

Chapter 12: Governing Capital, Labor and Nature in a Changing World¹

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Summary

This chapter attempts a broad analytical compass for surveying the main actors, institutions and instruments governing our world. Despite its seeming ubiquity, governance is a relatively new expression in this context suggestive both of new modes of exercising power, and an enhanced focus on ordering a world undergoing rapid change. Speaking generally governance may be understood as the exercise of power organized around multiple dispersed sites operating through transnational networks of actors, public as well as private, and national, regional as well as local.

The turn to governance is often held to be coeval if not conjoined to profound changes in the meaning and nature of government associated with the ascendancy of ‘neo-liberal’ ideas and precepts. This has had significant implications for how governance tends to be understood. Critics associate it directly with the changing role of states in the economic and social sphere.

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Transnational governance, in particular, is criticized for foregrounding the priorities of corporate investors often to the detriment of social or environmental goals, subordinating principles of ‘comparative’ or ‘cooperative’ advantage to ‘competitive’ advantage, and promoting micro-regulatory forms of regulation over strategic or structurally-focused interventions (such as industrial policy). Associated shifts trace states’ powers, otherwise a touchstone of sovereignty, being increasingly negotiated with transnational private actors and international financial institutions (IFIs), and placed under external jurisdictions. The turn to governance tends also to be framed, whether directly or indirectly, justifiably or otherwise, alongside cuts in the public provisioning of health, education, housing, and social expenditures wherever they may have taken place, a parallel proliferation of managerial controls, and to governments contracting out public services to private and quasi-private agencies, or relinquishing them to the voluntary sector. At the risk of oversimplifying its critics’ views, if modern governments describe rule by/of citizens, governance describes rule over subjects.

This chapter maps a rather more fluid and differentiated landscape of governance across the five areas it surveys, i.e. finance, investment, trade, labor and environment. In finance, while regulation may appear to have become more transnational and to an extent even voluntary, deregulatory outcomes have reconfigured the nature of risk and the cognitive and policy frameworks for dealing with it. At the same time a growing risk of states having to foot the ultimate bill may still become a point of departure for more differentiated regulatory approaches. On the other hand, not only are environmental agreements continued to be implemented and enforced at national and sub-national scales, the ascendancy of market interventions and transnational institutions here has taken place in parallel with—and sometimes through mutual cooptation of—other kinds of interventions including those for promoting decentralization and community control over resources. Trends in labor regulation may also reflect individual state

choices more than direct transnational pressures, or run contrary to the preferences of specialized international organizations in the domain. Even in the controversial sphere of investment treaties, there is considerable ongoing fluidity with regard to norms, jurisdiction, and actors within and between national and international arenas. Thus, upon closer inspection and with the benefit of a more domain-specific approach, we may not necessarily observe a sweeping or uniform shift, but more a mosaic of regulatory frameworks, quite disparate trends with regard to their negotiation, implementation and impact, and a future rife with possibilities.

1. Introduction

This chapter attempts a broad analytical compass for surveying the main actors, institutions and instruments governing our world. ‘Governance’ is an increasingly ubiquitous expression used in this context. For centuries, governance was synonymous with government and conveyed little else of significance. From the 1980s it entered into more common and increasingly prescriptive usage in the context of ‘corporate governance’, particularly in the United States (Ocasio and Joseph 2005). During the 1990s, governance began to figure with greater frequency in World Bank reports (Moretti et Pestre 2015), accompanied by attempts to identify, measure and compare its dimensions through worldwide indicators. The IMF also began using indicators of ‘good governance’ in its conditional lending programs (IMF 1997). Indeed, even the currently common English language meaning of governance, as “the action or fact of governing a nation, a person, an activity, one's desires”, is of relatively recent origin (OED 1989, OED 2015). This chapter endeavors to unpack the meanings and practices of governance broadly

in relation to actors and instruments (who governs and how), subjects and objects (who and what is governed), and effects (with what consequences).

Speaking generally, governance may be understood as the exercise of power organized around multiple dispersed sites operating through transnational networks of actors, public as well as private, and national, regional as well as local (Djelic and Sahlin-Andersson 2006). It departs from the classical, albeit stylized, understanding of unbounded state sovereignty over one territory and population: even realists no longer deny the transformation of global governance in economic matters, or their effects on decision-making processes and substantive outcomes (Waltz 1999; Kahler and Lake 2009:253). While holding a low opinion of government, advocates of governance rarely distinguish between them explicitly or in an analytical way. Governance, according to them, signifies greater public accountability and participation at the expense of vertical and centralized authority (Slaughter 2004). Transnational governance and governance institutions, together with free, competitive markets lightly regulated by independent, rule-bound regulators, are also viewed in a positive light by comparison with governments that, even when not unrepresentative, corrupt, or beholden to special interests, representative are often alleged to be mired in red tape. (Best 2014). As a form of government purportedly by experts, governance is viewed as being more conducive to coordinated solutions for trans-border problems, including through the circulation of institutional and regulatory ‘best practices’ (Sabel, O’Rourke and Fung 2000; Mattli 2003; Büthe and Mattli 2011). The latter have a bearing also on regulation at the domestic level: whether one speaks of “competition states” (Cerny 1990) or “regulatory states” (Jayasuriya 2002, 2004), states have increasingly resorted to management techniques (Maurer 1999; Lascoumes and Le Gales 2007) that shun strong legal provisions in favor of incentives and, on paper at least, penalties to orient business decisions (Foucault 1977: 177). The resulting shifts from post-World War II methods of “command and control” regulation are regarded in this view

as pragmatic adaptations to the more complex, interconnected world of the 1980s. Governance here represents a response to past failures and an attempt to fashion more efficient instruments of control through a recursive cycle of regulatory changes (Ayres and Braithwaite 1992; Halliday and Shaffer 2014). Enmeshed in “webs of rewards and coercion” or “dialogic webs” (Braithwaite and Drahos 2000: 551-52), the switch to governance may also signal a government’s responsiveness to international economic actors’ preference for national “regulatory systems and social practices ... consistent with their general values, goals and desires” (Braithwaite and Drahos 2000: 15-19).

On the other hand, governance evokes strong reactions from its critics. For many, it is a controversial political project coeval if not conjoined with neoliberalism and globalization (Dodd 2000), and inconsistent with meaningful economic advance and social progress (Dezalay and Garth 2002; Blyth 2002; Krippner 2005). It represents part of an ongoing ‘great transformation’ driven by powerful actors seeking to aggrandize themselves at the expense of the state (Blyth 2002). Naturalizing particular forms of authority and power while foreclosing alternative possibilities, it promotes widening socio-economic inequalities and a ‘race to the bottom’ in labor, social, and environmental protections (Bourdieu 1987; Sassen 1996; Rist 2002; Milanovic 2016). In lockstep with neo-liberal precepts that places them, and societies more generally, at the mercy of international financial markets, ‘governance’ diminishes rather than enhances the democratic accountability of governments. Critics of governance in the South, especially, view it as part of a “post-Washington consensus” project to develop a “political-institutional framework to embed structural adjustment policies”: as such it “complements rather than replaces” the policies of the so-called Washington consensus (Jayasuriya 2002: 24). For such critics, governance describes or prescribes shifts in the distribution of power to the detriment of states and citizens, and in favor of markets, large corporations, and international financial institutions

(IFIs) like the International Monetary Fund (IMF) and the World Bank (WB) (Scholte 1997; Rose 1999; Ferguson and Gupta 2002).

Since the 1980s, forceful neo-liberal calls for the retreat of ‘government’ have indeed paralleled the growing power of business corporations and other private market actors to push states to abandon past forms of government regulation, adopt lighter forms of ‘governance’, and create conditions conducive to individualized, self-representational forms of agency associated with market actors. Such pressures may doubtless be associated with the rise of ‘governance’ without however being its full explanation. In this chapter, we map the trajectories of governance in five areas (i.e. finance, investment, trade, labor and environment), in an effort to clarify the nature of the institutional shift to governance; the regulatory instruments and processes embodying it; and their implications. Central to grand narratives of ‘globalization’, the prominence of these areas is mirrored equally in critiques of neo-liberalism (Dezalay and Garth 2002; Krippner 2005; Ferguson 2005; Jayasuriya 2006; Lordon 2010; Piketty 2015), with complex interplays in both accounts between developments in each of these areas, and even when not so explicitly acknowledged, the rise of governance and the decline of representative governments and democratic institutions, and finally their implications for social and collective goods. At the same time they enable us to clarify and wherever possible nuance the institutional shift to governance; the regulatory instruments and processes embodying it; and their implications.

These are each broad areas, hence the focus of this chapter is unavoidably narrow and differentiated. Our main endeavor here is to present an account of the complex nature of the rise of governance, its most visible instruments in each area, and outline the main implications of the turn to ‘governance’.

We find, mainly, that while developments in one area impinged on the others, there are nevertheless significant asymmetries of trajectory, impact, and learning in each area, and differences across them. For instance, finance may have witnessed a relative regulatory shift towards voluntary and transnational realms. Yet the resulting competitive pressures blindsided states to the risks and costs of regulatory failures not least to their own finances and credit, both private and public. In contrast, projects and experiences of environmental governance show that the ascendancy of market interventions and transnational institutions have emerged in parallel with—and sometimes coopt—other kinds of interventions including the promotion of decentralization and community control over resources. Furthermore, there appears to be more scope for differential scales and layers in environmental governance, with environmental agreements being negotiated and implemented at regional, national, and sub-national scales, with the latter also often criss-crossing national boundaries. Trends in labor regulation may reflect individual state choices more than direct transnational pressures, and run contrary to the preferences of specialized international organizations in the domain. Even in the controversial sphere of investment treaties, one may detect considerable ongoing fluidity with regard to norms, jurisdictions, and actors within and between national and international arenas, and an ongoing process of review and reform, both formal and informal.

2. The Rise of Global Governance

The nature, scope, and methods of economic regulation have changed greatly since the 1980s. The role of states has, in particular, been transformed, with welfare and distributional objectives yielding to the demands of competitive economic openness. Policies for ‘competitive advantage’ place greater emphasis on promoting an investor-friendly environment, sidelining

strategic economic or industrial objectives for more relational ones, and substituting market-focused, micro-economic regulation compatible with incentivizing private entrepreneurship for macro- or more structural interventions such as industrial policy (Cerny 1990: 260). Regulatory changes have also tended increasingly to be negotiated with transnational private actors and international financial institutions (IFIs), and placed under external jurisdictions (Halliday and Carruthers 2009; Carruthers 2016). The premise underlying many of these changes, that regulated private investment is more efficient than public provisioning, has encouraged the restructuring of vast spheres such as health, education, housing, and transport where many services formerly undertaken by governments have been contracted out or displaced to private entities, including in some places to private equity firms, or relinquished to the voluntary sector (Cooley and Spruyt 2010; Scahill 2011). If finance and modes of governance are interwoven, a key question relates to the ways in which the former reconfigured the balance of power and responsibilities not merely among, but importantly, between firms and states, between capital and labor, and between socio-economic groups.

We commence here by mapping the main governing actors, institutions, and forums in the five areas surveyed in this chapter. This section focuses on two broad features characteristic of modern governance: a relative fragmentation of power and authority especially in the last three decades, and its dense concentration at particular sites (Rose 1999; Hansen and Stepputat 2001; Jessop 2007) which are also often nodes of accumulation of capital and wealth. On the surface these features may seem complementary: as large business, associations, lobbies, and interest groups become more powerful, they may fragment the authority of nation-states and redistribute power in ways that mirror and reinforce inequalities of income and wealth (Piketty 2015; Cafaggi and Pistor 2015; Büthe 2013). Fragmentation can also obscure or naturalize vertical power hierarchies, and even when not promoting complicit associations between regulatory bodies and

their targets, enhance the power of larger, better-resourced and networked private actors to determine what constitutes knowledge, ‘optimal policies’, ‘best practices’, and so on (Lascoumes and Le Gales 2007). However, whatever its origins, governance is not reducible simply to the transmission and implementation of preformed neo-liberal templates and prescriptions. The regulatory fields in these five areas too, suggest important tensions and differences.

2.1 Finance

The Bretton Woods system (1945-1971) severely curtailed international capital markets. Wary, in particular, of the destabilizing impact of short-term capital flows, the original IMF Articles of Agreement prioritized currency stability over capital mobility. At first fixed exchange rates and capital controls restricted the range and riskiness of financial transactions (Eichengreen 1996; Helleiner 1993). However, accumulating current account imbalances and the growth of offshore banking placed great strain on fixed exchange rates and the capital controls that had held them in place. They also intensified destabilizing speculation against coordinated attempts to realign exchange rates or limit their movement, hence prefiguring both the onset of generalized floating and the parallel expansion of international capital flows (Adams, Mathieson and Schinasi 1999; Giry-Deloison and Masson 1988). These processes accelerated as a result of the 1970s oil shocks. Intensified cross-border capital flows weakened the independence of national monetary policies, while the slower but unmistakable internationalization of debt markets narrowed the scope for fiscal policy. National regulation of financial markets was also challenged by the growth in cross-border risk relationships which outpaced the regulatory capacities of states or of any alternative mechanisms, and heightened possibilities for transnational evasion (Cerny 1994: 328).

These changes in the financial and regulatory landscape were not entirely systemic, spontaneous, or ‘market’-driven. ‘Loopholes’ in UK banking regulations enabled London to emerge as a major off-shore banking center in the 1960s and facilitated the accumulation of overseas banking balances. Competing 1970s changes to US regulations allowed US-owned banks to expand abroad. In retrospect these were the thin end of a deregulatory wedge that unfolded to more overtly ideological and political initiatives under the Thatcher and Reagan administrations to lift capital controls and free up banks and financial markets (Boyer 1996; Helleiner 1996; Loriaux 1997; Mishra 1996; Blyth 2002; Dezalay and Garth 2002). Financial deregulation continued largely without major interruptions in the 1990s and 2000s despite a change in government in both countries, with a bi-partisan House majority passing the Gramm-Leach-Bliley Act (GLBA 1999) during the Clinton Administration to formally repeal the 1933 Glass-Steagall proscription on institutions ‘engaged principally’ in banking underwriting or dealing in securities. A monumental piece of deregulation, GLBA represented the culmination of decades of lobbying efforts by the financial industry (Sherman 2009). But the ground for it was laid in the late-1980s when the Federal Reserve under successive Republican administrations allowed bank affiliates to underwrite an expanding variety of securities, including mortgage-backed securities and consumer finance assets.

Historically, normative priorities and legal norms have been set by powerful countries. Financial regulations are no exception. Pressures from international financial institutions, for instance, reinforced the deregulatory push in the South and led unsurprisingly to enhancing their authority vis-à-vis Southern states. At the same time, some norms and practices, at least, of Anglo-American financial market governance may have diffused around the world through mimetic cross-country processes rather than through direct transnational governance pressures (DiMaggio and Powell 1983). Textbook theories of rational expectations and new orthodoxies

such as the efficient market hypothesis, and deregulatory policy prescriptions based on them, travelled from Chicago to Brussels to inform European economic policy (Blyth 2002; Majone 1994). The liberalization of domestic capital markets in the US, and to a lesser extent in the UK, was associated with realizing the supposed promises of ‘shareholder capitalism’. It is impossible to do justice here to the resulting regulatory shifts, or their effects. But we may note that one of their pronounced effects has been an emphasis on “shareholder value,” which has had the further effect of transforming notions of value and meanings of performance, or even profitability (Fligstein and Shin 2007). Illustratively, fears of leveraged buyouts of firms judged by stock markets to be “underperforming” and “undervalued” lead to a reconfiguration of risks, incentives and objectives including of large industrial firms, and to a transformation of their structures, organizational and employment practices, and relationship with local communities (Ho 2009).

In explaining the turn towards deregulation particularly beyond the Anglo-American world, therefore, it may be important to attend to the ways in which ideologies and external shocks and pressures were mediated to particular ends, and consequently their wider contexts and processes. The resistance of major European governments to what they perceived to be hegemonic US attempts to restrict the scope for independent national financial regulation, and its gradual bending in the 1990s, highlights the intimate connections between changes in governance, regulation, financial, industrial and employment structures, and business interests. Already in the 1980s the European Commission had begun to look at US norms and standards to free up and integrate European financial markets, becoming in the process an epistemic agent of neoliberal orthodoxy and affirming its own position as an important new actor in the governance of markets (Abdelal 2010). The Commission’s 1989 resolution to form a monetary union and the 1991 adoption of the Maastricht Treaty soon came to emblemize this conversion while also adding a seemingly unstoppable momentum to the liberalization and integration of capital

markets (Aglietta and Brand 2013:42). One upshot was the enhanced traction for transnational indicators such as for example the Basel capital adequacy norms for banks. Conventionally associated with banking stability, in Germany, Basel II norms were feared to undermine the ability of its banks to lend freely at their discretion to the small and medium enterprises that formed the backbone of 'Rhine capitalism' and the associated social model of the 'Mittelstand,' and for whom bank loans had long been an indispensable source of investment finance (Kruck 2011, p. 11). The same was not true in France, with its more consolidated industrial structure and bank lending. Hence the French government, large French banks, and even the governing socialists had fewer qualms about overcoming their habitual skepticism for external norms to throw their weight behind the efforts of the Jacques Delors-led European Commission to promote financialization (Langohr and Langohr 2008: 195). This offers an apt illustration of how practices of financial market governance identified with Anglo-American capitalism could subdue overt resistance to make headway in Europe, expanding into spaces vacated by governments in Washington, London, Paris and Brussels, and more broadly entrenching transnational governance norms, mechanisms, and regulations that spread subsequently around the world through processes of state-to-state diffusion.

In Southern states financial leverage in the form of multilateral lending and structural adjustment programs have played a major role, including by promoting retrenchment or privatization in spheres such as health, education, social and welfare services, transport and communications, and other infrastructure. International financial institutions, notably the IMF and the World Bank, played a crucial role in spread neo-liberal agendas outside the West (Dezalay and Garth 2002). Indeed, until recently their main impact was felt in the developing world where, in varying degrees, the opening up of trade, abolition of price controls, privatization, and the rolling back of the state took the form of a 'shock therapy' imposed from

outside by the IMF and World Bank at the behest or with the active support of powerful Western states. By the mid-1970s the United States was, as noted above, relaxing capital controls, soon it began turning its attention to freeing up capital flows in other parts of the world (Best 2014:61). Pinochet's Chile remains the most notorious instance of extensive deregulation promoted as an antidote to leftwing development agendas, but by the 1980s it had become merely the first candidate for the 'shock therapy' inflicted by the IMF and the World Bank on other developing countries, including many in South America burdened by debts contracted in the 1970s that had become unsustainable in the wake of a sharp rise in US interest rates (Johnson 1995; Silva 1997; Dezalay and Garth 2002). In the 1980s stabilization and structural adjustment programs also became pervasive in Africa (Noorbakhsh and Paloni 1999) where unfavorable growth comparisons with Asia and Latin America helped advance programs seeking to foster growth through eliminating economic or structural 'bottlenecks' (Konadu-Agyemang 2000).

Several explanations may be ventured for why the Bretton-Woods institutions became such redoubtable champions of neoliberal policies and supranational governance of financial markets. An important 'institutional effect' is of particular relevance here, i.e. their expanding surveillance responsibilities under conditions of free capital mobility and destabilizing speculation. Far from feeling inhibited about undertaking responsibilities it was ill-equipped for, the IMF, in particular, became an unabashed champion of capital account liberalization in the 1990s (Shaffer and Waibel 2016:307-11), and thus of its own enhanced influence. Its efforts may well have achieved greater success (Reserve Bank of India, 1997) had the 1997 East Asian crisis not intervened to demonstrate the perils of financial openness and lead to a brief of reversal, and overall to a more measured approach towards financial liberalization notably in Asia, but also in other parts of the South.

2.2 Investment treaties

The post-Uruguay Round liberalization of trade and the rapid growth of foreign direct investment (FDI) in the last three decades has deepened the stakes in international investment protection. The latter is mainly governed by two actors: states, which are parties to investment treaties, and arbitrators who resolve disputes about the interpretation and application of those treaties. Investors are granted protection under these treaties which permit them to bring arbitral claims directly against the states in which they invest. But the system itself is largely governed by states and tribunals, even if the system is often designed for the benefit of investors and driven by them.

Though the late-twentieth century expansion of cross-border capital flows intensified demands for legal protection of overseas investments, the latter has a longer history rooted in European overseas empires and extra-territoriality clauses in bilateral agreements. Overseas investment protections were subsequently fleshed out bilaterally in decolonization agreements. Parallel attempts in the 1950s to formulate a multilateral investment treaty however failed because capital exporting and capital importing states were unable to agree on common standards. Consequently for over four decades from the 1950s, bilateral investment treaties remained the norm though their numbers remained quite small by the standards of the growth witnessed in the 1990s, when they mushroomed five-fold from around 385 in 1989 to nearly 1900 by the end of 1999 (UNCTAD 2000). In 1998 attempts to negotiate a Multilateral Investment Agreement under the auspices of the OECD failed, hence attention reverted to bilateral investment treaties whose numbers continued to rise (Van Harten, 2007). In 2016 there were an estimated 3200 international investment agreements worldwide (UNCTAD, 2016).

In principle states have two broad motivations for entering into investment treaties. The explicit rationale for a predominantly capital exporting state is to secure protections for its nationals with investments abroad. The stated motivation for a capital importing state is to attract foreign investment on competitive terms. From the investors' perspective, investment treaties offer protection against expropriation without compensation, and the tendency of host states, however hospitably disposed they may have been at first, to engage afterwards in rent-seeking behavior. Since relocating investments can be costly or impossible, investment treaties bind treaties to treat foreign investors fairly after the investment is made (Guzman, 1998). The evidence on whether investment treaties actually promote foreign investment is, however, mixed. Some studies find a positive effect on investment flows, others find no such effects. Tracking bilateral investment flows and attributing differences to investment treaties can also be fraught with methodological difficulties (see, e.g., Salacuse & Sullivan, 2005 and Yackee, 2010). In the absence of clear-cut evidence, some commentators argue that investment treaties serve no purpose, or impose obligations on states without any clear benefits. Another growing concern relates to expansive notions of investors' rights in treaties and the jurisprudence, especially given that the sorts of violations the former were originally designed to protect against – such as direct expropriation of mineral rights or mining investments without compensation – are no longer common.

Investment obligations are also increasingly embedded in pluri-lateral and mega-regional free trade agreements an early example of which was the North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico. Other agreements on the drawing board, or proposals that are in various states of suspense, include the Trans-Pacific Partnership Agreement (TPP), the Regional Comprehensive Economic Partnership (RCEP) involving the ASEAN and six states in the Asia Pacific including China, and the Transatlantic Trade and

Investment Partnership (TTIP), similarly incorporate investment provisions. While none of these count as worldwide multilateral treaties, the US, Europe and China have at different times attempted through such mega-regional agreements to compete in setting the standards that they hope will be adopted by the rest of the world.

The rise of investment treaties has led to a boom in the demand for private arbitration and may be said to signal a turn from government to governance. Investment treaties usually have two main features. First, on a substantive level, the treaty parties accept certain obligations with respect to the treatment of investing nationals from the other treaty party. These obligations typically include treating them fairly and equitably, not expropriating their investments without due process and adequate compensation, and not discriminating against nationals belonging to the treaty partner in favor of the state's own nationals (national treatment) or other foreign nationals (most favored nation treatment). Second, on a procedural level, investment treaties usually provide two forms of dispute resolution. The states may undertake state-to-state arbitration to resolve any disputes about the interpretation or application of the treaty. Investors may also bring investor-state arbitral claims if they believe that they have suffered damage as a result of the host state's violation of its treatment obligations (Roberts, 2014). The most unusual feature of investment treaties is that they permit investors, who are non-state actors, to bring arbitral claims directly against states before ad hoc arbitral tribunals. But unlike human rights treaties like the European Convention on Human Rights (Douglas, 2003; Roberts, 2010 and 2013; Paparinskis, 2013) to which they are sometimes compared, investors can usually bring claims without first exhausting local remedies. Besides they have a role in selecting arbitrators to resolve the dispute. The main justification for this procedure is that it permits investment disputes to be depoliticized (Shihata, 1986; Paparinskis, 2010): previously, a foreign investor claiming mistreatment by the host state had to bring the dispute before its domestic courts or rely on its own home state for

‘diplomatic protection’ (e.g. by bringing a claim on behalf of the investor on a state-to-state level). Investment-treaty arbitration was intended to enable foreign investors to take their claims directly to an ostensibly independent and unbiased international tribunal without being subject to the political decision-making processes of the home or host state. However, while granting them procedural rights to enforce substantive treaty protections (Douglas, 2003; Roberts, 2015), investment treaties usually do not impose reciprocal obligations on foreign investors, whether in regard to their treatment of the host state, or of the environment, its employees and workers, and so on. Host states cannot generally bring arbitral claims against foreign investors, though they can sometimes raise limited counterclaims. Workers, individuals and NGOs cannot use investment treaties to bring claims against foreign investors whether in domestic courts (which however they may do under domestic laws) or in arbitration tribunals.

This system results in governance through arbitration (Van Harten, 2007), whereby states agree to bypass domestic courts in favor of private networks of international arbitration firms and judges. This form of “contracting out” a key element of sovereign authority – e.g. judicial power – is all the more notable since the older-style investment treaties tended to be short and vague (in contrast to newer ones that are often longer and more detailed), leaving many issues unaddressed, or their terms open to being interpreted in many ways. As a result a large measure of interpretive authority, particularly with regard to the older treaties, has passed to arbitral tribunals tasked with resolving particular disputes (Roberts, 2010). Thus, even if in theory there is no system of precedent between investment treaty tribunals and arbitral awards, in practice, a de facto body of precedent has emerged because tribunals in one case often refer extensively to awards from other cases (Kaufmann-Kohler, 2007) and because of the tight grouping of the “arbitration community”, sometimes referred to as the “arbitration mafia” (Dezalay and Garth 1996). This has meant the emergence of a body of investment treaty jurisprudence, and of investment treaty

tribunals as important governance actors in this regime. Thus, as in the case of finance, where IFIs have used the turn to de-regulation to claim more authority over governance in general, and national-level macro-economic policies in particular, the multiplication of investment treaties and arbitral awards has reinforced the judicial authority of transnational private networks of arbitration professionals, and the opacity, and in some degree the clubby backroom character, of governance (Dezalay and Garth 1996).

2.3 Trade

Global trade governance may be defined as encompassing attempts to manage, resolve, or supersede conflicts of interest in international trade. Some of the "behind-the-border" issues having a bearing on trade, such as the treatment of foreign investment, labor rights, and environment, are discussed in other parts elsewhere in f this chapter and others, such as human rights, elsewhere in this volume. This section focuses on trade-related regulatory governance of products and services, as well as the governance of competition law and policy as a trade-related issue. It shows that the developments in global trade governance over the course of the last three decades have involved "the reallocation of authority upward, downward, and sideways" (Hooghe and Marks 2003:233), thus illustrating the full spectrum of changes entailed in contemporary understandings of governance.

To examine the causes and consequence of these developments, it is useful to distinguish between the traditional "at the border" trade barriers (most centrally tariffs and import quotas) and the new behind-the-border issues that have increasingly been governed at the international level conjointly with, or even entirely through, trade institutions. These "trade-plus" issues cover a wide swathe. They include standards and regulations (Grieco 1990; Yarbrough and Yarbrough

1992; Mattli 2003; Büthe and Mattli 2011), government procurement (Arrowsmith and Anderson 2011; Rickard 2015), competition policy (Büthe 2014; Bradford and Büthe 2015), services (Hoekman and Braga 1997; Shingal 2015), exchange rates (Copelovitch and Pevehouse 2014), investments (Büthe and Milner 2008), labor rights (Mosley 2011), and even more broadly human rights (Aaronson 2014) and the environment (Esty and Geradin 1997; Barkin 2014; Zeng and Eastin 2007; Schreurs and Economy 1997).

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

Closer inspection, however, reveals subtle, yet significant deviations from the ideal-typical notions of state sovereignty even with regard to the traditional core trade issues. Under GATT and WTO, the principal-supplier prerogative in tariff negotiations might be said to have amounted to a case of product-specific horizontal ("sideways") delegation from the smaller and less trade-intensive to the larger and more trade-intensive economies (Steinberg 2002). Under this procedural rule, the major importers and the major exporters of a given product conduct the primary negotiations, and the tariff reductions agreed by them (for the said product) then get multilateralized to all GATT/WTO member states. Preferential trade agreements (PTA), which

are usually negotiated among a small group of countries (often just two countries bilaterally) entail less delegation. Many PTAs contain most-favored-nation (MFN) clauses committing the signatories to grant to each other the most favorable terms granted to any other trading partner, including in other PTAs. MFN, however, only applies to favorable terms granted by a signatory state to *its* other PTA partners in exercise of its sovereign authority. In that sense, the shift in further trade liberalization from the multilateral WTO-based trade regime to PTAs covering a smaller number of countries but often going much deeper, may be said to constitute something of a reversion of trade (negotiation) governance "back" to individual national governments beyond the extent of their commitment to their existing WTO obligations.

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

Changes in trade-related global governance, however, extend considerably beyond the traditional core issues of tariffs and quotas. They represent the particular focus of this section. As Steven Vogel (1996) famously pointed out, "freer markets" seem to require "more rules." Concretely, a market economy requires a legal and regulatory framework to help market participants reduce information asymmetries (Akerlof 1970), overcome time inconsistency (Kydland and Prescott 1977), and to inhibit forms of behavior, such as cheating and fraud which,

if unchecked, can adversely affect investment and accumulation (Hough and Grier 2015). These rules may also allow socio-economic actors to turn paralyzing uncertainty into calculable risk, though the ability to do so might be illusionary (Blyth 2010). And when governments engage in economic liberalization—i.e., when they reduce the role of the state in the economy and no longer direct economic activity—they actually need to put a stronger legal and regulatory framework in place for markets to work well (Vogel, 1996).

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

Effective regulation of international trade has hence also come to mean the international regulation of product markets. Technical standards offer an apt illustration. They can be critical to having a market in the first place, for example because they define comparable and compatible products (Yarbrough and Yarbrough 1992:92f; Spruyt 2001; Balleisen 2014), and often help achieve important public policy objectives such as consumer protection (David Vogel 1995) or

workplace safety (Cheit 1990), at times even without the need for government regulations that make them binding (Morrison and Webb 2004). Here, the Technical Barriers to Trade (TBT) Agreement of the WTO—which is an integral part of the treaty that created the WTO and thus binding on all WTO member states (Marceau and Trachtman 2002)—and similar provisions in many PTAs oblige national and sub-national public authorities to use compatible international standards, where available, as the technical basis for non-trade distortionary public policies. However, neither the TBT Agreement nor corresponding provisions in PTAs contain or create standard-setting procedures for the vast array of often complex traded products where the absence of standards might increase the costs and riskiness of market exchange, or make, say, the management of negative externalities, such as inadvertently putting users at risk, more challenging. Rather, the TBT Agreement recognizes two transnational, *non-governmental* organizations, the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC) as sources of "international standards," and leaves it open whether other standards bodies might also be considered sources of international standards for WTO purposes. The TBT Agreement thus radically changed the status of ISO and IEC, greatly empowering the mostly private-sector experts in the two long-standing organizations whose "technical committees" may develop and revise the actual ISO and IEC standards (Büthe and Mattli 2011). Given their status under international trade law, many of these standards now determine market access and have given the non-governmental ISO/IEC and the private-sector technical experts they assemble, an influential role in the governance of international trade.

Similarly, for the sensitive issue of food safety (Ansell and Vogel 2006; Gaughan 2004; Liu 2010), the WTO's Sanitary and Phyto-sanitary Measures (SPS) Agreement obliges governments to defer to the international food safety standards of the Codex Alimentarius Commission (Marceau and Trachtman 2002; Büthe 2008). The Codex commission is formally a

joint organ of two international organizations (the World Health Organization and the Food and Agriculture Organization). It may however be more accurately described, as a hybrid public-private body, since the majority of the experts who wield power over global trade by developing its standards come from the private sector, often from the very food industry whose products are to be regulated, even if they happen nominally to represent Codex member governments (Avery, Drake, and Lang 1993; Veggeland and Borgen 2005; Bütthe 2009).

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

Another distinctive illustration of transnational governance relating to trade comes from the diffusion of competition law. There have historically been close links between trade policy and national competition laws, notably in late-nineteenth century Canada and United States. The Havana Charter for the ill-fated International Trade Organization in the aftermath of World War II included a competition policy chapter, and the founding treaties of the European Community included competition rules in its framework for the governance of the eventual common market

(Büthe 2014). However, the idea of a multilateral competition regime proved controversial in the context of GATT; proposals in the late 1990s and early 2000s to add a competition chapter to the WTO treaty (or drawing up an add-on agreement akin to TBT and SPS) also made little headway. Still, these setbacks have not deterred closer connections between trade and competition regimes, including a growing 'backdoor' integration of competition policies in the international trade regime. The striking growth in the number of countries with a domestic competition law from some thirty 1990 to more than 130 today may be traced to the conduit effect of institutionalized trade openness (Büthe and Minhas 2015). Besides, more than two thirds of the PTAs since 1990 include competition provisions, including for regulatory cooperation between national competition authorities. The latter is also a key objective of some 170 recent bilateral agreements relating to competition law and policy.

Thus many changes in the global trade regime have shifted rule- and decision-making up, down, and sideways from domestic politics and traditional inter-governmental institutions. National governments as unitary actors in the international sphere have yielded gradually to more complex webs of "governance" institutions, ranging from "trans-governmental" networks of specialized government officials working directly with their counterparts abroad largely outside the channels of traditional international diplomacy (Keohane and Nye 2001 1977; Slaughter 2004; Eberlein and Newman 2008), to hybrid public-private bodies such as the Codex Alimentarius Commission where government delegations mostly comprise corporate sector employees of the regulated firms or industries (Büthe and Harris 2011), to non-governmental transnational bodies such as the International Electrotechnical Commission (Büthe 2010a) or the International Organization for Standardization (Büthe and Mattli 2011; Murphy and Yates 2008), to civil society or private sector-driven transnational bodies clamoring for regulatory influence in global markets (Auld 2014).

2.4 Labor

Labor regulation has traditionally been the province of national governments which have, however, rarely operated in isolation. In addition to national governments, other relevant actors in the sphere of labor are domestic trade unions, employers, including multinational corporations, employer associations, and NGOs. National trade unions have historically pushed for protective measures for workers (e.g. limitation on working hours, minimum wages, employment protection legislation, unemployment benefits, etc.) which were adopted either through negotiating collectively with firms and employer associations, or through campaigns resulting in government legislation which might also sometimes take the form of “bargained laws” ratifying and giving general applicability to outcomes produced by collective bargaining between unions and employers. Alternatively labor laws have provided a procedural framework for collective bargaining procedures to give regulatory effect to legislated goals such for instance those relating to health and safety at the workplace (Blainpain 2007, Hepple and Veneziani 2009).

In brief, private bodies such as trade unions and employer associations have always played an important role in the field of labor regulation. “Corporatist” policy-making may nevertheless still represent a distinctive Continental European and Scandinavian style by comparison with Anglo-American countries. In corporatist systems national governments have often been willing to share their policy-making prerogatives with their “social partners” (trade unions and employer associations) in the labor and social domains, i.e. they have involved private actors representing labor and capital in the conception and execution of public policy (Baccaro 2014, Berger 1981, Lehmbruch and Schmitter 1982). Empirical research suggests that corporatist societies tend to be

less unequal than non-corporatist ones, while their macroeconomic performance in terms of growth and employment seems comparable (Hicks 1988, Kenworthy 2002, Wallerstein 1999).

At the international level, labor regulation was strongly influenced by a somewhat diluted version of the corporatist model illustrated by the governance structure of the most important institution at the global level, i.e. the International Labour Organization (ILO). Established in 1919 as part of the Versailles Peace Treaty, the ILO was the West's response to the "red scare" (Cox 1973: 102). After the Bolshevik revolution, the Western powers represented corporatism as an institutional alternative to communism in Europe. The ILO survived the collapse of the League of Nations and became a specialized agency of the United Nations after World War II. Today it is the only international organization to incorporate private actors in its structure, with its governing body being composed of governments, trade unions, and employer associations.

The ILO discharges a vast mandate: reflecting the conditions under which it was founded, the preamble to its constitution describes the organization's goal as contributing to "universal and lasting peace" by bringing about "social justice" specifically, by removing "injustice, hardship, and privation" in conditions of work which can "produce unrest so great that the peace and harmony of the world are imperiled." The preamble also states that "the failure of any nation to adopt human conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries." International labor regulation under the aegis of the ILO has thus aimed to protect states with generous worker benefits and protections from competition from others seeking to gain trade advantage through lower wages and protective standards. A notable sign of this commitment in the early years of the ILO was its efforts to legislate an eight-hour working day. The 1944 Philadelphia Declaration which gave the ILO a new foundation and *élan* added that its "fundamental objective" was to ensure that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being

and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.” The ILO was hence assigned “a responsibility ... to examine and consider all international economic and financial policies and measures in the light of this fundamental objective.”

Since the 1980s, principles and practices relating to labor regulation have been profoundly transformed by upbeat assessments of the benefits of free capital and labor markets in which the ILO itself had little direct say. First, new research in both macroeconomics and labor economics tended to view policies for employment protection, unemployment insurance, national or industry-level collective bargaining, etc., as contributing to raising the non-accelerating inflation rate of unemployment (NAIRU), and advocated deregulation as a way to sustain employment in Western labor markets (Layard, Nickell and Jackman 2005, Nickell, Nunziata and Ochel 2005). Second, labour regulation has been blamed from a micro-level perspective for reduced efficiency and increased inequality in the labor market, notably between privileged ‘insiders’ (generally male and older workers) with access to stable ‘legacy’ employment offering good wages and good working conditions protected by legislation and collective bargaining rights, and ‘outsiders’ (predominantly young and/or female) condemned to precarious working conditions (Boeri 2011, Lindbeck and Snower 1988, Saint-Paul 2002). Similar arguments are made for developing countries where labor regulation is said to lead to a rationing of formal jobs and the expansion of an unregulated informal economy. A less regulated labor market would, in this view, equalize conditions between organized and unorganized workers, and the formal and the informal sectors of the economy (Frölich et al. 2014, Heckman and Pagés 2000).

Such analyses have been very influential including within international organizations (IMF 2003, OECD 1994). Within the ILO, the 2000s saw the launch of a Decent Work agenda (ILO 1999). “Decent Work” was never precisely defined, but its emphasis on dignity, equality,

fair income, and safe working conditions evokes a flexible and negotiable combination of rights and protections. Referring to “work” rather than “labor” was also an important rhetorical innovation with “work” capable of embracing a range of employment relationships without necessarily privileging stable employment. The ILO’s decent “work” agenda implicitly acknowledged its earlier focus on formal employment and neglect of workers in the unorganized sector, a majority of them in the poorer countries (Baccaro and Mele 2012). This critical reassessment of labor institutions and regulation was accompanied by a rethinking of the effectiveness of state action in regard to labor. For advocates of this new approach, regulatory problems were far too complex, interrelated and diverse to be effectively dealt with by the imposition of rigid standards. It was preferable instead to adopt “experimentalist” modes of governance in which regulators set the broad goals and parameters of public policy while leaving their execution to partnerships between firms and civil society actors sharing organizational learning anchored in quantifiable indicators of performance and information about best practices (Sabel, O’Rourke and Fung 2000). As a result, if traditional labor regulation was directed at restricting employer discretion and sought to strengthen the bargaining position of workers, the new prescriptions are premised on decent working conditions offering positive pay-offs to employers, including in the form of stronger worker motivation, commitment, and productivity (Elliott and Freeman 2003, Vogel 2005, Ruggie 2008).

As financial de-regulation and the opening of capital markets got underway, economies have experienced a historic shift in the distribution of power and resources, reflected in a declining share of labor incomes and an accompanying surge in wealth inequalities within many countries (Piketty 2015). Labor has also been a direct target of deregulation affecting rights and concerns ranging from unionization and collective bargaining to employment conditions and health and safety at the workplace. Critics of worsening labor conditions, including the

marginalization of young adults, women, older workers, and so on have traced these trends to the financialization of the economy (Krippner 2005). “Structural reforms” promoted by the IMF and the World Bank in the developing world, and by national governments and the EU Commission in Europe, undermined public investment, led to transfer of wealth from the working class and middle class to wealthier groups, increased inequalities, and reduced rates of social mobility (Piketty 2015). As a rule, the most vulnerable and those who relied most on welfare benefits were among those who were hurt the most.

Their different contexts of transition (post-socialism vs post-colonialism) are crucial to understanding differences in the actors, instruments and results of “shock therapies” between Eastern Europe and, say, Africa, and their effects on labor regulations. In Africa from the start, structural adjustment programs affected individual and social well-being including through their effects on the rights of labor and conditions of employment (Logie and Woodroffe 1993). In Ghana, for example, structural adjustment programs led to significant cuts in the public sector workforce and in state expenditures on public services, with the imposition of user fees for health and education leading to reduced access to health and educational services. At the same time, besides inflation and declining real wages, steep currency devaluations led to a four-fold increase in Ghana’s total debt between 1980 and 1995, and increased external debt from approximately 32 per cent to 95 per cent of GDP during the same period (Konadu-Agyemang 2000).

Labor in the richer countries has also been affected by the loss of many forms of industrial employment, the decline of unions and the loss of bargaining power, both in greater or lesser degree a result of changes in labor laws and regulations, the widespread growth of contractual employment, and the emergence of a ‘precariat’ (Standing 2011). These trends are by no means new. Prolonged periods of sluggish growth, rising inequalities, and decline in public services may also be traced back at least three decades. Yet recent years have seen a startling

intensification of these trends, with reinforcing policy changes, and sharper distributive effects. While their direction was unmistakable, the rather more incremental implementation of deregulatory policies over a nearly two decades-long period and a still functional, though rapidly fraying, social safety net enabled the more affluent parts of the West to absorb the consequences of deregulation and liberalization. Public borrowing also compensated to some extent for declining revenues (Streeck 2014), while looser monetary policies and debt-financed increases in consumption helped offset the effects of falling public and private investment and lower incomes (Rajan 2010). Welfare systems too, helped countries cushion the effects of layoffs necessitated by the reduction in trade barriers (Esping-Andersen 1996). However, even in the West, the distributive consequences of policy choices made in the 1980s and 1990s have become increasingly clear and inescapable since the onset of the financial crisis in 2008. Their impact has been particularly harsh in the countries of southern Europe where successive cutbacks in public investments and roll backs of the state since 2010 have not only provoked acute social crises, they have in the absence of compensating increases in private investment led to an acute employment crisis, particularly among young adults.

2.5 Environment

The environmental domain differs from the other domains to the extent nation states have retained more control over environmental governance despite calls for international and supra national environmental governance mechanisms and bodies (Bulkeley 2005). To some extent it reflects the fact that there is not one 'environment' but many: environmental questions range across different scales and across levels, from local concerns about air or water quality, protecting flora, fauna or biodiversity, to regional (including trans-boundary) environmental

management, say of rivers or curbing acid rain, to global level concerns like climate change, with each implying different types of actors, epistemic and ethical values, and solutions. Hence, as a domain, environment illustrates the impossibility of envisaging a single model or locus of regulation or governance – (Bulkeley, 2005; Dingwerth, 2008; Jordan & O’Riordan, 2004; Shove & Walker, 2010, Steffen et al., 2015, Vaccaro 2007). Furthermore, regardless of scale, environmental governance is usually conceptualized as profoundly place-specific (Pestre 2008), more closely connected to local public spaces and politics (Swyngedouw, 2005), and concerned also to govern non-humans, for example containing the spread of chemicals, managing global effects such as climate change, or regulating animal population levels. To a considerable extent environmental governance also reflects aspirations to manage the impact of markets on the use and exploitation of planetary resources.

Environmental governance’s focus on the *environment*, rather than humans, has institutional and instrumental implications; it may also help explain why nation-states have remained powerful actors in this sphere of government. While environmental governance has not been immune to the turn towards market-based solutions and/or transnational governance, the combination of place-based environmental resources and ‘services’ and the need to govern ‘global environmental goods’ (like climate), means that even to their most ardent advocates markets may not always offer the best solutions. In the North, as explained below, government regulations, voluntary compliance and limited market-based mechanisms have prevailed. In the South, in addition to these mechanisms, there has been greater emphasis on decentralization of resources such as forests and water, leading to the development of both state and donor supported community level users groups to govern resources (Lemos and Agrawal 2006), and ecosystem schemes that link local users to financial arrangements designed to promote environmental quality and sharing of scarce resources, especially water (Cobera 2007). Market-based solutions

such as ‘cap and trade’ for pollutants have been slow to develop or not been particularly stable or successful, especially at the international level. Thus, in general, nation states remain central to environmental decision-making (Pestre 2008, 2016).

Inter-state organizations have continued to play an important role in defining and managing environmental challenges, often in coordination with technical experts and scientists (Newell, 2012, Sending and Neumann 2016; Bulkeley 2015). Engaged scientists within these IOs, often aligned with citizen groups, emerged as important voices on the environment, playing an influential role in setting environmental agendas and bringing expert knowledge to bear on them (Bäckstrand, 2003, Hulme, 2011). An important consequence was the growth of the ‘environment’, as an object of regulation and of the associated expertise in the natural sciences. The environment often refers to or implies forms of commons that are not always easy to study or interpret (Bakker, 2007). Therefore, identifying environmental issues and evaluating them using appropriate tools, are intrinsic to the government of nature (Hulme, 2010). The nature of environmental knowledge was one reason why the management and protection of the environment could not be left to the market. This applies to climate change – panel 1 of the International Panel on Climate Change (IPCC) for example – or to the state of the biosphere among many other environmental questions such as air and water pollution. The United Nations Environmental Programme (UNEP), the UNESCO and international scientific organizations like the International Union for Nature Conservation (IUCN), or SCOPE, were central in setting up many of these environmental governance institutions particularly in the 1970s.

A distinct feature of environmental governance is also the extent to which it has been driven at various levels by horizontal and vertical mobilization criss-crossing states and embracing an enlarged political sphere occupied by new social movements and increasingly politicized civil society groups. Such mobilizations are often explicitly critical of neo-liberal

governance agendas (Rajagopal 2003; Valdivia 2008). For instance, environmental mobilizations have mutually fostered and brought together international groups of scientists like the IPCC (Beck 2012, Beck et. al. 2014), transnational activist-advocacy groups like Green Peace and Friends of the Earth, national coalitions of Native American groups protesting environmental justice issues, and grassroots movements protesting large dam projects such as the Narmada in India (Swain 1997), and local, smaller-scale protests, for instance against garbage incinerators in Los Angeles (di Chiro 1996). One consequence of these mobilizations has been to force industry, including notably multinational corporations, and national governments to become more invested in the environment, leading to a range of outcomes from voluntary standards to negotiating regional and other cross-border agreements (Cashore, 2002).

The impact of such movements is particularly evident in the contrast between the 1970s and the early-1980s, when the knee-jerk attitude of international businesses was to resist any action in favor of environmental protection, and the subsequent decades. In the 1970s, while the environment had begun to move up national and international governance agendas, international businesses continued to trivialize the issue and its consequences, in many instances even joining hands with authoritarian governments to victimize environmentalists and attack early environmental movements as disruptive extremist movements. This tendency is far from dead, not only in many poorer countries that are rich in minerals or resources like timber (Peluso 1993; 2011, Swain 1997, Neumann 2004), but in some wealthy countries such as the United States where, as recently as 2017, attempts by a Native American band to block an oil pipeline over their territory (over which they have treaty rights) were met with police and government violence (Sammon 2017).

If Western governments have been frequently complicit in vying to protect their nationals' concessions and investments both at home and abroad, from the late-1980s, major

groupings of business such as the International Chamber of Commerce (ICC) began in parallel to nuance their stance, overtly acknowledging the environment as a legitimate public and business concern and attempting to co-opt campaigning groups and NGOs in their efforts to beat back public regulation in favor of voluntary firm- or industry-level goals and targets, at best with some 'independent' monitoring (Forsyth, 2005). Such strategies, which, arguably from the perspective of the management were more 'efficient' and 'cost-effective' (Bennett, 2000), multiplied through organizations such as the International Chamber of Commerce and dedicated entities such as the Geneva-based World Business Council for Sustainable Development (WBCSD). As the environment became a growing and incontestable public concern, and in many cases a source of public scandal with reputational consequences, a potential drag on stock performance, and a source even of civil or criminal liability, businesses began to embrace environmental concerns, to the extent possible on their own terms (Pestre 2008, 2016).

However the sovereignty of scientific knowledge and environmental concerns of local actors has not escaped challenge including from those who recognize the necessity of environmental governance. Particularly in official settings (e.g. government bureaucracies and international organizations), the link between the environment and the political sphere has tended to be mediated by economic experts playing an increasingly institutionalized role. The reasons for this may be said to be political, managerial, institutional, as well as epistemic. Right from the start protecting the environment was recognized to involve economic trade-offs, including in the South with efforts to reduce poverty, and soon such concerns began to feature prominently in World Bank lending agendas, particularly for large environmental projects such as dams. Whether, to what extent, or how this resulted in international financial institutions extending their clout to the sphere of the environment must remain a matter of speculation. More generally, as environment began to be framed as an 'externality', debates about the environment and

implementation of environmental norms and programs tended also to be expressed in terms of incentives and penalties (e.g. ‘polluter pays’), and more generally in cost-benefit terms. The notion of ‘ecosystem services’ has also been generative of schemes to pay people for protection of valuable resources like upstream water, or most recently, for carbon sequestration. The ‘economization’ of environmental discourses was also reflected at the institutional level in international financial institutions and intergovernmental organizations. A notable example is the OECD where the environment unit was detached from the scientific division which had created it, and placed under the responsibility of economists. The OECD soon became instrumental in proposing new rules, guidelines, voluntary agreements, for example relating to investment policies of multinational enterprises in the South, which were conceived as tools to organize global forms of regulation bypassing state-based measures. The World Bank likewise played a key role in standardizing environmental impact assessment exercises for Northern investments projects in the South, in doing so privileging ‘scientific’ assessments over the perspectives of local people (Moretti and Pestre 2014). This trend towards ‘economism’ may equally be seen in the functioning of the IPCC which prioritizes economic and technical evaluations (Dahan Dalmedico and Guillemot 2008), and in international organizations such as the WTO and its arbitration tribunal whose decisions often hold implications for national environmental laws. (DeSombre 2002; Charnovitz 2007; Shaffer 2010). Demands to reconcile the environment with the purported demands of employment and growth have also given rise to concepts such as ‘sustainable development’ and categories such as ‘green technologies’ which, in turn, have arguably facilitated the constitution of a scaled-up ‘global’ as the proper space or scale for environmental action (Bulkeley, 2005; Hulme, 2010; Mahony, 2014).

3. Authority and regulation / Regulatory shifts and new technologies of governance / technologies of regulation and governance / Modes of Governance

This section explores the forms of authority, instruments of governance and calculative devices mobilized to regulate private and public actors in the five areas under study here. The turn from government to transnational governance is often identified with the expanding deployment of instruments of market self-regulation and thus associated with the spread of neo-liberal ideologies and practices (Ferguson and Gupta 2002; Lascoumes and Le Gales 2007). There is indeed some confirmation that the turn to transnational governance has meant greater reliance on market discipline in some areas (for instance, labor and environment). At the same time, in finance and investment it correlates with innovations in monitoring, surveillance, techniques of risk calculation, arbitration, and so on more conducive to ‘governance by experts’ whose panoply of regulatory instruments may work in tandem with the market but is not limited to it. Thus, transnational governance may not only enhance the sphere of private self-regulation, it has also the potential to change how public regulation operates.

3.1 Finance

Since the 1980s, changing forms of domestic financial regulation and the redistribution of regulatory roles between the public and private sectors were led by a series of innovations signifying a shift from statutory legal codes to more flexible, expert-based “risk-sensitive” rules, accompanied by the introduction of new techniques of risk calculation (Riles 2011). Statutory regulations in finance conventionally involved static provisions applicable to the whole sector, for example in the case of banks separating banking and investment, restricting scale or overseas

operations, licensing entry, etc. In Europe and the developing world after the Second World War, many central banks and governments adopted varying degrees of directed lending policies affecting the distribution of institutional credit between the public and private sectors as well as within them. Directed lending policies could be motivated by several objectives, and any impact they might have on asset quality and financial market stability were more easily manageable in closed economies (Balachandran 1998). Financial regulation in open economies is naturally more complex, more so as financial markets also grow more complex. Here, particularly for advocates of flexibility, instead of defining the scope of permissible and impermissible transactions, modulating regulation across sectors and contexts of exchange could make it more effective and reduce incentives for evasion.

The new modes of regulation have largely coalesced around the use of indicators. This is particularly notable for regulation sensitive to risk (Davis et al. 2012). The expansion of private risk expertise is emblematic of a broader expansion in the knowledge infrastructure for regulation where private firms have been joined by international organizations (such as the IMF) and other entities as suppliers of knowledge. Such knowledge has implications for investors' decisions, functioning of markets, and directly as well as indirectly for macroeconomic policies and outcomes. The diverse sources of supply for this knowledge, in turn, raise important questions about the nature of modern financial markets and financial market signals.

Ratings offer a good example of “governance by indicators” with respect to financial and investment decisions, and more broadly of macroeconomic policies (Davis et al. 2012; Pénét and Mallard 2014). The dispersal of regulatory authority and knowledge following the deregulation of institutional lending and investment since the 1970s was accompanied by an increased reliance on ratings as private risk-based technologies of public regulation. Historically credit rating agencies emerged to provide, for a fee, financial market information to investors who, unlike say

the big banks, lacked the means to produce their own information. Already in the 1930s, US regulators were enjoining the use of public ratings by banks and investment firms that did not devise or were unwilling to share their own internal ratings (Carruthers 2016). After the war, with stringent capital controls and the consequential reduction of systemic risk, regulatory demand for ratings remained sluggish. But from the mid-1970s ratings began to make their way back into regulatory provisions. In 1975, the US Securities and Exchange Commission (SEC) began using them to regulate capital-adequacy norms for broker-dealers.

Since the 1980s ratings began to be incorporated into a broader variety of contexts in the United States, and subsequently in the European Union. Sometimes this could be opportunistic or symbolic: for instance, deployed as a test of national banks' qualifications to establish financial subsidiaries following the 1999 repeal of the Glass-Steagall Act, ratings became a rationale for dismantling a centerpiece of the New Deal regulatory framework. But regulators also used ratings as risk-sensitive restrictions on the types of investments which financial institutions are permitted to issue, such as pension funds and insurance companies. Regulators use rating-based formulas when computing differential disclosure requirements. For instance the SEC mandates higher disclosure requirements for financial institutions with riskier asset portfolios as measured by credit ratings (Crockett et al. 2003: 7). Ratings are used to determine the eligibility of securities for central bank accommodation of private sector bonds, and embedded in private options contracts outside the regulatory framework of public exchanges, while platforms such as the International Swaps and Derivatives Association (ISDA) use rating triggers to reassess collateral (Riles 2011). Rather than appearing as an instrument of deregulation, ratings here serve as a means for voluntary compliance and oversight in what might otherwise be an unregulated industry.

The use of ratings, not to mention ad hoc and often opaquely-based assessments put out from time to time by public and private bodies, is not without problems. For many critics credit ratings possess little intrinsic informational value (Partnoy 1999). Not only have they failed to forecast defaults, they may aggravate instability even when credit rating agencies appear to be following rather than leading markets (Ferri, Liu and Stiglitz 1999; Rona-Tas and Hiss 2011, Pénet 2015). Though such critiques might be thought by some to beg the endogeneity of prices, the latter have been argued to be superior to ratings for regulatory purposes (Partnoy 2002). Recently, banks and investment funds have been distancing themselves from credit rating agencies by bolstering their internal expertise. However ratings remain in use to compute capital reserve requirements, banks also rely on them to risk-weight their exposures. Ratings continue to determine eligible securities for central banks' open market operations as in the case of the European Central Bank (Pénet and Mallard 2014). In other words, despite their limited informational value, demand for ratings appears to be institutionally well-entrenched. Yet with so much riding on them it is also open to question whether the real value of ratings, at least in the short term, may lie not in their informational value as much as in their utility as a tool of governance both whose supply and channels of impact conveniently fudge the boundaries of public/private, government/markets, and so on.

The management of sovereign debt and sovereign debt crises in recent decades also illustrates the complex relations and shifting boundaries between public and market regulation in the sphere of finance. From the 1950s until nearly the late-1970s, developing country governments' external borrowing requirements were largely met by IFIs, Western governments, and their consortia. A high, though declining proportion of securities issued by western governments were also held by home lenders. In the 1970s many developing countries' governments turned to western banks to escape IFI conditionalities. Latin American countries

were among the first developing countries to do so, and thus among the first to return to international capital markets after the Second World War. At first, i.e. from the 1950s to the 1970s by comparison to the later decades, IFIs and western banks kept a distance from each other. Yet within less than a decade of their turn to private borrowing, a combination of loan-pushing and over-lending, surging imports and declining export revenues, and a steep hike in US interest rates plunged the Latin American countries into a debt crisis. Western banks turned to their own governments at the first hints of trouble. In an early display of the tendency (in accord with realist theories of power) for multilateral lending institutions to act in collusion with sovereign creditors' interests (Cox, et al. 1973; Haas 1964; Stone 2002, 2004), soon governments and IFIs were back in play to negotiate structural adjustment programs for the debt-affected countries in return for rescheduling debts and new loans, the bulk of which went into paying off western banks. This landscape has largely remained unchanged for over four decades during which, as discussed above, developments in the sphere of regulation, regulatory institutions, expertise, and behavior have further helped diffuse the lines between public /private, governments/markets, and so on.

Conditionalities are an essential feature of multilateral lending. Their modern origins may be traced to efforts by nineteenth century private lending consortia such as the London-based Corporation of Foreign Bondholders to effectively collateralize public policy in lieu of tangible collateral assets or revenues in countries not subject to formal or informal colonial rule (Flandreau 2013; Flores Zendejas 2016). From the perspective of lenders, colonial loans or guarantees entailing enforceable conditionalities accompanied by close monitoring represented the ideal model of lending to foreign governments.

Modern-day conditionalities can be assessed with respect to substantive demands, i.e. the actual conditions, or the instruments used to support them (Babb and Carruthers 2008). Loans

may be made against the promise of meeting conditions; or fulfilling them may be a precondition for disbursing the loan. In both cases periodic monitoring and assessments would be the norm. Ex-ante conditionality can be coercive to the extent lending can cease if countries do not deliver on their promises. Ex-post conditionality may be more coercive and may partake the nature of 'hard law' (Abbot and Snidal 2000). It does not also preclude continuous monitoring of set performance targets, but in practice, it has been associated with the IMF's expanded surveillance role, which includes producing assessments of debt servicing capacity and vulnerability indices. For the poorest countries such assessments play a role not unlike credit ratings in sovereign bond markets, and with a similar bearing on private investment decisions. For borrowers with access to sovereign bond markets they complement private assessments of credit risk by rating agencies (Best 2014; Nelson 2016). In the wake of the 1997 East Asian crisis, conditionality programs even expanded to include institutional policies in the judicial sphere (Best 2014; Halliday and Carruthers 2009).

The 1980s were a 'lost decade' not only in Latin America but also in sub-Saharan Africa where World Bank and IMF programmes led to a decline in incomes, investment, and even trade as well as increased levels of poverty. While these failures did little to cause the IFIs to pause, with the late-1990s Asian crisis, "the question of what kind of failure this represented itself became a subject of contestation" within the IMF and World Bank (Best 2014:75). However, no amount of failure seemed to make a difference to conditionality-based lending, indeed by the late 2000s, it was no longer confined to developing countries. Since the 2010s conditional lending has come to form an accepted feature of debt restructuring and austerity packages within the Eurozone, notably in Greece, Portugal, and Ireland. At the same time, conditionality procedures, terms, and practices have grown more diverse and complex.

Overall, conditionality is a powerful, yet blunt and flawed mechanism of “expert” governance over sovereign debt issues. Its persistence may perhaps be attributed to IFIs and powerful governments, and perhaps even borrowing governments privileging technical or “calculative” surveillance instruments as a means to exert, or for the latter negotiate, both political and market pressures. Although sovereign defaults and debt restructuring have been on the rise since the 1980s, the international law on sovereign debt remains notoriously underdeveloped, and attempts to frame a comprehensive multilateral framework for resolving sovereign debt disputes through inter-state negotiation remain controversial and have made little headway (Krueger 2002; Helleiner 2008).

3.2 Investment

Governance of cross-border investment continues mainly to operate through inter-state negotiation (treaties) and litigation (mostly in the form of arbitration). As already noted, the two most important instruments used to regulate public actors in this sphere are the investment treaties themselves, which impose obligations on host states, and investment treaty awards, which are made by investment treaty arbitral tribunals in the context of resolving a specific dispute about the interpretation or application of the investment treaty. This institutional development is particularly worthy of note in the context of governance, for the triangulation of its inter-state framework with the needs and interests of private investors in the lending countries.

In terms of treaties, in addition to various mega-regional free trade agreements with investment obligations (like NAFTA, TPP and the RCEP), the 3,200 international investment agreements which have been signed up to now represent a complex spaghetti bowl of bilateral, pluri-lateral and regional agreements, which may be said to make up a “global” system despite

the absence of a single, overarching multilateral treaty. Indeed, even though the vast majority of these treaties are bilateral, this dense web of investment treaties is regarded as a global system for several reasons (Schill, 2009). First, many treaties contain similar substantive terms, as previous treaties are used as legal “boilerplates” (Gulati and Scott 2013) for future negotiations. So despite their bilateral form, they often partake of a shared multilateral substance. Second, investment treaties usually contain most-favored-nation (MFN) provisions enabling investors under one treaty to gain the benefit of favorable provisions in a state’s other treaties. Third, governance through arbitration is a key shared attribute of the investment treaty system. Investment treaties are subject to interpretation by arbitral tribunals, which often interpret provisions in one treaty by reference to decisions under other treaties.

However, the investment treaty system does not have a supreme court or an appellate body and an arbitral tribunal might not follow the decisions of another tribunal through a formal doctrine of precedent. This has meant that different arbitral tribunals have interpreted the same provisions in different ways. In some controversial cases, different tribunals have even ruled on the same scenario in different ways, leading to concerns about inconsistent or conflicting decisions (Franck, 2005; Van Harten, 2007). For instance, in two cases against the Czech Republic arising out of the same facts, one tribunal found no liability and the other found liability and awarded the investor USD\$350 million. In practice, however, a de facto body of precedent has emerged because tribunals in one case often refer extensively to awards from other cases (Kaufmann-Kohler, 2007). This does not always create consistency, however, as on some key issues such as whether MFN provisions apply to dispute resolution, investment treaty tribunals have split between two or more approaches.

Under international law, subsequent agreements and practice of the treaty parties can be taken into consideration when interpreting a treaty (VCLT, article 31(3); Roberts, 2010; Gordon

& Pohl, 2015), though it is not clear that a subsequent interpretation of the treaty parties would be binding on investment treaty tribunals. Still, the power of states to negotiate and enter into treaties, and arbitral tribunals to interpret and apply these treaties, should be understood as an iterative dialogue (Roberts, 2010; UNCTAD, 2011). After tribunals interpret treaties, treaty parties have the power to confirm, reject or qualify these interpretations by leaving the treaty terms the same or changing them in their next rounds of treaty negotiations. This can be seen most clearly in the evolution of US investment treaties which include specific changes that confirm or reject the reasoning given in particular investment treaty awards. Following a series of early cases, NAFTA states grew concerned enough over the broad interpretations of the treaty language by some investment arbitral tribunals for the Free Trade Commission (FTC), which is made up of cabinet-level representatives of the signatory states and has the power to issue binding interpretations of NAFTA provisions, to clarify their intent by issuing its interpretations of the investment treaty. Despite some initial controversy about the effect of these interpretations on ongoing cases, arbitral tribunals generally now interpret NAFTA in light of these FTC interpretations. Given this, many newer-style investment treaties contain a clause giving treaty parties the power to adopt interpretations that bind arbitral tribunals under the treaty. To some extent, therefore, investment treaty law is being developed through interactions between states and tribunals. But not all states have the resources to engage in this iterative process (Gordon & Pohl, 2015).

The regulatory sphere with regard to foreign private investment extends beyond the realm of hard law (i.e. investment treaties and arbitration awards). We may count, among tools of 'soft' regulation, the recommendations and advisory opinions of private consulting firms and large, multinational law firms, influential think tanks, and international organizations like the OECD which advise countries on their investment policies as well as the 'soundness' of their

investments abroad. In recent years, multilateral coordination against money laundering through forums such as the G-20 has investors, states, and other institutions coalescing around the “rule of law” and “transparency” frameworks developed as part of the World Bank and IMF’s anti-corruption initiatives in the 1990s (Halliday, Levi, Reuter 2013; Mehrpouya and Djelic 2015). As part of their anti-money laundering agendas, entities like the Financial Action Task Force (FATF) and the IMF have promoted “financial transparency” measures and banking reforms that extend the reach of reporting requirements like those promoted by the OECD. With the rise of counter-terrorism financing (CTF) campaigns after 2001, “financial transparency” regulations have gained teeth to a point it is doubtful whether they form only a ‘soft law’ even with respect to the transnational legal order regulating foreign investment (Biersteker 2009). This is a notable difference from the 1980s, though it is perhaps too early yet to speculate about the jurisdictional and knowledge asymmetries arising from the rapid creation of a global system for monitoring cross-border investment transactions (Zarate 2013, Mallard 2017).

3.3 Trade

Recent trends in international trade governance have impacted the regulation of private actors (how they are governed and by whom) and reshaped the role of governments and other public actors who have also themselves become to some extent subjects of governance. Two developments may be particularly worthy of note here, not least because rather than being simply opposed tendencies as often supposed, they appear to possess interesting complementarities: first, traditional instruments of inter-state negotiation and inter-state litigation continue to be central to trade governance; at the same time, governance by ‘expertise’ has burgeoned, and voluntarily or otherwise states have delegated regulatory authority in some areas to expert bodies including

those composed of “experts” with close ties to the regulated entities. To add to the apparent paradoxes, these developments have taken place in the backdrop of increased state control over territory, at least “at the border” (Thomson and Krasner 1989).

A key difference between the GATT and WTO regimes, which were both founded on a set of common, mutual, and more or less binding inter-state commitments, lay in the latter’s judicialization of the multilateral trade regime (Shell 1995; Zangl 2008). By rendering violations of trade agreements more easily detectable and punishable, the WTO system aimed to render the international integration of markets beneficial to competitive producers and consumers independent of the political power their countries wielded (Bagwell and Staiger 2010). By assisting the weaker states vis-à-vis the powerful, judicialization might also act as something of a corrective to long standing power-imbalances, and enhance the stability and legitimacy of the trade regime

Such optimism about the “rule of law” is however tempered by the recognition that formal-legal international institutions that seem to empower the weak might operate in the shadow of a possible resort to “informal governance” that favors the powerful (Stone 2011; Héritier and Eckert 2008). “Realist” observers of the politics of international economic relations have long held that international law was made by powerful states, and as such for their benefit (Krasner 1991; Drezner 2007). Early studies of the WTO dispute settlement mechanism which found that it disproportionately benefitted rich and powerful countries (Bown 2004; Esserman and Howse 2003) indeed seemed to bear out this interpretation and suggest that the rules governing international commerce were no exception. One of the insights from the World Justice Project’s multi-dimensional comparative analysis of the rule of law is that the broader institutional context of law and courts generates new and complex forms of inequality in the “access to justice” among otherwise very similar countries (Haggard and Tiede 2011). Even legal

forms of redress at the international level require political will, money, and specialized expertise, so perhaps unsurprisingly, few developing countries were found to have used the dispute settlement mechanism during the WTO's first decade (Busch and Reinhardt 2003; Kim 2008; Shaffer 2003).

More recent research on the WTO dispute settlement mechanism appears to nuance some of these insights: over time and with a modest amount of experience, many developing countries appear to be quite able to "learn" how to use the system to their advantage (Davis and Bermeo 2009). Though there is insufficient data at present to draw firm conclusions, a similar trend may be in evidence in regard to developing country experiences with bilateral and minilateral agreements on competition law and policy that have mushroomed in recent years (Waverman, Comanor, and Goto 1997; Petrie 2015). In particular, stronger dispute settlement provisions in many preferential trade agreements (PTAs) appear to have acted as a restraint on anti-competitive behavior or lessened indirect protectionist measures, brought more broadly symmetrical benefits to competitive producers and consumers in the partner countries, and thus institutionalized trade openness on more sustainable foundations (Abbott and Snidal 2009; Koremenos 2007). In short, despite the limited evidence, a shift of regulatory authority in the sphere of trade to the transnational level through an international governance mechanism offering an assured path to legal redress may yet hold out prospects for developing countries.

The trajectory of scholarship seems broadly similar with respect to the relationship between public and private actors where the latter play an enhanced role in trade governance: initial optimism about the progressive nature of transnational regulatory governance giving way to concerns about potentially severe downsides, followed by a more differentiated view that recognizes considerable variation in outcomes and a better understanding of conditional effects. Consider here the practically and normatively important realm of technical standard-setting

where the key actors tend mostly to be private sector firms rather than governments. Even here, access to conducive “complementary” institutions (Büthe and Mattli 2011) seems to allow firms from small, poor, or less powerful countries to exercise substantial influence if they feel persuaded by the stakes to make suitable investments in learning-through-participation.

The rise of transnational private regulation is regarded at least in part as an attempt to overcome limitations of traditional national regulatory regimes, especially when traditional international (Dashwood 1983; Raustiala 1997) and even newer trans-governmental forms of regulatory cooperation (Slaughter 2004: 36-64) were unavailable or ineffective. Transnational private regulation seemed under these conditions to be a means to overcome the incapacity of public (i.e., governmental) regulation to address negative externalities—and possibly achieve broader regulatory policy objectives—in global markets. It promised to lead to less costly (but at least equally effective) regulations, give regulated firms a stake both in the content of the standards and regulations and their implementation, and reduce enforcement costs (Haufler 2001). It also seemed to offer opportunities for participation by non-commercial stakeholders who are often marginalized in domestic regulatory decision-making and generally excluded from direct participation in intergovernmental regulatory cooperation (Cashore, Auld, and Newsom 2004).

More recent research calls this optimistic view into question. Creating and maintaining truly self-regulatory (or genuinely democratic) and effective regulatory institutions at the transnational level is difficult. Even though private actors face a range of market and non-market incentives to comply with nominally voluntary standards (Büthe 2010c), careful analyses of the practices of private actors reveal barely nominal compliance with transnational private regulatory regimes, and little effective enforcement (Locke 2013). Often—some might argue inevitably—transnational private regulatory bodies appear to be dominated by commercial stakeholders, with

few effective safeguards for the interests of other stakeholders, so that even under complete compliance private standards skew outcomes in favor of commercial actors (Mayer and Gereffi 2010). The rise of transnational economic regulation thus tends, in this view, to have long-lasting *political* distributional implications, further empowering the private sector, especially the larger corporate actors, vis-à-vis other interests (Cafaggi and Pistor 2015).

For those who adopt a zero-sum view of power, this trend toward empowering private commercial actors has also, by necessity, meant a loss of power of states or governments in the governance of trade and trade-related issues. Indeed, a prominent concern about the rise of transnational regulation is its undermining of the state as the only legitimate collective institution of a political community (Teubner 1996). The proliferation of transnational bodies where private actors make and enforce rules in trade-related governance moreover raises concerns about the disenfranchisement of citizens and consumers for whom participation in governance is now costlier and more difficult, and brings few corresponding benefits. Beyond issues where civil society stakeholders are already well-organized and/or have strong ex-ante preferences (e.g. human rights or environmental concerns), and unless private regulation is subject to strong public oversight, transnational private regulation can lead commercial actors, particularly the larger ones, to gain a disproportionately strong voice in setting market standards.

Yet a zero-sum view may be too one-sided. As noted above, for many countries these ongoing changes in global trade governance have taken place in the context of longer-term processes of state formation and technological change that have generally enhanced their governments' territorial control, both at and behind the border. Besides, the notion of “orchestration” (Abbott, Genschel, Snidal and Zangl 2015) may, if suitably adapted to the realm of transnational regulation, see states fostering transnational fora of governance (while retaining a

certain level of control) as a potentially congenial way to supplement their own ability to regulate in areas where they can no longer afford or possess the necessary capability.

Domestic producers and states can be resourceful and successful in protecting their interests in yet another way. A possible recourse is to non-tariff barriers (NTBs) that are not (yet) prohibited by existing trade agreements. And indeed as tariffs have fallen, NTBs have proliferated (Baldwin 2000). Political-economic analyses of international trade provide increasing support for Bhagwati's (1988) concern that there may be something like a "law of constant protection," according to which international agreements to open markets to more foreign competition result only in temporary increases in openness, followed by reversion to a comparable level of protection by other, often novel means. Research on the politics of trade shows that the use of new NTBs is particularly common in trading states—including democracies more likely to sign away their freedom to use recognized trade barriers and developing countries whose consumer-voters may embrace trade openness—where political institutions ensure a high level of responsiveness to the private sector (Ehrlich 2007; Milner and Kubota 2005; Kono 2006). Of course, calling on governments to protect them from increased foreign competition is not the only possible response of domestic firms. As long as producers in a newly integrated international market are similarly competitive, openness creates both incentives and opportunities for private transnational protection (Büthe and Minhas 2015). The formation of price-fixing or market-sharing cartels or other collusive anti-competitive practices become, under these conditions, a "rational business strategy" (Connor and Lande 2012). The available evidence of the scale and geographic scope of international cartels suggests that firms are well aware of such opportunities, though given the ongoing global diffusion of competition law, increasing enforcement cooperation, and the spread of whistleblower protection, it is difficult to ascertain

whether the detection of international cartels reveals an increase in anticompetitive behavior, or is the result of more effective enforcement (Connor 2015).

3.4 Labor

As noted above, the ILO partakes of a corporatist tripartite structure comprising representatives of governments, employers, and unions. It has no hard law instrument at its disposal, and has to rely on its power to persuade (Maupain 2013). Lacking hard law instruments, the ILO disposes of essentially two regulatory instruments, Conventions and Recommendations. Conventions are meant to be legislated into national laws by the states ratifying them. Recommendations, by contrast, are not obligatory. But they need no ratification and are intended to guide national and international policy, as well as adjudication processes at the national level.

Member states have to be persuaded to ratify Conventions. Once they do, the ILO, possessing no implementation capacities of its own, has to rely on national capacities. The ILO however has a highly developed reporting system for national-level application of Conventions. Countries that have ratified a particular Convention are required to submit periodic reports on the measures they have taken to give effect to its provisions (Art. 22 of the ILO Constitution). Each country produces as many reports as it has ratified Conventions on the basis of which a Committee of Experts evaluates national laws with respect to the relevant Conventions and proceeds where necessary to nudge ratifying states to modify their domestic laws and practices. Even member states which have not ratified a particular Convention are under obligation to report on the matters it dealt with, “showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention ... and stating the difficulties which prevent or delay” the ratification of the Convention (Art. 19.5(e)). This

constitutional provision has provided the basis for a new reporting mechanism built around the Declaration of Fundamental Principles and Rights adopted in 1998 on which more is said below. In addition, a semi-judicial body, the Committee on Freedom of Association, examines complaints about violations of freedom of association whether or not the country in question has ratified the relevant Conventions (i.e. Convention 87 of 1948 on Freedom of Association and Protection of the Right to Organize, and Convention 98 of 1949 on the Right to Organize and Collective Bargaining). Complaints can be lodged by each of the tripartite constituents, including from foreign countries, and by international associations of unions and employers. The committee's awards have been used to chastise anti-union policies followed by many countries, including Britain under Margaret Thatcher, the United States under Ronald Reagan, or in more recent years, countries such as Colombia.

A serious attempt to strengthen the ILO's regulatory "teeth" was made in the course of the 1990s debate on "social clauses" in trade agreements (Leary 1996). The effort here was to make core ILO Conventions a condition for market access, with violations offering just cause for retaliatory trade measures. Not surprisingly, to the Southern governments who vigorously opposed and managed to block the proposal, it smacked of an ill-disguised Western attempt at protectionism. In 1996 the WTO's Ministerial Conference in Singapore determined that the WTO lacked the competence to deal with labor standards and reiterated the ILO's exclusive mandate in this domain (Singapore Declaration). This was not motivated by a resolve to strengthen the ILO, more by developing countries' desire to head off a stronger, even possibly a punitive regime governing international labor standards.

ILO Conventions cover very specific issues concerning conditions of work in various industries, such as health and safety, provisions for vocational training, wage-setting provisions, social security, and so on. Many are arguably obsolete. The standards prescribed in the

Conventions are not rigid, nor are they spelt out with great precision. . Some simply require national authorities to introduce a national policy on a particular issue, for example on child labor, others offer regulators different options to choose from. Conventions can also make room for consultations or negotiations with “social partners” (unions and employers) at the national level. The overall record of ratification of ILO Conventions nevertheless remains dismal. Between the early 1960s and the late 1980s the ILO passed on average two Conventions per year, but fewer than 13 countries had on average ratified them within five years. Ratifications as a rule came from countries whose laws are already in line with a Convention. Where that is not the case, the ILO has little choice than to rely on the political will and implementation capacity of member states.

In 1998 the ILO adopted a Declaration of Fundamental Principles and Rights at Work, whereby all member countries confirmed their commitment to freedom of association and collective bargaining, non-discrimination, and the abolition of child labor and forced labor. The Declaration also introduced an important distinction between “rights” and “principles”. Principles are meant to be upheld by all states by virtue of their membership of the organization regardless of whether they have ratified the relevant Conventions. Principles indicate a goal and a direction, but leave member states free to implement them as they see fit. Rights, on the other hand, flow from the relevant Conventions and associated jurisprudence, and give rise to precise legal obligations.

Its defenders see the 1998 Declaration as a positive development which marks the transition from understanding standards as constraining the actor’s self-interest to re-conceptualizing them as legal devices that help actors achieve a more enlightened notion of their own self-interest (Langille 2005). To its critics, the shift from rights to principles represents a debasement of ILO norms since member states are no longer required to abide by the obligations

which the Conventions embodied (Alston 2004). Principles can also be fuzzy enough to allow countries like the United States, which has not ratified most ILO core Conventions and which has several problems of its own particularly with regard to freedom of association and collective bargaining, to claim the moral high ground vis-à-vis developing countries who may have a better record of ratifying and legislating ILO Conventions.

The ILO's reliance on state-based, territorially discrete actors and capacities hinders its ability to adapt to the restructuring of production through global supply chains. Even when developing country governments have the capacity to implement minimum labor standards, they might refrain from doing so for fear of damaging their competitiveness and losing export markets, investments, and employment. The ILO's own approach towards transnational production chains has been hampered by conflicting priorities, with some officials continuing to emphasise the importance of labor treaties (i.e. Conventions and Recommendations), others more concerned with employment creation and sensitive to possible trade-offs between labor standards and jobs. Conflicts of this nature highlight the main challenge under which the ILO has always labored, but which has only grown deeper in recent decades, i.e. that its constituents hold divergent views as to what represents feasible and just outcomes. While the ILO continues to pride itself on its tripartite structure, employers tend to see the ILO in a largely symbolic role that left local actors free to adopt their own solutions. However they may express it, Southern governments are to be found more often than not siding with employers. Unions are more likely to argue for universal standards based on appeals to human rights while also being chary of Western paternalism (and protectionism). Governments remain for the most part less engaged in ILO proceedings than union and employer representatives. That said, Western governments tend to be more aggressive champions of labor standards in Southern countries than the latter's own governments (Baccaro and Mele 2012).

In this context, the regulation of labor standards has come to rely increasingly on private initiatives set up by multinational firms or industry consortia. Such interventions have often been reactive to fears of reputational damage following public scandals which broke out with increasing frequency from the early 1990s when NGOs began targeting global brands such as Nike for the abysmal conditions under which their products were made. Such targeted campaigns and broader attempts to sensitize consumers to conditions of employment in the poor countries where their labels are produced have forced global brands to introduce private monitoring systems in global supply chains. Corporate codes of conduct sometimes drew on the ILO's 1998 Declaration, firms also began employing monitors to undertake site visits to check their suppliers' compliance with national labor laws and their own codes. But the credibility of such monitoring remains an acknowledged problem. Several consortia have been created to ensure independent monitoring, with mixed results: for instance, Locke (2013) has analyzed internal monitoring by three large brands in footwear, apparel, and electronics to conclude that private monitoring is of limited effectiveness, with little improvement in outcomes over time. In particular, freedom of association (i.e. the right of workers to join unions of their own choosing) is rarely respected. The threat of sanctions against violators has been of limited deterrent value. In addition, private monitoring does not address the root causes of labor violations, especially abuse of overtime regulations or of the rights of contract workers. These violations are ultimately the result of the practices of the brands themselves which typically impose tight deadlines and squeeze suppliers' margins as much as possible.

To a great extent, therefore, global labor regulation has come to rely on private monitoring systems where the relevant actors include global brands and buyers, local suppliers, industry consortia, and NGOs (Gereffi, Humphrey and Sturgeon 2005, Locke 2013, Seidman 2007). The ILO's own limited monitoring of supply chains is an exception that confirms the rule.

The first program in this area was the Better Factories Cambodia project (Ang et al. 2012, Oka 2015, Polaski 2006) which was launched in the early 2000s after the ILO was tasked by the US government to inspect and certify working conditions in Cambodia's apparel industry. Cambodia's access to the US market was made contingent on the results of these inspections. The Cambodia project acquired international renown and was continued even after the Multi-Fiber Agreement came to an end in 2005. For its part the Cambodian government decided to issue export licenses only to companies that passed ILO inspections. Although Better Factories was replicated in other countries such as Jordan, Lesotho, and Vietnam in collaboration with the International Finance Corporation (or IFC which is the financial arm of the World Bank—these programs are known as ILO/IFC “Better Work” programs), it remains limited.

Private monitoring represents a different approach to regulation from that advocated by the ILO, with rather different notions of effectiveness, accountability, and justice. It also suffers from severe limitations. First, accountability in private codes is largely limited to commercial accountability: suppliers are required to abide by their principal's code of conduct and as part of their commercial and contractual liability. The notion of democratic accountability to workers, for example by promoting the formation of free trade unions, rarely if ever forms part of private governance systems. Second, effectiveness is operationalized as reduction in workplace violations. However, the use of standardized scorecards for plant evaluation has generated various attempts to “game” the system by suppliers and better scores do not necessarily translate into better performance (Locke 2013). Justice is also ultimately subordinated to the bottom-line: companies may genuinely be committed to being socially responsible; certainly they are willing to spend millions of dollars setting up and running internal inspection systems. However, profits and returns to shareholders remain the ultimate goal and may explain why, rather than drop

suppliers, brands might opt to ride out any short-term impact of supplier controversies on their share prices.

3.5 Environment

Environment presents a diverse picture in regard both to its nature and scale. This impression is enhanced when one considers the varied instruments for regulating it, devised by a diverse cast of actors. Nation states control territory and resources, particularly forests, waterways, and mineral resources and, whatever their motivation, are unavoidably in the position of making laws and regulations relating to their exploitation and use. Since the 1970s several international treaties, mainly devised through the UN system (notably the UN Environment Program UNEP), set goals and standards for environmental protection that are ultimately expected to be enforced by nation states. A list of illustrative if not landmark treaties here might include the 1973 Convention on International Trade in Endangered Species (CITES), the 1987 Montreal Protocol on chlorofluorocarbons (CFCs), the 1997 Kyoto Protocol and the 2015 Paris agreement on climate change. Thanks to such treaties and conventions, the role and responsibilities of governments and public actors in environmental governance have greatly expanded in recent decades. Private actors are often here the main targets of regulation.

Rules and mechanisms for ensuring effectiveness and accountability and efficiency differ profoundly from one treaty to the next. They vary between texts with unenforced or unenforceable promises (e.g. the Kyoto Protocol), to controlled arrangements like the Montreal Protocol (whose success has been attributed to the chemical industry's ability to develop alternatives to CFCs). Some Conventions are routinely violated (e.g. CITES or the Convention on International Trade in Wild Flora and Fauna), while other initiatives (for e.g. REDD+ initiative

for Reducing Emissions from Deforestation and Degradation) may be diverted from their main objective—in this case carbon mitigation—to address goals such as economic and social development which are ancillary to the initiative.

This expanding inter-state dispensation for environmental protection has been accompanied by a growing reliance on scientific expertise on the environment. At the international level, environmental treaties are framed by interpretations and definitions of the ‘environment’ produced within biophysical sciences, and based on abstract models that reduce, decompose, reconstitute, and measure the world in ways that make it amenable to governance (Hulme, 2010, 2011).

Historically, scientists and states have often worked in collaboration to understand and govern nature (Drayton 2000, Dresner, 2008; Dryzek, 2013). In our own times, the International Panel on Climate Change (IPCC) marks an important intervention in its domain. Reflecting an enhanced level of cooperation between states and scientists, the IPCC has been able to put large resources behind building conceptual and computer models to capture complex interactions between diverse elements with a view to generating a better understanding of climate and climate change. Global Circulation Models (GCMs) were developed first in the 1980s to understand how emissions in one place might have an impact at other places, but the models were limited by data as well as in their capacity to address the challenge of scale. Technical and data constraints both meant that models could not aspire to fine-grained scales. Data for large parts of the South was either poor or simply unavailable. This was paradoxically a crucial reason why climate change became a ‘global’ problem, i.e. it was not possible to model atmospheric circulation on smaller scales (Eriksen, Nightingale, & Eakin, 2015; Mahony, 2014). In turn, the inability of models to capture local dynamics mostly confined our understanding of climate change to a global level, with countries in the South being left to highlight major blind spots in GCM-based perspectives

on climate change, demand regional downscaling, and insist on regionally-focused interventions and adaptation measures (Beck 2014, Mahoney 2014).

A quite different set of instruments binding public actors has been designed at the regional level, through regional treaties or arrangements adopted more especially since the 1990s (Pestre 2008). These are particularly numerous in Europe, and have led in most cases to notable environmental improvements—acid rain, Baltic and North Sea agreements, agreements relating to the Rhine and the Danube come to mind here. Such ‘control and command’ agreements are particularly effective when problems are not difficult to identify, large segments of the population are affected, and local action can provide solutions. Some of these questions—e.g. pollution, water quality, and so on—lie also at the boundary between health and environmental concerns. Fewer such instances may be cited in the South where attempts at regional cooperation have met with limited success. The Transboundary Haze Agreement in southeast Asia, for example, has been severely hampered by governments, that are often suspected to be in collusion with large agri-businesses or logging interests, lacking clear or legitimate authority over diverse, dispersed, and often poor and oppressed small holders whose combined actions (e.g., burning small forest plots for cultivation) can produce sizeable environmental impacts (Tsing, 2005). Where environmental problems originate in poverty, and states lack legitimacy, accountability, or effective authority, the immediate absence of options for people on the ground can present insurmountable difficulties even in the presence of shared norms and desire for environmental protection (Peet & Watts, 2004).

Green audits and management rules are the key instruments for holding businesses accountable for the environment. Initiated in the 1980s, their use exploded in the 1990s. As already noted, large Western companies began taking environmental challenges in their stride to champion voluntary approaches, sometimes using the vocabulary of ‘contract,’ ‘internalizing’ the

environment as a firm-level management problem, and advancing their environmental credentials, including through developing niche markets and premium products via enhanced public interfaces (Perkins 2009; Bailis & Baka 2011). By the 2000s the portfolio of environmental instruments extended to green finance and the sustainable management of assets. Such initiatives for self-regulation were shadowed by a growing view, notably within the OECD and UNEP, that it would be more efficient to internalize environmental protection in the process of production, rather than at the end of the pipe. A major consideration here was the needs of trade, in particular a concern to avoid disrupting markets and businesses, with business associations (notably the ICC and WBCSD) emerging as fervent advocates of a business-friendly approach to environmental challenges on the eve of the 1992 Rio Summit.

An upshot of private, firm level, self-regulation was that concrete rules remain concentrated in the hands of managers and auditors – *le secret des affaires* – leaving relatively limited room for public disclosure and monitoring. Environmental considerations were incorporated into management processes for energy savings and recycling on the principle of ‘pollution prevention pays’. In the aftermath of the introduction of ISO 14000 series in the 1990s many industrial agreements defining technical standards of products and processes were devised in cooperation between firms, states and international organizations (notably the EU), with the World Bank and other multilateral organizations later accepting and rendering them ‘international’ (Moretti and Pestre 2014). However such voluntary industry-level engagements tend to be based on loose guidelines and monitoring processes restricted to audits by competing firms in contexts that may be rife with conflicts of interest. For example in the chemical industry, where production tends to change rapidly on account of high rates of innovation and where diffusion of pollutants can be extensive, dispersed, or not easy to contain, regulation has remained weak and extremely sensitive to industrial lobbying. One may observe the same

phenomenon in other fields like energy production, transport, paper pulp or mechanical industries where the most common instruments are Best Available Technologies (BAT) based on available processes considered less harmful to the environment. Conflictual elements tend to be glossed by scientific and business experts defining and standardizing vocabulary, meanings, assessment techniques, process comparisons, ranking methods, and so on.

BAT benchmarks have also made their way into Environmental Impact Assessments mandated as conditions for project loans from the World Bank and other multilateral institutions. BATs and environmental impact assessments based on them may be contestable, but they lie beyond the authority and technical expertise of social movements, local communities, or even national governments in poor countries to challenge. Voluntary engagements are also not real contracts—for instance they typically do not involve independent, even if business-led, regulation or arbitration. Hence there are few effective mechanisms to enforce agreed upon standards and targets.

Despite the limitations inherent to voluntary environmental governance mechanisms, many public bodies in association with business consortia have placed growing reliance on industry-administered labels, certification schemes and public campaigns (e.g. industry environmental awards) to promote and publicize adherence to voluntary environment norms. Initiatives such as self-regulation by market actors and standard-setting practices that, as noted above, began to proliferate from the 1990s anticipate post-2000 innovations by major global companies in partnership with international NGOs such as the World Wildlife Fund (WWF), major Southern states, and in a few instances other locally-based entities, to set environmental quality standards for many agricultural products. The “Round Tables” for palm oil and soya are among the better-known examples here (Bailis & Baka, 2011; Fairhead, Leach, & Scoones, 2012; Fortin, 2013; Ponte, 2013). Such quality standards may be considered a form of ‘soft law’, but

they are voluntary and the initiative for their design and enforcement rests with corporations rather than the states or local communities to whom such “Round Tables” may sometimes be a pre-emptive response.

Mechanisms of this nature share some kinship with environmental labelling. Though its origins lie in the labeling of bio or organic produce in the 1970s, environment labels really turned ‘green’ in the 1990s alongside businesses embracing voluntary engagements, with the Forest Stewardship Council label for a sustainable management of forests (Klooster, 2005) and the Marine Stewardship Council label leading the way among a host of others (Boström & Hallström, 2010). Since then labeling has expanded into many sectors (including mining), with certifications varying in quality and amounting in some cases to a form of “greenwashing.” As with many tools and instruments of this nature, it is impossible to talk about a ‘general form of accountability’. Because rules of accountability are privately defined and quite varied, and because audits are closed black boxes and rarely open to counter-expertise, it is impossible to judge them against universal criteria or standards notwithstanding attempts, such as the so-called ‘gold standards’, to rank them (Spencer 2010). Compliance with such codes may also be selective and opportunistic—for instance in many countries of the South, enterprises might comply with restrictive EU standards to gain access to EU markets but cut corners in producing for domestic markets. The ability of such mechanisms to target the supply end of environmental degradation is therefore open to doubt.

Another important trend in the regulation of corporate environmental conduct is the valuation of environments based on the services they provide (Carpenter et al., 2009) and the adverse results of corporate actions on non-corporate actors. The former has led to the growth of consultancy firms and rating bodies employing biologists and economists to ‘value’ the ‘services’ rendered by ecosystems for purposes of compensation schemes arising from large projects such

as dams and airports. Methods of valuation can be opaque or even circular, with valuations and estimates of compensation sometimes based on assets, whether actually, prospectively, or even notionally, created by ‘rehabilitation projects’ in unspecified locations or locations far from the developments in question, and which are available to be bought or benchmarked as compensation for destruction elsewhere.

Ecosystem system valuations are also used in many Southern schemes to promote conservation goals, for example preserving upland forest ecosystems in order to protect water sources ‘downstream’ (Dempsey and Robertson 2012). Such methods and schemes nevertheless raise fascinating epistemic and ethical questions. Social and environmental cost-benefit analysis, environmental cost estimates, their throughput into prices of goods and services such as power, even mechanisms such as cap and trade schemes, are all in greater or lesser degree premised on the assumption of markets through which environmental degradation can be priced as a ‘negative externality’ in a firm’s *frais généraux*, or used to estimate the health or environmental consequences of particular products or manufacturing processes (Bennett, 2000, Bailis & Baka, 2011).

In regard to the environment, therefore, it is important to recognize firstly that states remain the only body capable of enforcing standards and norms, and secondly that the firmly entrenched practice of framing the environment as an externality deprives the private sector of a crucial incentive to self-regulate: as environment is not at the heart of business, but on its external margins, each firm manages the problem in its own way. Environmental assessment relies on epidemiology, clinical and toxicological studies and so on, with economic expertise subsequently estimating the costs of environmental protection in terms of cleanup costs or lost growth as a guide to decision-making, private as well as public. Environmental damage is not always a business risk, but rather an ‘external’ public risk with indeterminate outcomes. Hence, despite a

proliferation of bodies and instruments, environmental regulation has tended to remain largely ad-hoc and unsystematic.

This outcome may not altogether be accidental, indeed it may be said to follow from the approach managers and management consultants have taken since the last three decades, i.e. promoting a large menu of options offering relatively open-ended choices, time-frames, and modalities for disputes and deferrals. The success of the tobacco industry is worth recalling in this light, so too the pattern it set for effective climate change denial in the United States (Oreskes and Conway 2010). However, paradoxically despite the absence of any evidence in their favor, there has been no letup in the determination of businesses and conservative ideologues who profess to take the environment seriously, to persist with voluntarist and market instruments in preference to so-called ‘control and command’ legal frameworks for environmental regulation.

4. Implications and Assessments

What are the broader implications for social progress of recent trends in international economic, labor and environmental governance? As the preceding sections document, the shift from the government to governance has been rather uneven across the five areas. Yet there seems sufficient ground to suggest that inter-governmental, trans-governmental, transnational, and non-governmental ordering and rule-making processes have combined to create the impression of a world of "governance without government" (Rosenau and Czempiel 1992). The experience of this, whether as disenfranchisement or empowerment in their many possible forms and manifestations—no doubt vastly differentiated—however lies beyond the scope of this chapter. Though some appear widespread, for example the recourse to “expertise” and the use of

indicators and ratings (Davis, et al. 2012; Pénet and Mallard 2014), the apparent shift from government to governance has been accomplished by distinct instruments in each area. This shift has paralleled the decline in the power of states, yet some of it has been an outcome of inter-state treaties or inter-governmental agreements. Such paradoxes cannot also be resolved here. In this section we draw on the survey of regulatory landscapes attempted above to assess, or enable the reader to assess, unfolding governance scenarios in the five areas, and their broader social and political implications.

4.1 Finance

The impact of financial openness and more broadly of financialization of contemporary capitalism on the key indicators of social progress are addressed in other chapters in this volume; so too the meanings and goals of social progress and a ‘good life’. What may be safely ventured from the perspective of governance is that since nearly four decades there has been a growing and unmistakable global shift of power in favor of finance and the services directly and indirectly associated with it. The shift may be more pronounced in some countries than others, in some it may not even be easily distinguishable or may only become visible when the gaze is shifted to overseas and off-shore entities. However what seems indisputable is that financialization and its associated transformations have imposed severe constraints on the horizon of possibilities at least with respect to the strategies and instruments for achieving social progress.. This is true for both the advanced nations as well as those of the South. While such constraints may bite most deeply on the populations and governments of nations with high levels of external debt or in various stages of a debt crisis, their effects are by no means limited to the latter.

By the free-wheeling standards of the 2000s, ‘casino capitalism’ in the 1980s (when Susan Strange (1986) coined the expression), described a world of slot machines (Sinn 2010). However, the dice had already become heavily loaded against developing countries which looked to inflows of private capital to finance domestic investment. Besides while the incentives and rewards for risk were high, private, and largely external, the systemic consequences of risk were costly, public, and domestic. Unable to ride out these risks or withstand their political consequences, the state in many developing countries had dissolved into chronic crisis by the 1990s (Fukuyama 2004). A sobering revelation during the recent financial crisis has been the limited capacity or willingness of states even in the advanced countries to pursue independent policies to rekindle growth and reduce unemployment (Aglietta and Brand 2013). Whether or not this represents a loss of sovereignty—here again we would be well advised to take a differentiated view—it certainly represents a marked change from the time when states had considerably greater freedom to set and pursue their own welfare goals and objectives (Amadae 2003). The wider and longer-term social and political consequences of states’ weakened capacities in this respect could yet emerge as a source of concern from the point of view of social progress.

Against this broader backdrop, power shifts in favor of large Western institutional creditors seem particularly worthy of note. The Greek crisis offers a good illustration, though, of course, the point is far more general. Aglietta and Brand (2013:76) have remarked on the kinship between the early-1990s speculative attacks on the British pound, the Italian lira and the French franc, and the more recent relentless shorting of Greek and Italian debt. But one may observe a relatively new element, at least for the West, in the management of the recent (or current) financial crisis in southern Europe, i.e. that policymakers have felt under great pressure to coordinate their response with private actors including in order to lend credibility to their own

actions, such as even, say, the austerity packages demanded by lenders and debt markets (Aglietta and Brand 2013:79). Yet it is not all carrots: attempts at coordination are more likely to be effective in the presence of close central bank cooperation and expansion of central banks' "lender of last resort" responsibilities (a potential stick) to ward off speculative attacks and staunch a potentially perverse cycle of deleveraging, depreciation, liquidity crises, and seizure of inter-bank credit. The mix of carrots and sticks may thus bear watching to trace the course of financial (de)regulation and the social and political responses to it.

There is a case to be made that deregulation is not necessarily about reducing the role of the state even in the sphere of finance, but instead about redirecting it to particular purposes. This may be exemplified by trends in the governance of risk. In the wake of financial deregulation, larger actors embraced risk to power financial innovation and boost returns. It is far more likely, however, that for smaller, more vulnerable actors, whether workers or small entrepreneurs, risk was involuntary and came for the most part with the possibility of little sustained reward. Besides, while neoliberal governance models offloaded risk on to insurance or financial markets, states continued to provide the backstop when the latter failed, or in the event of a crisis. Consequently risk became a systemic feature whose distributional consequences were liable to be managed in ways that aggravated inequalities, including in respect of government support. Hence, while the financial crisis and its aftermath may suggest the return of governments, it has not yet, for all that, meant the end of neoliberal governance and its implications for social outcomes (Mirowski 2013).

4.2 Investment

The investment treaty system has also been a source of considerable concern in recent years and an object of ongoing reform. Concerns about the asymmetric nature of investment treaties have already been discussed. Among concerns relating to the functioning of existing treaties, an important one is the nature of their juridical process. For instance when a foreign investor initiates an investor-state claim under an investment treaty, the dispute is typically heard by an ad hoc arbitral tribunal instead of a national or international court (Van Harten, 2007). Some commentators argue that arbitrators suffer from an actual or apparent bias in favor of foreign investors, particularly on jurisdictional questions, as only foreign investors can bring arbitral claims and thus create “repeat business” (Van Harten, 2007). Investment treaty tribunals differ from international courts in important ways, as the arbitrators are selected ad hoc for a single case and the tribunal disbands after pronouncing on the respective claim. Lawyers working for major international firms have played an important role in helping to create and expand this investment treaty system which not coincidentally shifts power from state judicial institutions to private law firms (to the particular benefit of multinational law firms specializing in arbitration disputes), and which some argue reinforces a pro-investor bias in the system (Dezalay and Garth 1996; Transnational Institute, 2012). An associated concern is that many lawyers wear two hats, as counsel for one of the parties in some cases and arbitrators resolving claims in others. The investment treaty system is hence criticized for being rife with conflicts of interest where individuals’ roles as arbitrators in one case may not be independent of their interest as counsel for one of the parties in other cases (Corporate Europe Observatory & the Transnational Institute, 2012). Some recent investment treaty proposals, such as for instance the TPP, EU proposals in TTIP negotiations (EU Proposal 2015) and more recently the EU and Canada’s proposal to work

toward a multilateral investment court, sought to resolve this conflict by requiring investment arbitrators not to take on work as counsel in other cases. However, for the most part, investment treaties do not have this provision. Consequently “double hatting” remains a common practice.

A larger concern relates to the use of private dispute resolution mechanisms to resolve issues of significant public concern (Van Harten, 2007). International commercial arbitration usually involves private law disputes about contracts between two private parties or between a private party and a state acting in a private capacity. By contrast, investment treaty arbitrations involve claims by foreign investors against states often for acts undertaken in their public capacity. For example Philip Morris challenged Uruguay’s and Australia’s decision to introduce regulations on the packaging of tobacco and Vattenfall challenged Germany’s decision to phase out nuclear power. But it is important to distinguish between investors bringing claims and doing so successfully: it is worth noting that both Australia, and perhaps more significantly Uruguay, successfully defended themselves against Philip Morris’s claims. But states can still be required to spend considerable amounts defending their regulatory measures. Australia is reported to have spent around \$40 million in its defense against Philip Morris, and the award on costs remains pending. The average amount spent on legal fees in investor-state disputes is estimated to be \$8 million (Corporate Europe Observatory & the Transnational Institute, 2012). A successful state is likely to receive some of this money back in a costs award. But Uruguay still had to bear 30 per cent of its legal fees; besides the lengthy period of uncertainty created by the case was arguably of benefit to Philip Morris and may have persuaded other states to defer or abandon similar regulations.

Investment treaties seem, however, to be in transition from being mainly protective of foreign investors to also protecting important state prerogatives. As to procedure, new proposals are on the table to address some of the present inadequacies, though no one proposal has yet

gained significant momentum. Older-style investment treaties with strong investor protection and few express protections for state sovereignty (Alvarez 2010; Vandevelde 2009) were typically based on models developed by capital exporting states with little fear of being sued by foreign investors in their own countries. The North American Free Trade Agreement (NAFTA) was unusual because it included investment protections in a treaty between three states of which two were developed states. One result was that both Canada and the United States found themselves being sued by investors belonging to the other country. They hence decided to revise their model investment treaties to strike a better balance between investment protection and state sovereignty (2012 US Model BIT; 2004 Canadian Model BIT). This marked a beginning for developed states to realize that they had interests as both capital exporters and capital importers, and an opening to incorporate clauses that sought to distinguish non-discriminatory regulatory actions to advance legitimate public welfare objectives such as public health, safety, and the environment, from acts of indirect expropriation. In recent years more developed states have been named as respondents in investor-state claims.

Many developing countries are also beginning to recognize their growing interests as capital exporters. Their nationals may also sometimes elect to invest in politically unstable regions. The resulting convergence of interests between developed states and developing states is visible in a new generation of investment treaties that appear to be more balanced in their protection of investors' and states' interests (Alvarez, 2010; Vandevelde, 2009). More cognizant also of the prerogatives of domestic lawmaking bodies such as legislatures, newer investment treaties seek to go beyond merely protecting foreign investors and foreign investment, and indeed beyond a narrow focus on economic goals, to reconcile them with broader social and environmental objectives (van Aaken, 2014; van Aaken & Lehmann, 2013; Bonnitcha, 2014; Roberts, 2015). Such treaties may also prove to be of longer-term benefit to investors and states

particularly if they can help to create a level playing field without a regulatory race to the bottom (van Aaken, 2014; van Aaken & Lehmann, 2013; Bonnitcha, 2014; Roberts & Braddock, 2016).

Newer investment treaties also attempt to address the concern that pleadings, hearings and sometimes even awards are confidential in the private dispute resolution mechanism of most existing treaties. In response to NGO and civil society objection to this lack of transparency, some newer treaties allow interested third parties to intervene as amicus. Investment treaty awards are also usually made public. However the cases and documents are, with some exceptions such as NAFTA, still typically less public than in domestic courts or international tribunals. One potential reform that is gaining ground is the European Union's proposal to establish a permanent investment treaty court and an appellate body. This proposal would have the advantage of arbitrators being selected by the treaty parties, given security of tenure, and encouraged to act more independently than if they were reliant on ad hoc reappointment by the disputing parties. The prohibition on double hatting can be a further protection against conflicts of interest. An appellate mechanism may also permit greater consistency in interpreting claim resolutions. The EU has already agreed to Free Trade Agreements containing this procedural innovation with Canada and Vietnam, but it remains to be seen whether this proposal gains broader traction, and how awkward legacies such as multiple investment courts and appellate bodies under different treaties could be resolved. There may hence be room for proposals such as the one currently being considered by UNCITRAL, to have a new convention establishing a multilateral court and/or appellate body that states could sign onto, and that would then apply to their existing investment treaties (Kaufmann-Kohler and Michele Potestà, 2016).

4.3 Trade

The transformation of trade governance has occurred in the context of the differential capacity or willingness of national governments to regulate markets beyond the borders of their jurisdiction (Cutler, Haufler, and Porter 1999; Hall and Biersteker 2002), resulting in various forms of trans-governmental and transnational forms of governance of economic activity or production/value chains (Gourevitch 1999; Kahler and Lake 2003; Gereffi, Humphrey, and Sturgeon 2005). Some changes have been largely driven by governments, for instance the delegation of regulatory authority to private bodies such as the ISO and IEC in the TBT-Agreement (Büthe and Mattli 2011) and to hybrid public-private bodies such as the Codex Alimentarius Commission for food safety standards (Büthe 2009). Other changes have been driven by civil society activists, even broad social movements, or initiated by firms or business associations to head off the development of more onerous standards and certification schemes by civil society groups, or to forestall other sources of regulatory uncertainty (Cafaggi 2011; Green 2014; Bartley 2003). Furthermore, the legitimacy of transnational and global governance has been challenged on both procedural and consequential grounds and from a variety of perspectives (Keohane 2003; Zürn 2004; Joerges 2004; Bernstein and Cashore 2007).

To some extent such concerns might be alleviated by recognizing that trans-governmental and transnational governance may strengthen rather than undermine the ability of states to govern trade-related issues, even if somewhat indirectly. To the extent that new forms of governance help governments overcome limitations in nation-state-based regulatory capabilities in global markets, we may conclude—at least as long as the activities and the impact of trans-governmental networks and transnational private actors continue to be conditioned by public institutions at the domestic level (Risse-Kappen 1995)—that the new forms of governance may

complement and augment, rather than simply undermine, traditional public authority (Büthe 2010b; Abbott *et al.* 2015). Concerns about the marginalization of various societal interests (Kaiser 1969) may also be open to redress through administrative law procedures at the inter- and transnational level (Kingsbury, Krisch, and Stewart 2005) even if the substantive effectiveness of such safeguards would still depend on the ability of marginalized interests to make use of them (Mattli and Büthe 2005).

The shift in the regulatory authority traditionally associated with the modern state "upward, downward, and sideways" (Hooghe and Marks 2003:233) and the consequent reduction in the state's centrality as the site of political contestation over priorities, trade-offs, and the distribution of costs and benefits, poses a stiffer challenge. It is hardly possible to overestimate the significance of such contestations for the formation of political communities and representative institutions at the national level (e.g., Skocpol 1992; Caporaso 1996; Boix 2015). Since many countries in the South remain far from consolidated as political communities and even a number of Western countries face centrifugal political demands (Jolly 2015), the declining importance and influence of states, let alone their failure, may have profound political and social consequences.

What this means for social progress is not at all obvious except in perhaps superficial ways, for example those living in a country with a repressive or kleptocratic ruler (Levi 1988). By contrast for those who live in liberal-democratic societies, "social progress" may be best assured by international regimes that retain a central position for their governments—or assure the full range of stakeholders voice and influence in regulatory governance at the inter- or transnational level. In such cases the balance between power and public welfare would remain subject to active negotiation by stakeholders holding fluid structural positions in the traditional sense, yet subscribing to common principles and procedures for rule-making and accountability

norms, and sensitive to the marginalization of some potential stakeholders, the differential ability of others to take advantage of them, and the dynamic consequences of regulation in any form (Büthe 2010c). Yet even this distinction freights challenging normative and practical distinctions, for instance between Western and non-Western states, that risk turning “social progress” from a political or social project, into a pedagogical project for poorer countries.

4.4 Labor

It is difficult to assess the impact of regulation in the field of labor as far as “social progress” is concerned. Hard measures such as trends in real wages, share of wages to GDP, or wage and income inequalities do not suggest that attempts at regulating employment and working conditions have met with much success. In the last two to three decades real wage growth has lagged productivity growth in most countries, leading to income distribution being skewed in favor of profits at the expense of wages, particularly for unskilled labor (ILO 2009, OECD 2008). The causes of this phenomenon may be debated. Some point to the relative decline in the price of capital goods (Karabarbounis and Neiman 2014), others to the decline in unionization and the diminished bargaining power of workers and unions, and a generalized widening in income inequalities (Stockhammer 2013; Avdagic and Baccaro 2014; ILO 2008, 2015; OECD 2015). Debates over causality are complex enough without invoking shortcomings in global labor governance. Few would disagree however that labor regulation has been unable to counter these trends. This is consistent with the findings of empirical studies of private monitoring that it has little impact on improving even firm-level outcomes (Locke 2013).

The ILO’s declining ability to secure ratification and application of its Conventions by member states (Baccaro and Mele 2012, Maupain 2013, Standing 2008) does not also augur well

for global labor regulation. The ILO aims to prevent a race to the bottom by promoting the adoption of minimum labor standards by both developed and developing countries, but lacking the necessary wherewithal, whether carrots or sticks, can only rely on its own powers of persuasion. Some countries, notably China and India, suspect developed country protectionism behind ILO efforts to promote international labor standards. Secondly the employer constituency within the ILO has felt more emboldened to block the organization's attempts to increase regulatory effectiveness (Baccaro 2015). The ILO has, however, scored some symbolic successes, notably the widespread acknowledgement, including in major international policy documents, of its goal of 'decent work'.

The last three decades have also seen the failure of the model of private governance of labor, centering on the initiatives of multinational companies. As already noted, major global supply chains responded to NGO and consumer mobilizations in the West by establishing supplier norms and private monitoring mechanisms. Yet such efforts may be deceptive when the main causes of non-compliance stem from the commercial practices of the brands themselves, i.e. tight deadlines, meager margins, and in some instances a preference for captive suppliers whose margins and deadlines can be squeezed further. In addition, freedom of association and collective bargaining plays a very limited role in corporate codes of conduct which can seem inspired by a "unitarist" view of the employment relationship wherein labor and capital face no conflict of interest (Kaufman 2004) and problems calling for regulatory solutions are best left to the benevolence of firms and managers. In contrast, recent empirical research suggests that international labor standards may work best when private initiatives are accompanied by a strengthening of state capacities (Locke 2013).

While the path remains rocky for attempts to regulate labor standards globally, the future is not without opportunity. At the political and policy level much could depend on how the

growing evidence of a link between inequalities, over-saving, and slowing growth is translated into actionable policies for improving labor standards (Summers 2014; Baccaro and Pontusson 2016) as a means to reversing the slowdown and restoring growth. Secondly, international coordination is essential to this process, which has also the potential to make improvements in labor standards a positive sum game. Embedding globalization in an architecture of protective institutions, including to assure a minimum set of labor standards, may therefore well be seen to necessitate inventing an institution such as the ILO were one not already in existence.

4.5 Environment

Recent changes in environmental governance have had significant implications for social progress, even if the overall results present a mixed picture. Firstly, there has been a marked push towards certification, labeling and auditing as mechanisms of regulation, opening up environmental governance to a wider array of actors and decentralized mechanisms of accountability. These new actors and mechanisms both bring regulation ‘closer to the ground’ and serve to dispense information about, and authority to govern, environments. Secondly, there has been a move from national-level sectoral environmental policies that were common until the 1990s in areas such as forestry, water, grazing, and agriculture, towards sub-national level regulation of ecosystems viewed as ‘watersheds’, ‘corridors’, and similar frames intended to better capture the interconnected nature of environmental processes (Purdon, 2003). Though it has led to conflicts between different forms of expertise and priorities for governance, ecosystem management has been important in reshaping the inter-connected and multi-level logic of regulation by forcing foresters, water experts, wildlife biologists, and so on to cooperate to devise integrated management plans for designated territories. Thirdly, the impact of popular

mobilization has brought environmental concerns into the mainstream. Now most nation states and many private actors seek at least to cast a veneer of ‘environmental friendliness’ over their policies and practices.

These three general trends have resulted in both a tendency to carry on ‘business as usual’ with some industries and governments continuing to treat evidence of their adverse environmental impact with skepticism, as well as attempts at instituting environmental safeguards before major problems are revealed. Their effects also appear to be uneven, notably in industries such as chemicals or mining with a marked bias against environmental regulation and a tendency to evade them whenever possible. Lessons have no doubt been learnt from past mistakes—some major oil companies, for example, now prefer registering their tankers in countries like Denmark with strong industrial and environmental regulations to risking costly and damaging oil spills by registering in countries with more lenient norms (Dryzek, 2013). It is sobering at the same time that many practices still elude radical change (carbon emissions being a notable example).

Taken as a whole, environmental policies also illuminate the debate over the relative merits of statutory versus disciplinary regulation. The costs of cleaning up polluted environments, for example through the United States Environmental Protection Agency’s Super Fund sites, has helped push a variety of state and non-state actors to take environmental impact into account at the beginning of projects rather after the fact. However, culpable evidence of environmental damage can be hard to come by at the best of times. Particularly for some kinds of environmental damages such as loss of biodiversity or atmospheric contamination, it can be difficult if not impossible to link individual firms or industries to observed impacts. This can have an eventual bearing on the effectiveness of environmental laws (Ellerman 2003; Goulder and Parry 2008).

Last but not least, the extension of transboundary cooperation in environmental governance can come at the expense of effectiveness or binding enforcement (Bulkeley, 2005).

Today the impetus for integrated management has grown, not least because of the specter of climate change (McLaughlin, 2011). But as noted above, the modeling approach to such integration can expose epistemological tensions between inter-disciplinary data, as well as other limitations. In climate domains, modeling continues to be hampered by the underlying Global Circulation Model platform: as noted above, regional models have proven nearly impossible to ‘downscale’ and if modelers start over and build regional models, they cannot be easily integrated with existing GCMs. These epistemic issues translate into governance contestations on the ground as transboundary challenges encompass governmental and private actor cooperation, but also into national and disciplinary differences in environmental knowledge and sensibilities. Such challenges can supersede ecological goals (Mahoney 2014): for instance scientists specialized in research framed in terms of ‘planetary boundaries’ (Steffen et al., 2015) may be more likely to advocate supra-national governance bodies based on abstract anthropocentric conceptions that disregard the social and political dimensions of the environment.

5. Conclusion

Scale is a notable feature of projects for governing the world today, and ‘global’ their seemingly natural aspiration. ‘Global’ can claim a long genealogy for projects to make sense of the world if not necessarily to order it (Subrahmanyam 2005). But ‘global’ and ‘governance’ reflect scalar and other shifts in meaning with implications especially for how lives and societies are organized and governed. The world of empires obviously has different implications for how we are governed from that of nation-states, likewise a world where nation-states may be ceding authority to other institutions. What is governed and how that object is specified are affected by,

and affect, visions of scale as well as the spaces and nature of authority. Who governs and how has a mutual bearing on knowledge, norms, and subjectivities, and both together for the loci and relationships of power. None of this is new or original, yet it is useful in conclusion to remind ourselves that the expanded usage of ‘governance’ as a generalized description of all forms of rule coincides with a period of rapid shifts in the nature and distribution of sovereign authority and power. ‘Global’ and ‘governance’ may therefore describe, as well as constitute and naturalize, such shifts.

This chapter has surveyed governance in five areas, in an effort to add more shades to our understanding of contemporary government and governance. It is diagnostic rather than overtly prescriptive even in the individual areas, where the turn from government to governance reveals important similarities and differences. These relate both to the nature of the turn and the main actors (section 2) as well as the modes and instruments of governance (section 3). The resulting diversities underline that governance cannot avoid being work that, after a fashion, may be said to be in progress: what is governed, how it is framed, who governs and how—these are subjects of political contestation with a range of possible outcomes. Equally, while shifts in the actors, instruments, and mechanisms of governance have only partially transformed the role of nation states, the resulting social impact depends on the accountability of governments as well as their ability to regulate and hold institutions of governance to account.

The contested and fluid nature of governance rules out easy operational “fixes.” Government, governance, and any combinations thereof involve and reflect trade-offs between accountability, equity/justice, and efficiency, among other considerations. Such choices are fundamentally political rather than technical.

Expert knowledge is indispensable for government/governance; however, as is commonplace, the former is fragmentary and limited, and the interventions it fosters in one

context can undo or set back progress in others. The state's "ways of seeing" have been justly criticized (Scott 1998). Governance can also seem a "utopian project" and governance mechanisms have been argued too often to suffer from a "democratic deficit" (Follesdal and Hix 2006). To what extent they do depends partly on counterfactual assumptions. Yet some governance institutions—e.g. central banks—are designed to be independent of governments if not unaccountable to representative institutions. Not coincidentally independence emerged as the "Ark of the Covenant of central banking" alongside the post-World War I expansion of popular franchise. Monetary policy consequently became the first domain for which "experts" claimed monopoly, as well as immunity from democratic politics (Balachandran 2013). The revival of central bank independence in the 1990s coincided with burgeoning faith in the regulation of financial markets and services by "experts" often belonging to the industry or inhabiting its intellectual silos and echo chambers.

The implications of knowledge—i.e. its sources, nature, etc.—for governance and its relationship with government are visible across the five areas surveyed here. Governance seems more natural, and more amenable or vulnerable to being scaled up where the regulatory expertise is backed or entrenched by powerful interests (e.g. finance, trade, investment). Here the role of governments seems to be mainly to facilitate governance, help societies adapt, and should an opportunity arise, strive to reform governance mechanisms. Governance would seem more elusive or scale-bound where countervailing knowledges prevail, or hegemonic claims to knowledge and expertise may be unable to subdue local diversity. Where entrenched knowledge has been displaced and the intellectual and political capital for revising or restoring it seems wanting (e.g. labor), the resulting impasse may lead to a domain's relegation or reconfiguration (Lordon 2015). The nature of authorized knowledge seems also to have a bearing on the scale of

governance/government—the more credible or effective its claim to universal relevance, more it might be available to be mobilized for enlarging the space of governance or escalating its level.

Governments function more often than not in the same knowledge echo chambers as experts and may be as susceptible to “silo thinking”. Yet their greater public accountability offers a better possibility of self-correction. Democratic and responsive political leaderships are also, generally speaking, better able to dispose of knowledge in more integrative ways or act with greater sensitivity towards the interactive effects of their interventions on social progress.

Sustaining shared conceptions of the social good and expanding programmatic possibilities for social progress both demand broadening deliberative processes (Tocqueville 1835). The latter are too often limited to “stakeholders”—a gatekeeping term that can privilege some participants (e.g. organized private actors such as businesses and their representative organization), exclude others, or configure them into institutions such as NGOs more able to sidestep concerns of representativeness and accountability (Elyachar 2005). While there is surely a place for such consultations, the latter cannot substitute for social progress agendas and their diagnoses and prognoses being subjected to public debate and scrutiny, and their legitimacy established through democratic mandate. In the long run, democratic politics sensitive to scale and supported by the broadest possible deliberative processes can alone ensure that modes of government/governance reflect concerns for accountability, equity/justice, and symmetrical trade-offs with efficiency, and that they possess sufficient legitimacy to unite diverse actors around a shared platform for social progress.

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