentially beneficial for their flexibility of action. This ambivalence quickly turned to unified dismay, however, after it became apparent that mandatory independent action made it much harder to hold together conference agreements. As a shipping executive put it, "It is really a contradiction in itself as it sets out to destroy the stability and common pricing system that conferences are all about."²⁹ Though a variety of factors can affect conference market shares and rates, mandatory independent action may have contributed to the fall in both shares and rates that occurred after the 1984 Act was implemented.

The 1984 Act remains in effect today. As in Europe, though, attempts at reform have recently been sparked by the TAA's (and its successor's) activities in the Atlantic trade. Senator Howard Metzenbaum put forth a bill in late 1993 that basically proposed to terminate the conference system by ending anti-trust immunity for conferences.³⁰ Metzenbaum's bill marked the beginning of several years of debate in Congress, but as yet, no new law has been passed.

Meanwhile, the FMC has tried to salvage its reputation (and avert its own potential demise) by cracking down on the superconferences in the North Atlantic and gaining significant concessions from them. In 1995, TACA offered to roll back its rate increases for that year, and to make independent action by its members easier.³¹ Later that year, the FMC began investigating the Transpacific Stabilization Agreement (TSA), whose members responded by canceling their planned capacity management program.³²

²⁹ Erik Waage-Nielsen, quoted in Stewart Wade, *Fairplay*, July 17, 1986, p. 14.

³⁰ *Distribution*, January, 1994, p. 15.

³¹ Tony Beargie, *American Shipper*, March 1995, p. 8.

³² *American Shipper*, March 1997, p. 24.

Developing Nations' Approach

Though developing nations have usually been individually weak and inactive in the liner trades, their joint efforts through the United Nations Conference on Trade and Development (UNCTAD) have given them a role in the debate on liner conferences. From its earliest days in the mid-1960's, UNCTAD has been intensely concerned with the issue of liner conferences, as well as other shipping issues. UNCTAD's Committee on Shipping has actively articulated and pursued the interests of both carriers and shippers from developing nations. During the early 1970's, a Code of Conduct for Liner Conferences was negotiated under UNCTAD's auspices, and adopted by the United Nations in 1974.

UNCTAD's initial stance on liner conferences was one of suspicion and even hostility. Originating as they did among the industrialized nations of Europe, conferences were seen as an integral component of neocolonialism and dependency. UNCTAD worried about the access of developing nations' shipping lines to conferences, and about the decision-making process in conferences, including its secrecy and its responsiveness to shippers' interests.³³

Rather quickly, however, UNCTAD developed an approach to conferences that basically accepted their existence, but recommended that they be regulated in two key ways. First, conference power was to be balanced by the countervailing power of shippers' councils. This theme was developed in a 1967 UNCTAD report, *Consultation in Shipping*, and elaborated on several times in the 1970's. UNCTAD noted that "well-organized and efficient machinery for consultation" was often lacking in developing nations, and recommended that such machinery be established, with government assistance if necessary.³⁴ This approach was explicitly modeled on the European system, though its provisions for governmental intervention were a significant departure from the European idea that shipping should remain as privatized as possible.

The second form of regulation recommended by UNCTAD clashed even more with the notion of privatized shipping: It mandated that in the trade between two nations, a specified amount of cargo should be guaranteed to the lines of those nations. The formula that ended up in the UNCTAD Liner Code was the notorious 40-40-20 split, whereby 40 percent of the trade was allocated to each nation in a trade and 20 percent was left to cross-traders. UNCTAD reasoned that if such an allocation of cargo could be

³³ Farthing, 1987, p. 128.

³⁴ United Nations Conference on Trade and Development, *Consultation in Shipping*, New York: United Nations, 1967.

implemented, the conference system could protect and nourish developing nations' fleets. This reasoning led to an UNCTAD approach that, far from trying to weaken conferences, actually favored strict and closed conferences.

The 40-40-20 formula was obviously resisted by the major shipping nations, as well as other nations that disliked its protectionist flavor. Ultimately, it undermined the acceptability and effectiveness of the Liner Code, and by the early 1990's, UNCTAD's stance began to shift. In an effort to change the perception that it is anachronistic and protectionist, UNCTAD has begun to talk about moving away from "narrow national" approaches and forced cargo sharing. Instead, it is now emphasizing competition rather than protectionism, noting that the 40-40-20 formula tended to limit the carriers of developing nations to their national trades. According to some observers, this new stance is an effort to become relevant again, reflecting the imperative of "reinvigorating wavering financial support from the United Nations' biggest players."³⁵ UNCTAD is clearly adapting itself to the emphasis on competition that is emerging in both Europe and the United States.

Intergovernmental Dynamics

The traditionally different approaches of governments vis-a-vis liner conferences have spawned a history of both conflict and cooperation. During the immediate post-war era, as we have seen, liner conferences were left to their own devices: The Europeans preferred a privatized regime, and the United States was willing to acquiesce for the sake of important geopolitical objectives. To some extent, the legal differences among nations may even have encouraged an acceptance of self-regulatory arrangements: As the FMC has put it, conferences "provide a means for the self-regulation of an industry subject to the jurisdiction of several sovereign nations having disparate legal codes and diverse commercial practices."³⁶

During the immediate post-war years, too, many of the developing nations were still colonies, and those that had achieved independence were not pursuing the issue of shipping yet. Thus, the only intergovernmental activities that addressed the problem of liner conferences were the negotiations establishing the Intergovernmental Maritime Consultative Organization (IMCO), in which the major maritime nations (ie. the Europeans) insisted that the new organization be excluded from interfering in commercial matters.

When the U.S. reinvigorated its regulatory efforts in the late 1950's, however, the

³⁵ Elizabeth Canna, *American Shipper*, January 1993, p. 40-E.

³⁶ United States Federal Maritime Commission, *Section 18 Report on the Shipping Act of 1984*, Washington, D.C.: FMC, September 1989, p. 23.

issue of liner conferences quickly became prominent on the international agenda. Not only were the Congressional inquiries of 1958 to 1961 lobbied by foreign governments, but when the new FMC began to implement the 1961 Act, European and Japanese governments established the Consultative Shipping Group of Governments (CSG) to coordinate their responses to this activism. The CSG Ministers' Resolution of March 1963 established a common position which stated that though conferences were expected to make sure that shipper interests were represented in the conference system, the system would be supported against interventionary measures by foreign governments, especially the American government.

Farthing notes that the FMC's mandate in the 1960's to scrutinize freight rates on imports as well as exports was regarded as offensive by the Europeans because it extended FMC intervention across the seas to other countries. Import rates were the export rates of other countries: "What if those other countries sought to regulate them on the basis of the 'detriment' to their own commerce?"³⁷ In Farthing's view, this problem demonstrated that any regulation of international shipping should be internationally coordinated.

In the absence of such coordination, the 1960's and 1970's became a time of tension between the U.S. and Europe, and their fundamentally different notions of how the liner regime should be managed: Europe preferred a "privatized" regime based on consultations between the major stakeholders, while the U.S. preferred a regulated regime based on governmental action on behalf of shippers. Thus, the FMC's regular interventions were resented and resisted by the CSG governments, who ordered their shipping lines not to comply with FMC requests.

In the mid-1960's, too, the American government was joined by UNCTAD in its suspicion of the conference system. Thus, in early 1971, the CSG requested that its shipowners and shippers prepare a Code of Practice for Conferences to answer the mounting criticism. The idea was to follow up on the Rochdale Report's recommendation that an internationally acceptable code be developed to resolve disputes about how to oversee conferences. The result basically codified the European practice of operating closed conferences with regular consultations between carriers and shippers.

This code was unacceptable to many non-European nations, and actually violated some provisions of American shipping law. Many countries resented the attempt to impose a solution that they had not helped to develop, and this prompted UNCTAD to develop its own liner code, which culminated in the 1974 United Nations Liner Code. Except for the notorious 40-40-20 rule, this code turned out to be quite similar to the CENSA/ESC Code. The fact that the code ended up validating the conference system probably reflected the

³⁷ Farthing, 1987, p. 110.

growing realization among developing nations that as long as their shipping lines could gain entry to conferences, the conferences could protect those lines. At the same time, the blatantly protectionist 40-40-20 provision offended nations that were pursuing a liberal line in the global economy. The U.S. disavowed the Code and declared that it would not ratify it. Europe was divided on whether or not to accept it, with some nations (notably, Britain) recommending rejection while others (including Germany and France) favored acceptance.³⁸

The conference system thus emerged out of the 1970's intact, but saddled with conflicting constraints from different nations. Recognizing the need for a unified response, the European governments worked out a solution which entailed accepting the UNCTAD Code in their trades with developing nations, while applying their own code in their trades with each other.³⁹ In the U.S. trades, conferences had to adhere to American law, though the American government pursued bilateral agreements with many developing nations as a response to the Code. Meanwhile, Japan declared its willingness to ratify the Code, but never actually got around to doing so.

The 1980's, by contrast, saw a gradual convergence in shipping policy. This convergence stemmed partly from an increasing emphasis on promoting competition in shipping, part of a general trend towards liberalization in the global economy.⁴⁰ In addition, though, the Americans and the Europeans attempted to cooperate more on shipping policy so as to reduce the conflicts and disruptions that had marked the 1960's and 1970's. In 1982, the U.S. and the CSG began holding talks aimed at minimizing disputes, a move which both parties probably saw as another prong of their response to UNCTAD's Liner Code, ratified by 1983. On the agenda for joint action was the development of means to resist protectionistic and restrictive shipping policies.⁴¹

In general, a greater responsiveness to the other party's needs seems to have emerged. This consideration was evident in the 1984 Shipping Act and its preservation of the conference system despite the reigning ethos of deregulation that had emerged in the U.S. in the late 1970's. Both the Carter and Reagan administrations were concerned about the possible effects on diplomatic relations of pursuing a maritime policy that clashed too

³⁸ Farthing, 1993, p. 116.

³⁹ Farthing, 1993, p. 120.

⁴⁰ Mark W. Zacher with Brent A. Sutton, *Governing Global Networks: International Regimes for Transportation and Communications*, Cambridge, England: Cambridge University Press, 1996.

⁴¹ Tony Beargie, *American Shipper*, November 1984, p. 74.

strongly with that of other nations.⁴² Meanwhile, in Europe, Regulation 4056/85 mandates that the European Commission consult on issues where there could be a conflict of law with other countries.⁴³ There have been clear attempts by the Americans and Europeans to learn from each other, combined with attempts to explain and clarify policies, one example being FMC Chairman Christopher Koch's trip to Europe in 1992.

The Responses of Shippers

Like the responses of governments, the responses of shippers have varied across countries and across time. Not only have these responses been conditioned by government policy, but they have also contributed to the development of government policies, particularly in recent years. As we shall see, the growing activism of shippers has been an important, even critical, development in international shipping.

European Shippers

For a long time, European shippers acquiesced to the conference system, and the European arrangement based on non-interference by government. Because shippers are numerous and diverse, it was not until 1955 that the first shippers' organization, the British Shippers' Council, was formed to counter conference power. A major reason that the long-standing government recommendations to organize were finally acted upon was that in the early post-war years, the supply of ships had lagged behind the growth in trade, creating a world-wide shipowners' market that exacerbated the power of conferences. The British organization encouraged other European shippers to organize, too, as did the International Chamber of Commerce at a conference in 1958.⁴⁴

By the early 1960's, the newly-formed shippers' councils across Europe had formed a continent-wide organization, the European National Shippers' Council, which by 1970 had been renamed the European Shippers' Council (ESC) to emphasize its status as a transnational group. The general emphasis on integration in Europe at that time probably promoted this rapid formation of a European-level interest group. Active to this day, the ESC became an important representative of shippers' interests in negotiations with conferences and through its political lobbying. Notably, the ESC can make commitments

⁴² Martha Derthick and Paul J. Quirk, *The Politics of Deregulation*, Washington, D.C.: The Brookings Institution, 1985, p. 235.

⁴³ Farthing, 1997, p. 163.

⁴⁴ Herman, 1983, p. 123.

that are binding on each national council, but these decisions must be unanimous.⁴⁵

In 1963, ESC and CENSA signed a "Note of Understanding" that inaugurated an era of collective consultation on conference operations, and was the basis for their jointly developed code of 1971. The two organizations, as well as European governments, felt that their model of shipper/carrier relations should serve as an example for the rest of the world, and during the UNCTAD shipping negotiations of the early 1970's, they formulated and promoted a joint proposal for the United Nations Liner Code.

In recent years, however, European shippers have grown less tolerant of conferences, and less willing to rely on collective consultations. In 1983, the British Shippers' Council expressed dissatisfaction with certain loyalty demands being made by conferences, and hinted that it might welcome more government intervention.⁴⁶ Since then, European shippers have played an important role in the policy shift that has occurred in Europe.

When the TAA was inaugurated in 1992, the ESC quickly launched a fierce assault on the superconference, evidenced by a December 1992 letter from its chairman, Birger Nielsen, to Sir Leon Brittan, vice president of the European Commission. Nielsen begged Brittan to force the Commission to take action against the TAA. In going all the way to Brittan, Nielsen was bypassing the officials it normally deals with, apparently in frustration over what it considered a sloppy application of competition law.⁴⁷

The ESC now expends a considerable amount of effort on lobbying the European Commission. In response to the TAA and other powerful conferences, the ESC has even launched an attack on Regulation 4056/86 and its provision of automatic anti-trust immunity. Announced in December of 1995, the campaign began with ESC lobbying of the European Commission, and simultaneous efforts by ESC member organizations to convince their national governments. The goal, as yet unachieved, is the amendment of the regulation so that anti-trust exemption is granted only on a case-by-case basis, pending proper investigation of each case.⁴⁸

⁴⁵ Herman, 1983, p. 127.

⁴⁶ David Greenfield, *American Shipper*, September 1983, p. 32.

⁴⁷ Elizabeth Canna, *American Shipper*, January 1993, p. 40-B.

⁴⁸ Elizabeth Canna, *American Shipper*, January 1996, p. 13.

American Shippers

In the U.S., the mobilization and organization of international shippers' groups was slower than in Europe. Though there were attempts in the late 1970's to organize a United States Shippers' Council, these attempts had to be abandoned because the Department of Justice made it clear that such a group would not be tolerated.⁴⁹ Like European shippers, American shippers were also diverse and difficult to organize.

The negotiation of the 1984 Act was notable in that shippers participated more extensively than in earlier legislative efforts, and the result was what Friedmann and Devierno subsequently called a "shift from government regulation to shipper regulation."⁵⁰ According to Friedmann and Devierno, shippers decided not only to participate actively, but to do so in a manner that entailed working with carriers rather than opposing them. Though initially suspicious of the carriers' legislative campaign because of its drive for closed conferences, many shippers (especially larger ones) became more inclined to cooperate when the carriers dropped this demand. At that point, several large shippers coalesced into a group that could negotiate with authority, and with the help of Senator Gorton's staff, formed a coalition with the carriers.⁵¹ With that achievement, developments in the U.S. started to match the developments that took place in Europe twenty years earlier.

The emergence of American shippers' groups as major players has in fact turned out to be an important development in the international shipping regime. Even before the 1984 Act, shipper groups were invited to join the American delegation at negotiations with the Latin American countries and the CSG. Representatives of shipowners had been included before, but this was the first time that shippers were given a voice.⁵² Their expanded role seems to be related to both their increasing awareness of shipping issues and the generally rising concern with the competitiveness of American exports, probably exacerbated by the strong dollar of the early 1980's. Through their own efforts, and the receptive attitude of political leaders and administrative agencies, international shippers developed into an important interest group in the United States.

The development of shipper power did not occur without fits and starts that illustrate the difficulty of organizing a highly diverse and geographically dispersed group.

⁴⁹ *American Shipper*, May 1978, p. 15.

⁵⁰ Friedmann and Devierno, 1984, p. 311.

⁵¹ Tony Beargie, *American Shipper*, October 1982, p. 3.

⁵² Jesse Jessen and Denis J. Davis, *Distribution*, January 1985, p. 44.

Shippers often had different ideas on the issue of organization: Some were skeptical of broad-based groups, for instance, and wanted more regional or specialized organizations. Still others were skeptical of any organization at all, preferring to act independently. One organization, the International Maritime Council, was launched in 1988 with considerable fanfare and the support and interest of many important players in the industry. Two years later, though, it was still struggling to become fully established.⁵³

In the meantime, the National Industrial Transportation League (NIT League), Shippers for Competitive Ocean Transport (SCOT), and other shippers' organizations attempted a vigorous, if fragmented, representation of shippers' interests. Until around 1992, their general approach was to cooperate with conferences, as they had during the development of the 1984 legislation. Though the European model was considered inadequate, American shipper representatives nevertheless saw themselves as the voice of shippers in a dialogue with carriers. The IMC, for instance, was supposed to include as associate members both the United Shipowners of America (USA) and CENSA.⁵⁴

After 1992, however, the spirit of cooperation and mutual coordination turned sour. As in Europe, the proximate cause was the TAA. Groups like NIT League became overtly hostile to the very existence of conferences, and they were joined by other groups, such as the National Association of Manufacturers (NAM). These groups were entering the maritime debate for the first time, or organizing specifically to deal with the perceived rise in conference power. In the last several years, bills have been proposed to ban the exemption of conferences from anti-trust law. Moreover, the FMC has come under attack as too supportive of the conference system, a perception fueled by the fact that the FMC now appeared to be less strict than the European Commission.

Despite its vitriolic campaign against conferences, however, the NITL in June of 1995 struck a deal with SeaLand, a major carrier, that would have preserved the anti-trust exemption for conferences and consortia. In exchange, however, shippers would get the right to negotiate confidential contracts with individual carriers. Moreover, the Sealand/NITL proposal would eliminate FMC tariff-enforcement and regulation, as well as public filing of tariff and service contracts. In fact, the FMC itself would be eliminated, and its remaining duties transferred to the Department of Transportation.⁵⁵ The proposal was deregulatory in two senses: It reduced government regulation, but by extending independent action, it also reduced the ability of the conferences to self-regulate.

⁵³ Joseph Bonney, *American Shipper*, October 1990, p. 50.

⁵⁴ Elizabeth Canina, *American Shipper*, September 1988, p. 58.

⁵⁵ Farthing, 1997, p. 167-168.

Despite widespread acknowledgement that some kind of reform should be enacted, and the reluctant support of some other carriers, the proposal was attacked by many in the shipping community. After being approved by the House, it was rejected by the Senate in late 1995. The plight of smaller shippers in particular has been highlighted by some shipper groups, as well as the FMC: Confidential contracts would allow conferences to discriminate against small shippers. Some carriers also expressed displeasure with the exclusionary way in which the deal was negotiated, and Conrad Everhard, chairman of Cho Yang America, even suggested that the deal is part of a NIT League strategy to kill conferences: Once the FMC is gone, NIT League might convince the Justice Department to suspend antitrust immunity because of the lack of oversight.⁵⁶

Shippers' Transnational Relations

An important element in the evolution of American shippers' responses to conferences, as well as the recent developments in Europe, may be the emergence of a transnational shippers' coalition. The culmination of many years of gradually increasing shipper organization and mobilization has been the recent formation of a tri-continental shippers' alliance including NIT League, the ESC, and the Japan Shippers' Council (JSC).

The road to that alliance has been long and winding. The transnational character of liner conferences had prompted UNCTAD to suggest in a 1967 report that shippers should organize transnationally, not only regionally at one end of a trade (as in Europe), but across both ends of a trade.⁵⁷ Such an organization would match the organization of conferences, levelling the playing field for shippers. Despite this recommendation, however, the organization of shippers moved in the direction of transnational organization rather slowly, especially of the kind involving both ends of a trade.

In Europe, as we have seen, the regional organization of shippers quickly followed the establishment of national shippers' councils. Given the integrationist forces in Europe during the early 1960's, this development was perhaps to be expected. Moreover, European shippers were similarly positioned vis-a-vis the deep-sea liner trades: They were all at the same end of those trades. The forging of links to shippers at the other ends of those trades did not occur until much later, though, probably for the simple reason that few other nations had shippers' councils. An interesting exception was the JSC, with which the ESC established relations in the 1970's.

⁵⁶ Tony Beargie, *American Shipper*, August 1995, p. 12.

⁵⁷ UNCTAD, 1967.

When U.S. shippers began to pursue maritime issues more forcefully in the 1980's, they were initially reluctant to emulate the European approach, or even establish ties to the ESC. The first transnational efforts of American shippers, in fact, involved foreign *carriers* rather than shippers. One improvement of the newly established International Maritime Council (IMC) over the older National Maritime Council (NMC) was supposed to be its inclusion of foreign carriers as associate members; no mention seems to have been made of foreign shippers. The ESC was not regarded as a worthy model because it was seen as too collectivist, bureaucratic, and subservient to carriers.⁵⁸

Significantly, though, European shippers noticed manifestations of this disdain in the trade publication *American Shipper* and responded: In 1988, the chairman of the British Shippers' Council sent a letter to *American Shipper* in which he argued that the ESC's approach was far more in harmony with American shippers' views than they seemed to think. He went on to say that it was time for European and American shippers to begin working together.⁵⁹ The letter was highlighted in *American Shipper*, and a few months later, the journal published a long and respectful piece on the ESC.⁶⁰ Later, it began to publish regular articles on the "European Shippers' Perspective," written by the former chairman of the ESC, Gerard Verhaar.

In 1994, the NITL met with the ESC and the JSC to produce a joint declaration on international shipping. The chairman of the NITL declared the meeting "an historic opportunity for all shippers regardless of national boundaries to come together and define what is necessary to bring about reliable and cost-effective service."⁶¹ The agreement reached reflected various elements of the different national approaches: Competition was to be promoted, but so was government monitoring and consultation between shippers and carriers.

The effort to coordinate strategy between the three groups began somewhat haltingly. In the spring of 1995, the ESC endorsed the NITL's effort to repeal the anti-trust exemption for conferences. But as Verhaar pointed out, the ESC did not follow the NITL's lead by subsequently launching a similar effort in Europe, though the time was ripe for it.⁶² Moreover, the JSC clearly diverged from the NITL/ESC stance, noting in a letter to the

⁵⁸ David A. Howard, *American Shipper*, December 1987, p. 112.

⁵⁹ *American Shipper*, June 1988, p. 22.

⁶⁰ Elizabeth Canna, *American Shipper*, September 1988, p. 55.

⁶¹ Quoted in *Distribution*, December 1994, p. 20.

⁶² Gerard Verhaar, *American Shipper*, May 1995, p. 52.

NITL that it did not wish to eliminate conferences as long as they were strictly monitored by governmental authorities. The letter expressed concern that "if the conference system did not exist, it is more likely that small shippers would be placed at an unreasonable disadvantage."⁶³

By the time of its second annual summit meeting in October of 1995, however, the shippers' coalition had formulated a more radical agenda. This agenda was based on the NITL's anti-conference initiative, which was admired by the other shipper groups in the coalition. In early December, as we have seen, the ESC began urging the European Commission to terminate automatic antitrust exemption for liner conferences, while the JSC started lobbying MITI to do the same. Responding to allegations that they do not represent the interests of small shippers, the three groups also stated jointly that they will give priority to the protection of small shippers. At their most recent summit meeting in 1996, they asserted the view that conferences do not in fact benefit small shippers: Their hard line against the conference system appeared to be hardening. Moreover, they proposed to include other shipper groups in their organization, resolving to give observer status to shippers' councils from Hong Kong, South Korea, and Canada.⁶⁴

The Future of Liner Conferences

Amidst the complexity of the politics surrounding liner shipping, certain trends are clearly visible in the way that governments and shippers have dealt with liner conferences. Figures III-2 to III-4 present timelines of the major activities of carriers, governments, and shippers. Though it is clear that the conference system has been wracked by continuous controversy for the last forty years, it also clear that the last ten years or so have seen developments that have changed the basic parameters of that controversy. The traditionally central opposition between the U.S. and Europe has given way to another critical conflict, one that pits a global carrier community against a global shipper community.

In this increasingly bitter battle between carriers and shippers, shippers are finding that they wield considerable clout with governments, who are increasingly sympathetic to pro-competitive arguments. Though the general benefits of certain types of cooperation among carriers may ultimately dampen the attack on carrier agreements, those agreements will probably avoid conference-like arrangements. Instead, they will tend towards consortia, alliances, or mergers whose market shares are less dominant, and whose purpose (stated, at least) is not to fix prices and restrain competition, but simply to achieve scale economies. This shift in the way carriers cooperate is already underway, as the recent

⁶³ JSC letter, quoted in *American Shipper*, April 1995.

⁶⁴ Robert Motley, *American Shipper*, October 1996, p. 20.

emergence of several global alliances and mergers suggests.⁶⁵

The emerging consensus among shipping analysts, in fact, is that liner conferences are in serious trouble, and that a return to the era when they effectively regulated deep-sea liner shipping is extremely unlikely. As an analysis by Drewry Shipping Consultants argues, “it is clear that the shipowner case is irretrievably losing ground worldwide, and that an erosion of long-standing anti-trust privileges is taking place – a gradual war of attrition interspersed with periodic major reverses for carriers.”⁶⁶

The case of liner conferences, then, would seem to be a case of private governance in retreat, an example of how a private regime can succumb to pressures in its broader political context. Thus, the critical factors behind the decline of the liner regime (including a new regulatory ideology, an increasing concern with trade, and most importantly, the organization and mobilization of shippers) may have implications for the issue of private regimes in general. Such factors represent potential constraints on private regimes, constraints that in a globalizing economy can grow stronger even as other forces of globalization encourage the emergence of private regimes. Before we elaborate on these constraints and develop more general hypotheses, however, we turn to another type of private regime, one with a wholly different kind of purpose.

⁶⁵ Drewry Shipping Consultants, 1996, p. 16.

⁶⁶ Drewry Shipping Consultants, 1996, p. 11.

Figure III-2

Timeline of Carriers' Activities
Defending an Eroding Conference System

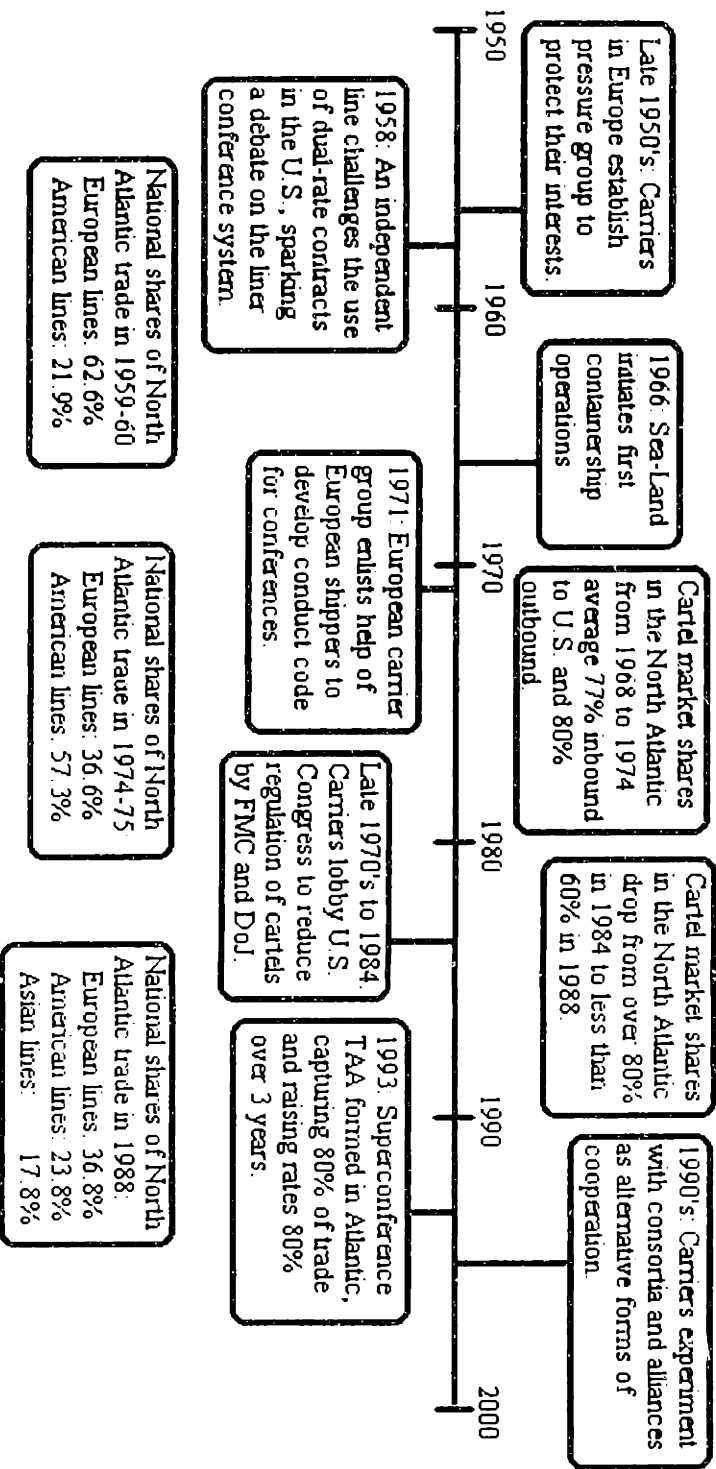


Figure III-3

Timeline of Governments' Activities
Conflict to Convergence?

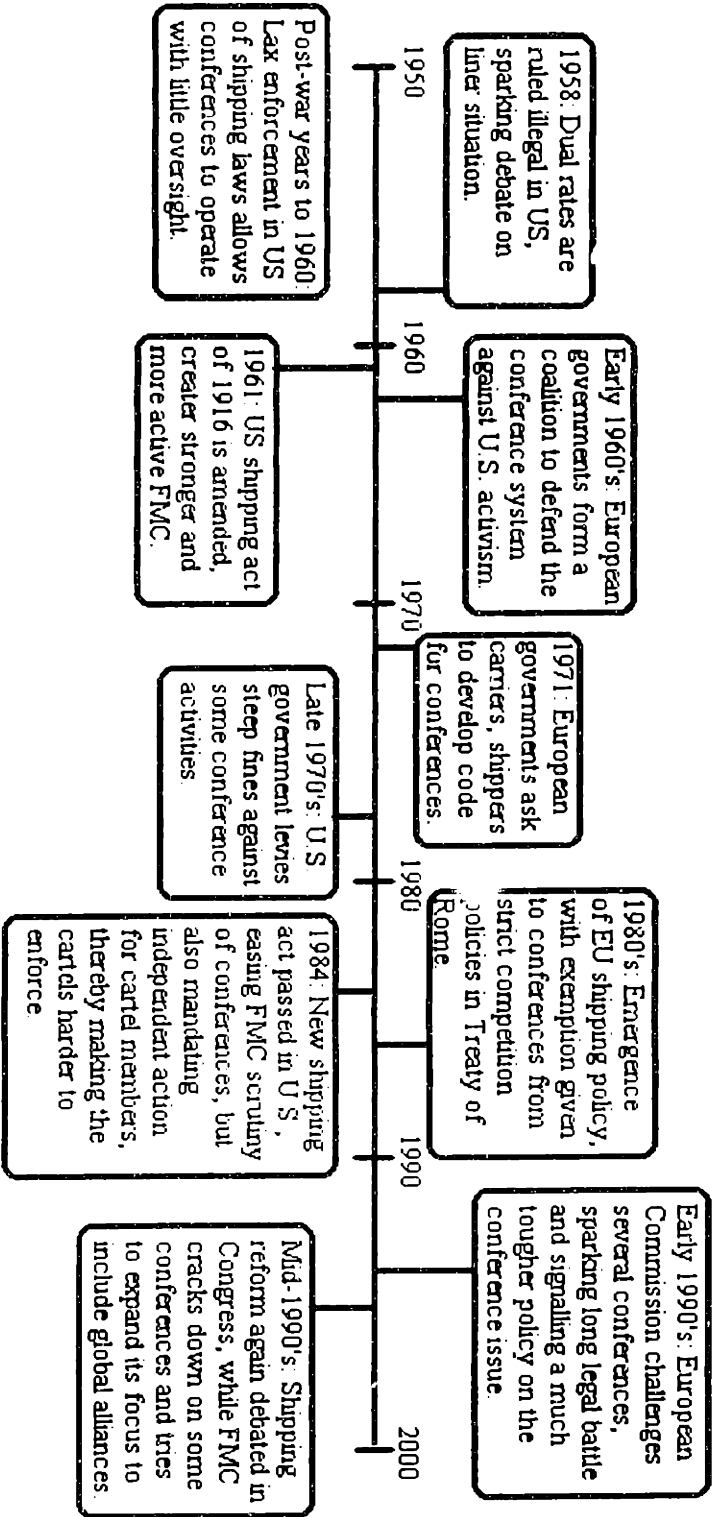
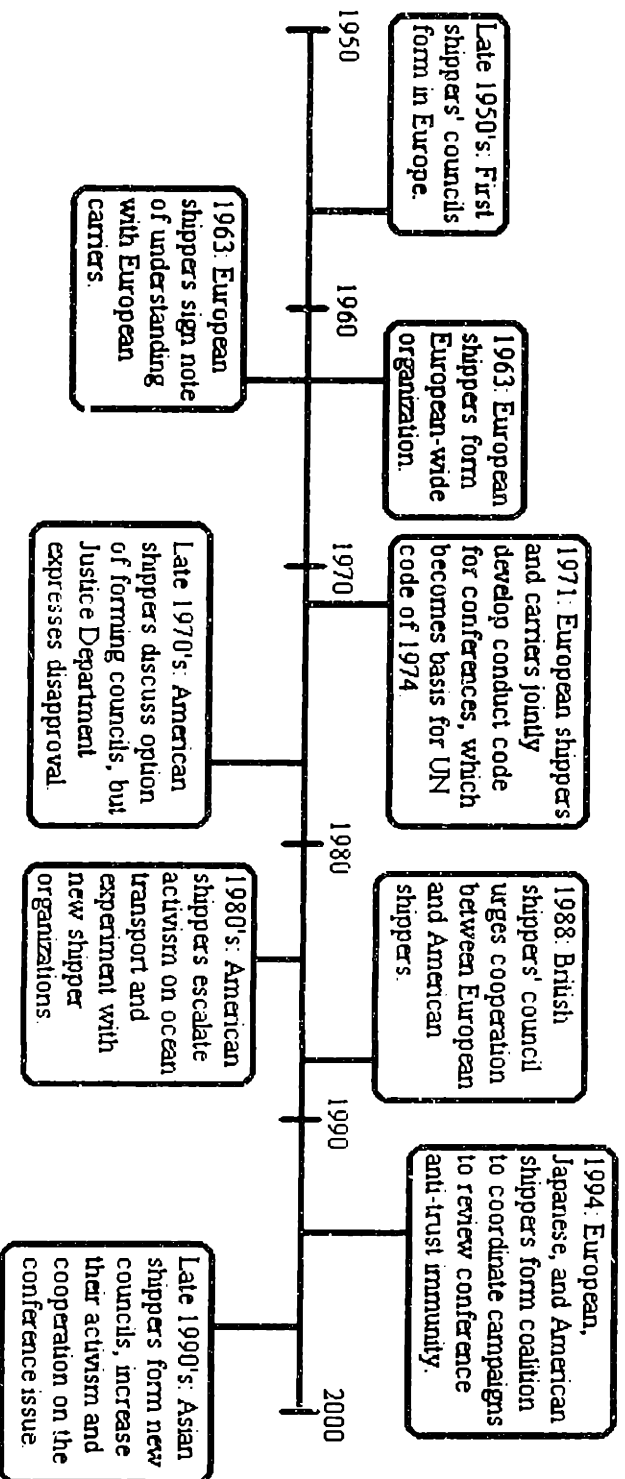


Figure III-4

**Timeline of Shippers' Activities
Mobilization, Transnationalization,
and Increasing Leverage and Clout**



PART IV
DEVELOPING STANDARDS:
THE INTERNATIONAL ORGANIZATION FOR STANDARDIZATION

CHAPTER SEVEN

ISO AND ITS ACTIVITIES

An important form of regulation that sometimes takes place privately in the domestic arena is the development of standards. In the international arena, standards-development is also a private as well as a public activity: Intergovernmental organizations such as the International Telecommunications Union (ITU) and the World Health Organization (WHO) create standards, but so do non-governmental organizations such as the International Organization for Standardization (ISO) and its partner the International Electrotechnical Commission (IEC).

The International Organization for Standardization was established in 1946 as a private federation of national standards bodies. Its short-form name, ISO, is not an acronym, but derived from the Greek word "isos," or "equal." Despite its officially non-governmental status, and the fact that it is unaffiliated with the United Nations, ISO (along with IEC) has become an important standards organization that is lumped together with intergovernmental organizations such as ITU. It develops standards in virtually every field; some examples of ISO standards include paper sizes, symbols for automobile controls, film speed codes, and freight container sizes.¹ This chapter reviews ISO's basic institutional structure, its standards-development process, and its recent and increasingly controversial foray into management standards for quality and environment.

ISO's Institutional Structure

ISO's basic institutional structure is similar to that of many intergovernmental organizations. Its official members are designated national standards bodies, one from each country. Currently, ISO has 120 members, with thirty of them having joined since 1992. These members, including correspondent and subscriber members that do not vote but may attend as observers, make up the General Assembly. The General Assembly, which usually meets once a year, handles ISO's annual report and its multi-year strategic plan. It may also establish advisory committees.

Like other international organizations, ISO has a central secretariat and several smaller bodies that actually conduct its operations. The ISO Council, consisting of ISO's

¹ ISO Website, at: <http://www.iso.ch/welcome.html>.

principal officers and eighteen elected member bodies, is the top governing body: It decides the budget of the Central Secretariat, and appoints the Treasurer, the Technical Management Board, and the Chairmen of the various policy development committees. The Technical Management Board in turn oversees the technical work of standardization, while the policy development committees address general issues such as consumer policy, conformity assessment, and the special needs of developing countries.

The Standards-Setting Process in ISO

ISO's standards-development process operates through a decentralized hierarchy of committees and working groups consisting of representatives from industry, government, and various other interests. According to the ISO/IEC Directives (on which the following summary is based), the process starts with an official proposal to ISO's chief executive officer, the Secretary-General, that work begin on a certain standard. The proposal can be submitted by any of several participants in ISO, including a national body, a technical committee or subcommittee, a policy committee, the Technical Management Board, or the Secretary-General himself. The Secretary-General comments on the proposal and then circulates it to all the national bodies.

If two-thirds of the national bodies that vote on the proposal are in favor of it, and at least five are willing to participate actively, the Technical Management Board assigns the work to an existing technical committee or establishes a new committee. In the latter case, the Board also allocates the secretariat of the new committee to a national body, after which the secretariat nominates a chairman who is responsible for the overall management of the committee. The chairman is supposed to act in a "purely international capacity" rather than as a national representative.

A new technical committee begins by agreeing on its title and its scope, which precisely defines the limits of its work. Then it establishes subcommittees, which are ratified by the Technical Management Board. According to the ISO/IEC Directives, "all national bodies have the right to participate in the work of technical committees and subcommittees."² Like technical committees, in fact, subcommittees are only established if there is a commitment by a national body to undertake its secretariat and a commitment by at least five members of the parent technical committee to participate actively. The subcommittees in turn establish various groups to assist them, including "working groups" of individually appointed experts acting in a personal capacity. Each member body also establishes a technical advisory group (TAG) for the technical committee, and a similar group for each subcommittee (SubTAG's); these TAG's and SubTAG's act on behalf of the member body.

² International Organization for Standardization, *ISO/IEC Directives*, Website at: <http://www.iso.ch/dire/directives.html>, Paragraph 1.7.1.

From proposal to publication, a new standard travels through several stages, corresponding to various drafts of the standard. The process takes place through both correspondence and meetings. The first draft is a so-called "working draft" prepared by a working group. This draft becomes a "committee draft" when it is circulated among committee or subcommittee members, who study it carefully and submit comments, leading to successive committee drafts.

Once there is general agreement, or if necessary, approval by a two-thirds vote of the committee members, the committee draft becomes an "enquiry draft," also known as a "Draft International Standard." This draft is circulated to all national bodies for voting and commentary. If a two-thirds majority of the votes cast are in favor, and not more than one-quarter of the total votes cast are negative, the draft becomes a "Final Draft International Standard."

After editing and modification based on the commentary, this final draft is sent out for another vote, but now affirmative votes are not accompanied by commentary, and approval results in the publication of the draft as an "International Standard." Needless to say, this process is quite laborious and time-consuming, and it generally takes years to develop and approve an International Standard. According to ISO, however, its standards are quite successful: "In many sectors such as basic mechanics, SI units, freight containers, textiles, photography and information technology, ISO standards have been broadly known, widely used and highly appreciated for many years."³

The Recent Management Standards

In the last decade, ISO has developed two major sets of management standards that cover all industries and have greatly raised ISO's profile in the global economy. Unlike many ISO standards, these standards are essentially conduct codes that focus on firms' behavior, their managerial processes. For certain key parts of the standards, companies can be registered or audited as adhering to the standard by third-party registrars (or "certifiers" as they are known in Europe) which are in turn authorized by accreditation bodies such as the U.S. Registrar Accreditation Board (RAB). These accreditation bodies vary from country to country; in Europe, for instance, they are regulated by government whereas in the U.S. they are not.⁴ As we shall see, both the scope of these new standards and the registration and accreditation issues they raise have made them much more controversial than previous ISO standards.

³ ISO, "Raising Standards for the World: ISO's long-range strategies 1996-1998," Annex I, ISO Website at: <http://www.iso.ch/presse/strategy/strategy.html>.

⁴ Amy Zuckerman, "Second thoughts about ISO 9000," *Across the Board*, 31(9), October 1994, pp. 51-52.

Quality Management: ISO 9000

The first set of management standards, ISO 9000, is a set of quality-management standards developed in the 1980's and completed in 1987. These standards do not specify actual levels of quality for a firm's products, a matter left to negotiations between a firm and its customers. Instead, the standards specify certain management processes that are meant to assure customers that the firm will turn out products of *consistent* quality. The basic motivation for the standard, then, is essentially to reduce transaction costs.

There are twenty components of a quality program that can be audited, including such aspects as management responsibility, contract review, control of non-conforming product, and training. Each of these aspects in turn has various components. Contract review, for example, requires that a firm have systematic and documented methods for meeting customer requirements and making contractual changes, that it review customers' orders before accepting them, and that it maintain records of orders and reviews of orders.⁵

Cascio notes that ISO 9000 "was the first time that ISO had ventured to create standards that were not essentially technically based and/or scientifically based."⁶ Though the standards are meant to be applicable to any kind of firm in any kind of industry, satisfying registrars that they are being met is not a trivial endeavor; a 1993 study found that 60% of companies fail their first attempt to be registered.⁷ According to Cascio and others, though, these standards have been very successful and popular.⁸

Environmental Management: ISO 14000

The success of ISO 9000 helped spur the second effort to develop management standards, the ISO 14000 series. ISO 14000 is a set of environmental management standards that are being released starting in the fall of 1996. ISO had developed test methods for pollutants years before, but its more recent and ultimately much more extensive foray into environmental issues really started in 1990. The proximate cause was the emergence of various national-level environmental labeling programs, which

⁵ John T. Rabbitt and Peter A. Bergh, *The ISO 9000 Book: A Global Competitor's Guide to Compliance and Certification*, Second Edition, White Plains, NY: Quality Resources, 1994, Chapter 6.

⁶ Joseph Cascio, Gayle Woodside, and Philip Mitchell, *ISO14000 Guide: The New International Environmental Standards*, New York: McGraw-Hill, 1996, p. 7.

⁷ *Quality Progress*, July 1993, cited in Rabbitt and Bergh, 1994, p. 124.

⁸ Cascio, et al., 1996, p. 7.

posed the risk of confusion among consumers and prompted ISO to create a special group to study the possibility of international standards for labeling.

Further exploration of environmental standards was suggested to ISO in 1991 by the organizers of the United Nations Conference on Environment and Development (UNCED), especially the Business Council for Sustainable Development (BCSD).⁹ At that time, the British were already developing an environmental management standard, BS 7750, which was being followed by a European effort, the Eco-Management and Audit Scheme (EMAS). As in the case of environmental labeling, these national and regional initiatives seemed to underscore the need for broader international standards, an imperative identified by GATT in 1979 and reiterated in the Uruguay Round.

In response, ISO established the Strategic Advisory Group on Environment (SAGE), which after some deliberation, recommended that ISO establish a new technical committee to develop environmental management standards. This committee, TC 207, met for the first in June of 1993. It was subdivided into six subcommittees addressing, respectively, management systems, auditing, labeling, performance, life-cycle analysis, and product standards. Most of these standards are meant to be used solely for guidance, helping companies achieve better environmental performance. Only the specifications for a management system, ISO 14001, are designed for third-party registration.¹⁰

Notably, too, the work of TC 207 was to exclude setting limit values of pollutants or establishing actual performance levels. Like ISO 9000, the ISO 14000 standards were to be process standards, specifying procedures for systematically integrating environmental goals into a company's activities. The goals themselves were to be left to the companies, making the standards flexible and adaptable to many different kinds of companies. Also excluded from the scope of TC 207 were product standards and test methods for pollutants, the latter of which was being addressed by other ISO technical committees.

Nevertheless, the standards, like ISO 9000, are not trivial: They make real requirements of firms, and as proponents argue, may even reach deeper into a company's activities and culture than traditional command-and-control regulation by government. To be registered to ISO 14000, companies must demonstrate that they have established a complex system that includes: Management commitment and an environmental policy; environmental goals and targets; a program of processes, procedures, and lines of responsibility designed to achieve those goals; auditing and corrective action;

⁹ *ISO Bulletin*, April 1992, p. 2.

¹⁰ Tim Tibor with Ira Feldman, *ISO 14000: A Guide to the New Environmental Management Standards*, Chicago: Richard D. Irwin, 1996, p. 38.

management review.¹¹

The cost of establishing such a system, and getting it registered, will obviously vary from company to company, and estimates differ greatly. According to Joel Charm, Chairman of the U.S. SubTAG to the Environmental Management Systems Subcommittee, many companies spent about \$500,000 preparing for ISO 9000 registration, and while these companies will spend considerably less to add ISO 14000 registration, those companies that do not have ISO 9000 yet will presumably spend at least that amount.¹² Some industry observers estimate that for small to medium-sized companies, the cost could be \$50,000 to \$100,000 or more, with an annual maintenance fee of \$25,000.¹³ Others estimate that the training costs for ISO 14000 registration could be between \$80 million and \$180 million for a group of 100 employees.¹⁴

Pressures to Conform

As an officially private standards body, ISO's standards are strictly voluntary: Though national governments can (and sometimes do) establish ISO standards as official standards, ISO itself cannot force any company to use ISO standards or be registered as conforming to them. As we have seen, however, even voluntary standards can be highly compelling. In the case of ISO, its standards are drawing more and more attention as global commerce expands and firms want to establish compatibility and credibility in the global marketplace. Conforming to ISO 14000 presents the additional possibility of greater leniency from government regulators. But the pressure to conform is often applied quite explicitly by customers on suppliers. With regard to ISO 9000, the customer wants reassurance on quality; with regard to ISO 14000, the customer will want the boost to its environmental image that imposing certain requirements on its suppliers might provide.

A few years ago, few firms in the United States thought that ISO 9000 would affect them very much, but by 1994 registrations had increased to 4,000 from only 100 in 1990.¹⁵ Worldwide, registrations are also increasing sharply. According to a recent

¹¹ Cascio, et al., 1996, p. 36.

¹² Cited in Ronald Begley, "ISO 9000: Environmental ISO standard adds to management tasks," *Chemical Week*, 156(13), April 5, 1995, pp. 45-47.

¹³ Helga Tilton, "The dawn of ISO 14000," *Chemical Marketing Reporter*, 249(15), April 8, 1996, p. SR5.

¹⁴ Rick Mullin and Kara Sissell, "Managers gear up for global standards," *Chemical Week*, 157(13), October 11, 1995, pp. 65-66.

¹⁵ Matthew Gallagher, "ISO expands," *Chemical Marketing Reporter*, 247(15), April 10,

survey by Mobil, they rose to nearly 130 thousand by the end of 1995, showing an increase of over 32 thousand (over 30%) in the nine previous months.¹⁶ Observers are noting the "cascade effect" that ISO is having,¹⁷ and the fact that some nations adopt and integrate ISO standards as official standards is of course strengthening this effect.

Some industries are using ISO 9000 as a foundation for developing more industry-specific standards, and then requiring their suppliers to certify that they are conforming to these more specific standards rather than just the basic ISO 9000 standard. In September of 1995, the Big Three American automakers, General Motors, Chrysler, and Ford, presented a common quality program known as QS 9000. This program supplements ISO 9000 with guidelines from the Big Three's own quality programs. Both General Motors and Chrysler are mandating third-party registration to QS 9000 for their suppliers in North America, while Ford is requesting that they conduct self-assessments and establish plans to address any nonconformance problems. All three companies are planning to extend the program to their foreign suppliers as well.¹⁸

As ISO 14000 comes on line, similar pressures to conform are likely to emerge for environmental management systems. Commenting in a trade journal for chief financial officers, an observer compared ISO's most recent efforts vis-a-vis the environment to the unseen portion of an iceberg whose visible part is the domestic environmental regulation that is apparently being pushed back: "Less visible but more substantial, private, market-driven, international, self-regulatory forces--the other nine-tenths of the iceberg--are moving in a very different direction."¹⁹ The basic message was that businesses had better take notice of what may essentially be a new and private policy forum, a forum that can move independently of public policy trends.

Conformity Assessment: A Building Controversy

At the same time, the rush to ISO 9000 registration, and soon perhaps to ISO 14000 registration, is leading ISO to review the registration and accreditation process, especially the problems that might result from multiple accreditation systems. So far, registrations have been performed by a variety of registrars, who have in turn been

1995, p. SR12 (!).

¹⁶ *ISO 9000 News*, November/December 1996.

¹⁷ Quoted in M. Gallagher, 1995, p. SR12 (1).

¹⁸ Amy Zuckerman. "ISO 9000: Heading towards gridlock?," *Metal Center News*, 35(10). September 1995, pp. 2A-6A.

¹⁹ Michael Silverstein, "It's a Green World After All," *CFO*, Vol. 11, No. 10, October 1995, p. 14.

accredited by various accreditors. In anticipation of the potential confusions and obstacles to trade posed by such a fragmented system of conformity assessment, ISO's Conformity Assessment Committee (CASCO) was established in 1985 to analyze these issues, prepare international guides, and promote mutual recognition among national and regional conformity assessment systems.²⁰

CASCO has studied the possibility of an international system for recognizing registrations to ISO 9000, which has led to the establishment of the Quality System Assessment Recognition (QSAR) group, a potential prototype for such a system. In 1993, some ISO members and their affiliated accreditation bodies established the International Accreditation Forum (IAF), an informal group of national accreditation bodies which has also come under consideration as a potential institutional locus for a more coherent international system of conformity assessment.

The IAF could conceivably address the issue with regard to ISO 14000 as well. In June of 1995, CASCO and TC207 hosted a workshop in Geneva to "begin to establish processes for cooperating in the development of conformity assessment guides and mutual recognition schemes to support the implementation of the ISO 14000 series."²¹ Participants in the workshop emphasized, among other things, that a scheme for international recognition of accreditors should be established for ISO 14000 as well as ISO 9000, and that coordination between the two schemes should be pursued. Both QSAR and IAF were indicated as models to consider. ISO is clearly worried about the structure and cohesion of the conformity assessment system that is emerging around its management standards, and may be willing to integrate other organizations (like the IAF) into the ISO-system if necessary. These worries are clearly justified: As we shall see in the next chapter, the evolving responses of governments and other stakeholders are focusing more and more on issues of certification and accreditation.

²⁰ Cascio, et al., 1996, p. 91.

²¹ Wolfe, *ISO Bulletin*, September 1995, p. 6.

CHAPTER EIGHT

THE RESPONSES OF GOVERNMENTS AND OTHER STAKEHOLDERS TO ISO

ISO's worries about conformity assessment have been fueled by the concerns of both governments and other stakeholders regarding ISO activities, concerns which also include the legitimate scope of ISO standards and the balance of representation in ISO's decision-making processes. In this chapter, we explore these concerns, focussing on how governments and other stakeholders have approached the issue of international standards and ISO's role in developing them.

Governments and ISO

For the most part, ISO seems to have had a close and even intimate relationship with governments. As we have seen, governments are collectively interested in reducing the use of standards as trade barriers, and the Uruguay Round included an upgraded and strengthened version of the 1979 GATT Agreement on Technical Barriers to Trade. While safeguarding the right of signatories to maintain their own standards and regulations, this agreement encourages nations to use international standards as much as possible, and to participate in the development of such standards. In addition, the agreement contains a "Code of Good Practice" for standards-developers, which includes provisions for non-discriminatory access and transparency.

ISO has sought to establish an integral role for itself in this intergovernmental agenda. It has adopted the Code of Good Practice, and it has established formal relations with the World Trade Organization (WTO). The two organizations have together developed a set of "Notification procedures relating to the WTO Code of Good Practice," which provides guidelines for how standardizing bodies should notify ISO and WTO about their activities.²² According to its strategic plan for 1996 to 1998, "ISO intends to become recognized as providing a special technical support role in relationship to the new and expanded WTO programmes."²³ ISO, along with IEC, has also issued a joint mission

²² *ISO Bulletin*, January 1996, p. 13-15.

²³ ISO, "Raising Standards for the World: ISO's long-range strategies 1996-1998," Paragraph 3.3.3, ISO Website at: <http://www.iso.ch/presse/strategy/strategy.html>.

statement with ITU, in which the three organizations formalize their collaborative relationships.²⁴

The relationships between individual governments and ISO have also been fairly harmonious. ISO's basic acceptability to various governments is bolstered by the fact that though ISO is officially a private organization, its member bodies can be either private or governmental. Thus, the different approaches of various governments to standards-development are at least partially reconciled in ISO: Each nation simply designates a member body that reflects its desired balance of public and private involvement. Notably, too, each nation is allowed to designate only one member and consequently has one vote, regardless of its size; smaller nations and developing nations thus enjoy the same access and voting power as bigger and more advanced nations.

But mismatches in national approaches to ISO, and their related conformity assessment schemes, have also spawned conflicts and worries among governments. Tensions have emerged precisely because different types of organizations are negotiating the standards, and, in the case of the management standards, accrediting the registrars that certify their use. These tensions have involved concerns about countering mercantilistic advantage-seeking, as well as reconciling legitimate national differences regarding standards and conformity assessment.

The European Approach

In Europe, governments have traditionally been quite closely involved in voluntary standards and conformity assessment. Their main standards organizations, as well as their designated accreditation bodies, are often private, but they are nevertheless closely linked with their governments and receive funding from them. The British Standards Institute (BSI), for example, has been granted a series of royal charters from the British government which describe the organization's major purposes.²⁵ The Deutsche Institute für Normung (DIN) has a similarly formal relationship with the German government, giving it a monopoly over standards-development in exchange for a commitment to consider the public interest in its activities.²⁶ In France, the main standards body was founded as a government agency, reconstituted as private in 1926,

²⁴ "ISO, IEC, ITU Mission Statement (1994)," ISO Website at: <http://www.iso.ch/presse/strategy/strategy.html>.

²⁵ United States Congress, Office of Technology Assessment, *Global Standards: Building Blocks for the Future*, TCT-512, Washington, D.C.: U.S. Government Printing Office, March 1992, p. 68.

²⁶ OTA, 1992, p. 62-68.

and once again converted to a government body in 1984.²⁷

Just as these organizations have roughly similar relationships with their governments, they also have fairly similar operational styles. As befits their officially private status, they are voluntary organizations that emphasize the principle of consensus. They also tend to focus on promoting international trade; as a 1992 Office of Technology Assessment report points out, the relatively small markets of individual European nations have meant that international trade has been necessary to achieve large-scale production.²⁸

Thus, DIN and BSI, for example, are very active in international standards bodies such as ISO.

The European standards bodies are also members of several increasingly prominent European-wide standards bodies, including the Comite Europeen de Normalization (CEN) and the Comite Europeen de Normalization Electrotechnique (CENELEC). These sister organizations were established in the early 1960's, and are known jointly as the Joint European Standards Institute. Like their member bodies, they are officially private, but have a charter from the European Commission. In their activities, CEN is the European counterpart to ISO, while CENELEC is comparable to IEC.

In the last decade or so, the standardization process in Europe has been complicated by the acceleration of European integration and the subsequently increasing urgency of developing European-wide standards. To meet this imperative, the European Commission approved a so-called "New Approach" to standards in 1985. This approach involves a kind of division of labor between the European Commission and CEN/CENELEC, with the Commission issuing general regulatory directives that then serve as the basis for more specific standards prepared by CEN/CENELEC. The directives usually address areas traditionally regulated by government, and accordingly constitute legal requirements. The standards, however, are still voluntary in that companies have the option of demonstrating conformance to the directives in other ways.²⁹ Nevertheless, the fact that the New Approach delegated to CEN/CENELEC a role in areas usually covered by government regulation gave its two organizations a new prominence, and greatly increased their output of standards. At the same time, it also put considerable strain on the organization precisely because its activities now go beyond the arena of non-regulatory, strictly private standards, and because the demand for these standards is so urgent.

²⁷ OTA, 1992, p. 67.

²⁸ OTA, 1992, p. 61.

²⁹ OTA, 1992, p. 73.

In 1990, this strain and its effects led the European Commission to propose additional reforms to improve the speed and efficiency of the European standards process. In a discussion paper (known as a "Green Paper"), the Commission proposed a new "European Standardization System," which recommended, among other things, more industry involvement in the process, and greater direct participation by interested parties in general. In fact, though the proposal sought to reassure national standards bodies of their continued importance, many of its suggestions effectively downplayed their role in favor of a process that was organized more by sector than by nation.³⁰ Though this strengthening of European-level institutions at the expense of national-level institutions is an important goal of European integration, the Green Paper was opposed by many national bodies and CEN/CENELEC as well.

Another opponent of the Green Paper was ISO. Though ISO accepted the fact that European-level standard-setting would be a chief concern in areas normally regulated by government, it was worried that the intensifying focus on integrating the European standards process might lead to the neglect of the voluntary international standards process as well. According to ISO, voluntary standards represented about 85% of Europe's standards requirements.³¹

Despite these worries, however, the Europeans have generally remained committed to international standards and ISO, continuing a tradition of support and involvement. The national bodies that serve as the members of CEN/CENELEC are also the designated members of ISO, and ISO and CEN are increasingly comparing and coordinating their work programs. With the acceleration of European integration since 1985, they have negotiated two agreements pledging continued cooperation and commitment to the cause of harmonized European and international standards.³²

The European Commission endorses this commitment, and under European law, CEN/CENELEC is supposed to use international standards whenever possible. In fact, the Green Paper suggests that "a positive step would be to continue to ask the international standards bodies to take on some of the work which is now being proposed at European level, particularly in standardization activity that is not related to EEC product legislation."³³ Such a step, of course, would also relieve some of the burden on

³⁰ European Commission, "The development of European Standardization: Action for faster technological integration in Europe," Green Paper, October 8, 1990, (reference COM(90) 456 90-10-08).

³¹ *ISO Bulletin*, "Western Europe unveils new proposals for a standards policy," January 1991, p. 2.

³² *ISO Bulletin*, "ISO and CEN going hand in hand," August 1991.

³³ European Commission, 1990, p. 34.

European bodies. In many ways, and perhaps out of convenience as well as close involvement, ISO has a quasi-governmental status in European eyes, serving as a kind of global version of CEN.

This status was reflected in the way the Europeans initially approached ISO 14000: The hope at first was for "full-system" standards that would require little additional regulation. Such regulations would match the Eco-Management and Audit Scheme (EMAS), which specified not only management criteria but also important performance and disclosure criteria.³⁴ Though the European Commission retains the option of ultimately making EMAS compulsory, the program is an experiment with alternatives to command-and-control regulation, a scheme in which market pressures are supposed to induce conformance. Like ISO 14000, then, it is a voluntary program, similar enough that a close harmonization of European and international schemes seemed attainable. Such a harmonization would satisfy the needs of the integrated European market while honoring both the obligations under the TBT Agreement and the tradition of commitment to ISO.

The American Approach

The European hope for ISO 14000 was dashed by the Americans, who have had a somewhat different approach to standards and to ISO. In the United States, standards-development has been a more fragmented affair. Much of it has been private, with considerably less government participation and little direct government funding. The main American standards body is the American National Standards Institute (ANSI), a private federation of standards bodies that does not develop standards but coordinates the efforts of other bodies. These other groups include general membership groups such as the American Society of Testing and Materials (ASTM), one of the largest standards developers, and various trade associations and professional societies. Sometimes these organizations clash over who should be developing a given set of standards; ANSI is supposed to resolve these conflicts.

The government is a member of ANSI and participates actively in its work, but more as a partner than as a dominating force. Over the years, though, there have been several federal investigations focussing on the effectiveness and fairness of the American standards process, and on the potential role of government.³⁵ In the 1970's, these investigations led to increased federal standard-setting in certain areas, including environment, health, and safety. In 1985, the Department of Commerce established the Interagency Committee on Standards Policy (ICSP) to coordinate federal involvement in those areas where standards-development remained voluntary and private.

³⁴ Cascio et al., 1996, p. 28.

³⁵ OTA, 1992, p. 54-55.

With regard to ISO, ANSI is the self-designated member body for the United States. Like ANSI, then, ISO is in American eyes a private, industry-driven organization. This attitude extends to conformity assessment: The Registrar Accreditation Board (RAB) was established in 1989 by the American Society for Quality Control (ASQC) as a private, independent organization that could assure the competency of third-party registrars for ISO 9000. ANSI is involved in this area as well, ensuring due process and public review for RAB, while also promoting its recognition.³⁶

The industry-driven nature of the American system is generally perceived as a strength by the U.S. government. As an official from the National Institute of Standards and Technology (NIST) put it at a Congressional hearing in June of 1996, "NIST believes strongly that the United States standards development system should continue to be industry-led and based on a private, voluntary process, with technical support from government agencies where appropriate... [a]n effective standards system does not require greater central control, but greater cooperation and communication among all affected parties."³⁷

Even for the EPA, ISO 14000 suggests the possibility of less interventionary government regulation, an additional element in an emerging strategy to increase the role of self-policing. According to Greg Waldrip of EPA's Office of Enforcement and Compliance Assurance, "we have to ask ourselves which companies don't need our oversight. Eventually, the new environmental standard will raise the issue: If a company is registered to ISO 14000, should it fall within EPA's command and control structure, with monitoring and inspection?"³⁸ EPA has been running pilot projects with some companies to test the feasibility of imposing fewer inspections and reduced penalties in exchange for ISO registration.³⁹

Tensions Among Governments

Given the private status of ANSI and RAB, and their subsequently less "official" authority, some observers and government agencies have nevertheless raised concerns that U.S. interests may not be adequately represented in international standardization

³⁶ *Quality*, September 1996, p. 16.

³⁷ Statement of Belinda L. Collins before the Science Committee Subcommittee on Technology, U.S. House of Representatives, June 4, 1996.

³⁸ Waldrip, quoted in *Manufacturing Engineering*, May 1996.

³⁹ Ronald Begley, "Is ISO 14000 worth it?," *Journal of Business Strategy*, 17(5), September 19, 1996, p. 50.

efforts. In its 1992 report, the Office of Technology Assessment (OTA) discusses the issue of international standards in frankly mercantilistic terms: International standards are steered by governments to benefit their national firms at the expense of foreign firms. Thus, the government needs to be much more involved in international standards fora in order to increase American bargaining power by matching the extensive involvement of other governments. The report notes that in intergovernmental fora such as ITU, the State Department coordinates U.S. input and is able to provide more effective representation.⁴⁰

In its recent testimony before Congress, NIST echoed some of these same concerns, and they are also examined in a September 1996 article which was published in the Commerce Department's trade-oriented magazine, Business America:

U.S. industry has worked very hard to develop market-based standards through our voluntary system standards that reflect the best U.S. technology and practices. However, these standards are often not considered for international acceptance by the International Standards Organization (ISO), International Electro-technical Committee (IEC) and other international bodies, in part because some of our trading partners dominate the process in key sectors, and also because government and industry in the United States have both been slow to realize the importance of harmonizing standards and conformity assessment practices at the international level.⁴¹

While the U.S. government has clearly stepped up the coordination of its policy on international standards in recent years, the article recommends further efforts to develop a more proactive "strategic standards commercial policy" that can meet the challenge of foreign standards strategies, voluntary as well as regulatory.

In spite of these mercantilistic considerations, however, the OTA report also suggests that other governments find the relative detachment of the U.S. government *problematic* as well as advantageous.⁴² Indeed, the mismatch of approaches can lead to confusion regarding the types of standards that voluntary international standards-developers can legitimately develop, as well as conflicts regarding the acceptability of various modes of conformity assessment.

In the most recent round of ISO standards-development, ISO 14000, a key issue was in fact the question of how specific the standards should be: How far should they go

⁴⁰ OTA, 1992, p. 17.

⁴¹ Department of Commerce, "Standards," *Business America*, 117(9), September 1996, pp. 126-137.

⁴² OTA, 1992, p. 23, Footnote 95.

in replacing government regulation? The Europeans, as we have seen, favored "full-system" standards that matched their EMAS and went well beyond management systems. While EMAS, like ISO 14000, did not specify actual performance levels, it required continuous improvement of environmental performance and detailed public disclosure of targets and accomplishments. These requirements were intended to go far towards establishing the European-wide regulatory system that the Europeans needed for their integrated market; the goal was not so much the replacement of government regulation but rather compensation for its absence.

The U.S., on the other hand, regarded such specific standards in the area of environment as an encroachment on its governmental prerogatives. In the U.S. view, ISO 14000 was to compliment national regulatory systems, not serve as a substitute for them. As a non-governmental organization, ISO was not supposed to formulate standards normally subject to a governmental, political process; it was supposed to limit itself to private-sector standards, just as the scope of TC 207 stated.⁴³

Most other countries were also wary of standards that went beyond process management. As Cascio puts it, "Most feel that a supplementary regulatory system either is not needed or is undesirable, and that the additional requirements of mandating environmental performance goals and public communication are better implemented through other means, on a country-by-country basis."⁴⁴ With this support from other non-European nations, the American approach prevailed, leaving the Europeans to work instead for an ISO standard on which they could then graft their more specific standards. The Europeans may develop a "bridge" document that specifies the additional requirements of EMAS.⁴⁵

But conflicts have also emerged on the issue of conformity assessment and the validity of various registrations, an issue that raises the controversial subject of trade barriers, and, again, the difficulty of distinguishing legitimate requirements from mercantilistic ploys. A recurring problem has been the private nature of the American conformity assessment system. European auditors have not always taken the RAB/ANSI accreditation scheme seriously, saying that it does not have the direct government backing that is integral to most European accreditation systems.⁴⁶ In 1994, the director general of the Mexican Standards Directorate, a governmental body, announced at a

⁴³ Cascio, et al., 1996, pp. 14 and 29.

⁴⁴ Cascio, et al., 1996, p. 29.

⁴⁵ Tibor and Feldman, 1996, p. 83.

⁴⁶ Paul Kemezis, "Confusion persists on issue of registrar accreditation," *Chemical Week*, 152(16), April 28, 1993, p. 42.

conference on NAFTA and ISO 9000 that the U.S. system of conformity assessment was not credible to Mexico: "Since you don't have a duly accredited registrar, we will not accept certificates issued by U.S. agencies as a warranty of quality assurance."⁴⁷

The problem of cross-national recognition also emerges when a particular government demands registration by registrars accredited by its own accreditation body. In 1995, the Japan Accreditation Board (JAB), an affiliate of the Ministry of International Trade and Industry (MITI), announced that it would ask foreign software vendors to be registered as conforming to its ISO 9000 derived standard by registrars accredited by the JAB. Though officially voluntary, this demand, like the Mexican move, raised the fear that ISO 9000 was leading to trade barriers rather than its stated goal of enhanced trade. It also prompted concerns that trade secrets might be lost during audits by JAB-accredited registrars.⁴⁸

The U.S. government, as well as RAB, has recognized the problem of foreign recognition for the United States' private system of accreditation and certification. In response, NIST has been developing the National Voluntary Conformity Assessment System Evaluation (NVCASE) program, which is designed to provide official recognition by NIST to American accreditation bodies that meet certain criteria. Such recognition would bolster the standing of the U.S. system in the eyes of governments that demand more official involvement in conformity assessment. RAB has applied for this kind of recognition, but the program is still in development and its finalization date is unclear.

In keeping with its traditional approach to standards and conformity assessment, however, the U.S. government has generally played a more supporting, rather than central, role in the international arena, at least with regard to ISO standards. Though the involvement of the government is apparently increasing, ANSI and RAB have still taken much of the initiative in reaching out to foreign accreditation groups to establish mutual recognition.⁴⁹ And though the U.S. government expressed concern about the Japanese initiative on software, the issue has recently been resolved through negotiations between JAB and ANSI, a resolution which U.S. Ambassador to Japan Walter Mondale cited as an example of "what can be accomplished when the Japanese and U.S. private sectors work together in the spirit of good will."⁵⁰

⁴⁷ Voss, *Journal of Business Strategy*, May/June 1994, p. 6.

⁴⁸ Rob Guth, "U.S. ISV's face Japan trade barrier," *infoworld*, 17(28), July 10, 1995, p. 29.

⁴⁹ Mark Morrow, "Geneva summit targets harmony," *Chemical Week*, 152(16), April 28, 1993, p. 43-46.

⁵⁰ Quoted in Laura Struebing, "ANSI/JAB agreement settles software dispute," *Quality Progress*, 28(12), December 1995, p. 21.

Ironically, it is European officials that are currently expressing the strongest worries that the current international standards system is "conflict-ridden and clumsy."⁵¹ Despite their typically enthusiastic approach to ISO, these officials have several concerns. They do not like the Big Three's initiative, QS 9000, which they see as a trade barrier and a threat to ISO 9000. Moreover, they are concerned about the proliferation of registrars, and the emergence of a registration industry whose interests may not coincide with the public interest. Spurred by these worries, the Europeans are participating actively in attempts to create a more orderly and unified registration system, at both the European level and the international level.

A notable aspect of this recent European effort is a growing skepticism about ISO itself, in particular its involvement in conformity assessment and even its development of management standards. European officials feel that the QSAR initiative should be moved over to the IAF, pointing to what they see as a major conflict of interest inherent in ISO's involvement with conformity assessment: National accreditation bodies, registrars, and consultants are closely involved in ISO, and these groups may not be entirely objective with regard to how their activities should be regulated.⁵²

In a surprising turn, European officials have recently suggested that ISO should perhaps discontinue developing management standards in the first place.⁵³ Though there is no talk of banning ISO registration, ISO may in fact have gotten a little out of control in European eyes, or more specifically, out of European control. Until recently, ISO 9000 and the surrounding conformity assessment schemes were very much a European game, and some American observers felt that the Europeans liked it that way: As an American observer noted in 1992, "the EC is not bending over backward trying to help us become part of their scheme."⁵⁴ The growing participation of American firms and organizations has eroded that European dominance, even as it has strengthened ISO. So despite their traditionally extensive support of ISO, the Europeans may now be trying to reclaim the initiative on international standards by cracking down a little, and by balancing ISO's growing influence with another organization, the IAF.

⁵¹ Amy Zuckerman, "Changes in the offing on the European standards front," *Journal for Quality and Participation*, 19(4), July/August 1996, p. 92.

⁵² Amy Zuckerman, *Journal for Quality and Participation*, 19(4):92-96, July/August 1996.

⁵³ Amy Zuckerman, "Changes in the offing on the European standards front," *Journal for Quality and Participation*, 19(4) July/August 1996, p. 92-96.

⁵⁴ Quoted in Kevin McDermott, "When 'Quality' Becomes a Trade Barrier," *D&B Reports*, 40(3), May/June 1992, p. 40.

Other Stakeholders and ISO

ISO claims to encourage the participation of all interested parties in its activities: "All interests are taken into account: manufacturers, vendors and users, consumer groups, testing laboratories, governments, engineering professions and research organizations."⁵⁵ Member bodies are expected to take into account all interests at the national level when formulating their standpoints for discussions, and in addition, ISO has "liaisons" with 500 or so organizations. The majority of these organizations are trade associations and commissions, but they also include the International Council of Scientific Unions (ICSU) and Consumers International. More recently, several environmental groups have acquired liaison status, including Friends of the Earth (FOE), the World Wildlife Fund (WWF), and the Environmental Defense Fund (EDF).

All proposals for work on new standards are supposed to indicate any liaisons with other groups that might be necessary; these liaisons are then established by the CEO in consultation with the relevant committee or subcommittee. There are two categories of liaison: Category A, consisting of organizations which "make an effective contribution to the work of the technical committee or subcommittee," and Category B, consisting of organizations "which have indicated a wish to be kept informed of the work" being done.⁵⁶ Category A groups are invited to meetings, while Category B groups are sent reports. Moreover, "technical committees and subcommittees shall seek the full and, if possible, formal backing of the organizations having A-liaison status for each International Standard in which the latter are interested."⁵⁷

Conceivably, then, an interested party can participate in the process both through its national body or through one of the 500 organizations with liaison status. In Europe and Japan, as well as the U.S., national bodies try to be inclusive and consensus-oriented, and there appear to be no formal limitations on who can acquire liaison status in ISO. This may be one reason that ISO, until recently, has apparently drawn little direct criticism. As we shall argue in the conclusion, the fact that ISO provides an obvious public good and takes pains to include all stakeholders has probably contributed to establishing a fairly broad-based legitimacy for the organization.

Nevertheless, the ability of various stakeholders to wield influence in ISO is likely to vary quite a bit. The costs of effective participation are high, involving a good deal of time and travel; predictably, influence is likely to stem from the ability to command

⁵⁵ ISO Website at: <http://www.iso.ch/welcome.html>.

⁵⁶ ISO/IEC Directives, Paragraph 1.15.2.

⁵⁷ ISO/IEC Directives, Paragraph 1.15.5.

resources and expertise, as well as build transnational coalitions. While large multinational companies are able to participate actively in international standards-setting, the OTA report suggests, smaller companies and public interest groups could easily be marginalized, suggesting that due process issues are not resolved.⁵⁸ So just as some governments have recently expressed certain concerns about ISO's new management standards, some of these other stakeholder groups have also started voicing complaints.

Many of these complaints have been about ISO 9000 and its conformity assessment schemes. Some groups representing small business have complained about the costs of the program, a problem that observers say ISO has neglected.⁵⁹ Thus, whereas NAM's large corporate members have actively supported the program, its Small Manufacturers' Forum has established a "cross-industry council to lobby for ISO 9000 price concessions for small and mid-sized firms."⁶⁰ In general, there has been a suspicion among some industry groups that the ISO 9000 program was created by consultants for their own benefit,⁶¹ an attitude that echoes some of the more recent governmental worries about the program.

In 1995, a coalition of nearly 40 major electronics companies all over the world, led by Motorola and Hewlett Packard, began demanding that the ISO 9000 registration process be streamlined.⁶² To reduce the amount of work that registrars do in a company, the coalition wants to replace plant-by-plant registration with one-stop registration. Many of these same companies were among those that united against the Japanese initiative on software vendors, JIS Z9901, and their complaints to the Office of the U.S. Trade Representative helped bring added pressure on the Japanese to negotiate with ANSI.

ISO 14000 has lately come in for some criticism as well. One environmental group, the Worldwide Fund for Nature (WWF), has voiced concerns about the possibility that the rather confusing exclusion of actual performance levels from the standards will mislead the public about the actual meaning of ISO 14000 certification; the group wants

⁵⁸ OTA, 1992, p. 19.

⁵⁹ Amy Zuckerman, "ISO 9000: Free trade boon, barrier or boondoggle?," *Journal for Quality and Participation*, 17(1), January/February 1994, pp. 88-92.

⁶⁰ Amy Zuckerman, "The high price of admission," *Appliance Manufacturer*, 42(5), May 1994, p. 8.

⁶¹ Amy Zuckerman, "ISO 9000: Free trade boon, barrier or boondoggle," *Journal for Quality and Participation*, 17(1), January/February 1994, p. 88-92.

⁶² Amy Zuckerman, "ISO 9000: Heading towards gridlock?," *Metal Center News*, 35(10), September 1995, pp. 2A-6A.

ISO to clarify the difference between ISO 14000 and other eco-labels.⁶³ Other critics have expressed doubt about the standards' ability to change corporate culture. One outside observer notes that while the standards provide useful tools and organizational ideas for companies, they "have been carefully vetted to remove specific, explicit normative or visionary (consciousness-changing) content."⁶⁴

Whether greater participation by environmental groups in the ISO 14000 negotiations would have produced a different set of standards is unclear, but environmental groups have not been a major presence at negotiations. As we have already noted, three environmental groups have liaison status, but that is a relatively small number, and, moreover, the number alone does not say much about the extent of their participation. Indeed, the American chapter of one of the environmental groups that is listed as having liaison status, Friends of the Earth, notes that while they would like to be involved, they simply do not have the resources.⁶⁵ Other groups may simply have failed to recognize the potential importance of ISO.

ISO has made concerted efforts to respond to some of these criticisms, especially the concerns of small and medium-sized businesses. According to the Secretary of TC 207, John Wolfe, the committee has tried to ensure the compatibility of its standards with the needs of smaller businesses, as well as businesses in the developing countries, since the very beginning of its activity in 1993: "By encouraging participation in TC 207 and its subcommittees by representatives of these groups, and through consultation with other experts. TC 207 has considered the particular requirements of SME's and LDC's and incorporated them into the core EMS documents."⁶⁶ At the 1996 plenary session in Rio de Janeiro, ISO delegates voted to establish a working group which will investigate the possibility of providing special guidance for SME's that are implementing ISO 14000.⁶⁷

Another group that ISO has made a special effort to integrate precisely because they are less likely to be effectively represented is consumers, who are obviously critical stakeholders. As early as 1964, the ISO council passed a resolution to promote the

⁶³ Frances Williams, "Eco-label standards attacked by WWF," *Financial Times*, September 13, 1996, p. 4.

⁶⁴ John Ehrenfeld, "ISO 14000 and Responsible Care: What Kind of Change Agents Are They?" Paper prepared for "ISO 14000: Preparing for Change" Conference, Houston, Texas, September 27, 1995.

⁶⁵ Personal communication with FOE, July, 1996.

⁶⁶ Wolfe, *ISO Bulletin*, November 1995, p. 3.

⁶⁷ Caroline Hemenway, "International e-standards head toward adoption," *Environment Today*, 7(3), July/August 1996, p. 30.

participation of consumers in standards development, and in 1978, a Committee on Consumer Policy (COPOLCO) was established to improve consumer awareness and participation, as well as coordinate consumer policy among various ISO groups. A chief representative of consumers in ISO has been Consumers International (CI), formerly known as the International Organization of Consumers Union (IOCU). CI participates in several technical committees and working groups.⁶⁸

Dilemmas of Representation

Complicating the drive to increase participation is another problem that ISO faces, a problem that stems partly from its exhaustive emphasis on consensus: ISO's complicated procedures are often too time-consuming, particularly for some types of standards. As Rada has recently noted, "the long time required to make decisions is a major impediment to ISO's influence in the rapidly changing information technology arena."⁶⁹ ISO needs to fasttrack its standards-development in some areas, but this could jeopardize the broad access its current process provides.

Rada suggests that ISO could learn from, and perhaps collaborate with, the Internet Engineering Task Force (IETF), the key organization in the Internet standardization process. The IETF is open to anyone interested in Internet standards, but its fluid and less bureaucratic procedures involving E-mail and public sharing of draft standards have produced standards quickly enough to support the rapid evolution of the World Wide Web, a feat that Rada doubts ISO could have accomplished.⁷⁰

Another complaint about ISO actually comes from two of ANSI's more powerful constituents, the American Society of Mechanical Engineers (ASME) and the American Society for Testing and Materials (ASTM). ASME and ASTM are major standards-developers, and their standards have often served as de facto international standards. To some extent, they are competitors to ISO, but their members are not the national standards bodies that constitute the ISO membership but rather individuals, from foreign countries as well as the United States. ASME recently changed its official name to ASME International.

Testifying before Congress in June of 1996, an ASME representative suggested that ISO's standards are inadequate because ISO aggregates interests on the basis of one-

⁶⁸ Michael O'Connor, "Consumer questions: IOCU and ISO help each other to help the consumer," *ISO Bulletin*, March 1995, p. 6.

⁶⁹ Rada, Roy, "Consensus Versus Speed," *Communications of the ACM*, Vol. 38, No. 10, October 1995, p. 21.

⁷⁰ Rada. 1995, p. 22.

nation/one-vote: "Because each of these members of ISO is entitled to one vote on a proposed standard regardless of the population of that nation and regardless of the size of the affected industry or market, ISO should not be considered as a true consensus standards developing organization.....[t]he ISO system...cannot ensure that requirements of an ISO standard has (*sic*) met the criteria of a balance of interest of those materially affected by the standard."⁷¹ At the same hearing, the president of ASTM echoed this criticism, noting that the one-nation/one-vote rule gives the Europeans, voting as a bloc, a much greater say than the U.S. in ISO.⁷²

ASME and ASTM may have various reasons for raising this issue, but it nevertheless underscores a potentially important institutional dilemma faced by ISO, and indeed by any international or transnational organization. The dilemma in fact turns on whether the organization is international or transnational, and on the representational implications of this distinction: Does it aggregate interests by nation, or by smaller units such as interest groups, companies, or individuals?

The former, an "international" institutional form, contributes to an organization's legitimacy among national governments, particularly those of smaller and economically weaker nations. It also favors those groups within nations whose most effective representative in the global arena is their national government. The latter, a more "transnational" institutional form, is favored by those groups who can effectively pursue their interests in the global arena, and who have, in a sense, already transcended the partitioning of the world into separate nations. It may also be preferred by national governments who identify the national interest with the interests of such powerful actors or groups.

This issue was explicitly raised by ISO in its critique of the European Commission's 1990 Green Paper on standards. ISO objected to the Green Paper's suggestion that interested parties should participate directly, arguing that national member bodies perform a critical representational function: "They organize the sources of industrial and public interest inputs into the international negotiating fora and, by virtue of their positions in their national infrastructures, they ensure the underlying procedural integrity of the international standardization process."⁷³ More specifically, ISO argued that:

⁷¹ Testimony by June Ling, ASME International, Before Science Committee Subcommittee on Technology, United States House of Representatives, June 4, 1996.

⁷² Testimony by James A. Thomas, President, American Society for Testing and Materials, Before the Subcommittee on Technology, House Science Committee, June 4, 1996.

⁷³ ISO, "ISO/IEC Review and Recommendations on the EC Commission Green Paper Concerning the Development of European Standardization," 1991.

The emphasis on direct company participation (not as represented in interest-balanced national delegations) at the European level might be a practical alternative for the larger multi-national companies, but their customers and suppliers including the small and medium-size enterprises simply do not have the resources to participate directly in multi-national standardization work.⁷⁴

Despite this defense of the international mode of organization, ISO's extensive provisions for liaison status by a variety of groups suggest that ISO has tried to strike a kind of balance between the two representational modes. Indeed, one of the organizations with liaison status has even noted that direct representation through such an organization can serve as an alternative to representation through national delegations.⁷⁵ This balance aims to serve both the needs of legitimacy as traditionally conceived in the international realm, and the needs of broad consensus and extensive expertise that characterize all voluntary standard-setting efforts. Notably, it is a balance that is showing signs of emerging in strictly intergovernmental organizations, too, where the role of non-governmental lobbying is rapidly increasing.

The Future of ISO

ISO's relations with governments and other stakeholders have clearly become more turbulent in the last decade. ISO's forays into management standards, particularly those involving issue-areas that are generally the subject of government regulation, has provoked responses that have been negative as well as positive. As we have seen, both governments and other groups have expressed concerns about the standards and their systems of conformity assessment. In response to these concerns, ISO's Technical Management Board voted in January of 1997 not to go forward with a management standard for occupational health and safety.⁷⁶

Unlike the conference system in shipping, however, ISO is not in any immediate danger of disappearing. In fact, the emergence of ISO standard-setting as a more salient issue reflects the fact that ISO has become more important and influential, taking a more prominent position among the institutions that regulate the global economy. The activism of governments and other stakeholders is guiding the evolution of ISO's operations, but it is not threatening the organization's existence or fundamental

⁷⁴ ISO, 1991, p. 3.

⁷⁵ Bruce Farquhar, "Consumer questions: Better coordination for consumer representation in standardization," *ISO Bulletin*, April 1996, p. 4.

⁷⁶ Amy Zuckerman, "ISO tables health and safety standard," *Iron Age New Steel*, 13 (3), March 1997, p. 105.

significance. It is notable that even as controversy unfolds over management standards, ISO continues its work on a variety of other standards in relative peace and quiet.

PART V
CONCLUSION

CHAPTER NINE

PRIVATE REGIMES AND LEGITIMACY

This dissertation began by pointing out a phenomenon that was interesting but puzzling, perhaps even dubious on closer inspection: The notion of a private regime was not only absent from most studies of international relations, but it seemed to violate the basic tenets of most mainstream theories. The questions it raised were thus obvious and stark. First, do private regimes actually exist? How do they work? And second, why would such regimes be tolerated? What is their relationship to governments and other concerned stakeholders?

After an extensive investigation, including theoretical analyses, an empirical overview, and two detailed case analyses, the answers to these questions are far from complete. Nevertheless, it is now possible to identify emerging hypotheses about private regimes and their implications, hypotheses that can serve as guides for future research in this nascent field of study. These hypotheses fall into two groups. The first concerns the phenomenon of private regimes itself, while the second concerns their broader political context. As we shall see, private regimes and their political context are intimately linked, and the latter is ultimately necessary to understand the former: Though private regimes are indeed a potentially significant form of governance, the role they play and the forms they take are structured not only by the internal dynamics of cooperation, but also by the external battles to secure acceptance for their power to order markets.

The Spectrum of Governance in the Global Economy

The first set of observations begins with the simple one that private regimes exist. Both the empirical overview and the case analyses suggest that, even by a relatively strict definition of governance that emphasizes collective management by formal organizations, the range of governance mechanisms in the global economy is indeed wider than generally recognized. For the particular types of private regimes that we have examined (transnational versions of certain kinds of domestic self-regulation), it is easy to identify multiple examples, some of which are critically important in the global economy. Increasing interdependence and interpenetration among national economies appear indeed to transnationalize domestic rationales for self-regulation. This observation confirms what Porter and Haufler argue in their seminal works on private regimes in finance and

insurance, underscoring the importance of studying alternative modes of governance and order in the global economy.¹

At the same time, the distinction between public and private regimes may not be so dichotomous. Instead, there appears to be a spectrum between public and private which includes wholly private arrangements such as liner conferences, but also more hybrid regimes. ISO is officially non-governmental, but its membership includes state agencies as well as private groups. Moreover, it has carved a niche for itself among intergovernmental bodies like ITU and WTO. In essence, ISO is quasi-governmental, occupying a position somewhere in the middle of the spectrum.

Just across the gray line between public and private might be the International Organization of Securities Commissions (IOSCO), which is officially an intergovernmental organization but prefers to consider itself non-governmental. Underhill argues that IOSCO illustrates an important development in global policy-making: A fusing of public and private into what he calls “integrated ensembles of governance.”² Such a development entails a profusion of organizations that, like ISO and IOSCO, tend toward the middle of the spectrum between public and private. Notably, not all of these hybrid organizations are new or even of post-war origins. The International Labor Organization, which dates from 1919, might also be placed somewhere in the middle, since its tripartite membership structure consists of delegates from labor and business as well as government.

Private Regimes as an Institutional Choice

Why do different regimes end up in different places on the spectrum of governance? And what difference does it make? As we have seen, the nascent literature on private regimes, like the literature on interstate regimes, has focused mostly on the internal dynamics of such regimes, the organizational challenges they face. For Porter and Haufler, then, the answer to the first question lies with the private regimes themselves, specifically their ability to maintain a cohesive organization that accomplishes its goals. When this ability falters, governments are likely to step in and take up the slack.

¹ Virginia Haufler, *Dangerous Commerce: Insurance and the Management of International Risk*, Ithaca, New York: Cornell University Press, 1997; Tony Porter, *States, Markets, and Regimes in Global Finance*, New York: St. Martin's Press, 1993.

² Geoffrey Underhill, “Transnationalising the State in Global Financial Markets: Cooperative Regulatory Regimes, Domestic Political Authority, and Conceptual Models of the State,” Paper presented at the International Studies Association Annual Meeting, Toronto, Canada, March 1997, p.1.

In his study of global financial markets, for example, Porter finds that the weak private regime in banking prompted the development of a strong interstate regime, while the more robust private regime in securities obviated the need for a strong interstate regime. Similarly, Haufler shows how the mix of public and private provision of international risks insurance has been linked to a private regime that decides the norms for what risks private insurers will assume. In this scenario, private regimes establish a role for themselves and the sectors they manage, which governments then supplement as necessary.

As an institutional choice for public and private officials concerned with the management of an issue-area, a private or quasi-private regime has the advantage of harnessing more thoroughly the often superior expertise of the private sector. Thus, to the extent that we are seeing a globalization of production that increases the need for such expertise, we should indeed see a tendency for new organizations to emerge somewhere on the private side of the spectrum, and for organizations that used to be strictly governmental to drift towards that side. An example of the latter development might be the increasing access of NGO's to intergovernmental fora, including the WTO.

The Political Context

But do the internal imperatives of success for private regimes suffice to explain the characteristics of such regimes? This dissertation set out to explore another set of potentially important factors: The broader political context in which private regimes must operate. My review of domestic self-regulation showed that private governance tends to be controversial. Like public governance, private governance often involves the exercise of power, and this raises issues of accountability that can provoke not only governments but other stakeholders to intervene in its exercise. Thus, self-regulatory arrangements in the domestic realm have been *externally* constrained in various ways, affecting their basic structure as well as their activities.

The obvious question with regard to the transnational manifestations of such arrangements, then, was whether they raise similar issues of accountability and supervision. Do private regimes operate as freely and unaccountably as scholars like Strange suggest? If not, how are they constrained and regulated, and what are the implications for private governance in the global economy? An important aspect of these questions is the fundamental differences between the domestic realm and the international realm. In what ways do these differences condition the emergence of accountability concerns, as well as raise additional issues that do not arise domestically? The answers to these questions will have both positive and normative significance, informing not only our understanding of the role that private regimes might play, but also our evaluation of what that role should be.

Geopolitical and Competitive Dynamics: Private Regimes as Tools of Statecraft

The issue of accountability may not always emerge with regard to private regimes, at least in the way that it emerges domestically. In some cases, governments want to protect or promote certain industries, to the point where they allow those industries considerable latitude to do what they see fit. Such a policy could stem from an industry's perceived economic or military importance for a nation. Shipping cartels, for example, were probably tolerated even after World War II because they stabilized an industry that had important security aspects. Moreover, the shipping industry was economically important to the Europeans, while the Americans recognized and accepted the need of Europeans to rebuild their major industries as part of the United State's own geopolitical interests. During this period, international dynamics overshadowed the concerns that arise domestically over self-regulation.

Such dynamics are discernible in other issue-areas as well. The International Air Transport Association's (IATA) role in managing commercial aviation was accepted for a long time because of the importance for national governments of protecting flag carriers. In the oil industry, Justice Department efforts in the 1950's to prosecute the so-called Seven Sisters for anti-trust abuses were stopped by the Eisenhower administration for national interest reasons.³ Even in the case of ISO, there is at least the suspicion that the recent European concerns about abuses has emerged not only because of actual abuses but also because the organization is less dominated today by Europeans than it used to be, and that simple fact has provoked more scrutiny of the ISO system. Along with the American activism that began on shipping in the 1960's, this development suggests that governments not only support and perhaps manipulate private regimes to suit their geopolitical objectives, but that they might also challenge them for the same reasons.

The Issue of Accountability

When governments begin to see the power of a private regime as less clearly instrumental to specific national interests, that power can become an issue of concern in much the same way that it does in the domestic realm. Government agencies, interest groups, or outside experts question the regime and its accountability to broader sets of stakeholders. In shipping, the periods of unfettered control by conferences are overshadowed by far longer periods of controversy and criticism, in which the potential power of conferences to exploit shippers has been a key issue. In the area of standards, too, questions of fairness and representation often arise. In recent years, especially, ISO and its related systems of conformity assessment have come under attack on various grounds, including the alleged neglect of small firms and the takeover of the system by certification consultants building a market for their services.

³ Kurt Rudolf Mirow and Harry Maurer, *Webs of Power: International Cartels and the World Economy*, Boston: Houghton Mifflin Company, 1982.

The issue of power and accountability is not absent from the cases investigated by Porter and Haufler, nor from other examples of private regimes. Porter notes, for instance, that the reassertion of control by large securities firms over bond trading during the 1980's provoked complaints of abuse from more marginal firms.⁴ Haufler describes the political problems that Lloyd's self-regulated market has had in the wake of recent financial scandals, problems that are casting doubt on the continuation of its self-regulatory privileges.⁵ In the area of aviation, IATA eventually had to weather strong criticisms of its cooperative fare-setting, including a challenge by the Civil Aeronautics Board in the late 1970's that forced it to marshal a major international effort to defend its practices.⁶

Though there may indeed be cases where the issue of power and accountability has not come up, it may also be merely a matter of time before they do. Fair or unfair, the accusations provoked by many private regimes underscore their inherently controversial nature. A full understanding of such regimes requires an examination of how these controversies emerge and develop, and what their implications might be.

Private Power and Legitimacy

When issues of power and accountability emerge, a private regime faces the challenge of justifying its activities in more than particularistic terms. In a sense, it faces a legitimacy crisis, a need to establish that it wields power appropriately and fairly. Haufler asserts that a private regime is legitimate by definition, but in so doing, she sidesteps what is in fact a critical issue: The cases of liner shipping and ISO suggest that establishing legitimacy can be an important challenge for private groups seeking to regulate themselves, a challenge that has consequences for the role they play and the institutional forms they take.

How can private regimes build legitimacy? The general problem of establishing legitimacy is usefully addressed by Beetham, who argues that three important factors contribute to the legitimacy of power: Its legal validity, its justifiability in terms of the general values and beliefs of its constituents, and the expressed consent of those constituents.⁷ Beetham, of course, has state power in mind, but these factors are relevant for private power as well as state power. Thus, private regimes must demonstrate, first of all, that they are legitimate in the sense that they do not break existing laws. Indeed,

⁴ Porter, 1993, p. 145.

⁵ Haufler, 1997.

⁶ Christer Jönsson, *International Aviation and the Politics of Regime Change*, New York: St. Martin's Press, 1987.

⁷ David Beetham, *The Legitimation of Power*, Atlantic Highlands, NJ: Humanities Press International, 1991, p. 12.

some of the legal battles fought by conferences have centered on precisely the legality of their activities in various jurisdictions.

At a deeper level, however, a private regime must assert its conformance to more general principles and beliefs about appropriate behavior, principles that underpin existing laws but also have the potential to be implemented as new laws. For Beetham, understanding this dimension of legitimacy means understanding the beliefs and values of a particular society. With regard to private regimes, of course, the relevant “society” is the group of national societies across which a given regime operates.

Ideally, then, such principles will be as broadly accepted as possible, enabling consensus across multiple nations as well as multiple groups. The cases of shipping and standardization suggest that two broad types of legitimacy are especially important. One type involves the validity of a regime’s basic purpose, and the other involves the fairness and integrity of its institutional structures and processes.

Functional Legitimacy: The Validity of a Regime’s Purpose

A key legitimacy issue is the perceived validity of what the regime does: How does its functions fit into prevailing notions of the kinds of activities that private groups can appropriately undertake? If global competition and free trade are the current mantras, for example, a regime that restrains competition (such as a cartel) should be viewed less favorably than a regime that facilitates competition (such as a standardization regime). This outcome is precisely what we find with regard to liner conferences and ISO. As governments converge on increasingly pro-competitive policies, the conference system has had a harder and harder time justifying itself. ISO’s basic validity, on the other hand, appears to be increasing with the new emphasis on removing technical barriers to trade.

Though there was a time when certain cartels could cultivate a favorable image as promoting stability and order, that time may be past. As an observer of the shipping scene notes:

Except in the eyes of those few who have it, antitrust immunity is highly unpopular. It’s far easier to convince the public of the potential dangers of antitrust immunity than it is to convince the public it might actually be beneficial.⁸

A leading shipping consultancy firm seconds this observation, and spells out the implications:

The world has become increasingly unreceptive to pleas that any interest group should be treated as a special case, and if truth be told, it is unlikely that

⁸ Elizabeth Canna, *American Shipper*, January 1996, p. 21.

conferences, or other forms of anti-trust exemption, would be permitted in Europe or the USA if they did not come with 100 years plus of precedent.⁹

Haufler's assertion that cartels do not qualify as private regimes may in fact be correct, but its accuracy depends on prevailing conceptions of what is legitimate and what is not. If the emergent literature on interfirm collaboration begins to soften the general perception that cartels are unambiguously harmful, anti-trust policy could once again allow some forms of market management. Notably, too, regimes that restrain competition in other ways besides price-fixing and capacity management remain politically viable. Haufler's own example of the regime that regulates international insurance is a case in point; one function of the regime was to declare certain risks off limits so that competitive behavior would not undermine the industry.

Institutional Legitimacy: Equity, Representation, and Tradition

Is functional legitimacy sufficient? Or can private regimes face other tests of legitimacy? Another set of legitimacy variables may involve the institutional structure of a private regime: How open and fair is the regime perceived to be? How does it fit into the traditional institutional structure of the international system? Shipping conferences have tended to be secretive and rather exclusive, heightening the resentment and suspicion surrounding them. They have also been "transnational" in the sense that their members are companies rather than nations. Thus, they cut against the grain of the international system's traditional organization into nation-states.

ISO, on the other hand, is representationally inclusive, encouraging broad participation and consensus. It is also "international" in structure in the sense that it is an organization of national representatives, one and only one from each nation. This structure contributes to its hybrid, quasi-governmental quality, allowing it to borrow legitimacy from more traditional international institutions, and rendering it acceptable to a broad range of governments. As we have seen as well, ISO has argued that a representational structure based on interest-balanced national delegations rather than direct company participation reduces the bias in favor of large firms that have an easier time lobbying internationally.

At the same time, of course, such a structure has its own biases, and ISO's exhaustive emphasis on consensus is very time-consuming. Both of these aspects of ISO's institutional structure have drawn criticism, and to the extent that these critical views become more widespread and entrenched as valid assessments, ISO and other "internationally structured" organizations may find themselves having to modify their structures in order to preserve their aura of legitimacy. In the case of ISO, it is conceivable that the numerous rounds of voting by national-level member bodies that are

⁹ Drewry Shipping Consultants, *Global Container Markets: Prospects and Profitability in a High Growth Era*, 1996, p. 13.

now required before a standard becomes final might be cut back in the interest of speed. Such a reform would effectively give more power to the transnational participants in the ISO process.

Other interesting aspects of institutional structure might include the formality of a regime and its perceived immunity to excessive manipulation by particular governments. As with interstate regimes and agreements, the degree to which a private regime is formalized can yield both advantages and disadvantages.¹⁰ A regime that is characterized by formal organization and explicitly codified rules and processes might be vulnerable to bureaucratic sluggishness and inflexibility. It is also likely to be more visible, more readily noticed by other stakeholders and the general public, which as we shall see in the next section, can have important effects on the way it is scrutinized. On the other hand, a more formalized regime might also reap the gains to legitimacy that can come from transparency, consistency, and a perception that there is “due process.” These characteristics might in turn promote the perception that the regime is not a tool of competitive manipulation by some government or set of governments.

A Condition Variable: The Mobilization of Stakeholders

In both shipping and standardization, there has been a clearly discernible increase in the efforts of the relevant regimes to build legitimacy. In the case of shipping, we can also see recent failures of these efforts, suggesting that the challenge of building legitimacy is becoming insurmountable for certain kinds of private regimes. In essence, the link between a private regime’s political viability and the legitimacy factors I have identified is becoming stronger: To use Van Evera’s terminology, a “condition variable” appears to be strengthening the relationship.¹¹

That condition variable may be the increasing mobilization of the stakeholders affected by the private regimes in question. In shipping, especially, the stakeholders have gradually built a powerful coalition that has put intense pressure on the conference system. In response to this mobilization, conferences first had to bolster the institutional legitimacy of their system, setting up increasingly formalized consultation arrangements with shippers. Over time, though, they have also found themselves defending the basic functional legitimacy of the conference system. It is this latter battle that they are now losing, as shippers underscore with growing unity and resolve the mismatch between the functions of conferences, on the one hand, and the generally accepted notions of legitimate cooperation among firms, on the other.

¹⁰ Charles Lipson, “Why are some international agreements informal?” *International Organization*, Volume 45, 1, Autumn 1991, pp. 497-538.

¹¹ Steven Van Evera, *Guide to Methodology for Students of Political Science*, Defense and Arms Control Studies Program, Massachusetts Institute of Technology, p. 3.

The transnational scope of the shipper campaign has been an important factor, contributing to a redefinition of national interests and the subsequent convergence of government approaches. As one observer notes about the newly-formed coalition of European, Japanese, and American shippers:

Since trade and transportation are by nature global businesses, courting the public can only be easier for shippers if their advocates join forces. ESC, JSC, and the NIT League have already reaped some benefits of their cooperation. It was because of pressure from the shipper advocates that regulators at both ends of trade lanes started comparing notes with each other.¹²

Because of ISO's less controversial functions and its more open institutional structure, it has been better able to absorb the effects of growing mobilization among various groups. As the recent concerns expressed by European officials suggest, however, even ISO has not been wholly successful at securing legitimacy for its more recent forays into management standards. The doubts of many firms facing the question of whether to register to ISO 9000 and ISO 14000 are being articulated more and more clearly by new and powerful coalitions of firms, including smaller firms that in the past might have remained unheard.

The basic sources of this mobilization are of course familiar: Increasing transnational interactions and communications. The way in which it took place, however, can be cast as an illustrative example of how the structural constraints of the nation-state system can channel groups' efforts, only to be overcome by the realization among the players that "extra-structural" alternatives might be possible. The case of shipping is particularly revealing. During the 1980's, as we have seen, there was considerable momentum among American shippers towards establishing a more powerful political presence. But initial attempts at building an effective coalition failed, perhaps partly because they were so nationally based: The idea of forging ties with shippers across the oceans either did not occur to them or was just not implemented. It was only with the realization that such ties could be productive that a new and ultimately powerful coalition could emerge.

The halting, even haphazard way in which transnational mobilization breaks through structural constraints brings to the fore the normative component of the accountability issue: Though it is clear that the problem of accountability can play an important role in the politics of private regimes, it does not follow that the problem is adequately addressed. The marginalization of certain groups remains a possibility, probably a reality. For those groups that fail to overcome Olsonian logics or other obstacles to effective mobilization, the outcomes of struggles over private governance could be directly harmful. Ironically, as in the case of some domestic self-regulatory arrangements (and government agencies as well), the goal of balanced policy might

¹² Elizabeth Canna, *American Shipper*, January 1996, p. 21.

sometimes require a degree of *independence* from particularistic interests, though this approach entails its own dangers.

The Future of Private Regimes

Private regimes clearly represent an important phenomenon in the global economy, at least among the advanced nations that dominate that economy. Several trends suggest that such regimes could emerge as supplementary forms of governance, and they have done so already in certain sectors. Yet there are constraints on the role that private regimes might play, constraints that are operative even among the liberal states that have emerged as the focus of this study. Ironically, the globalization and transnationalization that underlie their potential expansion could also strengthen forces that curtail that expansion: Broader and deeper stakeholder mobilization, and more coordinated pro-competitive policies among governments, for example, could entail challenges to the legitimacy of private regimes.

In some cases, private regimes could rise to these challenges by successfully validating their functions and satisfying important institutional criteria of legitimate governance. Liner conferences, for example, might win back some of their lost validity by bringing into the public debate the recent wave of scholarship on interfirm collaboration and its potential benefits. In other cases, though, private regimes might be forced to redefine their missions completely, as IATA appears to have done. Sometimes, too, they will need to modify their institutions or strengthen their relations with other groups and organizations. The future may bring regimes that, like ISO, are more hybrid than strictly private. The critical point is that an adequate understanding of the role that private regimes might play requires an understanding of their broader political context and the constraints that it imposes.

Chapter Ten

Epilogue

Implications for Globalization and the State

While important in its own right, the issue of private regimes has implications for more general debates about international relations, including the escalating debate on globalization and its consequences for the state. Central to this debate is the question of whether the fundamental institutional structure of the international system, the system based on sovereign nation-states, remains viable in a globalized economy. This question has spawned a variety of arguments, ranging from dramatic assertions that the state is becoming increasingly irrelevant to emphatic rejoinders that it remains as important as ever.

The issue of private regimes is relevant to certain strands of this debate. While it may not bear directly on such central issues as the problem of welfare policy in a globalized market economy,¹³ it is highly pertinent when the issue is not loss of control to market forces, but loss of control to private authority. As a non-state form of governance, private regimes and their expansion could, on the one hand, support the hypothesis that governments are in retreat. For Susan Strange, as we have seen, the expansion of private authority is a critical component of a general erosion of government authority.¹⁴ On the other hand, a closer analysis of the responses of governments to private regimes could also support a more qualified hypothesis about the changing role of the state. What looks like retreat and loss of control may actually constitute a more calculated and supervised *delegation of authority and legitimacy*.

This chapter briefly reviews the debate on globalization, and shows how the findings from this study might bear on some of the emergent issues. I argue that while states may indeed be surrendering direct control in some issue-areas, that surrender could come with important conditions that maintain the primacy of the state in global affairs. In these areas, the role of the state may be shifting from that of manipulating outcomes to that of supervising processes.

¹³ Dani Rodrik, *Has Globalization Gone Too Far*, Washington, D.C.: Institute of International Economics, 1997.

¹⁴ Susan Strange, *The Retreat of the State*, Cambridge, England: Cambridge University Press, 1996.

Globalization and the Retreat of the State

The claim that globalization is fundamentally changing the world and rendering its institutional framework increasingly obsolete is taken seriously by both policy-makers and observers of the world economy. The basic logic of their position is simple and familiar: The scale and scope of international transactions, including trade, investment, and other flows, have made national borders meaningless, and thereby crippled the ability of the state to control fundamental economic variables. This erosion of the state's capacity has been magnified by the declining importance of military security as a problem faced by advanced societies, a development that has allegedly stripped the state of one of its most important legitimizing functions.

The argument about globalization can be traced back to earlier periods in this century (and perhaps even the previous one), but it has become much more popular in recent years, particularly as scholars have begun to assess the significance of the end of the Cold War. Some scholars have stated the argument quite starkly. Ohmae echoes Kindleberger when he describes the "end of the nation-state" as an inevitable outcome of powerful economic forces.¹⁵ Strange argues that traditional conceptions of power, politics, and legitimacy have become grossly inadequate, necessitating a complete reconceptualization of the theories we use to understand international politics.¹⁶

Other scholars are less dramatic in their exposition, but almost equally provocative in terms of the substance of their arguments. Cerny, for example, argues that "the logic of collective action is becoming a heterogeneous, multilayered logic, derived not from one particular core structure, such as the state, but from the structural complexity embedded in the global arena."¹⁷ The state, in other words, is no longer the fundamental building block of global politics, but one of many components in a complex network of policy. Less radically, Zacher suggests that states are ceding a certain amount of control to commercial processes, allowing a "competition norm" to emerge in areas where tight regulation by the state used to be typical.¹⁸

For some of these scholars, the declining authority of the state is a welcome development. Ohmae suggests that states are "largely unnecessary" and mostly "just get in the way."¹⁹ For others, the retreat of the state has dangerous possibilities, entailing

¹⁵ Kenichi Ohmae, *The End of the Nation-State*, New York: The Free Press, 1995.

¹⁶ Strange, 1996.

¹⁷ Philip G. Cerny, "Globalization and the changing logic of collective action," *International Organization*, 49, 4, Autumn 1995, p. 620.

¹⁸ Mark W. Zacher, with Brent A. Sutton, *Governing Global Networks*, Cambridge, England: Cambridge University Press, 1996.

¹⁹ Ohmae, 1995, p. 4.

potentially serious consequences for order, equity, and democracy. One of Cerny's hypotheses paints a rather grim picture:

The world will be a neofeudal one, in which overlapping and democratically unaccountable private regimes, regional arrangements, transnational market structures, "global cities," nongovernmental organizations (NGOs), quasi-autonomous NGOs, and international quasi-autonomous NGOs, with rump governments—the extreme form of the residual state—attempting to ride free on global/local trends for short-term competitive interests.²⁰

The findings of this study provide support for certain elements of this vision. Like Strange's *The Retreat of the State*, they point to an important and increasing role for private governance in the global economy, confirming the examples she cites (accounting groups, cartels) and adding others (industrial standards bodies). At some level, this increased role for private governance entails a diminished role for states; it certainly means that the direct and exclusive control typically attributed to states does not obtain in some issue-areas. The world is indeed becoming institutionally more complex, with private governance emerging as an alternative to state policy.

The Persistence of the State

In response to the widespread belief that the state is in retreat, however, several scholars have developed counterarguments that attack the notion of globalization and its alleged consequences on several fronts. For some scholars, the idea that we are seeing an unprecedented interpenetration of national societies is itself exaggerated. Wade, Hirst and Thompson, and others argue that on many key indicators, today's international economy is no more open and integrated than the international economy between 1870 and 1914.²¹ Moreover, the recent rebound in transnational flows is hardly global because it is still concentrated among Europe, Japan, and North America.

Another attack focuses more on the consequences of globalization, arguing that they are less ominous for the state than is generally recognized. Garrett, Krugman, and others suggest that globalization has had a far weaker role in pressuring the welfare states of developed nations than factors such as advancing technology and demographic shifts.²² Other scholars point out that globalization is partly the intentional result of deliberate

²⁰ Philip G. Cerny, "Globalization and the changing logic of collective action," *International Organization*, 49, 4, Autumn 1995, p. 625.

²¹ Robert Wade, "The Limits of Globalization," in Suzanne Berger and Ronald Dore (Editors), *National Diversity and Global Capitalism*, New York: Cornell University Press, 1996; Paul Hirst and Grahame Thompson, *Globalization in Question*, Cambridge, England: Polity Press, 1996.

²² Geoffrey Garrett, "A Virtuous Global Circle," *Boston Review*, Volume 22, 6, December/January 1997-1998; Paul Krugman, "First, Do No Harm," *Foreign Affairs*, Volume 75, 4, July/August 1996, p. 164-170.

government policies. In a useful corrective to the *laissez-faire* visions of analysts like Ohmæ, Craig Murphy argues that states have been the critical creators and managers of the infrastructure that supports the globalizing economy and its interconnected industrial order.²³

In many issue-areas, moreover, governments have been able to establish regimes that exert at least a modicum of supervision and control over private sector activities. In his analysis of international finance, Kapstein acknowledges that globalization has posed serious challenges for states, but shows that states are meeting these challenges through a coordinated policy of "home country control."²⁴ Similarly, Hirst and Thompson argue that governance in the international economy is still possible, in part because there are only three really major players (Europe, Japan, and North America).

My study of private regimes ultimately supports and extends these arguments, specifically those that highlight the continued importance of the state. The findings from the cases of liner shipping and standardization suggest that though states may be surrendering direct control in some issue-areas, that surrender may come with important conditions. These conditions can be conceptualized as modes of accountability, and though imposing them can involve challenges of intergovernmental cooperation, they may become an increasingly significant aspect of what states do in the global economy.

One mode of accountability is competition. Though the *laissez-faire* market is often thought to be synonymous with competition, market actors are apt to cooperate as well as compete; the emergence of private regimes is a case in point. As the shipping case suggests, however, states might decide that the cooperation has gone too far, and that measures to increase competition are long overdue. Liberalization, in other words, can constitute not only a retreat by the state, but also a state-imposed surrender by private groups of private control. As the history of American anti-trust policy illustrates, and as Vogel has recently argued,²⁵ liberalization does not necessarily entail the end of regulation. A renewed emphasis on liberalizing the world economy could entail the emergence, eventually, of a global program of anti-trust enforcement involving considerable government activism.

In her discussion of cartels, Strange is pessimistic about the likelihood of such a program, and she uses liner conferences (especially the Trans-Atlantic Agreement) as one of her examples. But a detailed analysis of conferences and particularly their recent history shows that states have been quite willing to crack down on them. When conferences operated freely, in fact, it was at least partly because they served state

²³ Craig Murphy, *International Organization and Industrial Change*, New York: Oxford University Press, 1994.

²⁴ Ethan B. Kapstein, *Governing the Global Economy*, Cambridge, MA: Harvard University Press, 1994.

²⁵ Steven Vogel, *Freer Markets, More Rules*, Ithaca, NY: Cornell University Press, 1996.

interests. The role of European and Japanese governments in actively defending the conference system for much of its history underscores this point. States, in other words, can be well aware of what private regimes are up to, and ready at times to restrain them.

Perhaps partly because enforcing competition as a mode of accountability can entail severe restrictions and even prohibitions on private regimes, states might also impose accountability in another way: The enforcement of procedural principles of representation. Again, states step back from their traditionally direct and exclusive control over international matters, this time allowing private regimes to emerge in some sectors. But again, states impose another form of control, in this case involving measures to promote participation and representation of other stakeholders in those regimes.

This mode of accountability is clearly visible in the way that European governments have historically approached shipping conferences and, more recently, consortia. In both cases, they have explicitly directed them to establish consultations with shippers. But it is also a familiar approach to private standardization bodies, especially domestically but internationally as well. For a given state, of course, the chief concern will continue to be the interests of its own firms and citizens. But the manner in which it protects those interests may be different from the means traditionally highlighted in theories of international relations.

Hirst and Thompson envision precisely this kind of a role for the state in their discussion of the “new sovereignty” that they believe is emerging:

Nation states should be seen no longer as ‘governing’ powers, able to impose outcomes on all dimensions of policy within a given territory by their own authority, but as *loci from which forms of governance can be proposed, legitimated, and monitored.*²⁶ (*emphasis added*)

Having in mind both supranational institutions and private mechanisms of governance, Hirst and Thompson suggest that the continued centrality of the state vis-à-vis these competitors for authority rests on the unique relationship between states and their populations: “States remain ‘sovereign’, not in the sense that they are all-powerful or omniscient within their territories, but because they police the borders of a territory and, to the degree they are credibly democratic, they are representative of the citizens within those borders.”²⁷ Democratic states, in effect, are the only channels through which all citizens have the automatic right (if not always the means and the inclination) to express their interests, and this gives states a unique legitimacy among the institutions that regulate the global economy.

The ability of states to translate their unique status into efficacious global policies obviously depends on successful cooperation with other states. Whether states prefer to

²⁶ Hirst and Thompson, 1996, p. 190.

²⁷ *Ibid.*, p. 190.

enforce competition in a given sector or impose procedural requirements on private regimes, they should probably agree on which of these to apply and in what manner. Though a private regime can often adapt to different regulatory environments, a mismatch of approaches can be disruptive not only for the regime itself but for the entire sector in which it operates. Thus, regime-supporters will put considerable pressure on states to harmonize their approaches sufficiently to allow effective operations. As we have seen, private regimes can facilitate this process by adapting institutional forms that accommodate remaining differences, allowing, for example, varying degrees of government involvement.

Conclusion: The Indeterminacy of Globalization?

Ironically, the ability of the state to manage globalization may in some cases increase with globalization itself. Cerny makes an important point:

Globalization is neither uniform nor homogeneous; its boundaries are unclear and its constituent elements and multidimensional character have not as yet been adequately explored.²⁸

Indeed, as the cases in this study suggest, globalization is not a monolith of changes rolling over the state, but a roiled sea of conflicting drives and interests. Though globalization in its early stages was dominated by large corporations that expanded their operations effectively unopposed by other groups, recent years have seen a dramatic increase in transnational mobilization that has complicated the dynamics of private power in the globalized economy. In the coming battles over various issues, states will be in prime position to mediate among contending players, finding support for their own agendas in the pluralistic constellation of interest groups around them. These groups, of course, will be as likely as ever to seek the support of states in their struggles. Again, the normative issues are far from resolved, and it will be an important task for policy-makers and scholars to identify the groups that remain excluded and unrepresented. But the analysis of globalization will be contextual and eclectic, and outcomes hard to predict.

²⁸ Cerny, 1995, p. 595.

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