LEVELLING THE FIELD THROUGH TRANSNATIONAL REGULATION

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ABSTRACT

This paper identifies factors that may lead transnational companies to support transnational regulation in order to level the field between itself and its rivals when it confronts an uneven field produced by either public regulation or private governance. Transnational regulation offers these companies a means to reduce competitive losses by distributing compliance costs on to rivals. Differential regulation is necessary but insufficient to result in corporate advocacy for an international agreement or other form of transnational regulation. Instead, other factors influence the strength or weakness of those preferences for transnational regulation, such as (a) extent of global footprint, (b) net gain or loss resulting from heightened compliance costs, (c) targets for regulatory change, d) pathways for regulatory change, (e) market participation rates, (f) stakeholder characteristics, and (g) a company's susceptibility to private governance.

I. INTRODUCTION

Recent policy debates are exploring the overlapping agendas for anti-corruption and business and human rights.[1] Legislative interest in the latter has led some anti-corruption experts to observe that increased national regulation of corporate human rights compliance may lead corporations to favor a transnational regulatory approach as had been similarly observed following the enactment of the Foreign Corrupt Practices Act (FCPA) in the United States.[2] While the former involves a broader set of norms than those associated with the latter, they both present a shared risk of enhanced regulation that may be unevenly distributed across jurisdictions and, consequently, across businesses. This manuscript examines the various factors that may lead corporations and other business actors in these situations to favor international treaties or other forms of transnational regulation to "level the field" among businesses.

Previous scholarship has identified circumstances under which businesses will advocate for regulation in order to impose costs on their rivals that can impact the latter's entry or competitiveness in a market or provide other business advantages to the former.[3] In the international context, scholars have explained that, in certain circumstances, international environmental agreements can increase business profits by reducing aggregate output.[4] Others have explained that companies may favor international environmental agreements when their technological advantages allow them to produce an alternative

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1 *See, e.g.*, Jonathan C Drimmer, Tara K Giunta, Nicola Bonucci, & Renata Parras, PAUL HASTINGS CLIENT ALERT: INTEGRATING HUMAN RIGHTS AND ESG INTO INTERNATIONAL REGULATORY COMPLIANCE: POLICIES AND PROCEDURES, https://bit.ly/3vIQdCu.

2 Paul Stephan and Pierre-Hugues Verdier, *International Human Rights and Multinational Corporations: An FCPA Approach*, at 70-71 (forthcoming *Boston University Law Review* 2021)(manuscript on file with author).

3 *See e.g.* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. OF ECON. MGMT. SC. 3 (1971), at 5; Michael Maloney & Robert E. McCormick, *A Positive Theory of Environmental Quality Regulation,* 22 J. L. ECON. 99 (1982), at 105-06.

4 Ana Espínola-Arredondo and Félix Muñoz-García, *When do firms support environmental agreements?*, 41 J. OF REG. ECON. 380 (2012), at 381, 388.

before their rivals can do so, thereby allowing the former to capture market share.[5] These insights are part of broader research that has explored how regulation is one of many strategies that can "raise rivals' costs," which can benefit some companies even if their rivals do not exit.[6]

Companies may be particularly keen to use regulation to raise rivals' costs when they adhere to a higher regulatory standard compared to their rivals. Companies that operate in multiple jurisdictions may confront varying regulatory standards but may prefer to adopt the highest standard in all their global operations in order to benefit from economies of scale.[7] For example, automobile manufacturers often operate through extensive global supply chains, spanning multiple jurisdictions, and need large economies of scale in order to remain competitive.[8] Standardization of production is valuable so that manufactures can reduce their unit costs, but adherence to a higher production standard is also more costly.[9] These dynamics contribute to a situation in which "export-oriented firms wishing to maximize scale economies for technology engineered to comply with higher standards have a strong incentive to level the playing field domestically, pressurizing national governments to set the regulatory bar closer to the level found in their major export markets."[10]

Legal considerations can also favor global standardization. For example, "legal risks associated with compliance errors induce companies to adopt internal policies that govern the company's global operations"[11] and "[t]hese company-wide policies typically reflect the legal standards prevailing in the most demanding jurisdiction."[12] For these reasons, a company may adhere to a higher regulatory standard in a jurisdiction when its rivals do not. It may therefore attempt to level the field between itself and its rivals by supporting legislation that would fix the regulatory threshold closer to its own standards.[13]

Companies may also adhere to higher standards because they are subject to private governance when their rivals are not. "Private governance" refers to the adoption of institutions such as intra-firm or inter-firm codes of conduct, multi-stakeholder initiatives, non-binding guidelines and recommendations, and other institutional arrangements. These institutions provide substantive guidance regarding corporate conduct and may be supported by enforcement mechanisms. Frequently, corporations do not adopt these institutions because they are required to do so. Instead, they often join these institutions to appease one or more stakeholders who are "[a]ny group or individual who can affect or is affected by the achievement of the firm's objectives."[14] Unlike public regulation, private governance is performed by a variety of non-state actors pursuing traditional public objectives through a range of mechanisms, such as private agreements. NGOs are often agents of private governance who subject companies to public scrutiny and organize campaigns to pressure companies to change. Companies may enter into agreements with NGOs, committing to

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5 Melissa Durkee, *Persuasion Treaties*, 99 VA. L. REV. 63 (2013), at 108-109; *see also* Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681 (1997), at 694-95.

6 Steven C. Salop and David T. Scheffman, *Raising rivals costs*, 73 AM. ECON. REV. 267 (1983), at 267–70.

7 Anu Bradford, THE BRUSSELS EFFECT (Oxford: Oxford University Press 2020), at 56.

8 Richard Perkins and Eric Neumayer, *Does the 'California effect' operate across borders? Trading- and investing-up in automobile emission standards*, 19 J. OF EUR. PUBLIC POLICY 217 (2012), at 223-25.

9 Ibid.

10 Ibid, at 223-24.

11 Bradford, above n 7, at 56.

12 Ibid.

13 Perkins and Neumayer, above n 8, at 223-24.

14 R. Edward Freeman, STRATEGIC MANAGEMENT 25 (Cambridge: Cambridge University Press 1983).

organizational practices, in order to end a boycott campaign against it.[15] They may also include governance provisions within their supply contracts to bind their suppliers to particular environmental or labor standards.[16] Previous scholarship on the "spiral model" identified processes that socialized state actors to human rights norms through distinct phases, including repression, denial, tactical concessions, prescriptive status, and rule-consistent behavior.[17] Subsequent research has applied this model to the socialization of human right norms by business organizations.[18] Companies that initially respond to criticism with denial may switch to tactical concessions that involve adopting codes of conduct and other measures designed to address the aspects of the business that draw criticism.[19]

But like public regulation, private governance may also impose standards unevenly across companies.[20] For example, private governance may prove more effective against companies depending on brand recognition, emotional salience of the violated norm violated,[21] "location in the supply chain, the visibility and prestige of a product, or the size of the company,"[22] as well as "the dependency on certain areas of operation, such as the location of natural resources or the amount of sunk costs through previous investments."[23] For these reasons, some companies are going to be more susceptible to private governance compared to their rivals. Businesses that are vulnerable to NGO activism may therefore seek to "level the playing field" by creating or supporting organizations, programs, and other initiatives that would bind their rivals to the norms that they must uphold.[24] It may seek to level the playing field among itself and competitors by advocating for an industry code of conduct that replicates, in whole or part, the higher standard at which it already operates. Once this code is adopted by the relevant industry organization, it could obligate all the organization's members to sign on to the code and implement it in their contracts and other operations. This levelling of the playing field becomes even more complete when the industry organization possesses enforcement capabilities to sanction non-compliance by members.

In sum, previous scholarship demonstrates that some companies adhere to higher regulatory standards in jurisdictions when their rivals do not, and that they may favor public regulation or private governance strategies that could level the field between themselves and their rivals by subjecting the latter to higher regulatory standards. This Article adds to the scholarship by exploring the circumstances that may lead transnational companies to support transnational regulation in order to level the field among itself and its rivals when it confronts an uneven field produced by either public regulation or private governance. It explores how business preferences for transnational regulation

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15 *See* Kathryn Sikkink, *Codes of Conduct for Transnational Corporations: The Case of the WHO/UNICEF Code*, 40 INTERNATIONAL ORGANIZATION 815 (1986), at 823.

16 Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA LAW REVIEW 913 (2007), at 921–26; Li-Wen Lin, *Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 AM. J. COMP. L. 711 (2009), at 721–23.

17 Thomas Risse & Stephen C. Ropp, "Introduction and overview," *in* Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds), THE PERSISTENT POWER OF HUMAN RIGHTS (Cambridge: Cambridge University Press, 2013), at 5-7.

18 Nicole Deitelhoff and Klaus Dieter Wolf, "Business and Human Rights," *in* Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds), THE PERSISTENT POWER OF HUMAN RIGHTS (Cambridge: Cambridge University Press, 2013) vol. 1, 222–38 at 230.

19 Ibid.

20 Vandenbergh, above n 16, at 947.

21 Sikkink, above n 15, at 823.

22 Deitelhoff & Dieter Wolf, above n 18, at 228-29.

23 Ibid.

24 Ibid, at 231-34.

may be influenced by (a) extent of global footprint, (b) net gain or loss resulting from heightened compliance costs, (c) targets for regulatory change, d) pathways for regulatory change, and (e) market participation rates, (f) stakeholder characteristics, and (g) a company's susceptibility to private governance.

II. EXPLAINING PREFERENCES FOR TRANSNATIONAL REGULATION BY BUSINESS ENTERPRISES EXPERIENCING ASYMMETRICAL PUBLIC REGULATION

Consider a hypothetical involving two jurisdictions: a high-regulating jurisdiction and a low-regulating jurisdiction. In a given policy area, the first jurisdiction sets a regulatory standard more stringent than the one found in the second, which may even decline to regulate in the area. This section explains that a company's preferences for transnational regulation will vary depending on the extent of its global footprint, net loss or gains, targets for regulation, pathways for regulation, and market participation rates.

A. Extent of Global Footprint

A company's preference for transnational regulation is influenced by the extent of its global footprint. If it operates exclusively in a highly regulated jurisdiction, then its preferences for transnational regulation may be weak because that jurisdiction's laws level the playing field among all competitors within it. The company's preferences change if it also competes in the less regulated jurisdiction because that company may face drivers that lead it to comply with the more stringent laws of the former jurisdiction even while operating in the latter. One reason it may do so is because of the extra-territorial application of laws from the higher regulated jurisdiction. Another reason a company may adhere to a higher standard in a less regulated jurisdiction is because of standardization drivers. For example, it may export to a higher regulated jurisdiction and may prefer to standardize its operations in order to take advantage of economies of scale. This may place it at a cost disadvantage in less regulated jurisdiction, however, that may motivate companies to pressure those governments to align their laws in conformity to those set by the export market.[25]

For example, the United States enacted the Foreign Corrupt Practices Act (FCPA) in 1977 that "generally prohibits the payment of bribes to foreign officials to assist in obtaining or retaining business."[26] It also obligates "issuers to maintain accurate books and records and have a system of internal controls sufficient to, among other things, provide reasonable assurances that transactions are executed and assets are accessed and accounted for in accordance with management's authorization."[27] The FCPA applies extra-territorially to any "prohibited conduct anywhere in the world and extends to publicly traded companies and their officers, directors, employees, stockholders, and agents."[28] As such, US companies that operate abroad are regulated by the FCPA even when they operate in jurisdictions that do not have similar laws. As a result, many US companies found themselves adhering to a higher standard than their rivals in less regulated jurisdictions. The FCPA also applies to foreign

25 Perkins and Neumayer, above n 8, at 223-24.

26 U.S. Securities and Exchange Commission, *Spotlight on Foreign Corrupt Practices Act*, https://bit.ly/30uyHo9.

27 Ibid.; Karen Woody, *No Smoke and No Fire: The Rise of the Internal Controls Absent Anti-Bribery Violations in FCPA Enforcement,* 38 CARDOZO L. REV. 101 (2017).

28 U.S. Securities and Exchange Commission, *Spotlight on Foreign Corrupt Practices Act*, above n 26.

companies that maintain certain types of connections with the United States.[29] Scholars have argued that the increased enforcement risk against foreign companies shifted the preferences of those companies in favor of their home jurisdiction's enforcement of anti-corruption laws against their domestic and regional competitors who may not otherwise confront an enforcement risk under the FCPA.[30]

B. Net Gain or Loss

Higher regulatory costs may be insufficient to determine a company's preferences for transnational regulation. Whether a company advocates for regulatory change may also depend on whether it experiences a net market loss or gain from adhering to a higher regulatory standard. Higher regulatory costs may offer an advantage to a company when those standards communicate qualities about the company to key constituents who could not otherwise obtain that information because of information asymmetries.[31] A company's compliance with a higher standard may allow that company to credibly signal characteristics about itself, such as its quality of products or governance processes, which can aid it in attracting consumers and investors.[32] It is therefore possible that the higher regulatory threshold brings corresponding benefits to a company that may compensate for the costs associated with compliance.[33] In such a situation, a company adhering to a higher regulatory standard in an unregulated jurisdiction may not have a strong preference for domestic or transnational regulation because its costs are outweighed by the benefits it gains from adherence to a higher standard. The company may not want to apply that standard to its rivals because that may result in the company losing its market differentiation benefits if it is no longer the only one adhering to the higher standard. However, sometimes these benefits do not accrue and the regulatory costs outweigh the benefits. In these situations, companies adhering to a higher standard may find themselves operating at a disadvantage compared to their unregulated rivals.

In the context of the FCPA, one benefit of the law was that it gave companies a credible basis to refuse to offer bribes to foreign public officials who demanded them.[34] For example, Robert Dorsey, Chairman of the Board of Gulf Corporation, stated at a senate hearing in 1975 that "[s]uch a statute on our books would make it easier to resist the very intense pressures which are placed upon us from time to time."[35] However, many businesses objected to the FCPA on the grounds of a loss of competitiveness that they suffered when they were unable to compete for business abroad the way that their foreign, unregulated, peers could.[36] For example, in the early 1990s, officials from General Electric visited the Secretary of State to "present[] evidence of specific sales lost to foreign bribe-

29 Crim. Div. Dep't of Justice & Enforcement Div. Securities & Exchange Commission, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2nd ed. 2020), at 1.

30 Sean J. Griffith and Thomas H. Lee, *Towards an Interest Group Theory of Foreign Anti-Corruption Laws*, 2019 ILL. L. REV. 1227, 1256-1260 (2019).

31 Bruce G. Carruthers and Naomi R. Lamoreaux, *Regulatory Races: The Effects of Jurisdictional Competition on Regulatory Standards*, 54 J. OF ECON. LIT. 52 (2016), at 54-55.

32 *See* ibid.

33 *See* Paul B. Stephan, *Regulatory Competition and Anticorruption Law*, 53 VA. J. OF INT'L L. 53 (2012), at 64.

34 Rebecca L. Perlman and Alan O. Sykes, *The Political Economy of the Foreign Corrupt Practices Act: An Exploratory Analysis*, 9 J. OF LEGAL ANALYSIS 154 (2018), at 167.

35 Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO STATE L. J. 929 (2012), at 947.

36 U.S. Chamber Institute for Legal Reform, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act* (2010), at 6.

paying firms."[37] The legislative history of the FCPA illustrates Congress's acute awareness of business concerns regarding loss of competition. According to the Senate report accompanying the 1998 amendments, "[s]ince the passage of the FCPA, American businesses have operated at a disadvantage relative to foreign competitors who have continued to pay bribes without fear of penalty."[38] This legislative history referenced the Commerce Department that had "learned of significant allegations of bribery by foreign firms in approximately 180 international commercial contracts since mid-1994, contracts that were valued at nearly $80 billion."[39] One explanation of these widespread practices is that "some of our trading partners have explicitly encouraged such bribes by permitting businesses to claim them as tax-deductible business expenses."[40]

The differences in regulation of anti-corruption of US firms compared to foreign firms led to increased costs for the former in four ways. First, they could not offer the same types of payments as their foreign competitors; they were therefore at a higher risk of losing out on business (*business costs*). Second, if investigated, they incur legal costs associated with legal defense and, if found liable, the financial costs associated with fines (*legal costs*). The business community has argued that FCPA investigations re-distribute investigation costs from government officials to the private sector "by having companies suspected of FCPA violations shoulder the cost of uncovering such violations themselves through extensive internal investigations."[41] The compliance costs with the FCPA could prove both high and non-divisible *(compliance costs)*. Companies may incur substantial costs associated with hiring external counsel to establish an adequate compliance program and the types of accounting systems required by the FCPA.[42] These compliance costs may be non-divisible for global corporations; General Electric, for example, found that "[e]ven if bribery were lawful in one area of its business, the practice would inevitably infect areas in which it was criminal and undermine other policies."[43] GE therefore opted "a company-wide antibribery policy, equally applicable to international transactions."[44] Additionally, FCPA investigations may impose a variety of reputational costs on companies and their officers and directors, which may also lead to additional financial losses (*reputational costs*).

C. Targets and Mechanisms for Regulatory Change

A company may not prefer transnational regulation even if it incurs a net loss from adhering to a higher standard in less regulated jurisdictions . Instead, its preferences may also depend on its options to engage in the following: (a) eliminate or amend laws in the higher-regulating jurisdiction to reduce the compliance costs it incurs, (b) introduce similar laws in less regulated jurisdictions to impose comparable costs on its market competitors in those countries, and (c) advocate for transnational regulation to impose comparable costs on its market competitors in all foreign countries. These

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37 Kenneth W. Abbott and Duncan Snidal, *Values and Interests: International Legalization in the Fight against Corruption*, 31 J. OF LEGAL STUDIES S141 (2002), at S162.

38 Department of Justice, Senate Report No, 105-277, International Anti-Bribery Act of 1998 (30 July 1998), at 1 https://bit.ly/31OMkxK.

39 Ibid.

40 Ibid.

41 *See Restoring Balance*, above n 36, at 5.

42 Perlman and Sykes, above n 34, at 171.

43 Abbott and Snidal, above n 37, at S175.

44 Ibid.

options identify the targets for change: high-regulation jurisdictions, low-regulation jurisdictions, or transnational.

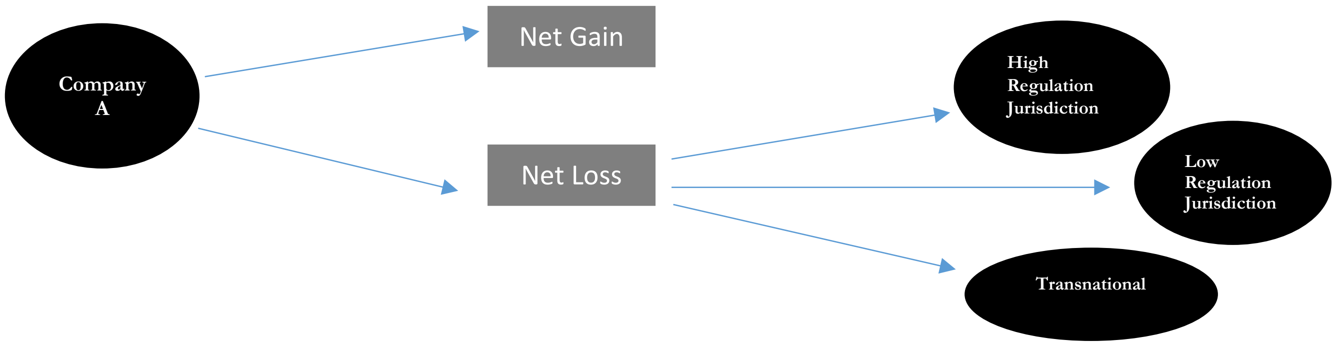

Figure 1: Targets for Regulatory Change

The first option may prove the most straight forward route for a company to level the playing field, but it may not be possible in light of political realities. A company's preferences between the other two options depends on the scale of its international footprint. If a company only competes in two countries, one of which is higher regulating than the other, then we can imagine that regulatory duplication between these two jurisdictions may be enough to level the playing field everywhere that the company competes. However, if it also competes in a number of other countries that are also unregulated, then it faces the same differential regulatory cost problem in all these other countries: it will need to comply with the laws of the highly regulated jurisdiction whereas its competitors will not. It may therefore prefer a transnational regulatory approach to level the playing field. If it cannot eliminate or adequately amend the law and it maintains a fully global footprint, then it will likely prefer a transnational regulatory option to level the playing field in all the markets in which it operates. This analysis only identifies the type of law that is targeted for legal change (transnational). A company can pursue changes in transnational law, or legal changes in either of the two jurisdictions, using one of the following mechanisms for regulatory changes: *private ordering*, *lobbying*, and *transnational regulation*.

Private ordering can introduce domestic, foreign, and transnational changes depending on the scale of the sponsoring organization and the breadth of the membership. However, this form of private ordering can change standards only above the level set by public law; a business cannot seek to avoid a penalty for violating its home country's national law by stating that it adhered to the lower standard set by a national industry organization. A company can also seek to change all three types of laws through lobbying. It may lobby for legislative changes in either the more or less regulated jurisdictions. It may also exert its influence over policy development in less regulated jurisdictions, especially when those jurisdictions are dependent upon it for its economic well-being.[45] It may also try to influence international policymaking by (a) developing positions favorable to it that are then advanced by government representatives,[46] or (b) may directly lobby international organizations through accreditation of business associations as consultants or by creating NGOs that obscure the mission and interests of their business members.[47]

45 Martin G. Otańez, Hadii M. Mamudu, and Stanton A. Glantz, *Tobacco Companies' Use of Developing Countries' Economic Reliance on Tobacco to Lobby Against Global Tobacco Control: The Case of Malawi*, 99 AM. J. OF PUB. HEALTH 1759 (2009), at 1759.
46 Ibid, at 1764.
47 Melissa Durkee, *International Lobbying Law*, 127 YALE L. J. 1742 (2018), at 1767-69.

Finally, companies may also use a transnational pathway to change either laws in the higher or lower regulating jurisdictions. Here, "transnational" refers to a pathway for change and not a target for change. The difference lies in transnational as a process for change and not the institutional object for that change. "Transnational" as a process occurs when business actors want to change substantive global norms, such as those contained in multilateral agreements or soft law guidelines, to change, in turn, the laws in an individual country if that country become a signatory to a treaty. Why would a company rely on a transnational route to introduce change instead of attempting to introduce change directly in the countries concerned? First, the company may operate in a number of countries that have absent or lenient laws. Transnational regulation offers them a means to introduce regulatory changes in all of these countries without lobbying for change country by country. Second, they may adopt the transnational approach when they may have greater prospect for effective influence at the international level than is afforded at the national level. For example, international organizations vary in the level of involvement permitted to business groups, from access to membership.[48] When international policymaking occurs through an international organization that offers the latter, businesses may focus their efforts at capturing that process in order to influence the resulting international agreement that is then adopted by countries. This preference is strengthened when countries implement laws that insulate their domestic policy-making from corporate influence. The result is that the international forum becomes more porous to corporate influence than the domestic, thereby attracting corporate lobbying efforts; policies made at the international forum then become the vehicle by which to influence domestic policymaking.

With reference to the FCPA, US companies had a number of options to contend with these higher costs of business compared to their unregulated peers; these options relate both to the laws that were targeted for change and the mechanisms for changing each of these laws. First, they could attempt to introduce changes by repealing or amending the FCPA. Repeal proved untenable because of the nature of the values advanced by the FCPA and the political context in which the FCPA was implemented.[49] The United States Congress enacted the FCPA in the wake of the Watergate scandal when, as part of the investigation into illegal political campaign contributions, the SEC reported that its inquiry had revealed the existence of "'secret slush funds'" that were "'were used for a number of purposes, including . . . , questionable or illegal foreign payments.'"[50] While the SEC investigation was underway, Senator Frank Church's Subcommittee on Multinational Corporations held a number of hearings, including ones regarding Gulf Oil, Northrop, Mobil Oil, and Lockheed.[51] Each of these were embroiled in allegations involving payments to foreign government officials (or their parties); moreover, the private conduct of these companies had the potential to compromise US foreign policy objectives when the scandals came to light.[52] According to Senator Frank Church, "'while bribes and kickbacks may bolster sales in the short run, the open participation of American firms in such practices can, in the long run, only serve to discredit them and the United States. Ultimately, they create the conditions which bring to power political forces that are no friends of ours, . . .'"[53] These moral and

48 Ibid, at 1801.
49 *See* Susan Rose-Ackerman and Sinead Hunt, *Transparency & Business Advantage: The Impact of International Anti-Corruption Policies on the United States National Interest*, 67 NYU ANNUAL SURVEY OF AM. L. 433 (2012), at 437; Griffith and Lee, above n 29 at 1240-41.
50 Koehler, above n 35, at 932 (quoting the Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices (1976)).
51 Ibid, at 934.
52 Ibid, at 939.
53 Ibid, at 940.

political considerations made it difficult for US companies to eliminate the higher costs imposed on them by eliminating the law; corporations that publicly objected to the statute could risk negative reputational consequences from appearing to resist "virtuous legislation" that is intended to address corruption around the world.[54] Therefore, after introducing global anti-bribery policies, GE opted to advocate for a multilateral approach as opposed to attempting to repeal the FCPA.[55]

US companies also could carve out greater latitude for themselves through amendments to the FCPA. Indeed, the 1988 amendments clarified that US companies were permitted to make "facilitating payments"[56] and introduced an affirmative defense if a payment to a foreign official is lawful under the written laws of the foreign country.[57] While amendments gave latitude, this route can only go so far. The only way to level the playing field via amendments was to change the FCPA to bring it into conformity with business practices around the world to narrow the gap between what was expected globally and permitted locally. But there was a limit to how much the FCPA could harmonize with global trends. To put it crudely, levelling the playing field was going to occur through the import of business norms into the FCPA or the export of the FCPA norms globally. US companies could also have attempted to advocate for legal changes in other countries that reflected the requirements of the FCPA. Even if feasible, the task would have proven extremely time consuming and resource intensive for US companies because they would have needed to lobby for changes on a country by country basis. Additionally, US companies would have confronted the issue of ensuring that the changes introduced in this country by country approach harmonized with each other so that the companies did not find themselves complying with different sets of laws. For this reason, the business community was left with the last option to externalize costs to competitors transnationally: multi-lateralize the FCPA so that all the other countries would harmonize their laws with the higher standard posed by the United States.[58]

For this target, US companies could have used the three different mechanisms of lobbying, private ordering, or supporting a state-led transnational regulatory process. The first two options were not as critical for US companies because of the interest convergence between US industry and US government regarding the importance of multi-lateralizing the FCPA to level the field. The United States had attempted to multi-lateralize the FCPA throughout several presidential administrations. Even following the 1988 amendments, "Congress directed the Executive Branch actively to seek to level the playing field by encouraging our trading partners to enact legislation similar to the FCPA"[59] so that US businesses would not continue to be at a disadvantage. A 1998 Senate Report expressed the view that the FCPA "coupled with implementation of the OECD Convention by our major trading partners, will go a long way towards leveling the playing field for U.S. businesses in international contracts."[60] This interest convergence between the regulated industry and the regulators meant that the latter would address the former's concern – lack of competitiveness – by seeking the same objective of multi-lateralizing the FCPA to level the field. Additionally, other options had proved unsuccessful. The US business lobby attempted to multilateralize anti-corruption norms through

54 *See* Ackerman and Hunt, above n 49, at 437–38; Abbott & Snidal, above n 37, at S173–74.

55 Abbott and Snidal, above n 37, at S176; Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. OF INT'L L. 665 (2004), at 675.

56 Bartley A. Brennan, *The Foreign Corrupt Practices Act Amendments of 1998: Death of a Law*, 15 NORTH CAROLINA J. OF INT'L LAW & COMMERCIAL REGULATION. 229 (1990), at 241-422 ((citations omitted).

57 Ibid.

58 Griffith and Lee, above n 29, at 1240-41.

59 Department of Justice, Senate Report No, 105–277, above n 52, at 2.

60 Ibid, at 1-2.

private governance efforts of the International Chamber of Commerce that created anti-bribery commitments that could be incorporated into contracts.[61] However, many foreign businesses chose not to opt in to these commitments, thereby compromising the application of these norms globally.[62]

Some have argued that the uneven field exists despite the passage of the OECD Convention because countries under-enforce the laws that the OECD Convention now requires that they keep on their books.[63] For example, one scholar noted that even years after the OECD Convention was adopted, only four states were "active enforcers" while "[h]alf of the OECD membership is ranked as having little to no enforcement of the agreement"[64]; the United States alone accounted for over 50% of all OECD bribery prosecutions.[65] The disparities in enforcement therefore presented a return to the uneven field problem as US companies faced the prospect of competing with firms that bribed even when those firms originated from countries that formally adopted the OECD Convention and implemented corresponding anti-corruption laws.[66] One way to counteract this problem is for the US to use its enforcement powers to level the field by prosecuting foreign firms, especially those operating in countries with weaker anti-bribery institutions.[67]

D. Number of Market Participants

The number of market participants, and the global footprint of those participants, can also determine the preferences of a company for transnational regulation. This factor is less significant in a highly regulated jurisdiction because the laws of that jurisdiction level the field between competitors. This factor becomes more significant in a less regulated jurisdiction when a company may still abide by a higher standard because of the extra-territorial application of another jurisdiction's laws, its own operational constraints, or other factors. Companies may have a weak preference for transnational regulation if all companies competing in the less regulated jurisdiction encounter similar drivers because these drivers will encourage all companies to adopt comparably high standards. But we can imagine that less regulated markets also include market competitors that do not adhere to a higher standard because they do not (a) operate in highly regulated jurisdictions, or (b) encounter comparable standardization drivers. In the first situation, a company may only operate domestically in the less regulated jurisdiction or in only other less regulated jurisdictions; as such, it does not encounter the same incentives to adopt a higher standard. In the second situation, a company may operate in a foreign market that sets a higher standard, but that company does not encounter standardization drivers that lead it to adopt the same higher standard in the less regulated jurisdiction at issue. The result is that there is an uneven field in the less regulated jurisdiction because of the number of market participants and their global footprint. Those companies adopting a higher standard may therefore prefer to encourage regulations in those unregulated jurisdictions to level the field or, if they lack leverage, support a transnational regulatory process that could would similarly encourage regulatory obligations in those jurisdictions. Therefore, we see that the preference for transnational regulation

61 Ibid, at 1241-42.
62 Ibid.
63 Tarullo, above n 73, at 672 ; Rachel Brewster, *The Domestic and International Enforcement of the OECD Anti-Bribery Convention*, 15 CHICAGO J. OF INT'L L. 100 (2014), at 100-01, 106.
64 Brewster, above n 63, at 106.
65 Ibid.
66 Ibid, at 100-01.
67 *See* Stephan, above n 47, at 66; Stephen Choi and Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act* 11 J. EMPIRICAL LEGAL STUD. 409–445 (2014), at 411.

depends on the extent of market participation and the constraints under which those market actors participate.

E. Additional Illustrations

While this section focused on anti-corruption, it is also worth exploring business preferences for transnational regulation in other business areas. One potential area is data privacy. The EU's General Data Protection Regulation (GDPR) requires "companies that handle the Personally Identifiable Information (PII) of EU citizens to implement a series of safeguards and processes developed to protect an individual's privacy."[68] The GDPR is extra-territorial in scope and therefore applies to US companies if they handle the data covered by the GDPR. Scholars have noted that the extra-territorial application of the GDPR may explain industry support for privacy legislation in the United States that conforms to the GDPR: "Foreign corporations affected by EU laws face no additional compliance costs from the de jure Brussels Effect, giving them the incentive to lobby for the EU standard at their home market as well. This way, they can level the playing field vis-à-vis their domestically oriented companies that currently do not need to comply with the GDPR."[69] But tech proponents of legislation may have mixed motives and a desire to level the field is only one. For example, commentators have also attributed these preferences for privacy regulation to a desire to manage public relations following crises such as Cambridge Analytica, as well as an attempt to distract from other regulatory initiatives that could threaten the business model of tech companies such as Facebook.[70] In other areas, multinational companies may advocate for transnational regulation not to level the field but to increase their business advantages. Major oil companies publicly objected to the Trump administration intention to withdraw from the Paris Agreement.[71] Commentators have explained this preference with reference to the diversification of these companies in natural gas, which is favored under the Paris Agreement.[72] These explanations are more consistent with prior scholarship that attributed preferences for regulation to industry actors' expected gains in market share or other business benefits.[73]

III. EXPLAINING PREFERENCES FOR TRANSNATIONAL REGULATION BY BUSINESS ENTERPRISES EXPERIENCING ASYMMETRICAL PRIVATE REGULATION

A company may also prefer transnational regulation when private governance requires that it operate at a higher regulatory standard compared to its rivals. The following section explores the factors that can help to explain when a company facing private governance may favor transnational regulation to level the field between itself and its competitors. Like public regulation, private governance may also impose costs unevenly across companies. As discussed below, some companies may encounter a greater risk of private governance because of the characteristics of the stakeholder exercising the

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68 Assent Compliance, REGULATORY RESOURCE CENTER, https://bit.ly/3lHKDeW.
69 Bradford, above n 7, at 148.
70 Elizabeth Schulze, *Mark Zuckerberg says he wants stricter European-style privacy laws — but some experts are questioning his motives*, CNBC (Apr. 1, 2019), https://cnb.cx/2QVX0ZT.
71 Matt Egan, *Why Big Oil wants Trump to stay in Paris climate deal*, CNN (Apr. 18, 2017), https://cnn.it/3cdPfGy.
72 Ibid.
73 *See* Durkee, above n 5, at 108-109; Espínola-Arredondo and Muñoz-García, above n 4, at 388.

governance or their own characteristics that render them particularly susceptible to private governance. These factors may lead to an uneven field between companies that some may prefer to close through transnational regulation. It is not always the preferred approach. Increased private governance may lead to a net gain if the company can signal positive attributes about itself to key stakeholders that can aid it in securing important resources. Private governance may also lead to cheap or superficial changes that may not disadvantage a company significantly. In other situations, private governance can impose costs on one segment of the market and the affected companies may prefer to impose similar costs on their rivals through private ordering or public regulation. The challenge with private ordering is that it is voluntary; a company that is not under significant risk of private governance may similarly not face many drivers to participate in a private ordering arrangement that would impose costs on it. Therefore, public regulation may be an attractive option for companies under private governance to impose costs on their rivals if the former's regulatory standard is similar to the latter.

A. Stakeholder Profile

Private governance can be exercised by the stakeholders who maintain relationships with a business.[74] These stakeholders possess various resources that corporations need to succeed: consumers provide revenue; employees provide human capital; investors provide financial capital; suppliers provide goods and services, and the list goes on. It also includes regulators who determine the level of regulatory risk that a corporation confronts, news and social media that influence the nature and extent of reputational risks, and local communities that can provide or withhold the "social license to operate" that, among other things, can influence the level of litigation risk that a corporation encounters. The ability to provide or withhold these resources provide stakeholders with a certain amount of leverage over the corporation because the latter needs these resources in order to succeed, even to survive.[75] In certain situations, that leverage may be sufficient to introduce organizational change in a corporation in accordance with a stakeholder's preferences; for example, leverage may be heightened when corporation is embroiled in a crisis that deprives it of legitimacy.[76] The need for legitimacy could make a corporation more willing to introduce organizational change in order to win back the trust of its stakeholders or protect itself against similar risks in the future.

These stakeholders can create distinct pathways to encourage corporate institutional change including *revenue* and *capital*. Each of these pathways is created by a particular type of agent that exercises its own particular form of leverage over the corporation. The reasons motivating these actors differ, as does the extent of organizational change possible under each of these pathways. Consumers have pressured corporations to change their practices through the "revenue pathway" for organizational change; specifically, "naming and shaming" practices can create risks of brand harm and consumer boycotts that can force corporations to change directly, such as through a private agreement,[77] or indirectly by progressively reforming practices. Similarly, investors pressure corporate change through the "financial capital pathway": specifically, investors are demanding more information about

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74 Freeman, above n 14, at 4–25.

75 Jeffrey Pfeffer and Gerald R. Salanick, THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE APPROACH 43(Stanford: Stanford University Press 1978), at 53

76 Kishanthi Parella, *Improving Human Rights Compliance in Supply Chains*, 95 NOTRE DAME LAW REVIEW 727 (2019), at 755-76.

77 Sikkink, above n 15, at 823.

corporate environmental, social, and governance practices and signaling that they make their future investment decisions based on those criteria. Even the demand for more information may change company practices as company representatives would likely not want to reveal unflattering information to investors.[78] Finally, shareholders may be able to pressure corporations to change through a successful shareholder resolution that introduces reform or a private agreement between the shareholder and the company's representatives that binds the latter to reform.[79] While private regulation can serve as a source of institutional rules independent from public regulation, the latter make it more or less likely that these forms of private regulation can succeed.

In the business and human rights context, corporations are under pressure from a number of different stakeholder groups to address the risk of human rights abuses in supply chains. Consumers have been a traditional group concerned about child labor, forced labor, and a variety of other human rights abuses in the supply chains of household items. Investors are also becoming increasingly concerned about the human rights practices of corporations and have raised these concerns in various shareholder proposals brought against a number of companies over the years.[80]

B. Company Susceptibility to Private Governance

A company's preference for transnational regulation may depend on its exposure to private governance compared to its rivals. Private governance can create an uneven field between companies for a number of reasons relating to characteristics of private governance strategies, company profile, success rate of governance, and its substantive content. First, private governance may have specific instead of general targets: consumers boycott target specific companies (or, possibly, industries) and shareholders engage in activism on a company level. Either type of stakeholder may engage in boycotts or activism against a number of companies, but these efforts will likely not capture all the market players. The result is that not all companies will be targets for stakeholder action; some companies may go "under the radar." Second, company characteristics may lead to some companies being more vulnerable to reputational and regulatory risks for human rights abuses; therefore, they may adhere to a higher standard of conduct, even if not required to do so under private or public regulation, because there is a greater risk that their misconduct will be discovered and will lead to stakeholder backlash and the possibility of future regulation (private or public).[81] For example, companies that sell goods to consumers with a recognizable brand name may be particularly susceptible. A survey conducted by the British Institute of International and Comparative Law (BIICL) found that "business respondents indicated that reputational risk is their top incentive to undertake due diligence under the current status quo"[82] and that "[i]t is expected that these existing reputational risks may be reduced through the introduction of a general due diligence duty."[83] A report prepared by a joint committee of the UK House of Lords and House of Commons found that suppliers also shared that an uneven field exists between compliant and non-compliant manufacturers,

78 Hillary A. Sale, *Disclosure's Purpose*, 107 GEORGETOWN L. J. 1045 (2019), at 1050.

79 Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L. J. 262 (2016), at 279–85.

80 *See* As You Sow, PROXY PREVIEW (2019).

81 *See* European Commission, STUDY ON DUE DILIGENCE REQUIREMENTS THROUGH THE SUPPLY CHAIN: FINAL REPORT 89 (2020).

82 Ibid, at 22.

83 Ibid.

with ethical suppliers losing out to business when their non-compliant peers are able to offer buyer companies lower prices.[84]

A third reason for an uneven field is the reality that not all private governance efforts will succeed. Therefore, only a portion of the targeted companies will be forced to change. Private governance therefore only regulates a portion of a given market, creating an uneven playing field between those susceptible to private governance and those that are not. Fourth, private regulation may also create an uneven field because of characteristics of the jurisdiction, such as the presence of an active news media that focuses on issues of corporate misconduct and can inform consumers accordingly. Finally, the content of private governance can vary, thereby imposing higher costs on some companies compared to their peers.

When Rana Plaza, a factory complex, collapsed in Bangladesh in 2013, killing at least 1,100 individuals and injuring more than 2, 500,[85] the companies that sourced from Rana Plaza suppliers faced significant pressure to demonstrate that they were committed to preventing a similar tragedy in the future. In the wake of the crisis, over 190 brand companies and retailers, two global trade unions, a number of Bangladesh garment unions and union bodies, and four international labor organizations created the Accord for Fire and Building Safety in Bangladesh (the "Accord").[86] The Accord is a legally binding agreement that creates a multi-stakeholder governance body of company and trade union parties, provides for binding arbitration of disputes, and requires factory inspections as well as company support for remediation efforts.[87] But the Accord is a privately created institution and binds those companies that joined it. In contrast, a parallel private institution, the Alliance for Bangladesh Worker Safety, lacked many of the features of the Accord, including legally binding obligations.[88] Rana Plaza therefore led to the creation of two different types of uneven fields: (a) between those companies that were privately regulated, under the Accord or the Alliance, and those that were not, and (b) between those companies regulated under the Accord and the Alliance. These are only two examples of private regulatory institutions that were created in response to a crisis. Other industries have also developed their own private institutions to address labor and human rights risks in supply chains, either in response to a crisis or to prevent one. These institutions similarly replicate the uneven field between those privately regulated and those that are not.

All of these factors can explain why some companies may incur higher costs as a result of private governance. The extent of those costs depend on the types of organizational reform that is accomplished. One danger of private governance is that consumer boycotts and other strategies may only lead to superficial changes achieved through largely "symbolic structures," which refer to a "policy or procedure that is infused with value irrespective of its effectiveness."[89] These symbolic structures can fall along a continuum between purely symbolic to symbolic and substantive; the former "do little or nothing to effectuate legal ideals within organizations"[90] whereas the latter are "more

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84 United Kingdom House of Lords and House of Commons, HUMAN RIGHTS AND BUSINESS 2017: PROMOTING RESPONSIBILITY AND ENSURING ACCOUNTABILITY (Apr. 5, 2017), at 21.

85 Dana Thomas, *Why Won't Learn from the Survivors of the Rana Plaza Disaster?* New York Times, 24 April 2018.

86 2018 ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH (May 2018), https://bit.ly/3id4cti.

87 Ibid.

88 Alliance for Bangladesh Worker Safety, AN INDUSTRY TRANSFORMED: LEAVING A LEGACY OF SAFETY IN BANGLADESH'S GARMENT SECTOR (Nov. 2018), https://bit.ly/2FlI29o.

89 Lauren B. Edelman, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS (Chicago: University of Chicago Press 2016), at 5.

90 Ibid, at 32.

effective in bringing organizations closer to legal ideals."[91] But the danger of all these structures is that "[b]ecause these structures are law-like in form, they afford organizations the possibility of demonstrating attention to law while adapting or maintaining practices that meet business prerogatives."[92] For example, a company subject to NGO pressure may adopt a company code of conduct to appease critics, but that company may have little intention of ensuring that the code is effective. A company that only adopts symbolic structures without engaging in meaningful organizational changes may not incur sufficient costs that it would seek to pass on to rivals through transnational regulation. Instead, company officials may fear that public regulation may impose a higher regulatory threshold than that set by private governance, which may be satisfied by relatively low cost symbolic structures. In other situations, even symbolic structures may offer a valuable starting point for change. According to the "spiral model," codes of conduct and other tactical concessions can serve as a basis for a new round of shaming tactics and pressure if NGOs reveal that the company diverges from those practices.[93] In a number of lawsuits, plaintiffs criticized defendant companies for supply chain practices that they claimed were inconsistent with the companies' advertised codes of conduct and other policies.[94] The divergence from these codes exposed the companies to both legal risk and the reputational risks that accompanied the publicity over the lawsuits. According to the spiral model, this new round of criticism in response to tactical concessions can lead to further institutionalization of norms within company policies.[95]

The concern over symbolic structures informed comparisons of the Accord and the Alliance that were created in the wake of the Rana Plaza collapse. Commentators noted that the Accord was a legally binding instrument that was signed by companies, NGOs, and trade unions.[96] The Accord requires that signatory companies commit to long-term sourcing relationships with suppliers, assistance with employment of workers during remediation, and financial support for remediation efforts.[97] In contrast, the Alliance is not legally binding and does not impose similar obligations on signatory companies.[98] These differences can influence the effectiveness of these initiatives as well as the extent of costs that companies incur to adopt new practices. However, these differences may not be readily apparent to consumers or other stakeholders. One labor right organization leader commented that ""[i]t's designed to sound like the accord. They talk about inspections. They talk about renovations. They can use all the rhetoric they choose, but if you look at the substance, there's very little there.'"[99]

C. Net Loss or Gain

As discussed above, a company's preferences for transnational regulation may depend on whether it experiences a net loss or gain from adhering to that higher regulatory standard. A company adhering to a higher private governance standard may be able to communicate desirable attributes about itself

91 Ibid.
92 Ibid.
93 Deitelhoff and Dieter Wolf, above n 18, at 230-31.
94 *See, e.g.*, *Doe v. Wal-Mart Stores*, 572 F.3d 677 (9th Cir. 2009); *Rahaman v. JC Penney*, 2016 WL 2616375 (Sup. Ct. Del. May 4, 2016); CLASS ACTION COMPLAINT, *Hodson v. Mars*, No. 15-cv-04450 (N.D. Cal. Sept. 28, 2015).
95 Deitelhoff and Dieter Wolf, above n 18, at 230-31.
96 Yo Shiina, *Two years since Rana Plaza: why the Accord and the Alliance are all the more relevant*, RIGHTSWIRE BLOG (July 15, 2015).
97 Ibid.
98 Ibid.
99 Steven Greenhouse and Stephanie Clifford, *U.S. Retailers Offer Plan for Safety at Factories*, N.Y. TIMES (July 10, 2013).

to its consumers or investors. For example, recent consumer surveys continue to show that consumers, especially millennial consumers, prefer brands that address social and environmental issues and that a significant number of consumers are attentive to a company's social responsibility practices when they decide which products to purchase.[100] Investors are also interested in the environmental, social, and governance practices of companies.[101] It is therefore possible that adhering to a higher regulatory threshold brings corresponding benefits to a company that may compensate for the costs by aiding a company in securing resources from consumers, investors, and other stakeholders. In these situations, that company may not have a strong preference for public regulation at either the domestic or transnational regulation because that may result in the company losing its market differentiation if it is no longer the only one adhering to the higher standard. Additionally, a company may secure particular reputational benefits by going beyond the regulatory standard set by public regulation. If the private governance standard is incorporated into public regulation, then the company is simply adhering to the law when it complies with the standard. While it may face reputational sanctions if it fails to do so, it may not secure the same types of reputational benefits for complying with public governance compared to private governance.

D. Targets and Mechanisms for Regulatory Change

In those situations when private governance does lead to higher costs and net losses, the affected companies may want to impose similar costs on their rivals. The first target for regulatory change is domestic law that can incorporate the applicable private standards into public mandate, thereby levelling the field between those companies that are privately regulated and those that are not. For example, Tommi Tervanen, CEO of Kotipizza Group, favors mandatory human rights due diligence laws in Finland because "“[m]any companies already implement human rights principles. . . . We have nothing to hide, and the same should apply to all Finnish companies.”[102] Fazer Group's Director on Corporate Responsibility, Nina Elomaa, similarly stated that "[c]ommon rules on human rights create a fair operating environment for companies."[103] The Netherlands recently adopted a child labor due diligence law that requires all companies selling products in the Netherlands to demonstrate that they are implementing due diligence in their supply chains concerning child labor. [104] While many Dutch companies opposed the law, it is notable that those companies in favor were led by a chocolate company. [105] The chocolate industry has been under consumer scrutiny for decades because of the risk of child labor in supply chains and has confronted a number of high profile consumer lawsuits over that abuse in recent years.[106] This scrutiny has also led a number of chocolate companies to join private regulatory institutions targeting child labor in cocoa supply chains, such as the Harkins-Engel Protocol.[107] It is not surprising therefore that companies under heightened scrutiny for child labor may favor public legislation that holds its peers to a higher standard that it is itself under pressure to

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100 Lyndsey Schaeffer, *Consumers Expect the Brands they Support to be Socially Responsible*, BUSINESS WIRE (Oct. 2, 2019), https://bwnews.pr/3up24o0; Adam Butler, *Do Customers Really Care About Your Environmental Impact?*, Forbes (Nov. 21, 2018), https://bit.ly/3wtB0pu.

101 Simoney Kyriakou, *Why is CSR important for investors?* FIN. TIMES ADVISER (June 14, 2018), https://bit.ly/3sRclJ9.

102 Press Release: *Companies pushing for Finland to adopt mandatory human rights due diligence legislation*.

103 Ibid.

104 Joseph Wilde-Ramsing & Manon Wolfkamp. *Going Dutch: Four things you should know about the Netherlands' new law to eliminate child labour*, Business and Human Rights Resource Centre (May 29, 2019).

105 Ibid.

106 *See*, *e.g.*, *Dana v. Hershey Company*, 2016 U.S. Dist. LEXIS 41594 (N.D. Cal. Mar. 29, 2016).

107 International Labor Organization, *Africa: Child Labor in Cocoa Fields/ Harkin-Engel Protocol*, https://bit.ly/34CwKbv.

observe. For example, following Rana Plaza, French legislators introduced the Duty of Vigilance Law that "requires companies to create and implement publicly-available vigilance plans for which they can be held accountable."[108] The French Law was one of the first of its kind to impose broad mandatory due diligence requirements on companies. But the French law only applied to French companies over a certain size.

The second target for regulatory change is a transnational standard. It is therefore not surprising that many of the companies that adhere to a higher standard because of these drivers may support national, regional, or international governance strategies that level the field between these different groups of companies. In April 2020, the European Commissioner for Justice, Didier Reynders, stated that the Commission is committed to introducing rules for mandatory corporate environmental and human rights due diligence (HRDD) for companies.[109] This move to human rights due diligence is favored by companies that were already implementing such measures. For example, the global social sustainability & human rights lead for Mondelez International, Virginie Mahin, explained that "[m]any companies like ours are already implementing due diligence measures and we want to avoid a patchwork of legislation at national level…it's important to have a level playing field."[110] Mahin added that "[b]ut while there are a lot of good voluntary initiatives we still think it would be beneficial to have a binding law at EU level to provide a level playing field, and bring along companies upstream in the supply chain, which may not be under the same consumer-facing pressure."[111] The BIICL surveyed hundreds of individuals at companies on their views regarding mandatory HRDD.[112] The study found that the majority of business survey respondents agreed that mandatory EU mandatory HRDD laws would "level the playing field"; this view was particularly strong among companies with over 1,000 employees.[113] But not all business representatives favored EU mandatory laws on human rights due diligence. The study found that while individual company respondents favored mandatory HRDD, representatives from industry organizations did not.[114] One explanation for the divergence is that the individual company respondents were generally TNCs, whereas industry organizations are comprised of both TNCs and smaller companies, the latter which is usually less vulnerable to the reputational risks as the former.[115]

Industry organizations have similarly objected to the development of a treaty addressing business and human rights. In 2014, the United Nations Human Rights Council adopted a resolution "to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational

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108 Assent Compliance, *Regulatory Resource Center: What is the French Corporate Duty of Vigilance Law?*, https://bit.ly/2O9QUko.

109 Business and Human Rights Resource Centre, *EU Commissioner for Justice commits to legislation on mandatory due diligence for companies*, https://bit.ly/3lrpzc7.

110 Benjamin Fox, *Companies will support EU law on due diligence, but need assurances on liability*, EURACTIV (Mar. 19, 2019).

111 Ibid.

112 European Commission, STUDY ON DUE DILIGENCE REQUIREMENTS THROUGH THE SUPPLY CHAIN: FINAL REPORT 44 (2020).

113 Ibid, at 146–47.

114 Lise Smit et al., *Business Views on Mandatory Human Rights Due Diligence Regulation: A Comparative Analysis of Two Recent Studies*, BUSINESS AND HUMAN RIGHTS JOURNAL, 1 (2020), at 9.

115 *See* ibid.

corporations and other business enterprises."[116] The open-ended intergovernmental working group has released multiple draft texts of a potentially legally binding instrument, each version soliciting objections from industry organizations such as the International Chamber of Commerce (ICC) and the International Organization of Employers (IOE). These organizations initially raised concerns that a legally binding instrument would undermine the implementation of the United Nations Guiding Principles (UNGPs), discourage foreign direct investment, and that it would not sufficiently incentivize governments to address human rights challenges within their own jurisdictions.[117] They also faulted the draft text for scope, lack of clarity, and implementation challenges, among other criticisms.[118] In subsequent commentary, these organizations affirmed their commitment to the implementation of the UNGPs: "ICC continues to actively support its members to scale implementation of the UNGPs – and we will intensify these efforts to achieve the maximum on the ground impact."[119] Industry responses also highlight that "the work of embedding the UNGPs into corporate practices is picking up impressive speed – with risk assessments, enhanced supply chain due-diligence and human rights training all now routinely implemented in many enterprises."[120] While supporting the UNGPs, the "ICC, in reflecting the views of our global membership, still remains unconvinced that a treaty-based approach can be truly effective in dealing with the web of complex interrelationships between business and human rights."[121]

It is also important to keep in mind that companies could attempt to impose costs on their rivals through private ordering at the national or transnational level. For example, companies that develop their own codes of conduct, under stakeholder pressure or not, may then lead efforts to develop industry wide codes of conduct that may impose comparable standards on their peers.[122] The problem is that these codes of conduct are voluntary and companies may not face sufficient drivers that lead them to join these initiatives or to abide by the terms of their commitments.

E. Standardization Constraints

When a company operates in many different countries, that company may standardize its production and business practices across its global operations by adhering to the leading standard depending on a variety of factors.[123] The previous discussion explored the applicability of these standardization drivers for companies when the regulatory standard was set by public regulation. There is also the possibility that private governance may set a regulatory threshold that companies subsequently standardize. The extent and effectiveness of private governance may vary across jurisdictions,

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116 United Nationals Human Rights Council, *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, https://bit.ly/3rU6hhJ; United Nationals Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014).

117 Int'l Chamber of Com. et al., BUSINESS RESPONSE TO THE ZERO DRAFT LEGALLY BINDING INSTRUMENT TO REGULATE,IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES ("ZERO DRAFT TREATY") AND THE DRAFT OPTIONAL PROTOCOL TO THE LEGALLY BINDING INSTRUMENT 3 ("DRAFT OPTIONAL PROTOCOL")(OCT. 2018), https://bit.ly/3tV9leZ

118 Ibid, at 3-4.

119 Int'l Chamber of Com., ICC BRIEFING: THE UNITED NATIONS TREATY PROCESS ON BUSINESS AND HUMAN RIGHTS – 26 October 2020, https://bit.ly/397BKpV.

120 Ibid.

121 Ibid.

122 Hewllet Packard, *HP Becomes First in Technology Sector to Release List of Top Suppliers*, Press Release (Apr. 3, 2008), https://bit.ly/3wrrPWv.

123 Bradford, above n 7, at 54.

depending on the type and resources of stakeholders, company susceptibility, and other factors. But companies may apply a private governance standard to all of their operations because operational constraints or reputational risks may favor a standardization approach. For example, private regulation also has extra-territorial application. Consumers are not dissuaded from shaming a corporation by the fact that the corporation's misconduct occurred abroad; that fact may increase consumer propensity to regulate.[124] The private institution to which a company binds itself may also extend to multiple jurisdictions. Therefore, its global conduct is still under scrutiny by its private regulators and a misstep may lead to more aggressive strategies by these private regulators. It may therefore reduce its risks of enhanced private regulation by adhering to a higher standard, even in countries that lack strong private governance institutions.

CONCLUSION

This Article explores factors that may lead transnational businesses to favor transnational regulation to "level the field" by raising the compliance costs of their rivals. These companies may have strong preferences for transnational regulation when they operate at a higher standard in less regulated jurisdictions compared to their competitors, but do not receive corresponding benefits from adhering to that higher standard and cannot level the field through other public and private regulatory mechanisms. In contrast, these preferences may be weak when the company competes only in jurisdictions in which all of its competitors adhere to a similarly high standard or the high standard brings corresponding benefits that the company wants to preserve. The preference may also be weak when there are other regulatory mechanisms available to level the field among competitors.

Transnational regulation offers a number of advantages to level the field because it offers a means by which businesses can export their preferences to a variety of jurisdictions through a unified channel of transnational lawmaking. For example, a treaty would obligate its signatories to implement the treaty's norms within that state; while states maintain discretion regarding that implementation, the treaty can lead to greater harmonization in domestic laws than may otherwise result. Additionally, businesses may have greater influence or access to a transnational decision-making forum compared to a domestic one; in such a situation, access at the transnational level allows a business to influence domestic policies that are otherwise insulated from it. These factors can create the conditions for business actors to advocate for transnational regulatory solutions.

Further questions remain regarding additional factors that may influence the strength of these preferences. As discussed above, standardization practices within companies – in response to either public or private regulation – can contribute to these preferences. It is important to relate these preferences to the mechanisms for intra-firm diffusion of policies and practices within the company. In order to do so, it is particularly important to understand when policies developed in response to regulations in one jurisdiction are incorporated into the broader operating practices of the entire company and how these diffusion practices may vary in response to public regulation versus private governance.

[124] Ibid, at 61-62.