

## 2 Private international regimes and interfirm cooperation

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This chapter focuses on the development of private international regimes as institutionalized manifestations of private authority. Private international regimes may, of course, emerge in a number of issue areas and involve a multiplicity of non-state actors, as many of the chapters in this book illustrate. However, the focus here is specifically on the emergence of such regimes through the cooperation of firms, business and industry associations, and other corporate actors. This focus is significant because contemporary developments in domestic and global political economies are enhancing the authority of private institutions, actors, and processes. In many states, the privatization of government activities, the deregulation of industries and sectors, increased reliance on market mechanisms in general, and the delegation of regulatory authority to private business associations and agencies are expanding the opportunities for the emergence of private and self-regulatory regimes. Indeed, “[p]rivate actors are increasingly engaged in authoritative decision-making that was previously the prerogative of sovereign states.”<sup>1</sup> Corporations, “singly and jointly, construct a rich variety of institutional arrangements that structure their behavior. Through these arrangements they can deploy a form of *private authority* whose effects are important for understanding not just the behavior of firms, but also for analyzing the state and its policies.”<sup>2</sup>

The paper is less concerned with the nature of the relationship between private international regimes and states, although this is clearly a challenging and pressing concern which is addressed more generally in the concluding chapter. Rather, the main concern is to frame or to distill *private international regimes* as instances of global governance relations or of private international authority. This raises three sets of considerations: analytical, theoretical, and normative. The first set relates to the analytical task of identifying private international regimes as a subset of the more general category of private international authority. Here I am concerned with establishing the indices and scope of private international authority, and clearly assume working definitions of both private

international authority and private international regimes. I am also concerned with developing some sort of understanding of the incidence of private international regimes and their nature and general character.

The second and third sets of concerns relate to the theoretical and normative dimensions of private international regimes. They raise the task of conceptualizing private international regimes as authoritative institutions and as manifestations of legitimate authority relations. This is, perhaps, the most troubling exercise. There are major obstacles to theorizing about private international authority in general, and private international regimes in particular.<sup>3</sup> Moreover, the normative implications of private authority are profoundly disturbing. Very basically, the democratic, formalistic, and legalistic associations of authority with states and the public sphere obscure the growing authority of private institutions, actors, and processes. As a consequence, efforts to hold private institutions accountable in any democratic way are bound to flounder, for that which goes unrecognized is difficult to regulate. Indeed, the move of private authority to obscurity is at root an ideological move inspired by the “liberal art of separation”<sup>4</sup> that serves to isolate and insulate increasing aspects of existence from public scrutiny and review. The legally formalistic associations of authority with the state function ideologically by depicting the world not as it *is*, but as it *ought* to be.<sup>5</sup> Legal formalism identifies state/public authority as the only legitimate authority, rendering non-state/private authority a theoretical and empirical impossibility. As an ontological *non sequitur*, private authority is thus not part of the discourse of responsible or accountable governance.

An adequate understanding of these obstacles and implications is absolutely crucial to evaluating the possibility of reversing the trend toward privatized authority, which is addressed in the conclusion to this chapter. Indeed, this chapter argues that overcoming these theoretical obstacles requires a critical examination of the conventional wisdom in the fields of both domestic and international political and legal theories. It requires moving beyond political theory and international theory as “problem-solving” theories to embrace them as “critical” theories in the manner contemplated by Robert Cox. Problem-solving theory “takes the world as it finds it, with the prevailing social and power relationships and the institutions into which they are organized, as a given framework for action.” It claims to be value-free, but Cox argues that it is in fact deeply ideological because it takes the existing order as a given and in so doing serves the sectional and class interests that are satisfied with that order. In contrast, critical theory “stands apart from the prevailing order of the world and asks how that order came about.” It reasons historically and

dialectically and is concerned “not just with the past but with a continuing process of historical change.”<sup>6</sup> Understanding the historical and dialectical manner in which private international authority and private international regimes emerge and develop provides important insight into what appear to be rather contradictory trends. As a number of chapters in this volume illustrate, forces of globalization that appear to be linked to the emergence and operation of private international authority serve, in some cases, to deterritorialize or delocalize authority relations, but in other cases to territorialize and localize authority.<sup>7</sup> The deterritorializing tendency of market authority, for example, is emphasized in the chapters by Saskia Sassen and Stephen Kobrin. In contrast, other incidences of market authority remain firmly embedded in the territorial state, as the chapter by Louis Pauly suggests. Critical theory assists in understanding variations over time in different manifestations of private international authority.

In addition, critical theory examines the material, institutional, and ideational dimensions of private international authority, and provides understanding of the complex nature of its operation. The highly institutionalized private international regimes that form the focus of this chapter are thus to be differentiated from the more informal and even diffuse moral authority of NGOs, as discussed in the chapter by Ronnie Lipschutz and Cathleen Fogel, or indeed that exercised by religious terrorists, addressed in Mark Juergensmeyer’s contribution.

Finally, critical theory is inspired by emancipatory goals – principal objectives being the clarification of alternate world orders and the promotion of change in social relations.<sup>8</sup> This alerts us to the inescapably normative dimension of private international authority, which is highlighted most clearly in the Lipschutz and Fogel chapter. The normative implications of illicit private international authority, addressed in the chapters by Phil Williams and Bernadette Muthien and Ian Taylor, are significant. Illicit private authority provides a profound challenge to democratic and formalistic theorizations of authority.

This chapter seeks to develop our understanding of private international authority by situating *private international regimes* as the most institutionally developed form or instance of private international authority. The discussion will first define private international regimes, identify significant empirical examples, and offer a few insights into the reasons for their proliferation. It will then turn to explore the theoretical and normative dimensions of private international regimes, highlighting the challenge that they and other forms of private international authority pose for conventional understandings of authority.

### **Private international regimes and private international authority**

There is a prior interest which raises theoretical and analytical issues that must be addressed before defining private international regimes. This concerns whether it makes sense conceptually and theoretically to adopt the regime framework developed for the analysis of interstate regimes for the study of non-state regimes. This is a troubling question that raises some of the central challenges to the theorization of private authority that are considered in the next section. However, a brief review of the nature and evolution of the analytical foundations of the concept of “international regime” illustrates that there are no obvious barriers to its adoption in the study of non-state authority.<sup>9</sup>

Paradoxically, regime analysis emerged as an analytical attempt to address inadequacies in the then conventional approaches to international organization, including their state-centricity and excessive legalism and formalism. Indeed, regimes came to form a central analytical focus for the study of international organization.<sup>10</sup> Regimes also became part of the conceptual framework for the developing field of international political economy. These analysts such as Stephen Krasner, Robert Keohane, Mark Zacher, Oran Young, and others adopted the regime concept as a useful corrective to studies that neglected the role of non-state actors in international relations.<sup>11</sup> Some, such as Robert Keohane and Mark Zacher, embraced the concept of regime robustly, and the next decade and more witnessed a proliferation of regimes studies.<sup>12</sup> While others, such as Susan Strange, though critical of the way in which the state had “colonized” the study of international relations, remained deeply skeptical about the political role of regime analysis,<sup>13</sup> the analytical framework of regimes came to form a central place in international relations scholarship, at least in North America. As the field developed, so too did the study of regimes. A number of European scholars embraced the concept and contributed to the proliferation of regime studies and of valuable cooperative theoretical and empirical analyses.<sup>14</sup> However, the promise of broadening the analytical net to include non-state actors, particularly of the corporate kind, was not fulfilled.<sup>15</sup> Regime analysis became progressively more state-centric in focus as the role of corporations was filtered through the lens of state power.<sup>16</sup> Regime analysis, like the study of international organization and international political economy, was “captured” by a neorealist synthesis of realism and neoliberalism, becoming about as state-centric as neorealism.<sup>17</sup> As Miles Kahler notes, neoliberals had challenged the excessive state-centricity of realism. However, “[n]eoliberalism was redefined away from complex

interdependence toward a state-centric version more compatible with realism.”<sup>18</sup>

In addition, the analytical focus on regimes became more formalistic, at least in the work of some leading regime theorists. Robert Keohane defined international regimes as “institutions with explicit rules, agreed upon by governments, that pertain to particular sets of issues in international relations.”<sup>19</sup> The focus on states, explicit rules, and compliance drew regime theory closer to its roots in formalistic and legalistic international law, factoring out attention to informal and *ad hoc* normative arrangements. As Andrew Hurrell notes, the “apparently growing stress on explicit, persistent, and connected sets of rules brings regime theory and international law much closer together.”<sup>20</sup> The focus on explicit rules and institutional structures thus detracted from the analytical bite of informal practices and loosely institutionalized norms and practices.<sup>21</sup>

The association of regimes with states, state power, and formal institutions and rule structures might appear to be overwhelming, and is evident in the general currency of certain theories. Hegemonic stability theory, for example, associates international regimes with the provision of public goods, which only governments/states are in the general habit of providing, and with institutionalized state responses to market imperfections and failures.<sup>22</sup> However, while the concept of regime is interpreted predominantly in state-centric and formalistic terms, it need not be. “[S]ets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations” can logically extend to the activities of business associations, firms, cartels, and the like, whether formalized in explicit rules and institutions or not.<sup>23</sup> Indeed, one might begin by noting that authority has both analytical and normative dimensions, and one might draw upon the insights of regime analysis in developing the analysis of these dimensions.<sup>24</sup> This section addresses the “analytical element of how authority is structured, how it operates, and how it is recognized and distinguished from other forms of influence,” while the next deals with the normative aspects “of how authority is justified, who or what gives legitimacy, and why the authority of someone is accepted as such.”<sup>25</sup> When one differentiates between *cooperation* and *authority*, there is evidence to suggest that corporations often cooperate, but without a sense of obligation or duty.<sup>26</sup> “Authority requires a basis in trust rather than calculation of immediate benefit, and therefore cooperation must involve the development of habits, norms, rules, and shared expectations – cooperation must be institutionalized.”<sup>27</sup> A critical factor is that participants regard the rules and practices to be obligatory. The obligatory element is in turn related to acceptance of the legitimacy of an authority, as well as

a general sense of the efficacy of authority. Legitimacy involves the respect accorded “an authority,” such as a specialist, a scholar, or an expert whose authority derives from specialized knowledge and practices that render such knowledge acceptable, and appropriate, as authoritative. It also involves the respect accorded those “in authority,” such as political leaders, generals, or representatives who possess an explicit or implicit grant of authority from the state.<sup>28</sup> Efficacy involves general compliance with rules and practices.<sup>29</sup>

Moreover, to be authoritative, cooperation must be institutionalized. However, the degree of institutionalization is highly variable. Empirical studies reveal a high degree of variation in the scope and depth of institutionalization of private regulatory arrangements. Six general types of cooperative arrangements may be identified as authoritative arrangements, both in terms of their acceptance as legitimate by the participants and in terms of the latter’s general compliance with their precepts. They are organized in terms of increasing degrees of institutionalization, suggesting that interfirm cooperation moves in a linear fashion from low to high degrees of institutionalization. However, this is not necessarily the case. Nor is there necessarily a relationship between the degree of institutionalization and the strength of the cooperative arrangements. The types of cooperative arrangements may be delineated as follows:

1. *Informal industry norms and practices*: This is the loosest form of interfirm cooperation, which often evolves through repeated practices in industries and firms that acquire authority over time. The tacit understanding that emerged in the 1960s in the Eurobond market restricting issuers to blue-chip companies or to governments is one such example. There are other examples in the emergence of international commercial law.
2. *Coordination service firms*: These are firms that operate to coordinate the behaviour of other firms, like multinational law, accounting, management, and insurance firms, stock exchanges, debt-rating firms, and financial clearinghouses. These firms often operate on the basis of rules and practices established by business associations, which are discussed below.
3. *Production alliances, subcontractor relationships, and complementary activities*: Strategic partnerships, joint ventures, and networks are identified as three types of production alliances. They involve arrangements between firms that would otherwise compete with each other, but that decide to cooperate in the joint production of goods or services. Networks comprise extensive and complex subcontractor relationships among firms. These are increasingly common today. A good example is the

way in which Nike Inc. is organized on the basis of subcontracted facilities.

4. *Cartels*: Cartels are formal and informal arrangements between producers to coordinate their output and prices. Cartels are certainly not novel arrangements and bear likeness to production alliances. However, production alliances are regarded as generally legitimate, while cartels are censured by antitrust legislation. The maritime transport industry has long been regulated by cartels.
5. *Business associations*: Corporations often cooperate through the formation of business and industry associations, which today often operate transnationally. Such organizations may operate as self-regulatory associations, developing norms and procedures that bind their members. They also may operate as representative associations, acting on behalf of members in their dealings with governments and like. Business associations, like the International Chamber of Commerce, are an important source of norms and practices, many of which may evolve into rules of customary international law.
6. *Private international regimes*: A private international regime is defined as “an integrated complex of formal and informal institutions that is a source of governance for an economic issue area as a whole.”<sup>30</sup>

Private international regimes differ from the other types of private corporate authority identified above by the pervasiveness and breadth of their activities. They may also incorporate other types of private authority. Private international regimes may be created by “negotiation and interaction among firms within a particular industry sector or issue area, and generally incorporate a number of business associations, both national and international. They formulate rules and procedures for dealing with conflicts among participants, and between participants and their customers.”<sup>31</sup>

Private international regimes are thus important forms of interfirm cooperation, embodying the most extensive institutionalization of rules and procedures governing regime members and, in some instances, non-members as well. “The interfirm cooperation represented in international regimes operates on multiple levels in complex ways, and often involves extensive interaction and cooperation with the state. Indeed, one of the important analytical goals in studying private international regimes is to understand the degree to which the private actors in a regime are independent of the public ones.”<sup>32</sup> In addition, hierarchical integration in particular industries may be a significant source of private authority and could be used as a measure of institutionalization itself. For example, informal industry practices may be developed by coordination service firms

and later be adopted by industry and trade associations. They may also be adopted by and enforced by states in response to the representations of self-regulatory business organizations. Clearly, this sort of linear progression is not characteristic of all sectors, industries, or issue areas, and an important analytical concern is identifying variations in the integration and institutionalization of private authority. A related concern involves deciding when looser forms of interfirm cooperation may be regarded as having crystallized into a private international regime.<sup>33</sup>

The concept of private international regime has been fruitfully used to analyze the regulation of the internet, the international minerals industry, industrial production standards setting, the regulation of intellectual property, the insurance industry, and the maritime transport industry.<sup>34</sup> In addition, while not explicitly identified as private international regimes, issue areas including the early cotton industry, cartelized industries in the period between the two world wars, and debt-rating industries might also constitute private international regimes. These studies illustrate that many private regimes rely on informal norms and practices. Moreover, they suggest that, “because there is no objective criterion that can establish a required threshold at which private institutions are comprehensive enough to be considered regimes, their existence is often difficult to establish irrefutably.”<sup>35</sup>

A good empirical example of a private international regime is the transnational merchant law regime.<sup>36</sup> Known variously as the modern law merchant regime, transnational commercial law, and the law of private international trade, the regime governs international commercial relations of a private nature.<sup>37</sup> It has been in existence for over a millennium, although it has taken very different institutional forms over its history. The medieval law merchant order was a private, self-regulatory regime that operated outside local legal systems and political economies. Medieval merchants devised laws through private means and enforced them in private merchant courts that were independent of local legal systems. With the emergence of states, first in their mercantilist and later in their capitalist formations, the merchant order disappeared as an autonomous legal system as its laws and courts were incorporated into national legal and judicial systems. There international commercial relations became juridified, as states sought to systematize and rationalize international commercial relations.<sup>38</sup> Today, in a curious twist of Weberian state authority, the juridification of international commercial relations is intensifying, but at the hands of predominantly non-state, corporate actors through their exercises of private authority. The modern law merchant regime forms a highly institutionalized order in which both public and private authorities interact to create and enforce international commercial laws.<sup>39</sup>

Significantly, merchant autonomy over law creation and over international commercial arbitration (the latter is also addressed in the Sassen paper) is creating a highly privatized legal order that delocalizes and deterritorializes commercial transactions and law. However, states remain intimately involved in the enforcement of international commercial agreements, serving to relocalize and reterritorialize the transactions at the point of dispute settlement. This curious mix of private and public authority, which operates to delocalize/deterritorialize and relocalize/reterritorialize international commercial relations, provides an excellent illustration of the dialectical operation of a private international regime.

Other examples of private international regimes may be found in the dispute settlement orders emerging under the General Agreement on Tariffs and Trade/World Trade Organization, the Canada–US Free Trade Agreement, and the North American Free Trade Agreement.<sup>40</sup> In each case, privatized international commercial arbitration has replaced the adjudication of international commercial disputes in national courts of law. The operation of these regimes centers around multinational law firms which, as “merchants of norms,” exercise profound moral authority, in addition to market authority through their monopoly of privatized dispute settlement processes.<sup>41</sup> The international commercial arbitration world operates like a private club, the entry to which is limited to those schooled in Western legal science and which perpetuates a normative regulatory order that privileges neoliberal market discipline. Similar privatized regimes are emerging in the fields of taxation and accounting, suggesting that the expansion of privatized authority is an ongoing process.<sup>42</sup>

In seeking to explain the emergence of private international regimes, analysts have focused on market-based explanations, drawing upon efficiency incentives, transaction cost analysis, and public goods theory.<sup>43</sup> For example, the emergence of the law merchant order is explained by some as comprising institutional responses to the transaction and information costs and insecurity experienced by traders engaging in trade over wide geographical regions.<sup>44</sup> Other, power-based explanations of the emergence of private international regimes focus on the regulatory influence of firms dominating markets and issue areas.<sup>45</sup> More historical explanations focus on the significance of broader trends like globalization, rapid technological change, and the expansion of markets in enhancing the influence of corporate actors.<sup>46</sup>

These examples indicate that interfirm cooperation is increasingly taking on the “mantle of authority”<sup>47</sup> as the contraction of government authority and the expansion of private regulatory authority are generally accepted by societies. The apparent expansion of private international

regimes reflects a changing balance between public and private authority with broader implications of a normative and ideological nature, to which I will now turn.

### **Theorizing private international regimes**

In positing that interfirm cooperation is increasingly “taking on the mantle of authority,” I am arguing that firms are basically functioning like governments. This raises both theoretical and normative concerns. First, it raises major issues for democratic and representative theories of governance. Indeed, as mentioned at the outset, there are significant theoretical obstacles to conceptualizing private authority, which clearly apply to private international regimes as well. Liberal theories of the state and of international law associate political authority with the public realm of government.<sup>48</sup> Only public authorities are entitled or empowered to prescribe behavior for others because only public authorities are accountable through political institutions. Private entities, such as corporations or business associations, are not entitled to act authoritatively for the public, because they are not authorized by society and are thus not subject to mechanisms of political accountability. Indeed, their accountability (legally and financially) is to their private members. Thus, under democratic theory, only elected representatives and their delegates may function authoritatively in prescribing and proscribing behavior.

Similarly, under liberal theories of international law, the only legitimate “subjects” of the law are states and their designated representatives. This means that only states and their designates may initiate claims under international law and be the subject of legal rights and duties.<sup>49</sup> Corporate liability exists only as a derivative of state liability under the legal doctrine of state responsibility.<sup>50</sup> Corporate personality is thus filtered through the persona of the state. However, this poses major problems of ensuring accountability for corporate actions, a concern of growing significance in the areas of environmental damage and injury to consumers from faulty or defective products sold in countries with inadequate consumer protection laws. States are often unwilling to assume responsibility for the actions of corporations, particularly if the latter can disclaim liability for the actions of subsidiaries doing business abroad. Moreover, it is increasingly more difficult to determine corporate nationality and to identify the appropriate legal jurisdiction to which to attribute responsibility in cases of transnational corporations the operations, holdings, and directorships of which are widely dispersed. These factors are effectively rendering transnational corporations and their actions “invisible” under international law.<sup>51</sup>

The attribution of public functions to private actors directly challenges democratic and liberal theories of governance and law. Indeed, to impute political authority and accountability to corporate action “would be to turn representative democracy on its head.”<sup>52</sup> It threatens to undo “the liberal art of separation” that underlies separations between state and civil society; public and private; government and market; politics and economics.<sup>53</sup> However, the normative statement that only duly elected and representative governments “ought” to be capable of exercising political authority must not be confused with the empirical fact that corporations “are” increasingly functioning authoritatively in ruling themselves and others:

[t]his obstacle [the “public” nature of authority] is only convincing, however, if one accepts that the normative statement that private power “ought” not be regarded as legitimate and binding establishes the *a priori* validity of the empirical statement that private power “is” in fact not regarded as legitimate and binding. The public dimension of authority is only an obstacle if one accepts that private power does not *in fact* operate in an obligatory way.<sup>54</sup>

Formalism thus threatens to obscure the actuality of private authority. Moreover, while imputing “public” authority to “private” actors may well threaten the conflation of the public and private domains and thus undermine central tenets of liberal political theory, some of the most interesting and innovative studies of international regimes have had no difficulty in casting their analytical nets so as to catch the activities of private actors.<sup>55</sup> This suggests that there is a growing asymmetry between the theory and the practice of international relations: the theory makes an impossibility of private authority and private international regimes, while the activities of non-state actors grow increasingly authoritative. This asymmetry is not new to international law. Major ruptures of the political order are often only later reflected in legal theories, as in the shift from the medieval to the modern and then postmodern political economies.<sup>56</sup> Indeed, a source of innovation in legal theory comes from changing practices of the participants, states or otherwise. Today this asymmetry is a reflection of deeper processes of globalization at work that are producing a disengagement of law and state and enhancing the authority of non-state authority more generally. As one legal analyst notes, “[i]n so far as our stock of theories of law assume that municipal legal systems are self-contained or that public international law is concerned solely with external relations between states, such theories just do not fit the modern facts.”<sup>57</sup> The proliferation of transnational, regional, and nascent legal orderings reflects “new kinds of legal order” linked together by one theme – “the disengagement of law and state.”<sup>58</sup>

The erosion of the public/private distinction also raises normative concerns. The question here is whether private interests *ought* to be the yardstick for international regimes. There is nothing natural, organic, inevitable, nor inherently meaningful in the distinction between the public and private spheres. In both politics and law they emerged as part of the analytical foundations of the bourgeois state and political economy and owe their currency to dominant corporate and class interests.<sup>59</sup> As such, they function ideologically and instrumentally to advance the interests of corporate capital within states and the interests of transnational capital between and among states. For example, private authority in the maritime transport industry, in addition to structuring commercial expectations and actions, “also operates politically to ensure that certain activities do not engage public regulation, scrutiny, and review. Private protectionism in the form of maritime cartels and private associations ensure limited entry to those who are not members of the maritime ‘club’ by creating ‘invisible’ barriers to entry. Indeed, the distributional consequences of rules that purport to operate in the common interests of providing greater certainty in transactions . . . are rendered invisible by their private and, hence, ‘nonauthoritative’ origin.”<sup>60</sup> The maritime transport regime is a private international regime that privileges the interests of transnational shipping, insurance, and financial industries and preserves the interests of the most powerful maritime states. It thus gives rise to troubling normative implications that are only obscured by liberal legal and political fictions surrounding the properly “public” nature of authority.

However, while the concepts of private authority and private regimes raise important normative concerns, they do provide a useful corrective to excessively formalistic approaches to the study of international relations. They have an advantage that is particularly relevant to understanding the contemporary transformations associated with globalization. In focusing on informal and often only loosely institutionalized forms of governance, the concept of private authority is able to comprehend certain fundamental changes in legal ordering that are associated with the deepening of neoliberal discipline more generally. The privileging of private ordering and self-regulatory arrangements among corporations through autonomous processes of dispute resolution and the private arbitration of trade and commercial disputes, through special corporate tax arrangements, and through increasingly delocalized financial relations is minimizing the development of explicit rules of law and enhancing the influence of private, *ad hoc*, and discretionary practices. This is working a revolution in our notion of the “rule of law” and rendering the analytical focus on explicit rules and institutions highly formalistic, if not irrelevant. As William Scheuerman argues, both a unifying corporate elite and the

compression of time and space are obviating the need for explicit, predictable, and fixed legal rules.<sup>61</sup> Instead, the corporate world wants and is generating private, *ad hoc*, and discretionary standards. No longer are many transactions complicated by the distances of space and the lapse of time. Simultaneous transactions thus narrow the need for fixed rules, while the unity provided by a uniform legal culture continues to provide an element of stability in expectations. The preference today among commercial actors for “soft law” rather than “hard law” reflects this same trend in the transformation in the “rule of law” and the creation of a more permissive rule structure that permits cheating when necessary.<sup>62</sup> Indeed the modern law merchant regime operates to globalize both highly institutionalized authority and the moral authority of marketized and privatized legal regulation.

The concepts of private authority and private regimes can thus be very powerful analytically, theoretically, and ideologically. Analytically, they “render visible the activities of transnational corporations, business associations, and organizations that structure commercial activity and determine outcomes in terms of controlling market access and market shares . . . and regulating the entire process of transacting.”<sup>63</sup> Theoretically, they assist in clarifying the processes driving the generation of global authority relations. Ideologically, they assist in revealing the private interests being served by political orders and legal regimes and raise the vexing problem and challenge of enhancing corporate accountability, reminding us that “[t]heory is always *for* someone and *for* some purpose.”<sup>64</sup>

The investigation of these purposes in the various forms that private authority takes is a profound challenge and is inextricably linked to issues of legitimacy. Arguably, the authority exercised by corporations and markets is easier to accept in cases in which one detects the devolution, delegation, or even the silent permission of governmental authorities. In privatizing industries, services, and sectors, governments may be silently complicit in the occupation of the field by private corporate or market authority. Clearly, the global cities Saskia Sassen analyzes need the support of a governmental framework in order to survive, suggesting that the dialectic between deterritorializing and reterritorializing authority varies over time. Moreover, as the chapter by Louis Pauly suggests, governments might be quite prepared to reoccupy the field if they deem it necessary. However, when one considers other forms of private authority, it becomes more difficult to reconcile the infusion of private ordering into public domains or issue areas. Arguably, the moral authority of emancipatory NGOs, addressed in the chapter by Ronnie Lipschutz and Cathleen Fogel, can still be accommodated as exceptions to the conventional notions of the legitimacy of public and state-based

international authority. However, as one moves away from the legal into the margin of the legal or the domain of the illegal, legitimacy problems become more acute. The moral authority of religious terrorists, addressed in the chapter by Mark Juergensmeyer, pushes beyond conventional notions of legitimacy, as too do the private armies discussed by Bernadette Muthien and Ian Taylor. Clearly, overtly illegal authority, like that of the mafia addressed by Phil Williams, poses the most significant challenge to the legitimacy of private authority. If private corporate authority turns representative democracy on its head, illicit authority threatens to empty it of meaning. Such is the most extreme challenge of private international authority.

## NOTES

- 1 A. Claire Cutler, Virginia Haufler, and Tony Porter, "Private Authority and International Affairs," in A. Claire Cutler, Virginia Haufler, and Tony Porter (eds.), *Private Authority and International Affairs* (Albany, N.Y.: SUNY Press, 1999), p. 16.
- 2 A. Claire Cutler, Virginia Haufler, and Tony Porter, "The Contours and Significance of Private Authority in International Affairs," in Cutler, Haufler, and Porter, *Private Authority and International Affairs*, p. 333.
- 3 See *ibid.*, pp. 365–69, and A. Claire Cutler, "Locating 'Authority' in the Global Political Economy," *International Studies Quarterly*, 43 (1) (March 1999), 59–81.
- 4 Michael Walzer, "Liberalism and the Art of Separation," *Political Theory*, 12 (3) (1984), 315–30.
- 5 See Judith Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964).
- 6 The now familiar distinction is made by Robert Cox in "Social Forces, States, and World Orders: Beyond International Relations Theory," in Cox with Timothy Sinclair, *Approaches to World Order* (Cambridge: Cambridge University Press, 1996), pp. 88–89.
- 7 For further discussion of the contradictory nature of forces of globalization on the balance in relations between state and society, see Anthony Giddens, *The Consequences of Modernity* (Cambridge: Polity Press, 1990); Frederic Jameson, *Postmodernism or the Cultural Logic of Late Capitalism* (Durham: Duke University Press, 1991); and David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Cambridge, Mass., and Oxford: Blackwell, 1990).
- 8 For more on the emancipatory nature of critical theory, see Andrew Linklater, "The Question of the Next Stage in International Relations Theory: A Critical-Theoretical Point of View," *Millennium: Journal of International Studies*, 21 (1) (1992), 77–98, and Mark Hoffman, "Critical Theory and the Inter-Paradigm Debate," *Millennium: Journal of International Studies*, 16 (2) (1987), 231–49.
- 9 When Virginia Haufler, Tony Porter, and I first began the project on *Private Authority and International Affairs*, we in fact defined it as a study of private

- international *regimes*. However, our first workshop revealed that the analytical focus on regimes was simply too narrow to capture the complex, rich, and variable types of the activities that ordered the corporate world. Most participants were dissatisfied with what they regarded as regime analysis's excessive preoccupation with the state. As a result, we broadened our focus to that of private international authority in order to capture the phenomenon of non-state authority and its tremendously varied manifestations.
- 10 For further discussion of the analytical foundations of regime analysis that dates from that time, see Friedrich Kratochwil and John G. Ruggie, "International Organization: A State of the Art on the Art of the State," *International Organization*, 40 (1986), 753–75. For a less positive view of regime analysis in that same volume, see Martin Rochester, "The Rise and Fall of International Organization as a Field of Study," *International Organization*, 40 (1986), 777–813. For a contemporary assessment of the contribution of regime analysis to the study of international organization, see Rochester, "The United Nations in the New World Order: Reviving the Theory and Practice of International Organization," in Charles Kegley (ed.), *Controversies in International Relations Theory: Realism and the Neoliberal Challenge* (New York: St. Martin's Press, 1995), pp. 199–222.
  - 11 This is not intended to be a literature review of regimes theory. However, the classic originating text is Stephen Krasner's edited volume on *International Regimes* (Ithaca, N.Y.: Cornell University Press, 1983), which was a special issue of *International Organization*. It included articles by a number of authors who went on to develop regimes theory as the analytical foundation for international political economy.
  - 12 Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984); Mark W. Zacher with Brent Sutton, *Governing Global Networks: International Regimes for Transportation and Communications* (Cambridge: Cambridge University Press, 1996); Thomas Risse-Kappen (ed.), *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions* (Cambridge: Cambridge University Press, 1995); Volker Rittberger with Peter Mayer (eds.), *Regime Theory and International Relations* (Oxford: Clarendon Press, 1993).
  - 13 Strange, "Cave! Hic dragones: A Critique of Regime Analysis," in Krasner, *International Regimes*, pp. 337–54.
  - 14 See Andreas Hasenclever, Peter Mayer, and Volker Rittberger, *Theories of International Regimes* (Cambridge: Cambridge University Press, 1997), and M. A. Levy, O. R. Young, and M. Zürn, "The Study of International Regimes," *European Journal of International Relations*, 3 (1) (1995), 267–330.
  - 15 See Virginia Haufler, "Crossing the Boundary Between Public and Private: International Regimes and Non-State Actors," in Rittberger with Mayer, *Regime Theory and International Relations*, pp. 94–111, for the theory's neglect of corporate actors and authority.
  - 16 I deal with this matter more fully in "Private Authority in International Trade Relations: The Case of Maritime Transport," in Cutler, Haufler, and Porter, *Private Authority and International Affairs*, pp. 283–329. See also Stephen

- Krasner, "Power Politics, Institutions, and Transnational Relations," in Risse-Kappen, *Bringing Transnational Relations Back In*, p. 279, for the conditioning role of the state.
- 17 Miles Kahler, "Inventing International Relations: International Relations Theory After 1945," in Michael W. Doyle and G. John Ikenberry (eds.), *New Thinking in International Relations Theory* (Boulder, Colo.: Westview Press, 1997), p. 36.
  - 18 *Ibid.*, p. 35.
  - 19 Keohane, "Neoliberal Institutionalism: A Perspective on World Politics," in R. O. Keohane, *International Institutions and State Power: Essays in International Relations Theory* (Boulder, Colo.: Westview Press, 1989), p. 4. For a very good summary of debates over the definition of international regimes and the benefits and costs of different versions, see Hasenclever, Mayer, and Rittberger, *Theories of International Regimes*, ch. 1.
  - 20 Hurrell, "International Society and the Study of Regimes: A Reflective Approach," in Rittberger with Mayer, *Regime Theory and International Relations*, p. 54. Also, for the view that international regimes and international law have much in common, see A. Claire Cutler, "The 'Grotian Tradition' in International Relations," *Review of International Studies*, 17 (1991), 41–65, and Robert J. Beck, Anthony C. Arend, and Robert D. Vander Lugt, *International Rules: Approaches from International Law and International Relations* (New York and Oxford: Oxford University Press, 1996), ch. 7.
  - 21 It is noteworthy that regime theorists of a more constructivist bent offered the promise of a less formalistic approach. Certainly the work of Oran Young, Friedrich Kratochwil, and Alexander Wendt is notable in this regard. However, the focus remained very much on states. For a good review of constructivist approaches and a useful bibliography, see Hasenclever, Mayer, and Rittberger, *Theories of International Regimes*, ch. 5.
  - 22 But see Haufler, "Crossing the Boundary Between Public and Private," and Adrienne Héritier (ed.), *Common Goods: Reinventing European and International Governance* (Boulder, Colo.: Rowman & Littlefield, 2002), for examples of private actors providing public goods.
  - 23 Stephen Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variable," in Krasner, *International Regimes*, p. 2.
  - 24 Cutler, Haufler, and Porter, "Private Authority and International Affairs," p. 5, drawing upon Stephen Lukes, "Perspectives on Authority," in Joseph Raz (ed.), *Authority* (Washington Square, N.Y.: New York University Press and Oxford: Basil Blackwell, 1990), pp. 203–17.
  - 25 Cutler, Haufler, and Porter, "Private Authority and International Affairs," p. 5.
  - 26 See Robert O. Keohane, "International Institutions: Two Approaches," in Keohane, *International Institutions and State Power*, pp. 158–79, for the distinction between regime-governed behaviour and cooperation.
  - 27 Cutler, Haufler, and Porter, "Contours and Significance of Private Authority," pp. 334–35.
  - 28 For the distinction between "an authority" and those "in authority," see R. B. Friedman, "On the Concept of Authority in Political Philosophy," in Raz, *Authority*, p. 79.

- 29 These matters are developed more fully in Cutler, Haufler, and Porter, "Contours and Significance of Private Authority," pp. 362–65.
- 30 Cutler, Haufler, and Porter, "Private Authority and International Affairs," p. 13.
- 31 *Ibid.*, p. 14.
- 32 *Ibid.*
- 33 Not unlike how the practices of actors can over time crystallize into customary international law. See Peter Malanczuk (ed.), *Akehurst's Modern Introduction to International Law*, 7th edn. revised (London and New York: Routledge, 1997), ch. 3, for the variety of indicators used to determine if a practice has attained the status of law.
- 34 These, like the six categories discussed above, are all examples taken from Cutler, Haufler, and Porter, *Private Authority and International Affairs*.
- 35 Cutler, Haufler, and Porter, "Contours and Significance of Private Authority," p. 355.
- 36 See A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law and the Global Political Economy* (Cambridge: Cambridge University Press, forthcoming); Cutler, "Global Capitalism and Liberal Myths: Dispute Settlement in Private International Trade Relations," *Millennium: Journal of International Studies*, 24 (3) (Winter 1995), 377–97.
- 37 See generally Norbert Horn and Clive Schmitthoff (eds.), *The Transnational Law of International Commercial Transactions* (Deventer, Netherlands: Kluwer, 1982).
- 38 See Cutler, *Private Power and Global Authority*, and Cutler, "The Privatization of Global Governance and the New Law Merchant," in H eritier, *Common Goods*, where juridification is defined as the utilization of law to legitimate increasingly more claims to authority coming from both state and non-state actors.
- 39 See A. Claire Cutler, "Public Meets Private: The International Unification and Harmonization of Private International Trade Law," *Global Society*, 13 (1) (1999), 25–48.
- 40 See *International Organization*, Special Issue: The Legalization of World Politics, 54 (3) (Summer 2000); A. Claire Cutler, "Globalization, Law, and Transnational Corporations: A Deepening of Market Discipline," in Theodore Cohn, Stephen McBride, and David Wiseman (eds.), *Power in the Global Era: Grounding Globalization* (Basingstoke: Macmillan, 2000), pp. 53–66; and William Scheuerman, "Economic Globalization and the Rule of Law," *Constellations: An International Journal of Critical and Democratic Theory*, 6 (1) (March 1999), 3–25.
- 41 Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago and London: University of Chicago Press, 1996).
- 42 See Sol Picciotto and Ruth Mayne (eds.), *Regulating International Business: Beyond Liberalization* (Houndmills and Basingstoke: Macmillan, 1999); and William Bratton, Joseph McCahery, Sol Picciotto, and Colin Scott (eds.), *International Regulatory Competition and Coordination: Perspectives on Economic Regulation in Europe and in the United States* (Oxford: Clarendon Press, 1996).

- 43 See Cutler, Haufler, and Porter, *Private Authority and International Affairs*. This analysis bears some likeness to the distinctions between interest-based and power-based theories of international regimes identified by Hasenclever, Mayer, and Rittberger, *Theories of International Regimes*.
- 44 Paul Milgrom, Douglass North, and Barry Weingast, "The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs," *Economics and Politics*, 2 (1) (1990), 1–23.
- 45 This is part of the explanation for the emergence of international commercial arbitration. See Dezalay and Garth, *Dealing in Virtue*.
- 46 The chapters in Cutler, Haufler, and Porter, *Private Authority and International Affairs*, illustrate the validity of all three types of explanations. Indeed, variation across issue areas and industries precluded drawing any overall conclusions as to the relative importance of the three sets of considerations.
- 47 Cutler, Haufler, and Porter, "Private Authority and International Affairs," p. 22.
- 48 Cutler, "Locating 'Authority' in the Global Political Economy."
- 49 See A. Claire Cutler, "Critical Reflections on Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy," *Review of International Studies*, 27 (2) (2001), 133–50.
- 50 See Cutler, "Globalization, Law, and Transnational Corporations."
- 51 Fleur Johns, "The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory," *Melbourne University Law Review*, 19 (1994), 893–921.
- 52 Cutler, "Private Authority in International Trade Relations," p. 299.
- 53 Walzer, "Liberalism and the Art of Separation."
- 54 Cutler, Haufler, and Porter, "Contours and Significance of Private Authority," p. 367.
- 55 See Ronald B. Mitchell, "Sources of Transparency: Information Systems in International Regimes," *International Studies Quarterly*, 42 (1998), 109–30, and his references to the self-reporting activities of private corporations in different substantive areas.
- 56 See Cutler, "Critical Reflections."
- 57 William Twining, "Globalization and Legal Theory: Some Local Implications," *Current Legal Problems*, 49 (1996), 7.
- 58 *Ibid.*, 8–9. See also Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York and London: Routledge, 1995), on the plurality of legal orders operating subnationally, locally, nationally, and transnationally in the world today.
- 59 See Cutler, "Global Capitalism and Liberal Myths"; and Cutler, "Artifice, Ideology, and Paradox: The Public/Private Distinction in International Law," *Review of International Political Economy*, 4 (2) (1997), 261–85.
- 60 Cutler, "Private Authority in International Trade Relations," p. 316.
- 61 See Scheuerman, "Economic Globalization and the Rule of Law."
- 62 For further development of these trends and the distinction between hard and soft law and for the unifying influence of a global "mercatoracy" or merchant class and a global business culture, see Cutler, "Public Meets Private."
- 63 Cutler, "Private Authority in International Trade Relations," p. 316.
- 64 Cox, "Social Forces," p. 87.