Putting Regulation before Responsibility: Towards Binding Norms of Corporate Social Responsibility

Thomas McInerney
Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility

Thomas McInerney†

I. Introduction .............................................. 171

II. Intellectual History ....................................... 176
   A. Changing Nature of the State ......................... 176
   B. Increased Managerial Innovation and Flexibility .... 180
   C. Self-Regulation Comes of Age ....................... 182

III. Critique of Voluntary CSR from a Developmental Perspective ............................................... 183
   A. Generating Compliance: The Limitations of CSR ...... 184
   B. Regulating Firms is a State Function .................. 188
   C. Learning to Regulate (and Govern) ................. 190
   D. Beyond Economic Orthodoxy .......................... 193

IV. Examples of Alternatives: African Cases .................. 195
   A. Lesotho High Water Dam Prosecutions ................ 195
   B. Forest Law Enforcement and Governance in Cameroon . 196

V. Conclusion ............................................. 199

I. Introduction

Corporate activities that harm the environment, violate labor and human rights, and corrupt state actors and institutions remain problems in all market economies. Nowhere are these problems more acute than in developing countries. On the other hand, in developed countries, many think that state action constitutes a principal remedy for market failure. On this view, domestic regulatory systems can do the work of protecting the environment and worker rights, while the judiciary can ensure that human rights are upheld and corruption prosecuted. Yet the general view is that, whether due to inadequate resources, ineptitude, or perfidy, the same expectations do not hold for developing countries.1 As evidence of corporate transgressions has mounted, it is noteworthy that there have been few calls for international super-regulators to oversee these matters,

† General Counsel, International Development Law Organization, Rome, Italy. An earlier version of this article was released as the George Washington University Law School Public Law Research Paper No. 123 and appeared as part of the International Development Law Organization’s Voices of Development Jurist Working Paper Series.


nor has much attention been devoted to remedying the presumed shortcomings in developing country regulatory systems that thwart effective remedies for these social harms. Instead, policy makers and many activists have focused on voluntary corporate social responsibility (CSR) measures.²

CSR is an umbrella term that refers to a variety of initiatives ranging from voluntary codes of conduct to programs whereby companies can undergo external audits to verify the adequacy of their practices in a variety of areas of social concern.³ Although generally lacking formal state power of sanction, these efforts look to international law for their normative authority, intending to apply sometimes-latent international legal prescriptions directly to corporations. Following the practices of many state-level regulatory programs in recent years, these initiatives are consistent with the broader trend in regulatory policy away from so-called “command-and-control” regulatory techniques and towards voluntary firm-level self-regulation and self-policing.⁴

While important in helping to galvanize public opinion around the issues, this article contends that, as currently constituted, voluntary CSR initiatives remain problematic. Properly understood, voluntary CSR measures should supplement not supplant state regulation.⁵ Yet, supporters of voluntary CSR initiatives fail to recognize this fact. They equivocate on the role of government regulation and thus confuse the proper role of CSR.⁶

² Examples of these initiatives include AccountAbility 1000 Framework; AA1000 Assurance Standard; Business Principles for Countering Bribery; CERES Principles; Clean Clothes Campaign: Model Code; Eco-Management and Audit Scheme; Ethical Trading Initiative: Base Code; Fair Labor Association: Workplace Code of Conduct; UN Global Compact; Global Reporting Initiative; Global Sullivan Principles of Corporate Social Responsibility; ICC Business Charter for Sustainable Development; Marine Stewardship Council’s Principles and Criteria for Sustainable Fishing; The Natural Step Principles; OECD Guidelines for Multinational Enterprises; Shell Business Principles; SIGMA: Sustainable Guidelines for Management.

³ Among OECD countries, these areas are generally thought to be delimited by the law and thus CSR is sometimes assumed to refer to efforts to exceed legal requirements. Other discussions, particularly those concerning developing countries, invoke CSR as a way of supplanting or overcoming inadequacies in domestic legal orders. Confusing matters further is the recent trend among business interests in the United States and elsewhere to re-define the term by leaving out the word “social.” Hence, one sees press conferences with business executives promoting “corporate responsibility,” which usually amounts to no more than executives and firms obeying the law. The precise boundary between CSR initiatives and legal requirements are unclear in these discussions. For the purposes of this paper, I will consider CSR as the effort to overcome inadequacies in existing legal structures and enforcement regimes in developing countries with respect to the social issues identified above. This paper criticizes the attempts by various actors to remedy these problems primarily through voluntary measures.

⁴ See, e.g., OECD, REGULATORY POLICIES IN OECD COUNTRIES: FROM INTERVENTIONISM TO REGULATORY GOVERNANCE (2002) (describing the need to maximize voluntary compliance).


The reasons for this equivocation are not incidental but rather central to the CSR movement.\(^7\)

There are two reasons for this phenomenon. The first issue relates to the competing discourses involved in addressing CSR questions. Roughly stated, these discourses can be defined as globalist or developmentalist. The globalists include those whose inspiration for addressing CSR matters stems from globalization, which they reduce to questions of foreign direct investment (FDI) and outsourcing by multinational corporations in developing countries.\(^8\) Among the globalists are those who posit a declining—even shrinking role—for the state.\(^9\) Globalists contend that multinational corporations (MNCs) elude national regulation because they operate in multiple jurisdictions.\(^10\) On the other hand, as the name suggests,
developmentalists view matters from a developmental perspective. On this view, the challenge of private sector activities in developing countries is not limited to issues of FDI and outsourcing but rather involves broader issues of institutional and market strengthening and coordination with other development priorities.

In this paper, I contend that the globalists have framed the debate incorrectly. A key reason for this conceptual mistake is that the globalists have wrongly assumed that the state is in decline. This view is a broad-brush swipe rather than the product of detailed analysis. Indeed, developments in the field of comparative and international political economy show that the story is much more complicated. On this view, rather than international convergence towards one model of capitalism, states maintain distinctive types of market economies and respond to the pressures of globalization in distinct ways. Moreover, state level regulatory systems remain central to defining the trajectories of different systems. Other studies speak more of a changing role of the state or of the state being constrained in certain respects, but belie the hyperbolic claim that the state is declining in importance, is less relevant, or is unable to do its job. Rather than true across the board, the constraints hypothesis may be true in some respects but less in others. In particular, while states may be constrained in areas of monetary policy and financial markets, there appears to be much less support for the view that the state is constrained in matters of social, trade, industry, and innovation policies. Even the sly multinational enterprises (MNEs) credited for supposedly eluding law and regulation of states are subject to the laws of every jurisdiction in which they do business. Indeed, the race to the bottom argument often made in reference to MNEs’ supposed attempts to seek out unregulated markets also does not stand up to scrutiny. If states cannot be shown to be subject to

12. Id.
13. Id. at 4 ("Our premise is that many of the most important institutional structures—notably systems of labor market regulation, of education and training, and of corporate governance—depend on the presence of regulatory regimes that are the preserve of the nation-state.").
15. Weiss, supra note 14.
16. Wallace, supra note 10. A common but mistaken argument is that because the revenues of MNEs often exceed the budgets of various developing countries, the private firms essentially dominate those states. See Pall A. Davidsson, Legal Enforcement of Corporate Social Responsibility within the EU, 8 Colum. J. Eur. L. 529 (2002) (stating that economic power of MNEs often surpasses that of states). But this is a rather hasty conclusion to draw from comparing these figures. As will be described later in the article, states wield many instruments with which to enforce law and regulation, and it cannot be said ipso facto that modest state revenues preclude states from enforcing law against even the largest international firms.
17. Studies of tax rates, supposedly a key driver of firm arbitrage between jurisdictions, suggest, that the race to the bottom argument is misleading. See Geoffrey Garrett, Global Markets and National Policies: Collision Course or Virtuous Circle?, 52 International Organization 787, 801 (1998) (citing tendency for multinational producers to locate in countries with large public economies and high taxes); M. Ramesh, Globaliza-
substantial constraints in the exercise of their power, then a key argument for international rather than state-based corporate social responsibility measures would seem to be lost. Moreover, even if states can be shown to be too weak to deal with implacable MNCs, then what grounds exist for believing that mere voluntary measures will prove potent instruments of control?

Second, the globalists have reduced most of the problems involving economic activity in developing countries to exogenous factors attributable to linkages with advanced industrial economies. Economic globalization thus emerges as the culprit, while endogenous sources of social harm are ignored.\(^{18}\) While recognizing that the problems associated with economic globalization are real, the problems affecting capitalist development in developing countries are not reducible to problems of economic globalization. Were we to magically ensure that all outsourcing and FDI were done in accordance with the highest international standards, many developing countries would still face massive problems of regulation and governance directly related to the types of social harms that CSR attempts to address. Only the developmentalist perspective speaks to those needs.

The globalists' third misconception relates to the reasons behind this set of assumptions. To uncover these reasons, one must examine recent economic and political history. As this paper will argue, that history exposes the intellectual roots of voluntary CSR programs in neoliberal economics. It calls into question a shared assumption among CSR advocates that market failure can be remedied by market mechanisms.

This paper is divided into five parts. Part II consists of an overview of some of the intellectual, policy, and business trends that have fed support for CSR programs. This paper contends that a proper understanding of CSR initiatives involves recognition of its origins in the post Reagan-Thatcher regulatory agenda, which has changed fundamental expectations about business regulation and economic development. Part III critiques some of the key assumptions concerning voluntary CSR programs with particular attention to concerns in developing countries. It highlights two significant problems: first, the lack of rigorous enforcement of such initiatives; and, second, the lack of state involvement in their enforcement and definition, which undermines the broader development goals of democratic governance and the creation of well-regulated market economies. In light of these problems, this paper argues for using capacity-building of legal and regulatory authorities as a way to address these issues. Part IV describes and analyzes two examples of how domestic legal and regulatory
tion and Social Security Expansion in East Asia, in Weiss, supra note 14, at 83 (showing significant expansion of social welfare in Korea and Taiwan during period when they were integrating rapidly with the global economy); John M. Hobson, Disappearing Taxes or 'Race to the Middle'? Fiscal Policy in the OECD, in Weiss, supra note 14, at 49 (noting that states have been able to attract increased foreign investment while simultaneously maintaining and, in some cases, increasing corporate income tax yields).

actors can be empowered to further the public interest in their societies. A conclusion follows in part V.

II. Intellectual History

To understand where the voluntary CSR movement draws its raison d'être, one must consider recent intellectual history. Three general trends are worth noting: first, the demise of the post-WWII regulatory and developmental state, as exemplified by the New Deal institutions in the United States and social democracy in Europe; second, market-oriented radical transformations affecting business organizations; and, third, the emergence, as a result of these trends, of new programs of self-regulation throughout the developed world. What follows is a simplification of these complex trends; however, it should nevertheless help contextualize the environment in which voluntary CSR programs have emerged.

A. Changing Nature of the State

The modern regulatory state emerged alongside the growth of industrial economies.\(^{19}\) The conditions necessitating greater governmental control over economic activities include an increase in harmful externalities, such as pollution, injuries to workers, monopolistic tendencies within industry, a multiplication of the number of economic actors, and an increase in technological complexity requiring greater coordination among firms. Government's ability to address these new concerns depended upon the creation of large administrative units or bureaucracies to support its efforts. The multiplicity of actors and situations required a vast regulatory apparatus supported by significant resources.

For the sake of illustration and because of its influential role in affecting regulatory practices internationally, I will focus on the United States's experience. In the United States, the modern regulatory state was, in large part, an outgrowth of the New Deal. Prior to that time, the federal government played a relatively small economic and social role.\(^{20}\) What regulation existed was accomplished primarily through common law courts.\(^{21}\) Judges, not bureaucrats, were the arbiters of regulation. As the guardians of the common law, judges resisted attempts by legislatures to enact laws protecting health, safety, and the environment as unwarranted infringements on the judiciary's power to determine proper regulatory objectives. The *Lochner* decision,\(^ {22}\) in which the Supreme Court struck down a New York statute limiting the hours bakers could work on the grounds that it unconstitutionally infringed the freedom to contract, was one of the more notable examples of this type of thinking. Legislative efforts to regulate the


\(^{22}\) Lochner v. New York, 198 U.S. 45 (1905).
market grew significantly with the New Deal. After initially suffering losses when the Supreme Court cast aside a number of early New Deal enactments, the Roosevelt administration succeeded in enacting numerous laws to minimize the social harms of the market. This marked the beginning of a larger trend. Between the New Deal and the 1970s, the federal government created dozens of new agencies designed to regulate a whole range of industries and remedy a variety of social ills. The scope of the changes that occurred has led some constitutional scholars to consider the period a second American "rights revolution" or an effective amendment to the federal constitution. Similar trends occurred in Western European and developing countries. The growth of capitalism globally spurred efforts to restrain its negative effects.

Noteworthy among these developments is the qualitative changes to regulatory efforts that occurred between the New Deal and the 1960s and 1970s. In the New Deal period, the primacy of Keynesian economics led to a regulatory agenda designed to better manage the economy. By the 1960s and 1970s, government regulation became more concerned with protecting individual rights than with promoting collective goods. Across OECD countries, as regulation became less about demand management, through such institutions as centralized wage bargaining, and more about individual rights, such as laws against discrimination in employment, broader support for a dominant state presence in the economy eroded.

The emergence of economic stagnation and growing business unrest over bureaucratic "red tape" feed arguments for curtailing the growth of the federal bureaucracy in the U.S. The economic crises of the late 1970s and early 1980s—stagflation, energy shortages, and a decline in international competitiveness—led to complaints about regulatory controls. Congress also began asserting its power, seeking to reign in administrative action. Likewise, courts began scrutinizing agency actions with greater frequency. Immediately after his election, President Reagan began a program of comprehensive regulatory reform. Reagan's reforms from that time have since spread throughout the advanced industrialized economies and developing countries. It is important to review their main elements.

24. Id. at 24 (noting that between 1930 and 1940, the federal government created 17 new agencies but that later expansion of the regulatory state far exceeded this number. Between 1960 and the mid-1980s, more than 55 new agencies were created).
25. Id. See generally Bruce Ackerman, We the People: Foundations (1991).
27. Id. at 29.
30. See INS v. Chada, 462 U.S. 919 (1983). Congress's attempt to create a legislative veto was a particularly noteworthy instance of a larger movement for legislative oversight.
32. See James M. Boughton, The Silent Revolution: The International Monetary Fund 1979-1989 (2000). The author describes these developments in reference specifi-
Executive Order 12291 ushered in a comprehensive program of *ex ante* procedures and criteria applicable to any new regulation.\(^{33}\) This change empowered the U.S. Office of Management and Budget to act as a central authority for scrutinizing new regulatory initiatives. Two moves proved particularly instrumental in setting the climate in which emphasis on voluntary CSR grew. First, the order mandated the use of cost benefit analysis and the choice of the least burdensome alternative in connection with any proposed regulation.\(^{34}\) Second, it mandated that regulators consider alternatives before advancing new regulations.\(^{35}\) With this subtle shift, the view of the state as taking on a strong role in controlling capitalism was replaced by a general presumption against regulation unless it could be otherwise justified.\(^{36}\)

The OECD regulatory reform program illustrates how diffuse these practices have become. According to the OECD, states have adopted regulatory management systems involving explicit standards for regulatory quality, the use of regulatory impact analysis, systematic public consultation on regulation, use of alternatives to regulation, review and updating of regulation, and a reduction in administrative red tape.\(^{37}\) It is safe to say that these principles represent mainstream thinking on regulation today.

Aside from the question of defining proper regulatory ends was the question of means. Critics complained that “command-and-control” regulatory regimes were costly and unnecessarily punitive.\(^{38}\) This attack sought to eliminate rigid governmental prescriptions and instead to allow for greater flexibility in achieving traditional regulatory aims.\(^{39}\) The result has been, among other things, a growing shift towards self-regulatory or management-based regulatory strategies, described more fully in Part I.C below.

The second prong of the regulatory reform agenda has been a program of deregulation in several areas, including communications and broadcasting, discrimination, endangered species, occupational health and safety,
public utilities, and the environment.\textsuperscript{40} Deregulatory programs were followed by successive waves of re-regulation. In the area of economic regulation, states created new frameworks for introducing competition into previously uncompetitive industries through unbundling, withdrawal of subsidies, and use of competition law. In the area of social regulation, enforcement was frequently weakened and, in some areas, regulatory burdens lightened.

The push for deregulation and regulatory reform originating in OECD countries has since been exported globally through the intervention of international financial institutions. Drawing from the widely shared belief that excessive regulation hampered economic growth, development agencies promote the reduction of unnecessary regulatory barriers and excessive red tape.\textsuperscript{41} Likewise, structural adjustment programs have forced reductions in state spending that have compromised state regulatory capacity in some instances.\textsuperscript{42} International trade agreements have also driven states to remove rules that discriminate against foreign firms, thus reducing regulatory burdens in certain areas.

The third change in the nature of regulation was the demise of the developmental state in both OECD and developing countries. Slowing growth in OECD countries helped bring about the decline of the Keynesian developmental state. Driven by declining growth rates, tax revolt, and the need for fiscal restraint to avoid currency devaluation in a post-Bretton Woods environment, state \textit{dirigiste} policies fell into disrepute. Restraints on state subsidies for national champions and caps on budget deficits as a result of economic integration further tied the state's hands. In combination with many of these forces, developing countries faced added pressure for fiscal prudence from international financial institutions. In light of the manifest shortcomings of import substitution policies and the subsequent debt crisis, structural adjustment programs and conditionality were imposed on states as a way of reducing wasteful support for state-owned enterprises and profligate expenditures on state-owned industry and infrastructure. The rise of the good governance agenda and its application to states in the South further pressured them to avoid the risk of corruption through wholesale reductions in state-sponsored investment.\textsuperscript{43} Privatization, competition, and a reduction of state involvement in the economy have become central components of economic policy more generally and development policy more specifically.\textsuperscript{44} The simultaneous reduction in domestic demand management and downward pricing pressures on prod-

\textsuperscript{40} SPULBER, \textit{supra} note 28, at 107.

\textsuperscript{41} See \textit{INTERNATIONAL FINANCE CORPORATION, DOING BUSINESS IN 2004: UNDERSTANDING REGULATION} (2004).


\textsuperscript{43} BOUGHTON, \textit{supra} note 32.

\textsuperscript{44} See, e.g., MICHAEL U. KLEIN \& BITA HADJIMICHAEL, \textit{THE PRIVATE SECTOR IN DEVELOPMENT} (World Bank 2003) ("Openness and competition are key reasons we can have hope for poverty reduction.").
ucts due to international competition and technological change brought about a decline in aggregate demand in many countries. Consequences notwithstanding, private sector development is now the dominant, if not sole, economic policy paradigm. Osborne and Gaebler's now famous metaphor about the state steering and not rowing has diffused internationally. A dramatically different model of the state has become dominant in OECD countries, developing countries generally, and sub-Saharan Africa in particular.

B. Increased Managerial Innovation and Flexibility

In the last thirty years, management and production have undergone tremendous change. It is not, as the most exuberant proponents of the “new economy” suggest, one that renders traditional criteria for valuing companies wholly irrelevant. Instead, it constitutes a change in the fundamental approaches to private enterprise. According to the new approach to management, the ability to change, constantly improve processes, and reduce costs is a hallmark of success.

Throughout much of the twentieth century, business organizations, particularly larger firms, tended to be bureaucratic, centrally organized, and, as a result, slow and frequently inefficient. This corporate model, typified by the system of Fordist mass production, established set manufacturing processes and rigid management techniques, which limited opportunities for change. Gradually throughout developed economies, reductions in aggregate demand, increased international competition that limited pricing power, shortened product cycles that rendered inventories obsolete more quickly, and the growing knowledge-intense nature of work, strained bureaucratic business models. In addition, the emergence and success of many high technology companies, with few fixed assets, led many to see flexibility and intellectual capital as the hallmarks of success.

Three interrelated changes are particularly noteworthy. First, firms increasingly began incorporating team production methods. In contrast to the large centrally-directed firm described in Alfred Chandler's work,
decentralized structures, oriented to team or group decision-making, became diffuse. Under the influence of Japanese production techniques, firms began incorporating production practices that put increasing control in the hands of employee-directed teams. Decentralized groups were given the opportunity to use their judgment to set priorities and improve processes.

Second, many firms began to incorporate flexible production techniques. The move to flexible production and shortened production times made product offerings more responsive to changes in demand. Whereas a high degree of responsiveness to demand previously was confined to small, craft producers, these techniques proliferated among larger firms during the latter part of the twentieth century. For instance, the development of just-in-time inventory practices has allowed businesses to anticipate and respond to demands of the market while eliminating sunken inventory costs in outmoded and uncompetitive products. Today's firms can combine a high degree of flexibility in product offerings with high output.

Third, firms instituted new approaches to quality control. Techniques such as benchmarking, or "iterated goal setting," which allow companies to base the development of a new product on comparisons with best practices in an industry and consider competing alternative products, have become recognized as leading management techniques. One of the central features of this type of process is the review and modification of these goals in light of experience. Error detection and correction in some firms now occur in real time. Moreover, through the process of standardization, such thinking has even become institutionalized. ISO 9000, a widely-used management system standard, has effectively codified the practice of constant monitoring and continuous improvement with respect

53. See generally Sabel, supra note 49. See also Helper et al., supra note 52, at 5.
57. See generally PIORE & SABLE, supra note 50, at 221 (describing flexible production techniques).
These changes in business organization have allowed firms to adapt to the uncertainty of rapid economic, institutional, and technological changes. In contrast to more rigid manufacturing processes, which view manufacturing decisions as fixed, the new system treats every arrangement as provisional.

As a result of these changes in business practices, the regulator's task has become more challenging. No longer can governments depend on consistent business practices in setting regulatory requirements. The very malleability of management practices makes it difficult even to pinpoint the business practices that require regulation. A given practice may become outmoded before agencies can promulgate regulations controlling a certain type of conduct. The relative decline in vertical integration strategies, brought about through contracting, has given rise to more network-oriented forms of organization. Due to this increased flexibility in business, governments must constantly keep pace with the economy. Firms may not intend to evade regulatory initiatives, but regulators are slow to respond to their rapidly-changing practices. Within this framework, traditional command-and-control regulatory systems have had to change.

C. Self-Regulation Comes of Age

While self-regulation has existed in a variety of forms for years (e.g., stock exchanges and the legal profession in the United States), mounting criticism in the 1980s and 1990s of command-and-control regulation as inadequate led to increased attention to alternative regulatory programs. The idea was a pragmatic response to diminished resources, as well as a realization that traditional regulation was ineffective and had generated unintended consequences. In the United States, the advent of the Organizational Sentencing Guidelines in 1991 allowed for greater reliance on firm-level compliance to leverage dwindling state resources and ensure achievement of regulatory objectives. Throughout the OECD, regulators no longer see companies strictly in adversarial terms but rather recognize them as important partners in achieving regulatory objectives.

As a result, firm-level self-regulatory measures have grown in importance. Typically, compliance or management-based regulatory strategies provide incentives for firms voluntarily to implement compliance systems.

64. Sabel, supra note 49, at 17.
65. See e.g., O'Rourke, supra note 5 at 21 (noting that The Gap, for instance, may not know which suppliers it is using at a given time).
68. See OECD, supra note 4, at 16-17.
and sanction firms that lack such systems.69 While the approaches taken differ among jurisdictions, there is widespread agreement that declining state resources, growth in the number of regulated entities and complexity of business, and the inefficacy of traditional command-and-control regulation require regulators to leverage the resources of private entities in pursuing regulatory objectives.70 Similar considerations would seem to hold in developing countries, although to different degrees depending on a particular country's circumstances.

In some cases, process-oriented solutions have been suggested in place of strict adherence to clear cut rules. ISO 9000 and ISO 14000, the quality assurance and environmental standards developed under the auspices of the International Organization for Standardization, have proved influential in placing the management systems approach at the center of discussions on regulation. These approaches afford companies greater latitude in achieving compliance; companies can satisfy regulatory requirements provided they adopt the proper processes for addressing a particular regulatory issue. This approach has its shortcomings, however, as many observers have noted that companies can have the correct process in place while failing to achieve substantive performance criteria.

III. Critique of Voluntary CSR from a Developmental Perspective

In light of the historical context provided above, this section undertakes a critical examination of voluntary corporate social responsibility. First, I argue that even if norms such as protecting the environment or human rights generally are valued, taking a purely voluntary approach to promoting compliance with such norms will produce few results. Second, I argue that notwithstanding the presumed international dimension of CSR, control of individual business firms is generally the province of states. Third, I argue that voluntary, international CSR programs undermine development priorities, including strengthening domestic governance, insofar as domestic regulatory institutions fail to develop the capacity to protect their citizens. Finally, I contend that a more robust model of regulation complements efforts to transcend the neoliberal model of the state by providing a positive role for the state in driving economic development.


A. Generating Compliance: The Limitations of CSR

CSR proponents use economic incentives as the basis generating compliance with CSR norms. For the most part, these economic incentives and disincentives are linked to corporate reputation. Thus, CSR proponents maintain that firms respond to CSR-related concerns as a result of the self-interested goal of boosting their reputations with consumers, trading partners, and investors. A good reputation will translate into improved sales and profitability or higher stock price, while a bad reputation will have the opposite effect. As to the influence on sales, effects on reputation would be most evident for companies with strong consumer brands. Examples include the consumer pressure imposed on companies such as Nike for its reportedly abusive labor practices, or Shell for its failure to intercede on behalf of Ken Saro Wiwa. In the language of CSR, a key challenge of the movement is to exploit these "reputational drivers" effectively. Proponents argue that firms will act in a socially responsible manner in order to maintain positive reputations among the public. It is worth noting that this argument is neoclassical in substance. Unpacking the argument exposes the following logic:

1. Firms will choose to do what is economically in their best interests.
2. Acting in a socially responsible manner clearly inures to their economic benefit.
3. Therefore, firms will follow social responsibility norms.

As the following analysis of regulation and compliance shows, this logic is fundamentally flawed. If CSR was intended to correct market failure, does it make sense exclusively to rely on market forces as the solution?\footnote{In this respect, CSR deviates substantially from the understanding of what regulation involves. See \textsc{Tony Prosser}, \textit{Law and the Regulators} 270-77 (1997) (noting that major role of regulators is to create and police markets where they would not arise or do so spontaneously). Faced with this fact, CSR advocates could contend that CSR is not designed to address market failure. As such, CSR could then cede any responsibility for remedying market failure to regulatory bodies. Yet, because there appears to be little of substance to distinguish CSR’s relevant areas of concern from those of traditional regulation, there would then seem to be minimal territory for which CSR could claim exclusivity.}

Even conceding that certain firms might be responsive to improved stock price or customer pressures, these factors are unlikely to generate a high level of compliance. Consumers, trading partners, and shareholders may not countenance slave labor practices by firms or massive disregard for the environment, such as occurred at Bhopal. Yet, given the large number of companies operating in the world, the limited attention of the actors involved, and the voluntary nature of the whole arrangement, it is unlikely that companies will be driven to achieve more than a minimum of social responsibility. Most companies are unknown to consumers and, as experience has shown, to the extent consumers seem to respond to these issues, they have focused on a few companies. Similarly, investor pressure to promote CSR among companies is essentially limited to listed firms and, in
any event, generate relatively low-powered incentives to which companies respond by trying to avoid major scandals.

There is, however, reason to question the strong rationality assumptions that CSR proponents attribute to firms. It is not self-evident that even if the posited incentives exist, firms will necessarily choose to act upon them. Indeed, this assumption is itself neoclassical in nature. The evolutionary traditions in economics and the related field of capabilities theory have supplemented the neoclassical view by exploring limitations on profit-maximizing behavior. Nelson and Winter have argued convincingly that rather than maximize profits at every stage, firms are profit-seeking.72 Existing paths and the results of intrafirm "truces" may persuade many employees to leave well enough alone.73

In summary, there is reason to believe that serious flaws are involved with any CSR initiative that relies almost exclusively on market forces to encourage firms to adopt it. Although discussions of CSR have tended to view them as without historical parallel, this is certainly not the case. Studies of organizational compliance are well advanced and bear intrinsically on the question of what public policy actors can do to induce firm compliance with particular norms. Socio-legal studies and comparative analyses of organizational compliance in OECD countries are particularly relevant.

Many regulatory scholars recognize that there are four types of companies with which regulators have to deal.74 These four types include: those who know the law and are willing to follow it (Group A); those who do not know the law but would like to be law abiding (Group B); those who know the law and do not want to follow it (Group C); and those who do not know the law and do not wish to be law abiding (Group D). Most CSR literature does not even reflect these basics. As this analysis suggests, Group A firms are willing to comply on intrinsic grounds. Yet for CSR proponents, it seems that it is precisely Group A that represents its greatest source of support. Surely CSR must be more ambitious than seeking to ensure that the good continue to be good.

The most convincing argument in favor of voluntary CSR strategies concerns Group B firms. In this case, CSR can serve an educational purpose. The precise limits of CSR are clear with respect to companies in Groups C and D. Under this logic, CSR proponents contend that Group C and D firms should follow CSR norms because it is economically rational to do so. To these proponents, I ask: as rational economic actors, why aren't they already doing it? Bounded rationality can be the only answer. Indeed, bounded rationality may explain the move towards CSR by Group B firms. Yet if Group C and D firms, after having been shown the error of their ways by CSR campaigners, have not acted, can one still rely on

73. Id. at 110.
74. Baldwin & Cave, supra note 19, at 101-2; Ayers & Braithwaite, supra note 66, at 19.
bounded rationality to explain their behavior? Could it be that there are good, countervailing economic reasons to explain the socially irresponsible behavior of these firms?

A wide range of compliance literature supports these arguments. Generally it shows that voluntary standards are not self-enforcing. Firm compliance decisions are not solely responsive to the threat of sanction; however, some form of sanction is essential for firms' willingness to comply. In competitive markets without the risk of sanction, the likelihood of opportunism by firms dramatically increases. One of the leading proposals for management-based regulation advanced by Ayers and Braithwaite recognizes this fact explicitly. They call for voluntary self-regulation not as a stand-alone solution but instead as part of a system of governmentally-enforced self-regulation. They reason that firms must have discretion to determine appropriate means of achieving regulatory goals, but that government must oversee and enforce relevant standards, particularly in dealing with less cooperative firms.

75. OECD, Voluntary Approaches for Environmental Policy 86 (2003) ("Binding approaches are more likely to be environmentally effective than non-binding approaches - if non-compliance does not trigger any sanctions, any environmental improvements would have to rely on strong commercial/strategic interests of firms."); Alan Cameron, Supervision at the Micro Level: Do Disclosure-Based Regimes Work? in The Future of Domestic Capital Markets in Developing Countries, at 153 (Robert E. Litan et al. eds., 2003) (arguing that credible threat of enforcement is needed to ensure that disclosure-based regulatory regimes work).

76. Experience with the OECD Convention against Bribery of Foreign Officials in Connection with International Business Transactions should be sufficient to cast serious doubt on the most optimistic advocates of CSR. The 1997 OECD Convention was signed and ratified by 35 OECD member and non-member states. To date, other than a handful of prosecutions in the United States, which had enacted a predecessor law, the Foreign Corrupt Practices Act in 1977, none of the other 34 signatories has undertaken a prosecution. Peter Eigen, Multinationals' Bribery Goes Unpunished, INT'L HERALD TRIBUNE, Nov. 12, 2002, at 6. Nor does it appear that states have actively taken an interest in investigating allegations of bribery. Of twenty allegations of bribery involving United Kingdom companies or citizens, only two are under formal investigation. Moreover, the UK has failed to provide assistance to the Nigerian government seeking to recover $1.3 billion in state funds deposited in 23 UK banks by the Abacha regime. Susan Hawley & Andrew Phillips, Bribery Begins at Home, THE GUARDIAN, Oct. 6, 2004. The lack of prosecutions perhaps explains the view of 60 percent of German firms surveyed that the risk of corruption was "of no real significance" and, therefore, changing management practices was not necessary. Jimmy Burns, Laws Fail to Halt international Business Bribery, FIN. TIMES, October 15, 2002, at 12. Similar views were found in another survey by the investment firm Friends Ivory & Sime. According to their findings, "a large proportion [of companies surveyed] appears to have inadequate policies and implementation mechanisms." The Short Arm of the Law, THE ECONOMIST, Feb. 28, 2002, at 63, 65. Moreover, The Economist contends that while "a few" multinationals have taken steps to eliminate bribery, many more "have merely pretended to stamp it out." Id. As logic would dictate, because the threat of prosecution remains illusory in most OECD jurisdictions, bribery by firms continues unabated and many firms have failed to change internal policies and procedures to prevent bribery from occurring.

77. Ayres & Braithwaite, supra note 66. See also Parker, supra note 69 (conceptualizing regulatory compliance in terms of persuasion, education, and cooperation followed by sanction for failure to implement compliance systems).
In contrast to CSR discussions in which reputational advantage is the dominant driver, research has helped conceptualize compliance in terms of a dynamic process. Bridget Hutter conceptualizes compliance as an outgrowth of a longstanding relationship and series of interactions between the regulated firm and regulators. From this perspective, one can say that firms have an enforcement "career," meaning an ongoing relationship between the firm and the regulator. "Enforcement officials interpret, classify, and test the regulated and act accordingly," she writes. Consistent with the notion of graduated enforcement pyramids developed by Ayers and Braithwaite, as this regulatory career unfolds, the regulator can gradually intensify coercion in the event that the regulated firm fails to comply. This view does not assume that regulators must use coercion, but rather it recognizes that achieving something more than compliance among the willing requires an array of instruments, as well as regulatory authorities with historical and current knowledge of the entities they regulate. In other words, voluntary compliance may occur spontaneously but any serious discussion of compliance with a given regulatory regime requires some reference to enforcement tools as well. Indeed, the very notion of voluntary compliance posited by Ayers and Braithwaite contends that the coercive power of the regulator is essential to generating voluntary compliance.

Sophisticated public policies reflect this realistic understanding of the proper role of sanctions in any regulatory regime. The Ministry of Justice and Erasmus University in the Netherlands together developed an innovative approach to assess the likelihood that regulatory compliance will occur. They produced a Table of Eleven ("T11") key determinants of compliance that effectively synthesized much of the research on the topic. This framework demonstrates that the factors driving compliance decisions are multifaceted and complex. The T11 indicators break down the analysis into three aspects: (1) spontaneous compliance dimensions (i.e., those that generate voluntary compliance); (2) control dimensions (i.e., factors based on the likelihood of enforcement as drivers of the compliance decision); and (3) sanctions dimensions.

Consistent with the earlier discussion of Group A and B firms, most CSR compliance can be attributed to spontaneous factors. Following the T11 analysis, knowledge and general acceptance of particular CSR rules or

79. Id.
80. Id.
81. AYRES & BRAITHWAITE, supra note 66.
82. See, e.g., HUTTER, supra note 78, at 196, 206-28.
83. AYRES & BRAITHWAITE, supra note 66, at 19 ("strategy based totally on persuasion and self-regulation will be exploited when actors are motivated by economic rationality").
84. Id. at 39 ("[t]he key contention of this regulatory theory is that the existence of the gradients and peaks of the two enforcement pyramids channel [] most of the regulatory action to the base of the pyramid—in the realms of persuasion and self-regulation").
standards by firms, their normative commitment to such rules or standards, and the possibility of informal control account for most CSR compliance. Contrary to radical skeptics, the existence of these influences shows that firms are not wholly opportunistic.

Again, this is only the beginning of the analysis. Voluntary CSR initiatives—unlike binding state-imposed regulations—can rely only on these spontaneous compliance drivers. Standing alone these considerations are insufficient. They ignore Group C and D firms and fail to take into account that the phenomenon of spontaneous compliance occurs within a regulatory system that provides sanctions for non-compliance. The control and sanctions dimensions of the T11 framework are of critical importance to deal with Group C and D firms (and to motivate A and B firms). Factors such as the control probability (T7) and detection probability (T8) reflect the fact that scrutiny of firms by regulators contributes significantly to levels of compliance. When dealing with uncooperative firms, the state’s ability to devote substantial resources to such investigations is an important contributor to its success. Moreover, regulatory and law enforcement bodies can enforce their audit powers through the courts. The state can even employ the threat of enforcement as a bluffing strategy designed to push recalcitrant firms into compliance. Such factors clearly influence the importance of an audit to the audited firm. It is only logical that it also positively influences compliance. In contrast, private verification schemes, although more thorough than self-reporting systems, do not permit auditors an unlimited amount of time. Without mandatory audit rules, audited firms have great incentives to limit the costs of the endeavor by reducing its duration.

Finally, sanctions available to regulators extend beyond direct economic penalties. Regulators can issue warnings, suspend licenses of firms or their agents, deny permits, issue injunctions, and increase the frequency of inspections. As Ayres and Braithewaite suggest with the enforcement pyramid, regulatory and enforcement bodies can adjust their actions in response to the regulated community’s conduct. Serious economic consequences follow from the state’s use of any of these powers against particular firms. In contrast, CSR initiatives must rely on the power of reputational risks, which have only an indirect or uncertain cost element, as disincentives.

B. Regulating Firms is a State Function

Despite an increase in international commerce and law-making, regu-
lation remains state-based. On a general level, voluntary CSR initiatives seek to create an international regulatory framework that applies directly to firms, bypassing the state. In light of the constraints on state expenditures arising from international financial institutions and global capital market pressure, this attempt to regulate from above is understandable. As a matter of regulatory and development policy, however, it is mistaken.

States occupy a privileged position in connection with regulatory activities. Much attention has been given to state activity in shaping the substance of international law through international fora, but along the way the central role of state-based regulation in the process of controlling economic activity has become obscured. Hirst and Thompson describe the state as the "locus of governance in a galaxy of increasingly interlinked institutions of governance above and below it." In one sense, state-level regulatory systems constitute that locus. Only states can undertake the necessary work to ensure that the international norms to which they have bound themselves in international fora are respected in their territories.

International fora produce norms that by their very nature can be generalized across a variety of jurisdictions. Cosmopolitan democracy remains a valid concept when it comes to defining generally agreed-upon norms, but it is inadequate for local regulation, something that must occur through local deliberative democratic processes. Moreover, regulation of firms is in its essence particularistic. It is something states are uniquely able to do.

Only states have the knowledge necessary to regulate industries operating within their territories. They incorporate firms, whether as subsidiaries of multinationals or domestic firms. Regulatory personnel at the state

89. WALLACE, supra note 10, at 1187-88.
90. This statement may seem a platitude but given CSR discourse, it seems necessary to make it explicit.
92. Part of the reason that the role of the state has been obscured in recent law and policy literature on corporate social responsibility issues arises from recent trends in international relations scholarship. Matters of globalization and the transformation of contemporary governance that occurs under conditions of globalization are an important strand of international political economy. See, e.g., Nicola Phillips, State Debates in International Political Economy, in GLOBALIZING INTERNATIONAL POLITICAL ECONOMY 82 (Nicola Phillips ed., 2005). One school of thought, which some refer to as "hyperglobalist," has been particularly influential. It views globalization as "an inexorable, encompassing and irreversible process of global integration which heralded the obsolescence of 'national' entities, not only states but also economies, societies, systems of regulation, modes of governance and so on." Id. at 91-92. Another school of thought centers on the importance of non-state actors in global governance. See generally Private Authority and International Affairs (A. Claire Cutler et al. eds., 1999). According to these authors, "private authority can have structuring effects that are quite comparable to those of public authority in terms of their significance for citizens more generally." Id. at 369. Both strands of the debate, while identifying some important elements in international political economy today, have discounted the role of the state too severely. For additional arguments consistent with this position, see generally WEISS, supra note 14.
level have intimate knowledge of the regulatory framework within their jurisdictions. They understand the strengths and weaknesses of domestic regulatory capacity and can assess the relative need for self-regulatory measures over traditional command-and-control regulation. From a practical perspective, the state should implement structures to facilitate the participation of the public in setting standards that concern matters of CSR.

In comparison to voluntary CSR measures, which at best offer limited coverage of firms and industries, states regulate comprehensively.\(^{94}\) An environmental law, for instance, applies to all firms of a certain size. Health and safety laws apply to all firms operating certain types of facilities. CSR measures cannot claim the same degree of coverage. Generally, they only apply to a subset of usually self-selecting firms. They may target only firms in certain industries or those that agree to participate in a given program. Their inconsistent coverage makes the rationale for the existence of CSR initiatives—states’ lack of regulatory capacity—ring hollow.

States can also provide monetary incentives and disincentives. One way they can do so directly is by manipulating fiscal policy. For example, states can tax firms that pollute excessively. Thus, fiscal policy, with its ability directly to effect corporate profits, can potentially be much more powerful than CSR, which depends on reputational damage, and any subsequent indirect effects on corporate profits, as its incentive mechanism.

C. Learning to Regulate (and Govern)

At their core, arguments promoting voluntary standards over regulation in developing countries rest on utilitarian or pragmatic justifications. Proponents reason that many states are unable to fulfill their obligations to enforce international or domestic legal norms, and thus the international community must create some alternative system to prevent inappropriate practices. Such a view focuses solely on outcome-oriented values while ignoring process-oriented ones: maintaining certain norms are only valuable insofar as their outcome (corporate regulation) is achieved. It sees no social gains to be realized in the processes (setting up state regulatory bodies, for example) that make such outcomes possible. In other words, how society comes to adhere to particular norms generates social goods distinguishable from the outcomes. Such a process is particularly important for struggling democracies and emerging market economies.

In many developing countries, state structures are weak.\(^{95}\) Resource-strapped regulators lack the ability or means to ensure that rules are fol-

\(94\). The voluntary nature of CSR measures necessarily implies that they are less comprehensive than state regulation, as they rely on the “enlightened self-interest of companies” to pursue action in support of their goals. In fact, prefaces to both the UN Global Compact and the OECD Guidelines state that they are not regulatory instruments. See From Red Tape to Road Signs 7-8 (Core Coalition 2004) available at http://www.corporate-responsibility.org (stating that application of OECD Guidelines on Multinational Enterprise, UN Global Compact, and other voluntary CSR initiatives has been patchy at best).

\(95\). Paul Ocheje, A "Rights" Approach to Governance in Africa, in Legitimate Governance in Africa: International and Domestic Legal Perspectives 168 (Edward Kofi
owed. Poor enforcement authorities, such as justice ministries, hinder vigorous litigation. Corruption distorts state functions. Despite the prevalence of these phenomena, many developing countries are attempting to improve state performance. These reforms, however, do not occur in a vacuum. To be effective, the state must take meaningful actions to address society’s concerns. Enforcing norms related to corporate social responsibility thus constitutes an important part of the development of the state along with the development of the market.

By developing their capacity to regulate economic activity and harmful corporate conduct, states gain vital knowledge. Initial enforcement actions and prosecutions of corporations may be difficult and challenging, but by engaging in the process, enforcement personnel learn two things. First, they learn that effective regulation is possible. In addition, they learn the techniques and challenges involved in holding firms accountable for their actions. These results improve comprehensive state regulatory capacity.

Successful enforcement efforts help garner public support and enhance regulatory legitimacy. In this sense, command-and-control regulatory systems, though frequently disparaged among regulatory scholars today, may, through their brightline rules and clear enforcement practices, positively influence the public’s perception of the state’s legitimacy. Moreover, strong regulatory legitimacy strengthens both the state and the market. Unless the development of state capacity occurs jointly with the development of the market, it becomes more likely that the weakness of the former will jeopardize the latter.

Alternatively, if the state shows itself to be ineffective in controlling market actors, then the state may come under attack. Angered by incompetence or lack of vigor in the executive, citizens may demand more. For regulation and, more broadly, governance to improve in many developing states, the conditions for effective redress and communication between state and citizen must be strengthened. Perpetuating the existing system of elite dominance can only hamper the development process.

Strengthening these conditions involves generating local knowledge about the preferred method to control corporations in particular jurisdictions. Different jurisdictions will experience different labor practices, different production practices, and different incentive schemes. Different tax structures may enable regulators to provide incentives or disincentives that are unique to a jurisdiction. Different corporation laws may facilitate the imposition of sanctions designed to correspond to prevailing organizational structures in a jurisdiction. Different civil and criminal procedure


96. See Report of the Secretary-General’s High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility (United Nations 2004) (recognizing that states are the front-line actors in dealing with various threats to international security, including threats to economic development).

97. See BALDWIN & CAVE, supra note 19, at 35.

98. Id.

99. OCHEJIE, supra note 95, at 171.
laws may make it more or less likely that actions can be successfully brought or defended. Different licensing regimes may give regulators tools with which to control firm behavior that are unique to a jurisdiction. Likewise, regulatory institutions learn to regulate better through improved understanding of the firms within their jurisdiction. To the extent that regulators develop a deeper knowledge of firm histories in their jurisdiction, they can better determine which regulatory techniques to apply. States—not private auditing firms, NGOs making an occasional visit to a country, or the press—are best equipped to distinguish cooperative from uncooperative firms and regulate accordingly.

The learning that occurs within regulatory and enforcement bodies is not consigned to each institution standing alone. Such bodies can share practical experience horizontally. As it becomes understood that one method of dealing with violators works better than another, knowledge can be shared across agencies. An environmental agency, for example, may share useful experience with an occupational health and safety regulator that improves practice in the latter, for example. Good knowledge dissemination practices among these bodies may improve the state of public management overall.

Nor is learning confined to regulatory institutions. The process of defining and developing a legal understanding about law and regulations designed to implement CSR norms concerning the environment, labor, or human rights domestically, enriches countries' legal systems. States implementing statutory or regulatory provisions related to CSR can tailor enactments to their legal systems generally, while responding to the views of their citizens in determining an acceptable level of rigor for such provisions. Under conditions of scarce resources, the state must ensure coordination of regulatory priorities with broader development agendas. Moreover, after enacting relevant norms, courts and administrative tribunals can develop doctrine and case law that ensure compatibility between such norms and domestic systems. Through legislative and judicial activity, domestic actors know whom to turn to if dissatisfied. National debates can develop the best methods of regulating negative labor or environmental practices. Likewise, courts can explore national positions on the distinction between nuisance and environmental harm, or tort and human rights violations. By rooting CSR provisions in domestic legal systems, countries may organically tie such provisions to their shared experiences and hopes.

The view that states must exercise regulatory power within their jurisdictions over CSR matters does not limit them to command-and-control regulation. States may choose to develop structures in which management system standards or other more flexible regulatory structures are built into existing systems. Even states that have endorsed specific non-government-

100. This effect should be presumably more dramatic among regulators that have decentralized their operations.
101. Cf. STEPHEN BREYER, REGULATION AND ITS REFORM (1982) (describing a variety of possible state-based initiatives to regulate corporations on an industry by industry basis while cautioning against excessive state regulation).
tal standards, such as ISO 14000, have retained their power to regulate. Rather than exempting ISO 14000-certified firms from all forms of environmental regulation, for instance, certified firms may qualify for less intrusive or less frequent inspections, or receive favorable treatment in enforcement and settlement proceedings. Yet, the decision whether such matters ought to be left to wholly self-regulatory initiatives must be subject to much closer scrutiny in states struggling to assert their power and establish their legitimacy.

For these reasons, the expansion of voluntary CSR regimes that sidestep state institutions creates significant problems for developing countries. Even assuming that such initiatives can deliver the social goods, they leave state institutions no better off. Indeed, to the extent that regulation of the economy comes to be seen as something that non-state actors accomplish, the priority of building regulatory capacity in already fragile African states will be underemphasized. As their markets develop, the gap between states' ability to oversee the market and actual market activity will only widen. Under these conditions, if voluntary initiatives, even the more rigorous ones, leave social conditions unimproved, the shortfall in state regulatory capacity should elicit even greater concern.

D. Beyond Economic Orthodoxy

The call for the state to take a central role in private sector regulation is only one part of the effort to overcome the most pernicious applications of economic orthodoxy. Rather than stand by as passive observers of the development process favored by neoliberals, states must develop their capacity to foster development in strategic and intelligent ways. Turning over power to control (i.e., regulate) socially harmful practices to the private sector through CSR initiatives effectively undermines the development of state capacity not only to regulate but also to expand the domestic economy and mitigate social harms.

The history of neoliberalism is a history that casts state intervention in the economy as a necessary evil to be avoided. Yet, continuing declines in economic growth rates in African states, even after neoliberal reforms, suggests that a development policy that looks exclusively to the private sector may be misdirected. As the International Monetary Fund (IMF) and World Bank are forced to reconsider the approach to structural adjustment, a new understanding of the role of the state and the need for more flexibil-

---

102. For some of the difficulties involved in state sanctioning of private standards, see Errol E. Meideiger, Environmental Certification Programs and U.S. Environmental Law: Closer than You May Think, 31 ELR 10162, 10166 (2001) (“The most obvious means of incorporating certification into law is for an authoritative legal body to require that firms operating within its jurisdiction to be certified.”).

103. See George Parker, Hungary Can Hold to Its Eurozone Course, Says New Prime Minister, FIN. TIMES, Oct. 23, 2004. In this article, the Prime Minister of Hungary is quoted as saying that “We have got 700,000 people out of 10m who don’t have enough money to eat one decent meal a day . . . you can’t tell them to take responsibility for their own welfare, that the state doesn’t have a role.” Id.
ity in economic policy is emerging.\textsuperscript{104} Heterodox economists such as Robert Wade and Joseph Stiglitz have made compelling arguments supporting a larger role for the state in economic development. From this perspective, notwithstanding the failure of certain state-led development policies such as import substitution, the state is viewed as an important catalyst for growth.\textsuperscript{105} The state is thus not merely the source of the "rules of the game," after which it must withdraw. Viewed in this context, voluntary CSR appears lost in the wilderness. At its core CSR posits a central role for non-state, voluntary approaches to regulation in relevant fields. An improved economic understanding of the role of the state, as opposed to the market, sees the need for a strong state capable of investing to promote growth, rather than a weak state buttressed by regulatory forces that operate independent of its authority. Only strong state institutions can promote economic growth and reduce negative externalities.

If it is true that the neoliberal critique of the state has supported the rise of voluntary CSR initiatives, and to the extent that development experience now suggests that this critique has been oversold, one cannot consider voluntary CSR without first rethinking the perception of the state's role. That role involves designing regulatory policy in harmony with economic and development policy. Improved state capacity is a precondition for the state playing a role in promoting economic development. In departing from neoliberalism—both in its anti-Keynesian and liberalization phases—CSR begins to appear less compelling. If a greater role for the state is accepted—particularly in developing countries—it is no longer necessary to accept the enfeebled solution of voluntarism. Instead we may look towards a revitalized state that can vigorously and justly advance development.


\textsuperscript{105} See Atul Kohli, State-Directed Development: Political Power and Industrialization in the Global Periphery (2004) ("there is a stunning lack of evidence for the proposition that less government facilitates more rapid industrialization in the developing world . . . . On the contrary, the evidence shows that state intervention aimed at boosting investor profitability is strongly associated with rapid industrialization"). Kohli's work is, to my knowledge, the latest and most nuanced analysis of the role of the state in economic development. As such, his work responds to and validates some of the central findings of Robert Wade. See generally Robert Wade, Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization (1990). Likewise, Dani Rodrik has been a vocal spokesperson for the role of the state in catalyzing economic development. See Dani Rodrik, In Search of Prosperity: Analytic Narratives on Economic Growth (Dani Rodrik ed., 2003). Particularly relevant for countering conventional economic wisdom, Rodrik finds that state involvement in the economy has not been incompatible with growth. As research on cross-national comparisons of development trajectories expands, those calling for unbending application of market liberalization measures will find less empirical footing.
IV. Examples of Alternatives: African Cases

The critique offered in the previous section proceeded on a general level. The following section sets out some specific examples of how state regulatory and enforcement authorities in African states can work to develop strong responses to societal needs. The first seeks to show the value of state anti-corruption enforcement. This case illustrates how increasing state capacity can enable states to confront socially irresponsible corporate conduct. The second concerns a more technical matter involving efforts of state regulators to coordinate their regulatory approaches and ensure equitable treatment in international negotiations. Maintaining the developmentalist view advanced in this paper, these initiatives do not suggest that ambitions have been categorically achieved but rather speak to the challenges involved in creating functioning regulatory and enforcement systems.

A. Lesotho High Water Dam Prosecutions

In 1999, the Attorney General of Lesotho charged a former chief executive of the Lesotho Highlands Water Project (LHWP) with accepting $2 million in bribes from international companies over ten years.\(^{106}\) Sponsored by the World Bank, the European Union, and the European Investment Bank, the LHWP is Africa's largest dam project in history, meant to supply South Africa with water and Lesotho with electricity. The Lesotho courts found the former official guilty of thirteen counts of bribery and fraud linked to the LHWP and sentenced him to eighteen years in prison.\(^{107}\) After his conviction, more than a dozen European and North American construction companies were also implicated in the scandal.\(^{108}\)

Among the firms was Germany's Lahmeyer International GmbH (owned by RWE). Lahmeyer was charged on twelve counts of bribery and convicted of seven.\(^{109}\) It was fined approximately $1.6 million. On appeal these counts were all sustained and the fines were increased to approximately $2 million. Similarly, Canada's Acres International was convicted of two counts of bribery but succeeded in having one count overturned on appeal. It was fined approximately $2 million for its actions. In addition to these prosecutions, the French firm, Schneider International, pled guilty and was fined $1.6 million for its involvement. Finally, an agent of an Italian member of the consortium Impreglio pled guilty to arranging to bribe the chief executive of the project. These actions represent "the first time that courts in a developing country have convicted an international company for paying bribes rather than just prosecuting a local official for taking bribes."\(^{110}\)

\(^{106}\) David Greybe, Official Faces Charges Over R12 Million Bribes, BUS. DAY (Johannesburg), July 29, 1999.


\(^{108}\) Id.

\(^{109}\) C of A (CRI) 6 of 2002 (Lesotho).

\(^{110}\) Eigen, supra note 76.
By all accounts, conducting a prosecution of this magnitude required substantial resources. The litigants were located all over the world. Tracing the proceeds of the bribes required judicial cooperation with multiple jurisdictions, including Switzerland. Other than Switzerland, most other OECD countries and the EU failed to support these prosecutions. Surprisingly, none of the project sponsors were willing to offset the costs of the prosecutions. Moreover, because the project was established as a corporation separate from the state, the Lesotho government had no recourse to any funds held by the corporation to offset its costs. While South Africa considered offsetting some of the expenses, at this time they appear not to have fulfilled the offer. The United States provided some assistance in the form of computers and Westlaw access in the law library of the Court of Appeals.

Notwithstanding these impediments, the Lesotho courts performed well. According to judges on the Courts of Appeals and High Court, the difficulty involved in coming to terms with large legal teams assembled by the firms under indictment was significant. The dedication of time and resources for a small country such as Lesotho was also considerable. Demonstrating the commitment of the government, this poor country facing an HIV/AIDS epidemic had to devote resources to this case that could have been used elsewhere. Judges from other jurisdictions and practitioners provided assistance to the judiciary and Attorney General's office. To maximize judicial resources, one judge was assigned to the cases full time. The noticeable pride of those involved in the trials was that they had launched a major prosecution on a matter of principle. In the words of a former South African judge, the Lesotho prosecuting authorities “set an example of good governance, and have delivered a blow on behalf of all countries who face major challenges in strengthening their infrastructure through project activity.” It is a victory for the rule of law that a country such as Lesotho was able to overcome international banking secrecy in just over a year and make a successful case against some of the world’s largest and most powerful contractors.

B. Forest Law Enforcement and Governance in Cameroon

The Africa Forest Law Enforcement and Governance (AFLEG) initiative is a clear instance in which the international community has enhanced

---

112. Id.
113. The World Bank subsequently blacklisted Acres International and Lahmeyer International GMBH from any business for three years.
114. Interview with Eric M. Bost, U.S. Ambassador to South Africa.
115. Interview with Mahapela Lehohla, Chief Justice of the High Court of Lesotho (Jan. 2004).
117. Indeed, the chief prosecutor was a South African attorney, Guido Pelzhorn.
regulation and enforcement instead of using voluntary CSR to address significant environmental risks. After holding a summit in Yaounde in 1999, the states in Western Congo Basin held a summit in 1999 designed to ensure that forests remained a renewable resource able to ensure biodiversity. Later, ministers from some of these countries indicated their interest in focusing on forest law enforcement and governance issues. From these beginnings, the AFLEG initiative was launched under the auspices of the New Partnership for African Development (NEPAD) "to strengthen high level commitment . . . to build capacity for forest law enforcement, in particular relating to illegal logging and hunting, associated trade, and corruption."119 Because the ministerial-level focus of AFLEG is quite general and encompasses a number of states, I will focus on the experience of one of the participating AFLEG states, Cameroon, which has taken substantial steps in protecting its forests.

Timber is the second biggest export of Cameroon. As an effort to improve the efficiency of the timber industry, increase tax compliance by logging firms, and improve the welfare of local and indigenous peoples through community involvement in forest management, Cameroon enacted the Forest Act of 1994 (the "Act").120 Cameroon initially passed the Act under the World Bank’s mandatory terms of conditionality, but the Act’s implementation required additional efforts lasting approximately five years.121 The Act’s focus on preserving forests as a source of an economically important resource combines concern for the environment with broader development priorities.122

The Ministry of Environment and Forests administers the Act through the Central Control Unit (CCU). The law initiates a decentralized program of forest management, giving local communities the right to manage up to 5,000 hectares of forest on a twenty-five-year rotation pursuant to a management plan. Communities incur expenses for filing the plans but collect royalties in the form of leases to logging companies. In addition, communities receive a portion of taxes assessed by the central government for forest activities. Private firms must obtain Forest Management Units that entitle them to log over a given area for a specified period, subject to regeneration requirements.123

The CCU monitors compliance with the Act through field inspections. In 2000, the Cameroon government, after discovering substantial evidence

120. The focus on timber as the rationale for the Act contrasts with the experience of other jurisdictions, such as Nepal and India, where forest management is concerned primarily with matters of subsistence. See David Brown & Kathrin Schreckenberg, Community Forestry: Facing up to the Challenge in Cameroon 6 (2001). See generally Global Witness, Forest Law Enforcement in Cameroon: 2nd Summary Report of the Independent Observer December 2001-June 2003 (2003).
121. See Brown & Schreckenberg, supra note 120, at 15.
123. See Global Witness, supra note 120, at 1-2.
of corruption and irregularities in the forestry sector, invited Global Witness, an international NGO, to work alongside the CCU inspectors and other Ministry departments to provide independent observation. In addition to providing independent verification, Global Witness helped strengthen capacity among the inspectorate. It publishes periodic reports detailing both compliance with the law and the practices of the inspectors, such as failure to sanction observed violations.

According to the Independent Observation reports issued by Global Witness, since the system of independent observation began, official statements issued and prosecutions for illegal logging have increased. As a result of this program of law enforcement and independent monitoring, significantly more illegal logging practices have been exposed in Cameroon than in neighboring countries. However, Global Witness has exposed cases involving both a lack of cooperation and transparency, and even corrupt practices, of the Ministry, demonstrated by the lack of scrutiny over permit violations by certain private firms. The Ministry has appeared reluctant to issue official statements regarding offenses, and there is transparency regarding fines. In addition, the standards for documenting detected infractions appear inadequate for judicial proceedings, and CCU personnel undertake the inspection missions inadequately prepared. Global Witness recommends a program of training to build capacity within the institution.

The lesson of Cameroon is that states can enhance local law enforcement through the sustained involvement of the international community, including bilateral and multilateral donors and the NGO sector. However, the Cameroon forestry initiative has not been without its critics. In particular, many doubt the success of the community-based governance approach. As the Global Witness review suggests, corruption and incompetence undermine the CCU's effectiveness. Analysis suggests that there is cause for optimism, however, and the shortcomings may be attributed to growing pains as the state comes to terms with administering the new law. To development professionals working with state administrative and legal institutions, the challenges Cameroon faces are familiar. Having already created a workable legislative framework, the Ministry must eliminate corrupt practices from its inspection function, develop enforcement capacity, prosecute cases to conclusion, and improve its oversight competence. Meeting those challenges could make Cameroon an example for the

124. Interview with Global Witness Oct. 5, 2004. According to the staff person interviewed, the government made this invitation under pressure from the UK and the World Bank.
125. GLOBAL WITNESS, supra note 120, at 3.
126. Id. at 4.
127. Id. at 9.
128. Id. at 12-13.
129. Id. at 9.
130. See id.
131. See id. at 9.
V. Conclusion

Proponents of the position that states should defer to international voluntary CSR initiatives as a way of regulating important aspects of their economies, in areas such as labor, human rights, and the environment, erroneously assume that states will not need to develop this capacity. To the contrary, globalization of production and trade is inevitable, requiring states to develop the relevant capacity quickly.

The AFLEG initiative and Cameroonian efforts to enhance traditional state regulatory and enforcement capacity, rather than advance a voluntary CSR approach targeted at MNCs, may be indicative of the international community’s desire to develop a rigorous response to the issue of forest conservation. If this conclusion is true, then it may be reasonable to conclude that the matters with which voluntary CSR programs are concerned do not enjoy the degree of political support needed to get serious about the issues. From this perspective, voluntary CSR is a short-term compromise, useful only until the international community considers it necessary to take more forceful action. Unfortunately, rather than adopt a developmentalist approach—viewing these programs as transitional efforts on the way to more rigorous domestic regulation over CSR matters—the discourse surrounding voluntary CSR employs the same optimism that characterized utopian visions in the past.

Given the predominance of market economies in today’s world, improving regulation must be a priority. Voluntary measures can only play a role if states establish basic regulatory frameworks. Contrary to assumptions of voluntary CSR proponents, state regulation of the environment, labor rights, enforcement of human rights, and anti-corruption laws cannot be delegated to international or private organizations. Empowering domestic regulators is an essential component of the struggle to realize the positive benefits of capitalist development while limiting its negative effects. As experience with the New Economy showed, we ought to be skeptical of the view that the rules of the game have shifted fundamentally, such that the old problems no longer exist. This article contends that despite the increasing dependence of firms in OECD countries on production in developing countries, the challenges of today are the same as those that regulators have faced throughout the industrialization process. Contrary to the universalistic aspirations of CSR, strengthening domestic regulatory and enforcement institutions in developing countries is messy work, involving processes of trial and error. While the coercive power monopolized by state regulatory authorities has its limitations, it also has many benefits

132. See id. at 4.
133. See generally Peter Leigh Taylor, In the Market But not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change, 33 WORLD DEV. 129 (January 2005) (emphasizing the importance of governance in connection with voluntary market reform mechanisms).
which must not be understated. It is at great peril that we cede these responsibilities to untested methods that intuition, analysis, and experience suggest are bound to fail.