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## Dialogic Labor Regulation in the Global Supply Chain

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# DIALOGIC LABOR REGULATION IN THE GLOBAL SUPPLY CHAIN

*Kevin Kolben*

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## INTRODUCTION

In May 2006, the government of Jordan was facing a crisis. A small U.S. labor-rights activist group had just released a damning report documenting extensive labor abuses in Jordan's fledgling garment industry.

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Adding fuel to the fire, the *New York Times* published a front-page story about the report with its own field work that corroborated some of the allegations, such as long and abusive working hours, the confiscation of passports of foreign workers, horrendous living conditions, and sexual harassment. Although garment manufacturing was new to Jordan, after just several years of existence it already constituted an important part of Jordan's total exports, and the country could not afford to lose the industry.

Consumers and global activists took note of the report and mobilized to put pressure on companies sourcing from Jordan. The United States government also became involved, because the U.S. market was the primary destination of Jordanian garments and had extensive economic and political ties with the country. What resulted was a two-track strategy pursued by the Jordanian government. On the one hand, Jordan committed to improve its own public institutions of labor law enforcement. On the other, it agreed to implement a novel labor assessment and advising program called Better Work Jordan (BWJ), which operates more or less independently of the Jordanian government and has the participation of many large transnational garment corporations seeking to avoid more exposés of working conditions in their Jordanian supply chains.

The emergence of private regulatory tools to address poor working conditions in global supply chains, such as BWJ, has been an important development in transnational law and global governance in recent decades.<sup>1</sup> Pressed by consumers and other stakeholders, companies have been compelled to assure customers, civil society, and governments that they are filling the regulatory gaps—or “governance deficits”—left by states that have neither the ability nor perhaps the will to enforce the labor standards compliance demanded by their stakeholders. They have done so in a number of ways, including creating internal supply chain compliance departments, outsourcing enforcement to third parties, joining

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1. The term supply chain is loosely intended here to describe “the full range of activities which are required to bring a product or service from conception, through the different phases of production (involving a combination of physical transformation and the input of various producer services), delivery to final consumers, and final disposal after use.” RAPHAEL KAPLINSKY & MIKE MORRIS, INT'L DEV. RESEARCH CTR., A HANDBOOK FOR VALUE CHAIN RESEARCH 4 (2001), available at <http://www.prism.uct.ac.za/papers/vchnov01.pdf>. This definition comes from the global value chain literature perspective, which tends to focus more on questions of power between producers and suppliers, and the nature of their relationships. See generally Gary Gereffi et al., *The Governance of Global Value Chains*, 12 REV. INT'L POL. ECON. 78, 78-104 (2005) (presenting analytical conceptions of value chain relationships). In the business literature, a well-known definition of the supply chain is “a set of three or more entities (organizations or individuals) directly involved in the upstream and downstream flows of products, services, finances, and/information from a source to a customer.” John T. Mentzer et al., *Defining Supply Chain Management*, 22 J. BUS. LOGISTICS 1, 4 (2001). For a helpful discussion of the theoretical differences between schools of supply chain/value chain analysis see GLOBAL VALUE CHAINS: LINKING LOCAL PRODUCERS FROM DEVELOPING COUNTRIES TO INTERNATIONAL MARKETS 45-47 (Meine Pieter van Dijk & Jacques Trienekens eds., 2012).

multi-stakeholder initiatives that enforce a given code of conduct<sup>2</sup> or that, like BWJ, utilize more novel methodologies. Some companies now are even formed based on a commitment to ensuring good labor standards and living wages in their supply chains.<sup>3</sup> There are also private regulatory initiatives that have no corporate involvement at all, whereby stakeholders such as universities, consumer groups, and transnational activists engage in various forms of monitoring and activism to ensure that Multinational Corporations (MNCs) that rely on global supply chains enforce labor rights compliance in their supply chains.<sup>4</sup>

But while there has been an explosion of private mechanisms of labor enforcement in global supply chains in response to governance deficits, this does not mean that public governance is irrelevant. Indeed, in Jordan, Bangladesh, and other countries in which non-state regulatory regimes are active, legislatures pass labor laws, and ministries of labor enforce them with varying degrees of competence and rigor.

This presents the central tension that this Article addresses. On the one hand, there has been a proliferation of private governance mechanisms and regimes. On the other, these regimes necessarily co-exist with extant state regimes of varying quality and effectiveness. The descriptive question is thus, how do these regimes interact in practice when they encounter each other in the field? This descriptive question is closely linked with a normative set of questions, namely, how should scholars conceptualize and design regulatory regimes that can optimally profit from the co-existence of both systems in order to create a democratic, legitimate, and effective system of labor governance in global supply chains?

This Article thus examines and proposes a conceptual framework for understanding the interaction between private and public labor regulatory regimes in global supply chains that is informed by a normative approach to transnational labor regulation grounded in democracy, development, and state capacity-building. Its approach is conceptual and empirical, normative and descriptive. Its empirical section uses the Jordanian initiative, Better Work Jordan, as a case study. BWJ is in turn a local project of the organization Better Work, which is a joint creation of the International Labor Organization (ILO) and the International Finance Corporation (IFC). Headquartered at the ILO's Geneva office, Better Work aims to improve working conditions in supplier factories in the garment industry,

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2. See generally IVANKA MAMIC, ILO, IMPLEMENTING CODES OF CONDUCT: HOW BUSINESSES MANAGE SOCIAL PERFORMANCE IN GLOBAL SUPPLY CHAINS (2004) (discussing codes of conduct and institutions of enforcement).

3. An example is Alta Gracia, an apparel company that owns its own factory in the Dominican Republic and pays what it believes is a "living wage," which is three times the local minimum wage. See ALTA GRACIA, <http://altagraciaapparel.com> (last visited Feb. 2, 2015).

4. Prominent examples of these include the Clean Clothes Campaign and the Workers Rights Consortium, both of which have criticized corporate compliance initiatives and utilized transnational campaigns to further labor rights. See CLEAN CLOTHES CAMPAIGN, <http://www.cleanclothes.org> (last visited Feb. 2, 2015); WORKERS RIGHTS CONSORTIUM, <http://www.workersrights.org> (last visited Feb. 2, 2015).

and has implemented projects in several countries.<sup>5</sup> BWJ was among the first of its country programs. The case study of BWJ draws on secondary sources as well as primary data collected in part during two country visits, one in 2010 and one in 2011.<sup>6</sup>

Part I begins the discussion by describing the rise of transnational private labor regulation (TPLR) and its relationship with state regulation. TPLR refers to the private regulation of labor standards in global supply chains, and it is a subset of the broader scholarly field of transnational regulation. As will be explained, TPLR has emerged as a response to demands by transnational activists, consumers, and other stakeholders that corporations enforce domestic and international labor governance through various non-state means.<sup>7</sup>

TPLR needs to be understood, however, in the theoretical context of governance theory, which maps the rise of non-state governance regimes and the decline of state-centric “command and control” models of regulation.<sup>8</sup> A central question posed by governance theory is how can non-state governance regimes be utilized in conjunction with state governance to achieve optimal regulatory outcomes? This question is particularly relevant in the context of transnational regulation, which endeavors to address the regulatory problems that arise when market actors engage in cross-border economic activity in the absence of strong regulatory institutions with clear jurisdiction.<sup>9</sup>

The rise of TPLR, however, raises some important theoretical and practical questions about its effectiveness, sustainability, scope, and democratic legitimacy. Given the limitations of TPLR as a comprehensive means of addressing governance deficits, it is imperative that scholars analyze the ways that TPLR interacts, and should interact, with state regulation. Indeed, as the Article discusses in Part II, a growing body of recent scholarship, focusing particularly on labor and environmental regulation, has shown that private regimes of governance interact with the state in a variety of ways,<sup>10</sup> and that there are robust regulatory interactions be-

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5. See BETTER WORK, <http://betterwork.org/jordan/> (last visited Feb. 2, 2015).

6. Each visit lasted three days and the author conducted eleven individual and group interviews with key stakeholders in Amman and in factories nearby Amman.

7. See Part I.C.

8. See Part I.A.

9. See Part I.B.

10. See, e.g., Tim Bartley, *Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards*, 12 THEORETICAL INQUIRIES L. 25, 26 (2011) (arguing that transnational labor and environmental governance are “embedded in complex political, legal, and regulatory orders.”); Anne Posthuma & Renato Bignami, “*Bridging the Gap?*” *Public and Private Regulation of Labor Standards in Apparel Value Chains in Brazil*, 18 COMPETITION & CHANGE 345, 345-64 (2014) (discussing communication between private and public regulators). For examples in the environmental literature, see Benjamin Cashore & Michael W. Stone, *Can Legality Verification Rescue Global Forest Governance? Analyzing the Potential of Public and Private Policy Intersection to Ameliorate Forest Challenges in Southeast Asia*, 18 FOREST POL’Y & ECON. 13, 13-22 (2012) (discussing efforts to promote sustainable forestry by using non-state verification of compliance with domestic law).

tween actors in the transnational sphere, as well.<sup>11</sup> The modes of these interactions can be quite complex, and this Article reviews some of the qualities and mechanics of interaction that scholars have theorized and empirically identified.<sup>12</sup>

Building on the governance and transnational regulatory interaction literature, this Article proposes a conceptual framework that is termed “dialogic regulation.”<sup>13</sup> Dialogic regulation empirically describes how private and public regimes interact on the ground, while asserting the normative value of public-private interaction, as well as the theoretical and practical importance of the state in supply chain labor governance. At its most barebones, the proposed dialogic regulatory framework focuses on two descriptive categories to describe a given observed interaction: the first takes into account the degree of institutional formality in which the interaction takes place, and the second examines the degree of subjective intentionality of the parties who are engaging in that transaction.<sup>14</sup>

After outlining the basic analytical framework, Part III applies it to BWJ. BWJ is a supply chain labor standards improvement project that has hybrid characteristics: it is a non-state regime of supply chain labor governance with corporate stakeholders, but also includes governments in its governance structure. Its basic rule-generation process and enforcement machinery, as well as its staff and operations, however, occur by and large independent of the Jordanian government, very much like a purely private regime. It is important to emphasize that the empirical elements of the case study are not intended to be comprehensive, which would require more extensive time in the field. Rather, this Article’s aim is to provide a conceptual framework, an example of how a researcher might apply it, and to flesh out the analytical categories with real life examples.

## I. TRANSNATIONAL PRIVATE LABOR REGULATION

### A. Governance and Non-State Authority

To put the rise of TPLR into theoretical context, and to identify some of its theoretical and practical weaknesses, it is necessary to briefly examine the conceptual rise of governance in regulatory and political theory.<sup>15</sup> Governance as a regulatory phenomenon and tool has attracted significant attention from scholars as well as regulators as an approach towards solving increasingly complex domestic, supranational, and global regulatory problems.<sup>16</sup> One of the defining features of governance is that

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11. See Part II.A.

12. See Part II.B.

13. See Part II.C.

14. See Part II.D.

15. See generally, OXFORD HANDBOOK OF GOVERNANCE (David Levi-Faur ed., 2012) (providing a comprehensive overview of the field by a number of governance scholars).

16. The literature discussing the rise of governance and the decline of state law is extensive. For examples, see *id.* at 3; Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State*, in THE POLITICS OF REGULATION: INSTITUTIONS AND REGULA-

it complicates and reimagines the relationship between the state, regulated parties, and various stakeholders, often “blurring . . . [the] boundaries and responsibilities for tackling social and economic issues.”<sup>17</sup> It focuses on the interactions and relations between public and private regulatory regimes in a number of regulatory domains,<sup>18</sup> and conceptualizes law as an instrumental and pragmatic means of achieving desirable or, in some conceptions, “optimal” regulatory outcomes.<sup>19</sup>

The varieties and taxonomies of governance are numerous, and they include democratic experimentalism, often referred to as new governance;<sup>20</sup> its correlate, transnational new governance;<sup>21</sup> responsive regulation;<sup>22</sup> co-regulation;<sup>23</sup> and reflexive regulation,<sup>24</sup> to name but a few. The regulatory fields that it treats are also varied. In addition to labor law,<sup>25</sup>

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TORY REFORMS FOR THE AGE OF GOVERNANCE 145, 145-74 (Jacint Jordana & David Levi-Faur eds., 2004); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 342-470 (2004); but see Kevin Kolben, *Transnational Labor Regulation and the Limits of Governance*, 12 THEORETICAL INQUIRIES IN L. 403, 404 (2011) (questioning the applicability of some governance theory to transnational labor law).

17. Gerry Stoker, *Governance as Theory: Five Propositions*, 50 INT’L SOC. SCI. J. 17, 18, 21-2 (1998).

18. See Julia Black, *Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World*, 54 CURRENT LEGAL PROBS. 103, 109 (2001) (noting the complexity of interactions between social actors and government); Burkard Eberlein et al., *Transnational Business Governance Interactions: Conceptualization and Framework for Analysis*, 8 REG. & GOVERNANCE 1, 3-4 (2014) (describing the interactions between non-state governance schemes and the state); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 592-664 (2000) (reviewing various areas of private/interaction in U.S. administrative law); Bettina Lange, *Regulatory Spaces and Interactions: An Introduction*, 12 SOC. & LEGAL STUD. 411, 413 (2003) (emphasizing regulation as the interaction between state and economic actors).

19. For a discussion contrasting optimality in minimalist and experimentalist approaches to regulation, see Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 53-93 (2011).

20. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 267-473 (1998); Michael Wilkinson, *Three Conceptions of Law: Towards a Jurisprudence of Democratic Experimentalism*, 2010 WIS. L. REV. 673, 677 (2010) (centering new governance scholarship in the work of Charles F. Sabel and others on democratic experimentalism).

21. Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANS’N’L L. 501 (2009) (applying new governance theory to transnational regulatory problems).

22. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 4 (1992) (arguing that responsive regulation seeks an ideal interplay between public and private regulation to achieve optimal policy solutions).

23. CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* (2010) (examining new forms of workplace self-regulation).

24. RALF ROGOWSKI, *REFLEXIVE LABOR LAW IN THE WORLD SOCIETY* (2013) (arguing for a reflexive approach to workplace regulation in which the law’s function is to regulate self-regulation).

25. *Id.*; ESTLUND, *supra* note 23.

these domains include employment law,<sup>26</sup> environmental regulation,<sup>27</sup> occupational safety and health,<sup>28</sup> and food safety,<sup>29</sup> among others.

While governance-based regulatory theories are normatively and descriptively heterogeneous, there are several common characteristics that tend to emerge with varying degrees of emphasis. Governance recognizes, for example, that governing and rule-making are no longer the sole domains of states, whether acting alone or in a network, but rather of a broad range of actors. In particular, governance observes that there has been a significant rise in private authority in international as well as domestic regulatory processes.<sup>30</sup> While some might be concerned about questions of legitimacy in regimes of private authority, governance theorists have often claimed that de-centered regulation and non-state actors can meet the criteria required for democratic legitimacy.<sup>31</sup>

Governance scholarship recognizes the complexity of modern day regulatory problems, as well as the limits of state-centered capability to sufficiently address these problems. One of the defining features of governance theory, therefore, is that it seeks to complicate and re-imagine the relationship between the state, the regulated, and various stakeholders. Instead of conceptualizing regulation and, for that matter, law, to be the sole domain of *government*, governance scholarship recognizes a much broader field of regulatory activity that effectively and *legitimately* functions to reg-

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26. See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 458-568 (2001) (applying pragmatic problem-solving approaches to employment discrimination cases). In the context of American workplace law, labor law refers to the regulation of relationships between unions and employers and the concerted activity of employees, whereas employment law governs various topics that concern individual employment relationships.

27. See, e.g., Benjamin Cashore, et al., *Can Non-State Governance "Ratchet Up" Global Environmental Standards? Lessons from the Forest Sector*, 16 REV. EUR. CMTY. & INT'L ENVTL. L. 158, 158-72 (2007) (discussing governance approaches to environmental regulation).

28. See, e.g., Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 343-47 (2005) (applying governance theory to health and safety regulation). But see Eric Tucker, *Old Lessons for New Governance: Safety or Profit and the New Conventional Wisdom*, in SAFETY OR PROFIT?: INTERNATIONAL STUDIES IN GOVERNANCE, CHANGE AND THE WORK ENVIRONMENT 71, 71-95 (Theo Nichols & David Walters eds., 2013) (critiquing governance approaches to health and safety issues).

29. See, e.g., Spencer Henson & John Humphrey, *Understanding the Complexities of Private Standards in Global Agri-Food Chains as They Impact Developing Countries*, 46 J. DEV. STUD. 1628, 1628-46 (2010) (contextualizing the role and development of voluntary private standards in global agri-food chains).

30. See THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE 4 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002).

31. See Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 REG. & GOVERNANCE 137, 149 (2008) (locating legitimacy in the discursive acts of rendering account and of accountability relationships between regulators and "legitimacy communities"); Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?*, 8 CHI. J. INT'L L. 513, 523 (2008) (arguing many of the traditional elements of democratic legitimacy are present in non-state supragovernmental regimes).

ulate human activity. This can take place at the level of the family, the community, private organizations, or of course, the state.<sup>32</sup>

Governance regulatory approaches emphasize decreased reliance on “command and control” regulatory tools in favor of decentered and society-based problem solving and “pushing down” regulatory responsibility and authority to subsidiary bodies and to civil society.<sup>33</sup> Deliberation among regulated and regulator is favored over dictates from above. Transparency and the use of indicators to measure performance<sup>34</sup> and mutual learning and benchmarking are used to indicate best practices.<sup>35</sup> The regulatory responsibilities of participants range from designing enforcement tools<sup>36</sup> to developing creative and efficient means of meeting broad regulatory goals<sup>37</sup> to setting or amending those goals through an iterative process of feedback.<sup>38</sup>

Although a critique of the state is deeply rooted in many strains of governance theory,<sup>39</sup> the state in this regulatory vision does not simply disappear, but rather changes its function from its traditional privileged role. Instead of acting as a centralized command and control body, whereby the state formulates goals and issues rules and directives as to how to achieve them, in governance theory the state serves other facilitative functions. These include, for example, being an identifier of problems and broad based goals,<sup>40</sup> a punisher of last resort,<sup>41</sup> and a negotiator with the regulated.<sup>42</sup> The state encourages cooperative rather than conflict-oriented approaches to problem solving, and seeks to engage and interact with non-state actors to develop methods of regulation that are effective and responsive to issues that call for a regulatory response. In the conception of two noted scholars, the state is an “orchestrator . . . empowering a network of public, private-sector, and civil society actors and institutions,

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32. See James N. Rosenau, *Governance in the Twenty-First Century*, 1 GLOBAL GOVERNANCE: A REVIEW OF MULTILATERALISM & INT'L ORGS. 13, 13-14 (1995).

33. See Charles F. Sabel & Jonathan J. Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L. J. 271, 273 (2008).

34. Kevin E. Davis et al., *Indicators as a Technology Of Global Governance*, 46 LAW & SOC'Y REV. 71 (2012) (analyzing various ways that indicators can impact the processes and effects of global governance).

35. See Sabel & Zeitlin, *supra* note 33, at 273-74.

36. See Sabel & Simon, *supra* note 19, at 89 (discussing community policing methods).

37. *Id.* at 79.

38. See Dorf & Sabel, *supra* note 20, at 316-17.

39. For an analytical comparison of Charles Sabel's version of experimentalism and Friedrich Hayek's, see Amy J. Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 WIS. L. REV. 357, 358 (2010).

40. See Dorf & Sabel, *supra* note 20, at 288.

41. See AYRES & BRAITHWAITE, *supra* note 22, at 38-39 (describing an enforcement pyramid that emphasizes self-regulation under threat of potential state sanction).

42. See Freeman, *supra* note 18, at 548 (arguing that administrative law scholarship should focus on the set of negotiated relationships between private actors and the state).

all of which are encouraged to engage in various ‘regulatory’ (including self-regulatory) activities.”<sup>43</sup>

At the same time, governance theory is wary of over intrusion or of misalignment of the state, of bureaucracy, and of law itself in the regulation of social and economic life. For example, state-centric law-making can be problematic because, as Gunther Teubner argues from a systems theory framework, if law and society are insufficiently “structurally coupled,” there is a resulting crisis.<sup>44</sup> This is because the legal interventions will be “irrelevant or produce disintegrating effects on the social area of life or else disintegrating effects on regulatory law itself.”<sup>45</sup>

A democratic ideal grounded in deliberation and discourse is central to many governance regulatory theories.<sup>46</sup> The ideal is that the regulated and the regulator(s) interact. That is, they will engage in dialogic, deliberative processes that will help all parties shape regulatory goals and regulatory methods. Julia Black describes this process as “regulatory conversations,” by which she means “the communications that occur between regulators, regulated and others involved in the regulatory process concerning the operation of that regulatory system.”<sup>47</sup> In some visions, the relationship between the regulator and the regulated is more collaborative than adversarial,<sup>48</sup> and the boundaries between private and public for some scholars can become somewhat blurred or even disappear.<sup>49</sup>

In this idealized conception, individuals and communities of people in society are empowered to think about, discuss, and identify problems, and also develop regulatory solutions to address them in coordination and dialogue with public regulators. Rather than identifying problems and designing solutions from the top down, i.e. a state and regulators that are too detached, too removed, and perhaps cognitively unable to fully identify

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43. Abbott & Snidal, *supra* note 21, at 521.

44. Gunther Teubner, *After Legal Instrumentalism? Strategic Models of Post-Regulatory Law*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 299, 310-11 (Gunther Teubner ed., 1988). Structural coupling is a systems theory notion that argues that law can only be effective and relevant in affecting other social systems such as the political system or the economic system if it is structurally coupled to other systems. That is, it is able to “irritate” the other system so that the other system can continue to autonomously function and “co-evolve” using its own language code. See Rogowski, *supra* note 24, at 14-15.

45. Gunther Teubner, *Juridification--Concepts, Aspects, Limits, Solutions*, in *JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW* 3, 21 (Gunther Teubner ed., 1987).

46. See John J. Braithwaite, *Responsive Regulation and Developing Economies*, 34 *WORLD DEV.* 884, 884-85 (2006).

47. Julia Black, *Regulatory Conversations*, 29 *J.L. & Soc’y* 163, 170-71 (2002).

48. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. REV.* 1, 22 (1997) (outlining a normative theory of collaborative administrative rule-making).

49. See Freeman, *supra* note 18, at 564-65 (arguing for the interdependence of the public and private realms); Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 *IND. J. GLOBAL LEGAL STUD.* 447, 452 (2007) (arguing that the dichotomy between private and state law is a false one).

and resolve regulatory dilemmas, solutions instead come from bottom-up, that is to say from within society itself.

Not surprisingly, much of the governance and regulatory literature has focused on developed countries with well-functioning administrative regimes that have emerged in step with the growth of their economies and the increasingly complex regulatory challenges that arise from economic growth. But in developing and emerging economies, public institutions are often less developed and less effective than those found in more advanced ones. The problem therefore is not one of an overbearing and unresponsive administrative state, but rather one of inadequate and ineffective institutions that lack the capacity to engage in effective administrative enforcement.<sup>50</sup>

### B. *Transnational Regulation as a Response to Governance Deficits*

For its proponents, governance theory's positive and normative de-emphasis on state-centric regulatory solutions lends itself particularly well to solving transnational regulatory problems, where states and international institutions are not able to optimally regulate a particular economic activity.<sup>51</sup> In the regulatory literature, "transnational" is used to signify something different and more specific about the new ways that regulation operates.<sup>52</sup> Transnational regulation takes place across borders, and can refer to public rulemaking and enforcement mechanisms such as treaties, or to cooperative, networked administrative rule making between states and government officials.<sup>53</sup> But transnational regulation, as governance scholars like to emphasize, can also operate privately, outside of but also sometimes in collaboration with public actors.<sup>54</sup>

The new transnational regulatory space is thus constituted by complex institutional configurations and networks that are comprised of international governmental organizations, domestic and international NGOs, private corporations, and domestic states. As Abbott and Snidal point out in their analysis of transnational regulatory standard-setting institutions, a transnational regulatory organization can be dominated by states, by civil society, or by corporate firms in their governance structure, or in fact be governed by any combination of the three to differing degrees.<sup>55</sup> Environmental regulation, food safety, and banking standards are but a few examples of multi-jurisdictional problems that domestic and international state-based regulation cannot solve alone and that require transnational private

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50. See Kolben, *Transnational Labor Regulation*, *supra* note 16, at 427-28.

51. See Abbott & Snidal, *supra* note 21, at 509.

52. See Marie-Laure Djelic & Kerstin Sahlin-Andersson, *Introduction: A World of Governance: The Rise of Transnational Regulation*, in *TRANSNATIONAL GOVERNANCE: INSTITUTIONAL DYNAMICS OF REGULATION* 1, 3-4 (Marie-Laure Djelic & Kerstin Sahlin-Andersson eds., 2006).

53. See Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 *MICH. J. INT'L L.* 1041, 1042-43 (2003).

54. See Eberlein et al., *supra* note 18, at 3.

55. See Abbott & Snidal, *supra* note 21, at 512-19.

rule making and enforcement. The need for transnational regulatory solutions is particularly acute for the protection of labor rights and standards in global supply chains, where there are arguably significant domestic and international governance deficits.

A governance deficit exists when international and domestic regulatory supply is insufficient to meet the regulatory demands of a modern, global market.<sup>56</sup> The result is, according to Gereffi and Mayer, a “mismatch between the global economy and the institutions of market governance.”<sup>57</sup> In response to this mismatch, there have been efforts by various actors to address the resultant governance deficits by a) thickening international governance institutions, b) creating private regimes of labor governance administered by multinationals and civil society, and c) improving developing country regulatory capacity.<sup>58</sup> These deficits are particularly salient in issue areas where consumers and global civil society are highly attentive, such as the environment, human rights, and labor.

In the case of labor standards in global supply chains—the focus of this Article—a deficit between demand and supply arises when consumers, the state, and global civil society demand labor regulations that are higher, different, or better enforced than the state where the supplier is located is either willing or able to supply. Indeed, weak institutions of domestic labor governance are particularly endemic to developing countries, where domestic labor regulatory institutions are too weak to adequately address regulatory problems that often involve multinational corporations whose revenues are greater than the GDPs of the countries in which they do business.

There are complex reasons as to why developing regulatory states are unable or unwilling to satisfy the regulatory demands either of the global community, or often their own citizens. These include a lack of funding for enforcement bodies, political corruption, a lack of skills, and lack of will to regulate for fear of losing a competitive advantage in price-sensitive manufacturing sectors that are low on the value chain, such as apparel.

Given that labor regulation is traditionally a matter of domestic jurisdiction, weak capacity in producing countries is a particular problem, and one that is not easily remedied by turning to international institutions to fill the regulatory void. Consequently, one of the most significant developments in global labor governance has been the rise of private, non-state, and transnational regulatory tools that operate in countries where there exists a gap between regulatory demand and regulatory supply – the topic to which we now turn.<sup>59</sup>

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56. See GARY GEREFFI & FREDERICK MAYER, *Globalization and the Demand for Governance in THE NEW OFFSHORING OF JOBS AND GLOBAL DEVELOPMENT* 39, 45-49 (2006).

57. *Id.* at 47.

58. *Id.* at 49.

59. See generally *Making Global Corporate Self-Regulation Effective in Developing Countries*, 34 *WORLD DEV. (SPECIAL ISSUE)* 868, 868-932 (2006) (containing various articles

### C. *The Rise of Transnational Private Labor Regulation*

In response to frequent exposés of abhorrent working conditions in global supply chains and existing governance deficits in domestic legal regimes, there has been a rapid growth in transnational non-state mechanisms of labor governance. The broad outlines of the factors leading to the proliferation of TPLR are by now well-documented.<sup>60</sup> A key moment occurred in the mid-1990s in the garment and apparel sector when workers' rights activists exposed egregious working conditions in both domestic and foreign factories, mobilizing a range of civil society actors and putting immense pressure on corporations such as NIKE and Walmart to take action to regulate their supply chains.<sup>61</sup> As a result, a large number of non-state forms of TPLR have emerged to govern labor practices in global supply chains when domestic governments and international institutions are unable or unwilling to adequately do so.<sup>62</sup>

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exploring how corporate self-regulation can help address governance deficits in developing countries).

60. For analyses, see e.g., Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 AM. J. SOC. 297, 297-351 (2007); JILL ESBENSHADE, *MONITORING SWEATSHOPS: WORKERS, CONSUMERS, AND THE GLOBAL APPAREL INDUSTRY* (2004); VIRGINIA HAUFLE, *A PUBLIC ROLE FOR THE PRIVATE SECTOR: INDUSTRY SELF-REGULATION IN A GLOBAL ECONOMY* (2001). As Haufler and others noted, private regulation of transnational business conduct is not new. In the 16th century, for example, merchants developed the *Lex Mercatoria* as a means of self-regulating when there was no state that could adequately do so. Over time, many of the rules of the *Lex Mercatoria* have been codified into public law systems. HAUFLE, *supra* note 60 at 15. For a more theoretical discussion of the *Lex Mercatoria* and its interdependence with state law, see Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEG. STUD. 447, 447-68 (2007).

61. Bartley, *supra* note 60, at 325-36. In 1993 activists began to expose poor working conditions in Nike's contractor factories in Indonesia. In what Stolle and Micheletti have termed, the "year of the sweatshop," activists focused on poor working conditions in a number of contexts during 1995-1996. For example, indentured Thai workers were discovered in a California apartment building manufacturing clothing for major garment brands, Kathie Lee Gifford's clothing line for Walmart came under scrutiny for supplier conditions in Honduras, and the pressure on Nike's reputations caused it to engage proactively with labor conditions in its supply chain. DIETLIND STOLLE & MICHELE MICHELETTI, *POLITICAL CONSUMERISM: GLOBAL RESPONSIBILITY IN ACTION* 194 (2013).

62. There are numerous multi-stakeholder and private initiatives that have developed. See e.g., FAIR LABOR ASSOCIATION, <http://fairlabor.org> (last visited Feb. 2, 2015); SOCIAL ACCOUNTABILITY INTERNATIONAL, <http://sa-intl.org> (last visited Feb. 2, 2015); THE WORKERS RIGHTS CONSORTIUM, <http://workersrights.org> (last visited Feb. 2, 2015). It is important to recall and emphasize, however, that private regimes are not only corporate-led. Various multi-stakeholder initiatives (MSI) have been developed that also engage in supply chain monitoring, inspections, and regulation. These MSIs have numerous governance structures that include several combinations of corporate actors, governments, global unions, consumers groups, and other civil society groups. The governance structures, of course, affect the particular emphasis of a particular MSI and its regulatory regime. For example, the Fair Labor Association does not include unions in its governance structure and has been criticized for being a corporate-dominated organization that does not hold corporations' feet to the fire. On the other hand, the International Labor Rights Forum is an MSI that is dominated by universities; labor-friendly, independent members; and the activist group, University Stu-

Indeed, it has become almost *de rigueur* that any company that sources its products from contracted manufacturers maintain and enforce a supplier code of conduct to which its suppliers are held accountable, or participate in a multi-stakeholder initiative that consolidates efforts to ensure that the company's suppliers are enforcing domestic labor laws and complying with the applicable code of conduct.<sup>63</sup> Even small and medium-sized entities find themselves compelled to comply with the new expectation that corporations police their supply chains, despite the difficulty and cost for smaller entities to do so.<sup>64</sup>

#### D. *The Limits of Transnational Private Labor Regulation*

Private regulation has thus been increasingly utilized to enforce labor law and labor rights in supply chains. For its advocates, TPLR not only has the potential to address deficits of labor regulation in global supply chains, but can uniquely channel the power of stakeholders such as MNCs that are downstream in the supply chain and that have the economic power to influence their upstream suppliers.

But TPLR is no panacea, and scholars have shown that it suffers from significant weaknesses both in theory and in practice. First, the *effectiveness* of private regulation has been called into question. Richard Locke has argued that what he terms "the compliance model," whereby consumer pressure is focused on downstream buyers who in turn audit their factories based on a code of conduct and punish wrongdoing, has not lived up to its promise of broadly improving labor standards throughout the global supply chain.<sup>65</sup> In a multi-year, multi-country research project, Locke and his team found that despite efforts to improve labor compliance in their supply chains, the efforts of downstream buyers to regulate their supply chains have often failed to improve labor standards.<sup>66</sup>

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dents Against Sweatshops. It has no corporate representation on its board and has been criticized for being overly critical of corporations.

63. See MAMIC, *supra* note 2, at 26-28 (arguing supply chain governance is a central function of the organization); HAUFLE, *supra* note 60, at 12-19 (describing the growth of corporate self-regulation and the forms it has taken).

64. Jette Steen Knudsen, *The Growth of Private Regulation of Labor Standards in Global Supply Chains: Mission Impossible for Western Small- and Medium-Sized Firms?* 117 J. BUS. ETHICS 387, 395 (2013) (arguing that the shift of costs of corporate social responsibility from buyers to suppliers threatens to undermine supply chain compliance).

65. See RICHARD M. LOCKE, *THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY* 31 (2013).

66. Locke did find, however, that in certain conditions private regulatory regimes work better. First, the degree to which collaborative and cooperative relationships exist between the buyer and the producer are important. The more collaborative and engaged private inspectors were with supplier factory managers, even at the level of playing golf with them, the better the performance of factories in labor standards compliance. Locke, *supra* note 66, at 123. In particular, Locke describes dramatically different labor conditions in a study of two factories in Mexico producing for Nike. *Id.* at 107. In the factory with better labor conditions (higher wages and no forced overtime) there were more collaborative relationships with Nike inspectors, more worker participation including by its union in management decisions, and more flexible work organization. *Id.* at 105-25. Long term, strategic

But Locke did find, however, that certain external factors affect labor standards in the supply chain and the efficacy of private regulatory programs. Notably, he found that public legal and regulatory institutions matter. As Locke points out, labor standards are, not surprisingly, higher in factories where the state is effectively enforcing the labor code.<sup>67</sup> In other words, the stronger the public institutions, the better the performance of supplier factories.

A second limitation of private regulation is its *sustainability*. Private regulatory regimes are primarily driven by the desire, or perceived desire, of consumers and other stakeholders, such as transnational activist networks (TANs), to ensure that working conditions in global supply chains meet their expectations.<sup>68</sup> But this is a relatively weak driver for regulation in comparison to a public regulatory regime in a well-functioning and responsive democratic state. There, the primary drivers of labor regulation are: 1) ensuring that workers do not mobilize to vote out the current regime if their demands are not met and 2) the fear of economic and political instability through industrial action. Global consumers and TANs, on the other hand, might be mobilized around a set of issues at a given moment, but their attentions can quickly turn elsewhere, and thereby decrease pressure on corporations and other non-state actors to regulate the supply chain.

Third, and related to the first two claims, private regulation, and particularly regimes that are designed and run by corporations, are *limited in scope*. Private regulatory regimes tend to be better at, and more focused on, improving technical standards such as health and safety and ensuring that wages are paid properly. But they are not very good at, and generally less committed to, protecting and fostering freedom of association and collective bargaining rights, antidiscrimination, or what might be generally termed “process rights.”<sup>69</sup>

This conclusion is not surprising. Private regimes that are corporate run or “managerialist,” according to the moniker of one scholar,<sup>70</sup> will reflect the ideologies and interests of the entities that control them. Union and workers’ rights tend not to be prioritized in U.S. corporate culture. But it is not only corporations that de-emphasize freedom of association.

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relationships and frequent interactions, Locke argues, promotes significant advances in labor standards. *Id.* at 124-25. Second, in factories where there was a strong union presence labor standards were better. *Id.* at 96-97.

67. *See id.* at 172-73.

68. *See* GAY W. SEIDMAN, *BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS, AND TRANSNATIONAL ACTIVISM* 143 (2007).

69. Stephanie Barrientos & Sally Smith, *Do Workers Benefit from Ethical Trade? Assessing Codes of Labor Practice in Global Production Systems*, 28 *THIRD WORLD Q.* 713, 717 (2007); *see* Matthew Amengual, *Complementary Labor Regulation: The Uncoordinated Combination of State and Private Regulators in the Dominican Republic* 38 *WORLD DEV.* 405, 408 (2010).

70. Mark Barenberg, *Toward a Democratic Model of Labor Monitoring?*, in *REGULATING LABOR IN THE WAKE OF GLOBALIZATION: NEW CHALLENGES, NEW INSTITUTIONS* 37, 38 (Brian Bercusson & Cynthia Estlund eds., 2008).

Arguably, associational rights are also not as prioritized by global consumers as, say, child labor or egregious health and safety violations.<sup>71</sup> Some private regimes that have more involvement from civil society and trade unions, international and/or domestic, on the other hand, tend to be more focused on workplace democracy through freedom of association rights,<sup>72</sup> as well as democracy building at the national and political levels.<sup>73</sup>

Finally, TPLR arguably suffers from a deficit of *democratic legitimacy*, probably more so even than private regimes in other domains such as environmental regulation.<sup>74</sup> Public regimes are grounded in and bounded by legal authority that, in principle, is accountable to the public. Private regulatory regimes, on the other hand, are primarily responsive and accountable to their own stakeholders, which in the case of TPLR do not necessarily include the workers or factories that are subject to that regulation.<sup>75</sup> An additional democratic deficit inherent in TPLR is that the source of norms and the power to enforce them reside in private actors who are based outside of the legal jurisdiction of the “regulated” actors. What results are regimes of norm enforcement that are not necessarily responsive or accountable to the needs and wishes of the regulated parties, particularly workers.<sup>76</sup>

The inherent weakness of TPLR described above means that it is important for scholars to (re)focus attention on the state and its role in governing global supply chains. While TPLR has stepped into the gap left by

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71. See Seidman, *supra* note 68, at 34 (suggesting that transnational labor activists tend to emphasize worker victimization rather than creating vehicles for negotiation and bargaining).

72. See Barenberg, *supra* note 70, at 45 (describing the work of the Workers Rights Consortium); Barrientos & Smith, *supra* note 70, at 725-26.

73. Seidman, *supra* note 68, at 103-04 (describing the work of Guatemala’s Commission for the Verification of Codes of Conduct (COVERCO)).

74. Cf. Meidinger, *supra* note 31 at 513-14 (arguing that many supragovernmental environmental and labor certification organizations—that is, transnational non-state organizations—have evolved to satisfy democratic criteria).

75. Black, *supra* note 31, at 143 (explaining that “transnational, non-state regulators . . . pose the difficulty that the usual panoply of constitutional mechanisms of accountability which characterize liberal democratic constitutional systems is not necessarily available.”).

76. Scholars of governance in law and other fields have tried to address the legitimacy deficit by moving away from political accounts towards sociological ones. *Id.* at 144. The test for legitimacy becomes not whether the institution meets some transcendental institutional ideal, but rather on whether the regulated actor *believes* or *perceives* the regulatory power of the regulator to be legitimate. “Legitimacy thus lies as much in the values, interests and expectations, and cognitive frames of those who are perceiving or accepting the regime as they do in the regime itself.” *Id.* at 145; see also James N. Rosenau, *Governance, Order, and Change in World Politics*, in *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS* 1, 4 (James N. Rosenau & Ernst Otto Czempiel eds., 1992) (“Governance is thus a system of rule that is as dependent on inter-subjective meanings as on formally sanctioned constitutions and charters.”). But if our perspective is that of the workers in global supply chains, supply chain regulatory regimes will arguably still lack political legitimacy, for few workers would even know how if at all their workplace is being governed by private regimes.

various governance deficits, it would be a strategic and conceptual mistake to ignore or give up on the ability of states, especially ones that are currently weak or politically unwilling to enforce domestic and international labor law.<sup>77</sup> TPLR must be evaluated, therefore, not only on its ability to generate synchronic improvement in labor standards, but rather on its ability to be part of a sustainable and comprehensive approach to supply chain labor governance that necessarily takes the state into account, and that ideally helps develop the capacity of states to regulate labor markets and labor standards in their jurisdictions.<sup>78</sup>

The normative framework proposed here posits that private regimes may be helpful and even necessary mechanisms to address labor governance deficits in global supply chains. But these mechanisms should ideally be utilized in ways that can enhance state capacity through implicit and explicit interaction and dialogic engagement.<sup>79</sup> How to accomplish this, however, is a challenging question. The next Part delves more deeply into the concept of interaction, and proposes a framework for researchers who seek to understand how private and public regimes interact and engage in various forms of dialogic activity.

## II. REGULATORY INTERACTIONS

This Article has thus far examined the rise of TPLR and described its limitations. Against the backdrop of governance-based regulatory theory, it has argued that as a response to governance deficits and institutional constraints, TPLR, without the involvement of the state, is not up to the task of single-handedly realizing the goals of labor regulation or bridging the governance deficit, particularly in developing countries. Consequently, the need for a well-functioning public labor law regime is still desirable. But transnational labor regulation is not an either/or, state/non-state proposition. Indeed, there are opportunities to strategically utilize private and public regulatory regimes to dialogically and complementarily work together towards the same ends.

TPLR does not function in a regulatory vacuum in any jurisdiction or supply chain in which it is present. The market and market actors in the transnational sphere are regulated by a diverse set of actors: public and private, domestic and international.<sup>80</sup> Indeed, some scholars have noted

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77. See Seidman, *supra* note 68, at 143-44 (arguing to re-prioritize the state, democratic institutions, and worker citizenship in transnational labor governance).

78. In other work I have termed this normatively modeled relationship between public and private regulatory regimes an “integrative approach.” See Kolben, *Transnational Labor Regulation*, *supra* note 16, at 433. For my attempt to apply this approach to trade regulation see Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT’L L.J. 203, 203-56 (2007).

79. Kolben, *Transnational Labor Regulation*, *supra* note 16, at 405.

80. See Eberlein et al., *supra* note 18, at 3 (“[Transnational Business Governance] schemes involve heterogeneous actors—from individuals to organizations, technical experts to political entrepreneurs, NGOs to business firms to government agencies. Pursuing diverse interests, values, and beliefs, these actors establish institutions that take highly varied forms, and take on virtually all of the tasks that constitute regulatory governance.”).

that claims of a regulatory void and a governance deficit are perhaps overstated. In fact, private regimes are often shaped through interaction with public regimes,<sup>81</sup> and private regimes and regulatory mechanisms can theoretically also shape public law, turning soft law into hard.<sup>82</sup> Even in the weakest of states, private rule regimes necessarily engage with public law and are shaped by political conflicts and power relationships.<sup>83</sup>

But a major gap exists in the regulatory literature in describing how public and private regulatory regimes interact with each other in the transnational sphere, not only theoretically but also empirically.<sup>84</sup> If the objective is to understand and strategically facilitate dialogic interaction between private and public regimes that will build effective and democratically-accountable networks of enforcement institutions, and that will realize the goals of labor regulation, then what is needed is a better understanding of the interactive regulatory dynamics that do or might exist. Such an understanding will in turn help guide policymakers and scholars in the design of effective transnational labor regulatory regimes.

#### A. Transnational Interaction

Regulatory scholars have begun to investigate transnational regulatory interactions across a number of issues areas. Eberlein et al., for example, have made the most ambitious attempt thus far at conceptually mapping transnational business governance interactions (TBGI) between transnational actors across disciplines and “empirical domains.”<sup>85</sup> The authors define transnational business governance as “systematic efforts to regulate business conduct that involve a significant degree of non-state authority in the performance of regulatory functions across national borders.”<sup>86</sup> Consistent with other scholars’ notions of transnational regulation, the authors broadly conceive of transnational regulatory regimes to consist of “individuals . . . organizations, technical experts . . . political entrepreneurs, NGOS . . . business firms . . . [and] government agencies.”<sup>87</sup> These regimes interact both with one another, and with

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81. Bartley, *supra* note 10, at 42.

82. See John J. Kirton & Michael J. Trebilcock, *Introduction: Hard Choices and Soft Law in Sustainable Global Governance*, in *HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT, AND SOCIAL GOVERNANCE* 12 (John J. Kirton & Michael J. Trebilcock eds., 2004) (discussing the hardening of soft law); see also DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* (1997) (discussing how firms might be attracted to countries with more stringent levels of health, safety, and environmental regulations); Cashore et al., *supra* note 27, at 158-72 (applying Vogel’s theory to environmental regulation).

83. Bartley, *supra* note 10, at 26.

84. *Id.* at 524 (“Though scholars have developed a range of arguments about the interplay of public, private, and other rules, it is not always clear how these ideas might guide empirical inquiry.”).

85. Eberlein et al., *supra* note 18, at 2.

86. *Id.* at 3.

87. *Id.*

“state-based regulators.”<sup>88</sup> The nature of interactions among these actors is complex. As Eberlein et al. describe them, “[i]nteractions may be symmetrical or asymmetrical, antagonistic or synergistic, intentional or unintentional. Interactions frequently occur within specific sectors or issue areas, but may also occur across domains, as between trade and the environment.”<sup>89</sup>

Indeed, often the various stakeholders and institutions are not even aware themselves how they interact, nor do they necessarily desire or intend to interact. For example, when one scheme adopts another’s organizational structure or refers to its rules, the latter may engage in a process of mutual adjustment, may choose not to make any adjustment, or may even remain wholly unaware of the interaction. Nevertheless, these interactions take place and have important implications as to how the regulatory field is shaped.

The TBGI framework is intended, under Eberlein et al.’s design, to analyze and capture a very broad set of interactions that occur not only between private and public regimes, but also within private and public regimes. The TBGI framework is also not issue specific—it is intended to address all forms of TBGI across regulatory fields. This Article examines the specific issue area of transnational labor governance, which arguably has unique traits, such as the unique constellations of economic and social relations between buyers and suppliers, suppliers and workers, and buyers and workers, that make it worthy of a separate study. Nevertheless, the framework that is used to describe interactions between public and private regulatory regimes could be helpful in analyzing interactions in other issue areas, as well.

### B. *Qualities and Mechanics of Interaction*

One way to conceptualize the nature of regulatory interaction is to analyze the *character* or *quality* of the interaction.<sup>90</sup> One such quality can be potentially destructive or perhaps substitutive. That is, when the existence of a private regime has destructive or debilitating effects on the default public regime.<sup>91</sup> The concern is that rather than developing the

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88. *Id.* at 8.

89. *Id.* at 3.

90. To help guide scholars in studying the nature of these interactions, Eberlein et al. propose six questions that should guide the study of TBGI: “(i) who or what is interacting; (ii) what drives and shapes the interactions; (iii) what are the mechanisms and pathways of interaction; (iv) what is the character of the interactions; (v) what are the effects of interaction; and (vi) how do interactions change over time?” Eberlein et al., *supra* note 18, at 6.

91. *See id.* at 9. Some scholars of transnational labor governance have expressed concern with the potentially destructive or displacing effects of private labor regulation on state regulation. *See* Amengual, *supra* note 69, at 406 (noting that some scholars are concerned about the retreat of state authority in labor governance); Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct* 8 *IND. J. GLOBAL LEGAL STUD.* 401, 427-30 (2001) (discussing the potential obscuring of the state by private regulatory regimes); *see also* Teubner, *supra* note 44, at 311 (suggesting a reverse destruction interaction, when state law that is not structurally coupled with

regulatory capacity of the state, non-accountable and less democratically responsive privatized regimes might take over or displace traditionally state-based regulatory functions. But recent scholarship examining the interaction between public and private labor regulatory regimes questions the empirical basis of this hypothesis.<sup>92</sup> Rather, TPLR regimes are found to often operate in conjunction with extant public regimes in a range of complex ways that are sometimes mutually supportive, and sometimes not.<sup>93</sup>

But even if these displacement effects are not occurring, a second type of interaction might be present, such as forms of rivalry or competition.<sup>94</sup> Unlike the destructive effects described above, rivalry and competition need not be harmful to a public regime and can potentially be beneficial if there are opportunities for information sharing and mutual learning that could lead to a ratcheting up of labor standards and better enforcement by both private and public entities.<sup>95</sup> Rivalry and competition effects might exist as a result of system design, or might occur simply as a result of human interaction and individual or group psychology. In the case of labor regulation, state labor regulators and inspectors might feel competitive with their private regime counterparts and try to out-compete each other through more rigorous enforcement. In this case, there might be beneficial outcomes despite the fact that the parties are in a non-cooperative relationship.

A third form of interaction is what has been termed complementarity. Complementarity occurs, according to Trubek & Trubek, when “both systems co-exist in the same policy domain and promote the same goals.”<sup>96</sup> But even within that general framework, the character and mechanisms of complementarity can vary.<sup>97</sup> For example, complementarity can describe the phenomenon that takes place when a private regime fills the regulatory gaps left by ineffective public regimes. This allows both regimes to

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the social system that it seeks to regulate potentially damages that system, is irrelevant, or destructive of itself).

92. See Salo V. Coslovsky & Richard Locke, *Parallel Paths to Enforcement: Private Compliance, Public Regulation, and Labor Standards in The Brazilian Sugar Sector*, 41 POL. & SOC'Y 497, 501 (2013).

93. See Bartley, *supra* note 10, at 31.

94. Trubek & Trubek elaborate on this dynamic when they describe a hypothetical situation where a state-based or non-state based system (which they describe as “new governance”) of regulation coexist, and where one might be considered to be an alternative as well as a rival to the other. See David M. Trubek & Louise G. Trubek, *New Governance and Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539, 547-48 (2007); see also Meidinger, *supra* note 31, at 519-520 (discussing potential convergence effects of competition between state and supragovernmental regimes when both occupy a regulatory domain).

95. See ARCHON FUNG ET AL., CAN WE PUT AN END TO SWEATSHOPS? 4-5, 35 (2001) (arguing that competition between competing private and even public regulatory bodies can “ratchet standards upward.”)

96. Trubek & Trubek, *supra* note 94, at 544.

97. See Bartley, *supra* note 10, at 32.

focus on areas in which they enjoy comparative advantage.<sup>98</sup> For example, in his Dominican Republic case study, Mathew Amengual found that public and private labor regulators had different comparative advantages that worked in complementary ways to achieve shared regulatory objectives.<sup>99</sup> He found that private regulators focused largely on health and safety issues in factories in the country's export processing zones, while the state was more responsive to freedom of association violations, thus providing complementary space for each to specialize in their areas of comparative advantage.<sup>100</sup> Complementarity can also lead to a reallocation of resources that could permit resource-deprived state agencies to refocus their attention on areas that do not get attention from private regulators. For example, Amengual argues that because the operations of the MNC's in the Dominican Republic were located in Export Processing Zones (EPZs), the state was freed up to focus resources on industries and factories outside of the EPZs, thus facilitating an unintentional form of coordination where each actor could focus its resources more strategically.<sup>101</sup>

Complementarity is also a way to describe dynamic public/private interactions, such as a process whereby private regulatory regimes unintentionally or intentionally help improve state-based standards and regulatory regime performance.<sup>102</sup> This could occur through the competition dynamic described above, but could also occur more symbiotically, for example, when the state strategically deploys private regulatory tools to achieve specified regulatory goals, or when privately-generated standards or enforcement tools might be incorporated into law or public enforcement practices.<sup>103</sup> Again, Amengual found in his case study that private regimes not only did not displace the state, but in fact strengthened it in some ways. For example, private auditors would require official documents from supplier factories that could only be provided by the ministry of labor, thus reinforcing the need for state functions.<sup>104</sup>

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98. See Amengual, *supra* note 69, at 406.

99. *Id.*

100. *Id.* at 407-09.

101. *Id.* at 408; see Coslovsky & Locke, *supra* note 92, at 502-03.

102. See Cashore, *supra* note 27, at 169-171 (proposing a two prong approach to forestry standards that relies on private certification and laws on market access to drive up forestry regulation in producing countries); Kolben, *Transnational Labor Regulation*, *supra* note 16, at 432-36 (proposing an "integrative approach" whereby private regulation is strategically deployed to strengthen public regulatory capacity).

103. See Trubek & Trubek, *supra* note 94, at 547 (discussing the EU's Social Dialogue process whereby privately negotiated "rules governing employment relations . . . can become binding law by being subsequently adopted as directives by the European Council."); see also Paul Schiff Berman, *Dialectical Regulation, Territoriality, and Pluralism*, 38 CONN. L. REV. 929, 931. (2006) (noting the incorporation of "norms articulated by non-state communities often have significant persuasive power over time, and they either are adopted by state authorities, or they seep into legal consciousness and become part of the accepted vision of the 'way things are.'").

104. Amengual, *supra* note 69, at 411.

If the two systems become sufficiently intertwined, they might reach a level of hybridity in which the regulatory regime self-consciously utilizes both public and private regimes in a way that becomes holistic and integrated.<sup>105</sup> For some, this is the apotheosis and exemplar of new governance modes of regulation.<sup>106</sup>

Another aspect of interaction that needs to be analyzed is not the character or quality, but the actual mechanisms of interaction.<sup>107</sup> The mechanisms and mechanics of interaction take place at a micro-level, and the observer needs to parse out the explicit and implicit, formal and informal ways in which such interactions take place. It is only by understanding the “how” of interaction that policymakers can then design systems that will enable constructive interactions to take place, or to better anticipate what kind of interactions might be anticipated.

### C. Regulatory Dialogism

Building on the governance literature reviewed in Part II, as well as the transnational interaction literature reviewed in this Part, this section argues for a “dialogic” approach to understanding private and public labor regulatory regimes. A dialogic regulatory framework is normative and descriptive, in that it is meant to describe and evaluate the degree to which people and institutions explicitly and implicitly, formally and informally communicatively engage with each other in the generation and enforcement of rules and rule regimes. It analyzes both the qualities as well as the mechanisms of interaction and communication. Dialogic processes might occur spontaneously without intention, or they might be intentionally directed and designed. They might involve actual communication acts between various actors through speech or other communication forms, or the communication might occur through rules on paper that are generally applicable and not specifically directed at specific people or institutions.

The notion of dialogic regulation is not novel in itself.<sup>108</sup> Indeed, as reviewed earlier, much of governance theory is rooted in its fundamental premise that regulation needs to be a multi-vector process of communication between the regulator, the regulated, and the stakeholders that are impacted by regulatory decisions.<sup>109</sup> In the case of labor regulation in global supply chains, however, the interactive and dialogic dynamics that occur between the state and non-state regulatory regimes are particularly important for reasons discussed above. Often, these encounters, to the extent they occur, are unplanned or unintentional. Yet the state is wholly aware of the existence of non-state regulatory regimes, and will likely respond in certain ways.

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105. See Trubek & Trubek, *supra* note 94, at 543-44.

106. See *id.* at 549-57 (discussing the EU’s Water Framework Directive).

107. See Eberlein et al., *supra* note 18, at 2.

108. See JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 17 (2002) (describing the dialogic approach to nursing home regulation in Australia).

109. See Part II.A.

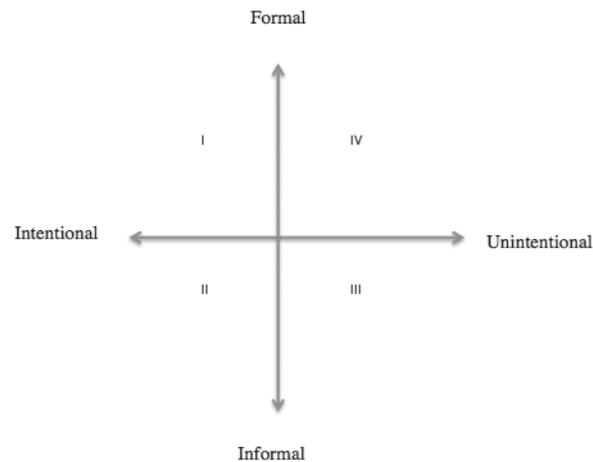
If one accepts the limitations, both practically and theoretically, of TPLR, as well as its potential to contribute to improving labor standards and labor rights, then scholars need tools to analyze where there are opportunities for dialogic interaction and for mutually-reinforcing engagement between TPLR regimes and states. This Article has thus far argued that transnational labor law regimes, which include or even solely consist of non-state regulation, ought to be designed and oriented towards strategically developing state regulatory capacity, particularly in specific areas where they possess comparative advantage, such as freedom of association.<sup>110</sup> Private regulatory regimes can potentially play an important role in the governance of labor supply chains and, if properly constructed, help improve and focus public regulatory performance through various mechanisms of communication and coordination. By identifying points of dialogic interaction and non-interaction, program designers and policy makers can better identify strategic areas where private regimes can help improve public labor law enforcement, and where the state might help improve private regimes and better steer them to areas in which they might have a comparative advantage. If this is to occur, however, scholars and policy makers need to better understand how interactions between state and non-state regulatory regimes function. To do so, there needs to be a framework that will help guide empirical research. The dialogic regulatory framework proposed in the next Part is designed to help move towards this goal.<sup>111</sup>

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110. See Part II.D.

111. My goal is similar to Bartley's in that I seek to understand the ways that public and private systems engage with each other. See Bartley, *supra* note 10, at 534. But in contrast to Bartley, my focus is not primarily on the way in which rules and norms develop based on the interactions with each other but rather on the modes and methods of enforcement. In this sense, I am engaging also with the literature on regulatory enforcement and inspections. See, e.g., Michael J. Piore & Andrew Schrank, *Toward Managed Flexibility: The Revival of Labor Inspection in the Latin World*, 147 INT'L LAB. REV. 1, 1-23 (2008) (describing the "Latin Model" of labor inspection in which inspectors engage in dialogue with regulated entities and have greater latitude and discretion than in the U.S. system). In fact, I would suggest that it is arguably enforcement, rather than the norms themselves, that is more important in the context of developing countries where the rules on paper are often good, but the enforcement is weak.

D. *A Conceptual Framework for Dialogic Regulatory Interaction*  
 Y Axis = Institutional Formality; X Axis = Subjective Intentionality



There is no single method by which private and public regimes interact with each other. Interactions are shaped by program design and by the behavior of the agents of the public and private regimes who engage in regulatory activities every day. Because of the importance of both institutional design and the on-the-ground subjective practices of the actors, in order to understand and evaluate public private labor regulatory interaction, scholars should analyze interaction in the framework of institutional formality and subjective intentionality.

The conceptual framework that is proposed here can therefore be understood to exist on a continuum that has two axes.<sup>112</sup> The Y-axis is meant to capture the institutional framework that the actors are working within. In particular, it is intended to gauge the formality of the institutional interaction, ranging from formal, to semi-formal, to informal. Formality is meant to reflect the forum in which the interaction takes place, and the degree to which it is provided for in the program design. A highly formal context might be an officially sanctioned meeting between a public and a private regulatory institution that takes place during the course of operation of the public or private regime. An informal meeting could, for example, be when agents of the public and private regime sit down for coffee at their own instigation to “talk shop.”

The X-axis, subjective intentionality, is intended to capture the subjectivity and practice of the individual actors involved in regards to their in-

112. The framework is intended to capture several specific variables and address a subset of questions that are suggested by Eberlein et al. and other scholars. Eberlein et al., *supra* note 18, at 6. In particular, among the questions emphasized for study by Eberlein et al., the dialogic analytical framework aims to help answer (i) who and what is interacting; (ii) the drivers of those interactions; (iii) the mechanisms and pathways; (iv) the character of the interaction; (v) the effects of interaction on labor conditions; and, (vi) how interactions change over time.

teractions with their public or private counterparts. While this axis measures what is described here as intentionality, it can be used as a means to illuminate various dynamics that were highlighted earlier, such as rivalry, cooperation or complementarity. If a researcher wishes to understand the ways in which norms might transfer between regimes, or to determine if there is implicit or “uncoordinated” complementarity occurring,<sup>113</sup> intentionality as an analytical category helps shed light on this. It is also quite possible that private and public actors might occupy different positions along the X-axis from each other in the same regulatory arena. For example, a private regulatory regime and its actors might wish to interact in some way with a public regulator, but that regulator refuses, or vice versa.

As should be clear, the interactions described above do not only take place at the level of norms and norm creation. In fact the emphasis here, and in the case study that follows, is on the practice of enforcement, although enforcement and rule making can be intricately intertwined. State and non-state actors might, in somewhat ideal circumstances, intentionally interact with each other to communicate and possibly coordinate their actions and methods. In other instances, it might mean formal consultations and coordination between private and public regimes and actors. In some instances, it could mean the intentional deployment of private actors by the state to regulate a particular issue area.

In quadrant one, we identify the most *formal and intentional* mechanisms of interaction where the parties intend to interact in a formal institutional setting. One example of such an interaction might be, for example, semi-annual meetings that are formally organized between a non-state actor and the state. Such formal meetings between purely private regimes and public regimes are relatively rare, but are more common in hybrid regimes, such as the Better Work program discussed below. Another example might be an intentional exchange or sharing of norms when the state and non-state regulatory regime are coordinating or operating in proximity to each other.<sup>114</sup>

Moving down to quadrant two, *informal and intentional*, regulatory actors might intend to interact with each other in a spirit of cooperation, but the cooperation and interaction takes place through informal mechanisms. This might occur through non-official, non-institutionally prescribed meetings and communications, such as through social or professional networks. For example, agents of private and public regimes might, hypothetically, informally contact each other to discuss particular issues that come up in the field; or, perhaps state labor inspectors and private inspectors that are graduates of a particular training program or school might meet at social and professional events, discussing issues re-

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113. See Amengual, *supra* note 69, at 411.

114. Meidinger, *supra* note 31, at 519-20.

lated to their work. Interaction might also occur accidentally, when private auditors and public inspectors encounter each other in a factory.<sup>115</sup>

The informal but intentional quadrant captures dynamics of dialogic engagement and cooperation between individual actors, but where the institutions, for either competitive or more innocuous reasons, might not formally sanction that cooperation and dialogue. It could also theoretically capture modes of rivalry or competition if they were expressed either through explicit communications in informal settings, such as in accidental encounters in a factory during an inspection, or through tacit competition where there were clear indications that there existed a competitive relationship even if such competition was not explicitly articulated.<sup>116</sup>

A third form of interaction, captured in quadrant three, is *informal and unintentional*. This describes a situation where the parties, without any intention of doing so, nevertheless interact in their regulatory activities. As a result, their own regulatory actions might be affected, and they potentially produce regulatory outcomes that would be different than if only one actor had been regulating the field.<sup>117</sup> This quadrant captures many dynamics of public/private complementarity in rule generation and enforcement, including rule layering<sup>118</sup> and uncoordinated complementarity,<sup>119</sup> where interactions take place often without intentionality or explicit awareness that such interaction is occurring. Such dynamics could also occur in the context of rivalry and competition, whereby the actors might not even be aware that they are motivated by competitive dynamics.<sup>120</sup> In the case of the aforementioned rivalry dynamics, for example, a researcher might record instances of public labor inspectors improving their perform-

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115. *But see* Coslovsky & Locke, *supra* note 92, at 500 (noting that the authors found no communication between public and private officials).

116. Meidinger, *supra* note 31, at 519.

117. Amengual, *supra* note 69, at 410 (describing an instance of where there is no coordination between state and private actors yet they are active in the same factories); *see* Coslovsky & Locke, *supra* note 92, at 518 (finding that the co-existence of private and public regulation in the Brazilian sugar industry has helped improve labor standards in ways that would not have been achievable if only one or the other had been at work).

118. Bartley, *supra* note 10, at 27. In Bartley's conception, a layering of rules describes when two or more rule systems operate in conjunction with each other in a given regulatory field, and shape each other in a synchronic process. In a synchronic analysis, the researcher first looks at the law on the books, as well as private and customary standards that are in play in a given jurisdiction, and identifies where the state and non-state norms conflict or are consistent. Then, to understand how the law interacts with the private regime, the researcher examines the way in which the rules, particularly where they conflict, are interpreted and applied in practice. *Id.* at 33-34. Bartley primarily focusses on understanding the relationship of transnational private regulatory regimes to public and customary legal regimes, and argues that it is important that researchers not view private standards as either transcendent of the state or as purely technical mechanisms that are independent of politics and power. Instead, he argues that private rule regimes, even in the weakest of states, engage with public law and are necessarily shaped by political conflicts and power relationships. *Id.* at 29-30.

119. Amengual, *supra* note 69, at 411.

120. *Cf.* Meidinger, *supra* note 31, at 519 (describing tacit competition whereby state and non-state actors are subjectively aware of competition and rivalry but do not express it).

ance against the backdrop of the introduction of new private regulatory schemes or other non-state governance regimes. This might take place even if they are not necessarily aware that they are doing so and are not self-aware of competitive dynamics.

It is also in this quadrant where researchers would be able to evaluate the development of aspects of legal consciousness.<sup>121</sup> For example, in the functioning of private rule regimes in states with low levels of respect for public law, might the existence of private rule regimes increase or decrease respect for the state and for the legitimacy of rule of law, and/or increase or decrease the degree to which workplace rules and laws are internalized into practice? Or in other words, might the introduction of non-state legal regimes reduce the subjective perception of legitimacy of a given public legal regime, or on the other hand perhaps paradoxically increase it?<sup>122</sup>

While this quadrant describes the lowest levels of formality and intentionality, there is potentially a great deal of activity in this area, much of which occurs “under the radar,” but that presents an important opportunity for research. While it is much easier to measure and capture interaction in formal and intentional contexts, it is in the interstices of informal and unintentional interaction that many of the most interesting dynamics take place. If illuminated, policymakers can utilize these dynamics to improve private and public regulatory performance by strategically anticipating specific interactive practices.<sup>123</sup>

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121. An oft-cited description of legal consciousness in the critical legal studies tradition is that legal consciousness “includes all the ideas about the nature, function, and operation of law held by anyone in society at a given time.” David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 *STAN. L. REV.* 575, 592 (1984). For more expansive discussions of legal consciousness see Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 *HARV. L. REV.* 937, 938-39 (2007) (arguing that modern critical legal consciousness overstates the inefficacy of formal law); Susan S. Silbey, *After Legal Consciousness*, 1 *ANN. REV. L. & SOC. SCI.* 323, 333-34 (2005) (tracing the genealogy of the concept of legal consciousness and understanding it to reflect and shape social structures).

122. One route by which the perceived legitimacy and respect of the state could increase is through the process that Amengual describes in the Dominican Republic. There, Amengual notes that need for government involvement was not mitigated by the presence of private regulators, but in fact enhanced, because private regulators often required papers and certifications that could only be provided by the state. What’s more, individual workers continued to view the state as the central institution to lodge complaints with, rather than private auditors. See Amengual, *supra* note 69, at 411. I am asking here if this kind of dynamic might also lead to a subjective shift, whereby the legal consciousness of factory owners and perhaps workers might change such that respect for law and legality might become internalized, thus promoting the ability of the law to affect behavior. This question of how legal norms become internalized rather than existing as external law, although beyond the scope of this Article, relates closely to the themes addressed by Jürgen Habermas in *JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996).

123. Amengual, *supra* note 69, at 413 (“As a policy prescription, this research suggests that developing ways by which the comparative advantages of state and private regulators can be strengthened and institutionalized should improve overall levels of global labor regulation. If scholars can find ways by which regulatory institutions can be shaped so as to take full advantage of complementary relations, policies can be designed so that the rise of private

A final combination, found in quadrant four, describes *formal but unintentional* interactions. This is perhaps the least likely scenario, but could occur for example when in the course of conflict and competition between non-coordinated and non-cooperating state and private actors, they should find themselves engaging with each other in a formal institutional structure. Such a structure might, for example, be imposed or facilitated by: 1) another domestic governmental agency or unit within a domestic state; 2) by an intergovernmental organization, such as the ILO; 3) by another government; 4) by a transnational organization; or 5) by an MNC. While this might seem somewhat rare, one could imagine for example such a situation in a country where there is a high level of distrust between the ministry of labor and private regulatory actors that are functioning within the same jurisdiction. But, hypothetically, the ministry of commerce might pressure the ministry of labor to formally meet and engage with the non-state actors or regime. Similarly, there might be a situation where there is a conflict, or simply lack of interest in interaction, between the state and a private regime. The ILO, for example, might facilitate or encourage the different actors to interact with each other in a formal meeting, or work out ways to coordinate activities despite their reluctance to do so. Finally, such an interaction could also occur when there are formal structures in place for interaction between a public and private regime, but when the individual actors involved are subjectively opposed or resistant to interactions for reasons of competition, rivalry, or personal enmity. In this situation, the interaction could be located somewhere on the border between quadrants four and one.

### III. APPLICATION OF FRAMEWORK TO JORDAN

Having outlined the dialogic framework of interaction above, this Article now turns to an application of the framework to a unique initiative that is largely non-state but that has certain private/public hybrid elements. Better Work is an innovative supply chain initiative of the ILO and the IFC that was established in 2007, and that grew out of a trade-related experiment in Cambodia. BWJ was one of the first country pilot projects of the Better Work initiative, and it launched in early 2008.<sup>124</sup>

Jordan was selected as a pilot location because in 2006 the Jordanian government was confronted with a crisis. A U.S. based labor activist group, the National Labor Committee, which subsequently changed its name to the Institute for Global Labor and Human Rights (IGHLR), had released a 162-page report that excoriated the Jordanian garment industry for its treatment of its largely migrant workforce.<sup>125</sup>

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regulation will more likely result in the strengthening of social protection than in the undermining of what little regulation currently exists.”).

124. Other programs currently include Vietnam, Haiti, Lesotho, Nicaragua, Indonesia, and Bangladesh. *About Us*, BETTER WORK, [http://betterwork.org/jordan/?page\\_id=17](http://betterwork.org/jordan/?page_id=17) (last visited Feb. 2, 2015).

125. CHARLES KERNAGHAN, NAT'L LAB. COMM., U.S.-JORDAN FREE TRADE AGREEMENT DESCENDS INTO HUMAN TRAFFICKING AND INVOLUNTARY SERVITUDE (2006), *availa-*

To contextualize the industry's labor problems, it is important to understand the political and economic conditions that enabled its initial creation and growth. Jordan did not possess any particular comparative or competitive advantage in garment manufacturing that would have naturally led to its creation or success. Rather, the industry developed because of the peculiarities of Middle Eastern and American politics. Jordan was the beneficiary of economic agreements and trade incentives that, combined with various domestic investment incentives, made clothing manufacturing economically viable.<sup>126</sup> Essentially, the U.S. government provided conditional tariff reductions and then a free trade agreement as a reward for Jordan's peace treaty with Israel, resulting in tariff free access to the U.S. market for garment and apparel.<sup>127</sup>

One of the challenges and peculiarities of Jordan's labor market was its real or perceived lack of productive and available local labor to staff the industry.<sup>128</sup> The result was that the largely foreign-based factory owners turned to foreign migrant workers. Of the approximately 43,000 workers staffing the industry when BWJ began operating, over two thirds were foreign guest workers from mostly South Asian countries on fixed-term, three year contracts.<sup>129</sup> They were essentially captive laborers, living in dormitories in the industrial zones located in the desert terrain around Jordan in which the factories were built. According to the IGLHR report, as well as earlier reports from the United States Department and others, employees at a number of factories were compelled to work extended shifts of 32, 48 and even as many as 72 hours at a time,<sup>130</sup> and were subjected to beatings and sexual assault, inhumane living conditions, and confiscation of their passports.<sup>131</sup>

As garment and apparel manufacturing was a new industry for Jordan, it had a great deal at stake economically and politically, and it was not ready for the attention that would be paid by transnational labor and human rights activists to its treatment of migrant workers. The government mobilized to contain and address the problem. One of the central

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*ble* at <http://globalabourrights.org///IGLHR-USJordanFreeTradeAgreementDescendsIntoHumanTrafficking.pdf> (last visited Feb. 2, 2015).

126. See Kevin Kolben, *Trade, Development, and Migrant Garment Workers in Jordan*, 5 MIDDLE E. L. & GOVERNANCE 195, 198-203 (2013) (discussing the political and economic causes for the development of Jordan's garment industry).

127. *Id.*

128. *Id.* at 206-208.

129. BETTER WORK JORDAN, GARMENT INDUSTRY FIRST COMPLIANCE SYNTHESIS REPORT 1 (2010) [hereinafter FIRST REPORT], available at <http://betterwork.com/global/wp-content/uploads/Better-Work-Jordan-1st-Compliance-Synthesis-Report.pdf> (last visited Feb. 2, 2015). Subsequent estimates by Better Work suggested that the actual number was closer to 75%. BETTER WORK JORDAN, GARMENT INDUSTRY SECOND COMPLIANCE SYNTHESIS REPORT 1 (2011). [hereinafter SECOND REPORT], available at <http://betterwork.com/global/wp-content/uploads/Better-Work-Jordan-2nd-Compliance-Synthesis-Report.pdf> (last visited Feb. 2, 2015).

130. KERNAGHAN, *supra* note 125, at 6.

131. *Id.* at 6-12 and various other sections.

actions that it took was to invite, with the encouragement of the United States government, the Better Work program to establish a unit in Jordan. The program launched in February 2008.<sup>132</sup>

### A. *Better Work*

#### a. Better Work Background

The history of the global Better Work program can be traced to an innovative ILO transparency and factory-monitoring program that was established in Cambodia in 2001 that is now called Better Factories Cambodia. Better Factories emerged as a result of a bilateral textiles trade agreement (BTTA) entered into by the United States and the government of Cambodia in 1999. The agreement primarily established quotas and tariffs on the export of garments and textiles by Cambodia to the United States. While the quota and tariff provisions were fairly standard, the BTTA contained an additional provision that was unique in the world of international trade agreements: a labor rights clause that provided an incentive for the Cambodian government and the fledgling garment industry to substantially comply with Cambodian labor law and international labor standards. If the U.S. government were to determine that the Cambodian garment industry was in substantial compliance, the U.S. government would increase the quotas by a specified amount. But to implement this provision, a system of monitoring and evaluation was needed. What emerged was an ILO-run and largely U.S.-funded program that combined monitoring of factories with a transparency mechanism whereby compliance information on the factories was made publicly available through “synthesis reports” published online. The Cambodian government made it mandatory for all garment factories to participate in order to receive permission to export, thus ensuring widespread factory participation.

In the meantime, the World Bank was also becoming interested in the Cambodia experiment. In 2004, two World Bank units, one that was then called the Foreign Investment Advisory Services (FIAS) as well as the IFC, undertook a survey of Western garment buyers to assess the degree to which labor standards played a role in sourcing decisions. The findings were surprising—a significant number of companies surveyed (93.2%) reported that labor standards were of critical importance to their sourcing decisions.<sup>133</sup> FIAS and the IFC were particularly interested in how labor standards compliance could play a role in improving competitiveness at both the firm and country levels. To advance this idea, the IFC partnered with the ILO to create Better Work and expand the Cambodia model to other countries. While Better Work is headquartered out of the ILO’s Geneva office, its governance is shared between the IFC in Washington D.C. and the ILO.

Reflecting its tripartite and hybrid character, the global Better Work’s board of advisors includes representatives from global union federations,

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132. FIRST REPORT, *supra* note 129.

133. FIAS, Cambodia: Corporate Social Responsibility & the Apparel Sector 4 (2004).

employers, and governments.<sup>134</sup> While different parties fund country-specific programs, as of March 2013, headquarters funding came from the governments of Australia, the Netherlands, Switzerland, as well as private donors such as the Levi Strauss foundation and the United States Council Foundation.<sup>135</sup>

#### b. The Better Work Model

Better Work aims to improve labor standards compliance in global supply chains by working at the factory level to improve labor law compliance and market competitiveness.<sup>136</sup> Improvements in the latter, it is believed, should lead to improvements in the former. The global Better Work program template, which is the template generally followed by BWJ, is based on providing three kinds of services: assessment, advisory, and training. The assessment component involves the assessments of factories. As a first step, Better Work employees, who are called Enterprise Advisors, conduct baseline assessments of a participating factory to provide it with an analysis of where it is out of compliance with international and domestic labor law, and what it can do to bring itself into compliance.<sup>137</sup>

The advisors use these assessments to create improvement plans for the individual factories, which they then help the factories to implement in order to improve the factory's performance by the next audit. That next audit takes place about four months later, when the first progress report is issued.<sup>138</sup> The factories are also instructed to set up a Performance Improvement Consultative Committee, which is a worker management committee that is charged with discussing work issues. Another progress report is issued after eight months. In addition to the audits and individual factory advising, the advisors also conduct trainings using a 12-month training module developed by Better Work. A central prong of the Better Work program is to make the general performance data of the industry publicly available. Thus every six months each country program is supposed to release a "synthesis report" that reports on the industry level rates of compliance in a given country.<sup>139</sup>

A key objective of Better Work is to leverage the influence and financing of buyers. First, in return for a subscription fee, MNCs that source

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134. *Advisory Committee*, BETTER WORK, [http://betterwork.org/jordan/?page\\_id=32](http://betterwork.org/jordan/?page_id=32) (last visited Feb. 2, 2015).

135. *Donors*, BETTER WORK, [http://betterwork.org/jordan/?page\\_id=275](http://betterwork.org/jordan/?page_id=275) (last visited Feb. 2, 2015).

136. BETTER WORK, *supra* note 124.

137. The inclusion of international labor standards in all Better Work programs creates tensions in countries where domestic law does not comport with international legal norms. This was true in Jordan, where migrant workers were initially not allowed to be in unions, although this changed in 2010. *SECOND REPORT*, *supra* note 131, at 5.

138. *FIRST REPORT*, *supra* note 129, at iv.

139. *SECOND REPORT*, *supra* note 131, at 10. In practice, however, the release times can vary, and in Jordan they have been released less frequently.

from participating countries are granted access to factory monitoring data generated by the Better Work programs. These MNCs look to Better Work as a means of providing an institutional mechanism to achieve what Better Work calls “sustainable improvement” in the supply chain, thus a) mitigating the risk of negative publicity events from labor rights exposés and b) consolidating and making consistent the disparate private monitoring regimes that exist along their supply chains.<sup>140</sup> The program thus seeks to provide a market-based solution to weak regulatory regimes that is replicable and scalable, and that is consistent with both the ILO’s objectives of social dialogue and improved labor rights protections, and the IFC’s objectives of promoting economic and sustainable development.

### c. Better Work Jordan

BWJ was created in February 3, 2008 and became operational soon thereafter. While there was a general template for the Better Work program, the Jordan implementation was confronted with the challenge of applying it to the context of Jordan’s unique labor environment and conditions, the most glaring condition being the unique context of migrant labor. The program faced a number of other challenges as well, including the problem that not all factories were initially required to participate. Participation was in fact completely voluntary and only 15 of the approximately 85 factories initially agreed to engage, making it harder to achieve wholesale changes in the industry. That changed, however, in March 2010 when the Jordanian government made it a legal requirement that all apparel factories exporting to the US and Israel, as well as their sub-contractors, participate in BWJ.<sup>141</sup>

BWJ is primarily financed by governments including Jordan, the U.S., and Canada,<sup>142</sup> as well as companies such as Walmart that source goods from Jordanian suppliers.<sup>143</sup> According to the program’s Chief Technical Advisor (CTA), the program was budgeted such that two-thirds of its time would be spent on advising and consulting suppliers, and the remaining time on assessments.<sup>144</sup> Its assessment results are reported publicly in ag-

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140. See *Buyers*, BETTER WORK, [http://betterwork.org/jordan/?page\\_id=267](http://betterwork.org/jordan/?page_id=267) (last visited Feb. 2, 2015).

141. SECOND REPORT, *supra* note 131, at 7.

142. The program is funded by the United States Agency for International Development (USAID) and the Labour Programme of Human Resources and Skills Development, Canada (HRSDC). *Id.* at 3; *Donors*, BETTER WORK JORDAN, [http://betterwork.org/jordan/?page\\_id=275](http://betterwork.org/jordan/?page_id=275) (last visited Feb. 2, 2015).

143. As per the general Better Work model, a number of companies pay a subscription fee to access the factory data through its proprietary information management system, called STAR (Supply Chain Tracking of Remediation Assessments). These included at the time of research: American Eagle, Gap, Jones Apparel Group, Polo Ralph Lauren, LL Bean, New Balance, Sears, Walmart, Marks & Spencer, Hanes Brand Inc., and Talbots. SECOND REPORT, *supra* note 131, at 26.

144. Interview with Chief Technical Advisor, Better Work Jordan, in Amman, Jordan (June 20, 2010) [hereinafter CTA, 2010].

gregate form in synthesis reports that are issued less frequently than the six month standard.<sup>145</sup>

d. The Better Work Jordan Governance Structure

The governance structure of BWJ reflects the tripartite governance structure of the ILO, and the multi-stakeholder orientation of Better Work. At the global level, Better Work governance is shared between the ILO and the IFC and is guided by an advisory committee that consists of governments, employers, workers organizations, buyers, and labor rights experts.<sup>146</sup> At the national level there is a Project Advisory Committee (PAC) in Jordan that is comprised of three government officials (two from the ministry of labor and one from the Ministry of Industry and Trade), three employer representatives, and three representatives from workers' organizations. In addition to the PAC, a Buyers' Forum takes place annually, which brings together a broader group of stakeholders to discuss the operation of BWJ. This governance structure, which includes both public and private actors, thus makes Better Work a more hybrid regime than a purely private one. Nevertheless, it does function largely autonomously from the Jordanian state and other government agencies, and as such it is a helpful, albeit context specific, vehicle to help understand public private interaction.

B. *Applying the Framework to Better Work Jordan*

a. Formal and Intentional Interaction

Because BWJ has hybrid qualities, it might be expected that there would be higher levels of interaction with the state than is seen in more purely private regimes. Indeed, formal and intentional interaction was the easiest to observe in the interactions of BWJ with the state. It is particularly at the level of formalized norms that one expects to observe the most formal and intentional interaction. In its assessments, BWJ uses a checklist based on what it terms "working conditions," such as compensation, contracts and human resources, occupational safety and health, and working time standards that are all based on Jordanian domestic law.<sup>147</sup> A second set of "core labor standards," such as the right to freedom of association and bans on child labor, for example, is based on international labor standards.<sup>148</sup>

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145. Notably, the second synthesis report actually reported compliance data for named factories, but this stopped in subsequent reports. According to Better Work's general guidelines, only the Haiti program provides factory-specific data in every synthesis report, which is mandated by the U.S. government, which is the primary funder. Cambodia has also recently re-instituted factory specific public reporting if factories fail to meet certain criteria. Better Factories Cambodia, Transparency Database Factsheet, <http://betterfactories.org/transparency/pages/view/18> (last visited Feb. 2, 2015).

146. See BETTER WORK, *supra* note 134 (last visited Feb. 2, 2015)

147. SECOND REPORT, *supra* note 131, at 9-10.

148. *Id.*

One interesting question that presents itself is if Jordanian law and practice might change to reflect international standards as Better Work highlights points of divergence, or if Better Work makes interpretations of Jordanian Law. For example, total working hours are not capped under Jordanian law, although after 48 hours of work in a week workers must be paid a premium of at least 125%.<sup>149</sup> While uncapped hours are allowed under Jordanian law, such practices are discouraged by the ILO and are the subject of several ILO conventions and recommendations.<sup>150</sup> In the first synthesis report, for example, BWJ made explicit that many of the factories had excessively long work hours and that, although the hours worked did not violate Jordanian law, Jordanian law was deficient.<sup>151</sup> BWJ also created criteria for minimum dormitory conditions,<sup>152</sup> which had been missing in Jordanian law until the Ministry of Health promulgated a regulation in 2011 regarding dormitory standards and an implementation plan

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149. Labor Law and Its Amendments No. 8 of the Year 1996, arts. 57, 59, available at <http://ilo.org/ilo/%20Law%20and%20its%20Amendments%20No.8%20of%20the%20year%201996.pdf>. However, it is interesting to note that a factory cannot gain “Golden List” status, which is a special high labor standard certification issued by the Ministry of Labor (MoL) separately from BWJ, unless it does not average more than four hours a day in overtime. Interview with Jordanian Ministry of Labor Inspectors, in Amman, Jordan (May 18, 2011).

150. While Jordan is not a party to the working hour conventions and recommendations, the ILO’s C001 - Hours of Work (Industry) Convention, 1919 (No. 1) Art. 2 calls for signatories to agree to eight-hour days and 48-hour weeks. Convention 30, Hours of Work (Commerce and Offices) Convention, 1930 (No. 30) Art. 4, further provides for a maximum of 10-hour days. A later convention further establishes the goal of a 40-hour week. See ILO, C047 - Forty-Hour Week Convention, 1935 (No. 47) Convention concerning the Reduction of Hours of Work to Forty a Week (Entry into force: 23 Jun 1957) Adoption: Geneva, 19th ILC session (22 Jun 1935); see also R116 - Reduction of Hours of Work Recommendation, 1962 (No. 116). Recommendation Concerning Reduction of Hours of Work, Adoption: Geneva, 46th ILC session (26 June 1962).

151. See FIRST REPORT, *supra* note 129, at 12. The leader of the garment manufacturers association critiqued BWJ for overstepping its bounds in criticizing the law. Interview with Farhan Ifram, VP Operations, Sterling Apparel Mfg. & Chairman, Jordanian Garment & Textiles Exporters Ass’n (JGATE), in Amman, Jordan (June 21, 2010) [hereinafter Ifram, 2010]. Indeed, in later synthesis reports, the commentary regarding working hours was excised, and there was only straight analysis based on Jordanian law as it stood. As of this writing, the rules on work hours have not changed.

152. Interview with Chief Technical Advisor, Better Work Jordan, in Amman, Jordan (May 17, 2011) [hereinafter CTA, 2011]. The CTA reported that these standards were derived from good practice standards in coordination with buyers and the Golden List standards of the MoL. The MoL had created a set of twelve dormitory standards as part of its Golden List Certification criteria. Interview with Director of Inspectorate, Jordanian Ministry of Labor, in Amman, Jordan (June 22, 2010) [hereinafter DI, 2010]. However, according to the CTA the BWJ standards were the most stringent.

in 2013.<sup>153</sup> It is unlikely that BWJ was the sole reason for the change in Jordanian law, but it is likely to have been one of the factors.<sup>154</sup>

In the area of labor standards, there already have been some significant changes in Jordanian law to reflect the international standards that BWJ has applied. For example, the Jordanian government as of 2010 removed Jordanian citizenship as a requirement for union membership, although non-citizens are not allowed to have their own separate unions or become leaders of unions.<sup>155</sup> There might be a number of other rule areas where such formal and intentional interaction is taking place through a form of norm migration from BWJ to the state, and this could be an interesting area of research. Conversely, in the vein of Bartley's rule-layering,<sup>156</sup> it would also be interesting to investigate further how BWJ is applying and interpreting Jordanian labor law in its own practice.<sup>157</sup>

But there are also several points of formal and intentional interaction not only at the level of norms, but at the level of enforcement and operations. First, the Ministry of Labor (MoL) and the Ministry of Industry and Trade (MoIT) sit on the Project Advisory Committee, which meets periodically and serves as a forum for members to voice their concerns and thoughts about the program in a formal governance setting.<sup>158</sup> The presence of the commerce side of the state is an important indicator that the business-promoting wing of the government views credible labor rights enforcement as an important element of Jordan's export promotion and the competitiveness of its factories.<sup>159</sup> Second, there is direct coordination between BWJ and the MoL. In July 2010, the two entities signed a collaboration plan outlining cooperation between the two groups, which would include supplementary training and quarterly meetings between the BWJ advisors and the Labor Inspectorate, and supplementary training of se-

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153. BETTER WORK JORDAN, GARMENT INDUSTRY FIFTH COMPLIANCE SYNTHESIS REPORT 6 (2013) [hereinafter FIFTH REPORT], available at <http://betterwork.org/jordan/wp-content/uploads/5th-CSR-FINAL.pdf> (last visited Feb. 2, 2015).

154. Another important causal factor was likely U.S. pressure operating behind the scenes. In January 2013 the U.S. government and the Jordanian government signed an implementation agreement as an attachment to the 2010 U.S.-Jordan Bilateral Free Trade Agreement that called for an implementation plan by the Jordanian government of the Health Ministry's regulation. Joint Statement of the Labor Subcommittee of the United States – Jordan Free Trade Agreement, Amman Jordan (Jan. 26, 2013). For the text, see Implementation Plan Related to Working and Living Conditions of Workers Between the Hashemite Kingdom of Jordan and the United States of America, U.S.-Jordan, available at <http://global-labourrights.org/-USJordanImplementationPlan.PDF>.

155. See SECOND REPORT, *supra* note 131, at 5.

156. See Bartley, *supra* note 10, note 118 (discussing Bartley's rule layering).

157. Indeed, one of the criticisms of Better Work by some of the MoL's labor inspectors, perhaps in the vein of rivalry and competition, has been that Better Work has not correctly interpreted Jordanian labor law and that the program needs more lawyers. CTA, 2011, *supra* note 152.

158. As of December 2013, the PAC had formally met sixteen times. FIFTH REPORT, *supra* note 153, at 7.

159. Interview with Gina Farraj, Advisor to the Minister of Trade & Indus., in Amman, Jordan (June 22, 2010) [hereinafter Farraj, 2010].

lected government labor inspectors.<sup>160</sup> It also outlined a protocol for what BWJ would do if major human rights violations were found—notably that BWJ would report them to the MoL.<sup>161</sup> Major human rights violations are defined primarily, according to the CTA, as forced labor and child labor.<sup>162</sup> Finally, as per the collaboration agreement, BWJ and the MoL engage in quarterly joint trainings in which they share best practices, and MoL inspectors have accompanied BWJ advisors as observers during BWJ assessments and administration of elections of factory committees.<sup>163</sup> The MoL's Director of Inspectorate (DI) reported that already the inspectorate's staff had learned better interview skills, improved its sampling methods, and learned how to determine the probability of overtime levels based on the number of broken needles.<sup>164</sup>

#### b. Informal and Intentional

Moving to quadrant two, there was also evidence of informal and intentional interaction between the top managers, but not at the lower levels of administration. BWJ, and specifically its CTA, interacted with the MoL and other state agencies not just through formal channels as described above, but also informally in a number of ways. The relationship between the MoL and BWJ was described by the CTA as “cordial,” and he viewed the head of the labor inspectorate as a “big supporter” who is “not threatened,” and who sees opportunities to learn from Better Work.<sup>165</sup> In a follow-up interview in 2011, the CTA claimed that the relationship “blossomed” and that the Jordanian DI was appreciative, for example, of including the labor inspectors into the trainings described above.<sup>166</sup> The DI also indicated there was a great deal of informal interaction with the CTA, and that “many times they call me to ask for something.”<sup>167</sup> But in 2010

160. Collaboration Plan between the Ministry of Labor and Better Work Jordan (July 20, 2010).

161. *Id.*

162. CTA, 2010, *supra* note, 144. However, according to the Second Synthesis report, there remains work to do. BWJ intended to work with the MoL to revise the Human Rights Protocol to include clearer procedures for addressing specific issues related to forced labor. Moreover, the program wanted to work with key stakeholders to address a number of problems related to the migrant nature of the labor force, including “working hours, curfew, labor contracts and recruitment fees, and dormitory conditions.” SECOND REPORT, *supra* note 131, at 6.

163. CTA, 2011, *supra* note 152; *Better Work Jordan and Ministry of Labor Build on Partnership*, NEWSLETTER NO. 1 (Better Work Jordan, Amman, Jordan), Jan.-Mar. 2011, at 2, available at <http://.com///-No.1-Jan-Mar-2011.pdf> (last visited Feb. 2, 2015).

164. Interview with Adnan Rababa, Director of Inspectorate, Jordanian Ministry of Labor, in Amman, Jordan (May 18, 2011) [hereinafter DI, 2011].

165. CTA, 2010, *supra* note 144.

166. CTA, 2011, *supra* note 152.

167. DI, 2010, *supra* note 152. It is not clear, however, what was the content of those informal conversations given that there is a confidentiality agreement in place such that BWJ cannot divulge any of its inspection information to the MoL unless there are major human rights violations, in which case BWJ is obliged to share the information. The interaction might simply be at the level of logistics. Rababa, for example, gave the example of getting a

the DI and the CTA reported that there was little interaction between the inspectorate staff and the BWJ advisors outside of formal channels described above, which was also confirmed by the MoL labor inspectors and BWJ advisors.<sup>168</sup> This lack of interaction extended to encounters in the factories, as well, where they generally did not interact.<sup>169</sup>

The DI described the relationship between BWJ and the ministry not as one of competition, but rather of “integration.”<sup>170</sup> In the words of the DI, “[w]e might help each other, or they help us and sometimes we help them. There is no competitiveness. Our inspectors are insufficient, so I’m happy to have someone deal with a company or sector.”<sup>171</sup> On the other hand, the CTA said that he believed that some of the “traditional labor inspectors” might have had a rivalry/competition relationship with BWJ and that they sometimes took issue with BWJ’s legal interpretations and questioned the degree to which BWJ “understood” the law. But there was little evidence in interviews that any rivalry was explicitly apparent (although it can be difficult to get interviewees to be forthcoming on these issues).<sup>172</sup>

In 2011, the informal interactions seemed to develop and cooperation grew. The DI described talking together and emailing every week with the CTA,<sup>173</sup> while The CTA reported many “unofficial conversations with the MoL.”<sup>174</sup> Some of the lack of interaction between the labor inspectors and the advisors might be due to the lack of a shared social or socio-economic background. Most of the BWJ EAs come from higher socio-economic backgrounds with stronger educational qualifications. Many of them have advanced degrees from universities in the United States and the UK, and worked for international NGOs or MNCs before joining BWJ.<sup>175</sup> Conse-

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call from Better Work to see if there was anyone present at the Department of Statistics. *Id.* This of course raises the question about the benefits of such confidentiality agreements. On one hand, the employers would not want that the information be shared with the MoL, as the MoL has fining power and the owners would be potentially disincentivized to cooperate and share information. In countries where corruption is present in the MoL and in other agencies, information sharing could create other problems.

168. CTA, 2010, *supra* note 144; Interview with Enterprise Advisors, Better Work Jordan, in Amman, Jordan, (May 17, 2011) [hereinafter EAs, 2011]; Interview with Ministry of Labor Inspectors, in Amman, Jordan (May 18, 2011).

169. EAs, 2011, *supra* note 168.

170. DI, 2010, *supra* note 152.

171. DI, 2011, *supra* note 165. Rababa acknowledged that a lack of resources prohibited the MoL from reaching all factories. He also noted that there will always be new “international issues” such as trafficking and forced labor that will pose new problems for the ministry, and for which it will need help. DI, 2010, *supra* note 152.

172. Some outside observers, such as a representative from JGATE, speculated that the labor inspectors were scared of being replaced. This might be true, but there would need to be a broader scope of research to follow up with that claim. Ifram, 2010, *supra* note 151.

173. DI, 2011, *supra* note 165.

174. CTA, 2011, *supra* note 152. Field research should focus on the content of those conversations, analyzing what issues in particular are subjects of discussion.

175. EAs, 2011, *supra* note 168.

quently they also earn about five times the salary of MoL inspectors.<sup>176</sup> One would think that the pay difference alone might generate a certain degree of rivalry and competition, although the MoL inspectors did not explicitly express these sentiments.

The CTA also had good relations with the MoIT, which sits on the PAC, particularly with the advisor to the MoIT, Gina Farraj, who was charged with overseeing the project. This relationship only improved over time, and in 2011 The CTA reported that the MoIT had moved from being among the biggest skeptics in the government to becoming a major ally.<sup>177</sup> But it remains unclear how much informal communication existed when incidents arose. According to the DI, he often received calls from BWJ advisors asking him for information and help. On the other hand, he claims there was “not too much interaction between inspectors and advisors,” but that while there is “not enough informal interaction, . . . it is growing.”<sup>178</sup>

### c. Informal and Unintentional

The third category is informal and unintentional interaction, which is where some of the most interesting and difficult to analyze dynamics are found. It also potentially presents great promise for identifying dialogic interactions, albeit unintended ones, that can lead to improved regulatory performance. It is here that many of the complementary dynamics discussed above such as rule layering<sup>179</sup> or uncoordinated complementarity can be identified.<sup>180</sup> It is also where one might potentially observe dynamics such as destructive and beneficial competition, both of which could be motivated by fears of replacement and substitution by the other regime.<sup>181</sup>

#### 1. Competition and Rivalry

As described previously, there was little evidence or expression of explicit and conscious, or what is described here as intentional, competition or rivalry between BWJ and the state. But there are other unintentional, latent competition dynamics that are subtler and that could be at play in a given regulatory field. Unarticulated competitive dynamics are difficult to observe, although some observers might have “gut feelings” about them, as did one manager who stated that he thought the MoL inspectors were scared of being replaced, even though he did not think that replacement

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176. CTA, 2011, *supra* note 152.

177. *Id.* Indeed, in a 2010 interview, Gina Farraj, Advisor to the Minister of Trade and Indus., although generally supportive, expressed a number of concerns about the presence of BWJ, including the potential costs of the program and the fear that BWJ might displace the MoL. Farraj, 2010, *supra* note 159. I was unable to follow up with Farraj, however, in 2011, to confirm this.

178. DI, 2010, *supra* note 152.

179. *See* Bartley, *supra* note 118.

180. *See* Amengual, *supra* note 69.

181. *See supra* notes 91 - 93 and accompanying text.

was a possibility or a desired outcome.<sup>182</sup> This dynamic might also result in beneficial outcomes, whereby the parties try to improve performance in light of sub-consciously perceived and unarticulated competition. To gauge this implicit unintentional dynamic, one might look at records of inspections, both at the raw number of inspections as a measure of productivity, or quality of inspections if there is any means to assess that.<sup>183</sup> If an increase correlated with the presence of the private regime is observed, this could indicate a ratcheting up of public regulatory enforcement as a result of tacit competition with the private regime. Of course correlation would need to be carefully distinguished from causation.

One hypothetical byproduct of real or perceived competition dynamics is that factory owners might come to believe that the MoL is incentivized to perform better, and thus give it more credibility. Indeed, the MoL did have an apparently low reputation in the eyes of some business owners, who generally believed that “the public sector is always less effective” and has “less credibility” than the private sector.<sup>184</sup> As one factory manager reported, the MoL inspections are “not as detailed as the [BWJ] inspection[s]. . . [BWJ] spends a full day in the factory, while the inspectorate’s inspections are much shorter.”<sup>185</sup> This means that the Jordanian employers believed that a “stamp of approval” from BWJ rather than the MoL would have a more positive affect on international buyers, who are presumed to share the same views about the MoL’s quality.<sup>186</sup> But at the same time, the same manager stated that he believed that the MoL had improved its inspection practices, describing in particular a recent inspection where the inspectors were “very fair, communicative, balanced . . . [i]nstead of taking a shortcut, they said why don’t you try and fix this instead of just fighting.”<sup>187</sup> But when pressed, the manager believed that this didn’t have anything to do with competition with BWJ, but rather with the fallout from the initial IGHRLR exposé.<sup>188</sup>

## 2. Strategic and Resource Complementarity

In addition to unintentional beneficial competition, there are other forms of complementarity that might be observed. Recall that complementarity occurs when the private and public regimes work compatibly to achieve desirable regulatory goals. One way in which this might function is when state and non-state regimes are able to strategically focus resources

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182. Ifram, 2010, *supra* note 151.

183. Interestingly, the DI did report that inspection frequency and fines had both decreased in 2011. He did not know why this was so. Was it because of overall improved performance due to BWJ inspections? Or did MoL inspectors “slack off” because they could lean on BWJ to do their work for them? DI, 2011, *supra* note 165.

184. Ifram, 2010, *supra* note 151.

185. Interview with Athulla Edirisinghe, GM, EAM Maliban Textiles, in Ad-Dulayl, Jordan (June 21, 2010) [hereinafter Edirisinghe].

186. *See id.*

187. *Id.*

188. *See id.*

on issue areas in which they have a comparative advantage.<sup>189</sup> There is some evidence that in Jordan, the regulated parties believed that the state and BWJ had certain comparative advantages, or at least *perceived* specializations and advantages in certain issue areas and domains. One factory manager claimed that BWJ appeared to focus and, in his estimation, to have a comparative advantage in health and safety matters as opposed to the MoL's focus on human rights issues.<sup>190</sup> This comparative specialization might be due in part to the inherent police power of the state and the punishment that it can mete out for human rights violations. Health and safety violations might, on the other hand, be more easily remedied through improved management and technical assistance—skills with which private auditors are likely better equipped.<sup>191</sup>

Another argument for private regulatory regimes in countries with limited regulatory resources is that they can free up government resources to focus on non-export sectors that are not under the spotlight of international pressure.<sup>192</sup> In Jordan, it is not clear if this has occurred as of yet, although there appears to be a distinct need. According to the DI, in 2010 there was about 1 inspector per 1125 workers in the QIZs, where the bulk of garment manufacturing occurs, but only 1 for every 12000 outside of it.<sup>193</sup> When re-interviewed in 2011, the DI's numbers did not change. When asked whether or not the inspectorate was doing the same work as BWJ, he responded “[BWJ] has a role that we don't have which is the improvement and training side of management.” The CTA also confirmed that there was overlap in the sector, and that resources are distorted towards the garment sector because of the trade agreements and the international spotlight, although he believes that BWJ is alleviating some of the resource pressures. In the follow-up interview in 2011, the DI still asserted that the concentration of attention was in the QIZs, and that the best inspectors were still allocated there. Nevertheless, he did express a desire that the allocation of resources would become more balanced within the next 5-6 years.<sup>194</sup>

The DI also hoped to hire more inspectors for a total of 200 inspectors on staff, but he claimed, perhaps but not necessarily expressing some rivalry sentiments, that “all the money is going to [BWJ].” Notably, the DI reported that the number of inspections and the number of fines issued by the MoL had decreased in 2011 from 2010, although he could not provide an explanation as to why. Could it be that the BWJ programs were already

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189. Amengual, *supra* note 69, at 412 (suggesting private auditors might for example be better suited at managing production to reduce overtime while public inspectors can instruct workers on overtime regulations); Coslovsky & Locke, *supra* note 92, at 519 (describing the comparative advantages of private auditors as insiders and of public inspectors as outsiders with the power to punish).

190. Edirisinghe *supra* note 185.

191. See Coslovsky & Locke, *supra* note 92, at 519.

192. Amengual, *supra* note 69, at 406.

193. DI, 2010, *supra* note 152.

194. DI, 2011, *supra* note 165.

having an impact on working conditions, thus reducing finable activity? Or did the inspectorate have an ability or freedom to reduce inspections because of BWJ's presence?

d. Formal and Unintentional

The absence of competitive or conflict-ridden relationships between BWJ and the state has meant that there had been little need for creating formal meetings between parties who did not wish to interact. If one were to broaden out the analysis, however, to factory owners and buyers, there might be more incidences of the formal/unintentional dynamic at work. This is because the factory owners were often highly reluctant to initially enter into the BWJ arrangement, and were compelled to do so, to some extent, by the buyers and the state. Although the relationship does not seem particularly conflict-ridden, according to one factory manager, most of the factory owners joined because the buyers told them to do so.<sup>195</sup>

CONCLUSION

The dual private/public governance of labor in global supply chains has become increasingly prevalent in countries that produce upstream goods and services but that do not provide a regulatory environment that meets the expectations of consumers, civil society, and other stakeholders. For scholars of global governance and transnational regulation who are interested in understanding and optimizing regulatory interaction to protect workers' rights, promote democracy, and further development, it is important to map the dynamics of dialogic interaction between public and private regimes in order to better harness them.<sup>196</sup> This Article has proposed a conceptual framework to help analyze and understand how some of those dialogic dynamics occur. Importantly, the framework is premised on recognition of the pragmatic and conceptual limits of private regulation. Indeed, the conceptual framework outlined here, while substantially aimed at describing the mechanics of interaction, is grounded in a democratic normative goal of preserving and developing state capacity, particularly in areas where the state has comparative advantages over private forms of regulation and where there are compelling theoretical and political arguments for privileging government action.

It is also important to recognize what this Article's empirical case study does not do. It does not necessarily examine the underlying causal roots of why there exist public governance deficits in domestic or international labor regulation,<sup>197</sup> why institutions such as unions or NGOs might

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195. Edirisinghe, *supra* note 185.

196. Amengual, *supra* note 69, at 413.

197. See Tim Bartley, *Institutional Emergence In An Era Of Globalization: The Rise Of Transnational Private Regulation Of Labor And Environmental Conditions*, 113 AM. J. SOC. 297, 309-12 (2007) (arguing for an institutional understanding of why transnational private labor regulation, and particularly certification regimes, has ascended in lieu of public transnational public regulation).

be dominant or weak, or identify the strengths and weaknesses of other important public institutions such as labor courts and other administrative bodies. Rather, the primary aim here has been to help conceptualize and illustrate some of the ways that dialogic interaction occurs in norm generation and enforcement.

While the thematic focus of this Article has been on labor governance, the analysis is equally applicable to other realms in which public and private regimes function in the same regulatory space. The new, complex forms of workplace governance in global supply chains provide a fruitful field of study for scholars in various fields who seek to understand the complex interplay between the state and private actors in the regulation of the workplace. While normative debates about the appropriate balance between public and private governance are vitally important, conceptual mapping grounded in empirical fieldwork is still sorely needed.<sup>198</sup> This information is needed not only to help inform normative and theoretical arguments about the appropriate roles of the state and private actors in transnational labor regulation, but also to help policymakers and scholars design mixed public and private regimes of labor governance that can sustainably improve labor standards and regulation in the global supply chain.

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198. See Bartley, *supra* note 10, at 32 (noting the need for more empirical research and emphasizing that it is still unclear how conceptualization about interplay between private and public regimes might guide empirical work).

