

INTERNATIONAL CORPORATE LAW AND FINANCIAL MARKET REGULATION

SOL PICCIOTTO



REGULATING GLOBAL CORPORATE CAPITALISM

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REGULATING GLOBAL CORPORATE CAPITALISM

This analysis of how multilevel networked governance has superseded the liberal system of interdependent states focuses on the role of law in mediating power and shows how lawyers have shaped the main features of capitalism, especially the transnational corporation. It covers the main institutions regulating the world economy, including the World Bank, the IMF, the WTO and a myriad of other bodies. The book introduces the reader to key regulatory arenas: corporate governance; competition policy; investment protection; anti-corruption rules; corporate codes and corporate liability; international taxation, tax avoidance–evasion and the campaign to combat them; the offshore finance system; international financial regulation and its contribution to the financial crisis; trade rules and their interaction with standards, especially for food safety and environmental protection; the regulation of key services (telecommunications and finance); intellectual property; and the tensions between exclusive private rights and emergent forms of common and collective property in knowledge.

SOL PICCIOTTO is Emeritus Professor of Law at Lancaster University Law School.

INTERNATIONAL CORPORATE LAW AND FINANCIAL MARKET REGULATION

Corporate law and financial market regulation matter. The Global Financial Crisis has challenged many of the fundamental concepts underlying corporate law and financial regulation; but crisis and reform has long been a feature of these fields. A burgeoning and sophisticated scholarship now challenges and contextualizes the contested relationship between law, markets and companies, domestically and internationally. This Series informs and leads the scholarly and policy debate by publishing cutting-edge, timely and critical examinations of the most pressing and important questions in the field.

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PREFACE

I will not attempt to provide an extensive introduction to this book, but I hope the detailed outline and chapter and section headings provide the reader with a map of the topics covered. However, some explanation of the structure, format and approach may be helpful here. The book attempts to provide an account and analysis of some of the main conceptual and institutional forms which have shaped the development of international corporate capitalism over the past century and a half. The focus is on the legal, institutional and regulatory forms, although the analysis is in terms of their development as a historical social process and within a political and economic framework. I focus on law not only because it is my main field, but also because law mediates power in capitalist society. Examining actual legal rules and institutions, providing this is done in their socio-economic context and in historical perspective, enables analysis to go beyond the abstract generalizations of some versions of social and political theory, and indeed helps to contextualize and evaluate those various theories. My aim is to give sufficient detail for an adequate understanding, and at the same time to locate the various theories and viewpoints, including my own, which have tried to rationalize these developments.

Indeed, my main method has been to immerse myself in the detail, while using as a guide some initial perspectives, which have been developed, revised and refined as the work proceeded. In that sense, the methodology was one of immanent critique. Although this sounds deliberate and strategic, in practice I have been in many ways moving through a dimly lit landscape, which only gradually became more clearly illuminated. Yet, to my surprise, most of my initial intuitions have taken increasingly solid form in this process, even some ideas of which I had been doubtful, or which were only semi-formulated. Perhaps this is because, although I have long had an interest in social theory, I have also been highly sceptical about abstract theorizing. The attempt to impose one's ideas on the world is a pointless and sometimes dangerous exercise, whether conducted by

the armchair academic or the political activist, or a combination of the two.

Thus, although the book is presented as a logical sequence, its writing did not unfold in that way. The first chapter, providing a general overview of what I understand to be the main contours and dynamics of contemporary global economic governance, resulted from earlier work on the main substantive topics, and has been continually revised. The next two chapters trace the historical development of the international system, over the past two centuries in particular, including a discussion of the main ideas about internationalism and international law and the key institutions in that historical context. I hope that they will be helpful to those without a background in international law, as well as to international law and international relations students and specialists. Their aim is to go beyond generalizations about globalization and deterritorialization, and examine in more detail the shift from the system of interdependent states of classical liberalism, to the more complex and fragmented system of interacting jurisdictions described today as multilevel or networked governance.

The six succeeding and substantive chapters give an account, again in historical perspective, of the shaping of the main legal and institutional forms of corporate capitalism, and of their internationalization, and of current issues and controversies. They are written to be substantially free-standing, so that readers can decide which (if any) of the specific areas are of interest, although there are of course interrelationships, which are indicated by cross-referencing. Chapter 4 examines the large corporation, the key institution which fundamentally changed the capitalist economy and society from the market economy of the nineteenth century to the corporatist capitalism of the twentieth, and its transnationalization and further transformation into the corporate networks of post-industrial capitalism. It also deals with antitrust and competition regulation, which emerged in the USA as a populist reaction to oligopoly, but became a means to manage and legitimize it, and with the internationalization of competition regulation in the second half of the twentieth century, and its current international coordination through informal expert communities. Chapter 5 discusses the dual processes of business regulation: the facilitation of corporate transnationalization through liberalization of capital controls and protection of international investment, counterpointed by growing regulation by both home and host states and the emergence of regulatory networks. It includes discussion of the international spread of anti-corruption measures, transnational liability litigation against corporations, regional frameworks, the rapid emergence

of international investment adjudication, and also of corporate codes and the corporate social responsibility movement.

Chapter 6 deals with taxation, which both constitutes and defines the state and its separation from the private economy, especially the income tax which has been central to the legitimization of the increasingly high levels of taxation and state expenditure in the main capitalist states, while the much lower levels of tax revenues in colonial and post-colonial countries have contributed to their dependency. The bulk of the chapter examines the emergence of international coordination of business taxation and of avoidance and evasion, the important roles of tax havens and the offshore system, and the more recent attempts to reassert more effective international tax cooperation. Chapter 7 considers the key sphere of finance and especially its international liberalization, which contrary to common belief was accompanied by an enormous growth of formalized regulation, loosely coordinated internationally. However, this regulation has taken forms which have stimulated and supported financialization, including the emergence of extraordinary levels of trading in complex instruments, and increasing financial fragility and banking failures, culminating in the 2007–8 crisis. The chapter explains the main forms of regulation and its complex coordination through public–private networks, shows how they contributed to the crisis, and analyses the main proposals for regulatory reform and ideas for a more radical reorganization of finance.

Chapter 8 examines the World Trade Organization (WTO), beginning with an account of its emergence from the General Agreement on Tariffs and Trade (GATT), and then an analysis both of the WTO itself and of its role as a central node in international regulatory networks. This includes discussion of the tensions between politics and science in setting and applying technical standards for food, the interactions of trade rules with national and international environmental protection regulation, the impact of the Services agreement especially in relation to the key areas of telecommunications and finance, and the debates about the ‘right to regulate’. The last part of the chapter considers the debates about the ‘constitutionalization’ of the WTO and its relationships with human rights norms, and surveys the operation of its important system of adjudication. Chapter 9 analyses the international expansion of the private-property paradigm of intellectual property rights due largely to pressures from key industries, but also traces the emergence of alternative models of shared or common property such as ‘open source’, and forms of collective property such as ethical brands, and geographical indications.

The final chapter draws the material together and uses it to put forward my own perspectives on the role of law and lawyers in global economic governance, in the context of an evaluation and critique of some of the main viewpoints of others which I consider important. I suggest that lawyers have played a key part in creating the key institutions of corporatist capitalism, as they work at the interface of the public and private in mediating social action and conflict, and because their techniques and practices of formulating and interpreting concepts and norms which are inherently malleable and indeterminate provide the flexibility to manage these complex interactions. These techniques have also been central both to the construction of the classical liberal system of interdependent states, and its gradual fragmentation and the transition to networked regulation and global governance. Some readers may prefer to jump straight to this concluding chapter, which again supplies cross-references to relevant material in the earlier chapters.

Thus, the book is both broad and relatively detailed, even though the substantive chapters offer only an overview of what are in my view the main issues of each field, which some specialists may find insufficient. Inevitably, some topics are only briefly mentioned or not dealt with at all. Perhaps the most significant omission is the lack of a chapter on environmental regulation, especially the climate change emissions-trading regime, which raises central questions about regulation of the high-energy economy.

To make it easier for readers to follow the general argument, detailed accounts of a number of specific points and issues are given in footnotes, some of which are in consequence quite long. I hope that readers will find this helpful rather than irritating, and the presentation of these detailed 'asides' as footnotes rather than endnotes should make it easier to decide how much detail to read. For the growing number of students, researchers and others interested in international business and economic regulation and governance, I hope I have provided an overview account and analysis that is both interesting and challenging.

Parts of some of these chapters draw on previously published work of mine, which has been cited where appropriate. An earlier version of Chapter 1 was delivered as a paper at the Hart Workshop in June 2006, then at a workshop at Oñati, and was published in an edited collection of papers from that workshop as 'Regulatory Networks and Multi-Level Global Governance', in Olaf Dilling, Martin Herberg and Gerd Winter (eds.), *Responsible Business: Self-Governance and the Law in Transnational Economic Transactions* (Oxford: Hart, 2008), pp. 315–41.

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This book has had a long gestation period. I first sketched it out in the mid-1980s, but what was intended to be one chapter turned into a book of its own, *International Business Taxation* (1992). My move to Lancaster University meant new challenges and less time for research, although in the mid-1990s I benefited from a grant from the Leverhulme Foundation to conduct some research into financial market regulation, in which I was greatly assisted by Jason Haines. My teaching and research shifted towards the tensions between the rights being granted to corporations, in bilateral investment treaties and the proposed Multilateral Agreement on Investment (MAI), and the revived movement for codes of corporate social responsibility, in connection with which I benefited from working with Ruth Mayne and her colleagues in the Oxfam-GB Policy and Research department, Nick Mabey and others. I subsequently became involved with the Tax Justice Network, in which John Christensen was instrumental; and I have learned much from working as an adviser on international tax issues with him and others, notably Bruno Gurtner, Jim Henry, Richard Murphy, Nick Shaxson, Prem Sikka and David Spencer. I also ventured into the fascinating field of intellectual property rights (IPRs), and examined aspects of the considerable impact of the creation of the WTO. A kind of connecting thread between all these developments was provided by the fashionable debates about globalization, and the role in it of law and of lawyers. Then the publication of the challenging and influential book by John Braithwaite and Peter Drahos, *Global Business Regulation* (2000), showed that it was possible to write a synthesis and overview which could also deal with substantive aspects in sufficient depth.

The opportunity to make my own attempt at such a synthesis came when I was fortunate enough to be awarded a research fellowship by the Economic and Social Research Council (ESRC) for a research programme on Regulatory Networks and Global Governance (Award RES-000-27-0117) for three years from 2004. I owe a great debt especially to those

who were willing to accept that the purpose of these fellowships of 'career development' could include allowing me to try to bring up to date my knowledge and understanding of the diverse fields I had studied over the years, and try to pull them all together. I hope that the efforts I have made to bring the project to conclusion after my formal retirement will encourage them to take similar chances with other researchers. I have also been very fortunate in finding almost the perfect place in which to complete the final chapters: the Oñati International Institute for the Sociology of Law. I would like particularly to thank the staff of the Institute for their indefatigable efficiency which made it possible for me to continue writing while also acting as scientific director, and the warmth which makes being here such a pleasure.

Both the ESRC fellowship and my earlier research grants have enabled me to carry out considerable empirical research, mainly consisting of interviews with practitioners of various sorts. Without the insights these have provided, my writing would have remained at the level of vacuous speculation or dogmatic assertion, which is unfortunately all too common in both academic and popular writing. Over one hundred interviews were conducted in the 2004–8 period, and a similar number in the earlier periods of research. The interviews were conducted on a non-attributable basis; mainly for this reason I will not list here the names or positions of individuals. I am nevertheless extremely grateful to all those who gave their time and shared their experience with me.

Along the way I have benefited enormously from interaction with many others. It is probably invidious to mention individual names, since there will inevitably be some omissions, but I feel that some specific debts should be acknowledged. Probably the greatest influence on the succeeding pages has been that of David Campbell, although our discussions have included often vehement disagreements, they have equally often been conducted in the most pleasant of contexts, usually country walks or memorable meals. Equally challenging to my thinking have been my discussions, from a different perspective but with a similar Marxist heritage, with Jane Kelsey, who is perhaps unusual in combining vehement conviction with strict technical rigour. I greatly benefited from a month's stay in early 2004 at RegNet in Canberra, specifically in the Centre for Tax System Integrity directed by Valerie Braithwaite, and where John Braithwaite, Peter Drahos, Peter Grabosky and their colleagues, as well as others such as Neil Gunningham, have created an unparalleled centre of socio-legal research. A visit to Dar es Salaam and Nairobi provided an opportunity

to see again many former students, friends and colleagues, particularly Marjorie and Simon Mbilinyi, Issa Shivji and the late Haroub Othman, and meet new ones, especially Florens Luoga. Other memorable and fruitful visits have been to Wisconsin Law School, thanks to David Trubek and Heinz Klug, and the American Bar Foundation, thanks to Bryant Garth, where I began discussions with Terry Halliday about globalized business regulation which have resumed at various places and times since. Yves Dezalay and Bérénice Cleeve have provided hospitality on a more personal basis, and Yves has tolerated my sometimes sharp criticisms of his work with Bryant Garth, which has nevertheless greatly influenced me. My collaboration with Joe McCahery and Colin Scott, as well as Bill Bratton, on conferences which led to two edited books, also shaped my thinking, as have subsequent interactions with Colin in his work on regulation.

Many colleagues and friends have been generous in sharing with me some of their research material, and reading and commenting on draft chapters, notably Michael Littlewood, Ronen Palan, Greg Rawlings and Jason Sharman on international tax and the offshore system; Paddy Ireland on the corporate form and property; Peter Muchlinski, David Schneiderman and Gus van Harten on investment regulation; Imelda Maher on competition regulation; Daniel Drache, Joanne Scott, Andrew Lang and Greg Shaffer on the WTO; Julian Cockbain, Jakrit Kuanpoth, Chris May, Dwijen Rangnekar and Alan Story on IPRs.

I have been fortunate enough to have found institutional locations which have provided fruitful intellectual interactions with both colleagues and students, first in Dar es Salaam, which was very formative; then at Warwick, where I learned much from colleagues in both law and sociology, and then Lancaster, which also in its own way offered an interesting social science context. Students, especially those whom I have been lucky enough to supervise in their research, have always been a source of stimulation; and in this book I have particularly benefited from the research of Louise Davies, Marika Toumi, Attiya Waris and Yun-Jung Yi. Others have kept in touch, and some have given me a warm welcome and help with contacts on research visits, especially Christine Agimba, Yao Graham, Patricia Kameri, Chin-Tarn Lee and Terence McDonald.

Needless to say, while I have learned much from all of these, and I am sure that this book has greatly benefited from these interactions, none of them bears any responsibility for the content of this book. My greatest debt is to Catherine Hoskyns, for more years of love and companionship

than either of us cares to remember, also to our wonderful daughter Anna, to Ed who also appreciates her, and to Freddie, Alice and Lily who give us hope for the future.

Oñati, July 2010

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