Litigation and Embedded Legality:

A communicative model of polycentric evolution for business and human rights

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ABSTRACT:

Maturation of the business and human rights discourse has been arrested by a protracted stalemate over the question of legality. Whether or not an international legal regime is desirable for the regulation of business and human rights, its development is exceptionally unlikely in the foreseeable future. The central argument of this work is that there remains, however, a formative role to be played by legal reasoning, legal concepts and legal institutions in the development of polycentric and hybrid regulatory systems. This claim is demonstrated by constructing a communicative model of transnational human rights litigation against corporations. Two communicative functions of litigation are explored. Firstly, it is argued that by articulating normative standards, courts lend clarity and authority to complex norms, and reference to that authority by other discursive actors embeds the legal framing of norms in the constitutive rules regulatory systems. Secondly, by iterating network links, litigation promotes strategic and communicative connections between actors, fora for normative contest, and regulatory mechanisms, linking the business and human rights discourse up with legal apparati and imposing distinct challenges to the legal profession. Together, by framing norms and expanding networks, litigation embeds legality in a discourse actively engaged in the construction of regulatory arrangements. Embedded legality does not determine the content of regulation, but courts have institutional and procedural advantages as fora for arguing about content. While embedding legality does not equate regulatory systems with legal regimes, it does satisfy the compliance criteria of several legal theorists, thereby transcending the dichotomy of voluntarism vs legal sanctions. The model concludes by suggesting that litigation ought to be promoted not only as a mechanism for punishing 'determined laggards' but more importantly for its long term influence on the way in which norms and identities within the business and human rights discourse are approached, understood and enacted. This strategy is especially imperative for the human rights movement, which has not yet managed to adapt coherently or effectively to the challenges posed by a global market.

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1 Introduction

1.1 Research Aims and Clarifications

1.1.1 The Research Question

Transnational human rights litigation against corporations in domestic courts is generally regarded in academic literature as anomalous and epiphenomenal, one of many diverse regulatory mechanisms operating in a complementary, but independent manner across the local, national and international registers. A broad mass of research explores the statutory basis and doctrinal developments of such litigation, and a polemic debate rages over its ability to deter and restitute corporate malfeasance, yet virtually no attention has been paid to ways in which litigatory practices might interact with a larger regulatory context. The analysis seeks to breach that lacuna by asking:

> 'What kind of long term effects, if any, do instances of human rights litigation against transnational corporations in domestic courts, either singularly or cumulatively, have on the international regulatory context of business and human rights?'

This entails a number of complementary, but ancillary questions regarding the nature and dynamics of that regulatory context, which actors and institutions are relevant and why, and what conditions promote regulatory coordination and efficacy.

1.1.2 Theory, Methodology and Outline of the Argument

In what follows, I will construct a 'communicative model' of regulatory system development in the business and human rights discourse. This model is novel for its theoretical amalgamations, which merit a brief description.

This analysis takes research on polycentric governance as its starting point, to which an 'interactive theory of networks' is applied, resulting in a discourse theoretic and constructivist understanding of the regulatory context. The analytical progression is thus a three step metonymic sequence, transmutating the unit of analysis from various actors engaged in transnational 'governance', to nodes in networks, to communicative platforms within a discourse. The resulting focus on interactive processes and social facts fits comfortably within a social constructivist research agenda, and has many affinities with the work of legal process scholars.[1]

A methodological challenge inherent in analyzing the conditions under which polycentric regulatory systems might be constructed for global business and human rights, is the invariable need to describe that which does not yet exist. This necessitates analogical theorizing, which turns here to the field of environmental regulation. Though environmental law is also without a global system for regulating corporate behavior, there exists a rich body of literature on polycentrism, examining both 'place-based' regulatory systems, and arrangements in the context of European Union integration. Analogical argumentation is, moreover, supported by the close affinity of the two paradigms. Human rights litigation often serves as a proxy for addressing environmental wrongs,[2] and the

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[1] Relevant approaches are surveyed in Slaughter, Anne Marie & Raustiala, Kal, "International Law, International Relations and Compliance," in Carlsnaes, et al. (eds.), *Handbook of International Relations*. (London: Sage, 2002), including the New Haven school and Yale's 'world constitutive process' model. On constructivism, see Finnemore, Martha & Sikkink, Kathryn, "Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics" 4 *Annual Review of Political Science* 391 (2001) and Ruggie, John Gerard, *Constructing the World Polity : Essays on International Institutionalization* (London: Routledge, 1998), pp 1-41.

[2] Litigation over "human rights violations arising out of the Bhopal gas Disaster in India " is a well known example, *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (1986), at 844. See also

quintessentially transnational character of environmental issues—both the indifference of environmental problems to cultural geography and the novel forms of cooperation their regulation necessitates—provides a useful model for imagining developments in transnational human rights regulation.[3]

After presenting the essential actors and arguments of the business and human rights debate in chapter 1, chapters 2 and 3 construct the communicative model. Chapters 4 and 5 explore the communicative functions and consequences of litigation within that model, and chapters 6 and 7 propose conclusions.

The argument may be seen to consist of two movements. The construction of the communicative model suggests novel perspectives on litigation in the business and human rights discourse. The examination of litigatory functions in that model suggests a role for legal language and processes in non-legal regulation, which may be thought an alternative means of transcending "the tired dogma of 'voluntary versus mandatory'"[4] currently dominating the business and human rights debate.

1.1.3 Terminology

One of the central tenets of this model is that rudimentary terms such as *business* and *human rights* are not statically and universally defined, but that their meanings are subjected to constant contextual processes of negotiation and construction, much as "insofar as the overall global context itself is in transition, standards do not simply 'exist' out there, waiting to be recorded and implemented, but are in the process of being socially

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Acevedo, Mariana T., "Intersection of Human Rights and Environmental Protection in the European Court of Human Rights" 8 *New York University Environmental Law Journal* 437 (1999-2000).

[3] Drahos and Braithwaite note that the environmental movement is the "best resourced and most organized" globalized social movement (Braithwaite, John & Drahos, Peter, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000) p 499), while Alston argued as early as 1991 that the human rights movement has much to learn from environmental regulation, especially in regard to issue integration (Alston, Philip, *Human Rights and Environmental Rights: Are They Compatible?* 1991, p 31).

[4] Ward, Halina, *Legal Issues in Corporate Citizenship*, Swedish Partnership for Global Responsibility (2003) , p 35.

constructed."[5] Such terms are accordingly here employed in their broadest of senses. *Transnational* is generally used to refer to dynamics compromising the traditional sanctity of national borders, while *international* appears in connection with political fora traditional dominated by states, and *global* denotes something approaching the universality of an understanding or ubiquity of phenomena. *Corporation* refers to enterprises, businesses and firms indiscriminately. *Polycentric system* follows Ostrom's seminal formulation,[6] while *hybrid* refers to structures or mechanisms that are composed of actors from, or engaged in regulation of, both the public and private spheres, or composed of both legal and non-legal elements. This model's understanding of terms such as *network*, *discourse*, *governance*, *communication* and *communicative* are intricately bound up in the logical progression of the argument, and define themselves in the course of its development.

1.2 The Debate on Business and Human Rights

Globalization poses numerous challenges to a traditional understanding of human rights, and the political apotheosis of the transnational corporation is as widely recognized as it is definitive. Accounting for approximately 70% of world trade, 25% of total global output, 80% of information technology trade, 90 % of private research and development,[7] some 70,000 transnational commercial enterprises and 700,000 subsidiaries[8] lattice the global in a vast and nebulous series of networks. Penetrating and transcending the

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[5] These processes are, in the final analysis, coterminous. Ruggie, John, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, United Nations Commission on Human Rights (2005), par 54.

[6] Ostrom, Vincent , et al. "The Organization of Government in Metropolitan Areas: a Theoretical Inquiry" 55 *American Political Science Review* 831 (2001), p 831.

[7] Robertson, Robbie, The Three Waves of Globalization: a History of a Developing Global Consciousness (London: Zed Books, 2003), p 198

[8] See http://www.unctad.org/Templates/webflyer.asp?docid=6087&intItemID=3489&lang=1&mode=toc , and Ruggie, cites the same at supra note 5, par. 10-12.

institutional, territorial and national boundaries of states, the transnational corporation exerts considerable influence on the day to day lives of individuals all over the world, even while emerging as a determinative force in the conduct of international politics.[9] This has provoked a number of theories for classifying human rights 'violations' by corporations,[10] and deriving their human rights obligations at international law as either a reflection of actor capacity,[11] or compelled by globalized market forces.[12] These analyses often entail regulatory prescriptions for either an international treaty[13] or cooperation between the world's most prominent international institutions,[14] but have made little headway in international policy circles.

A variety of novel regulatory mechanisms have also emerged, often of a private character, and the proliferation of corporate codes of conduct, private standards and certification schemes, shareholder initiatives and ethical investment portfolios, all attuned

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[9] On this latter point, see Bull, Benedicte, et al., "Private Sector Influence in the Multilateral System: A Changing Structure of World Governance?" 10 *Global Governance* 18 (2004).

[10] See Jungk, Margaret, *Business Responsibility for Human Rights Abroad*, Danish Center for Human Rights, Confederation of Danish Industries, and the Industrialization Fund for Developing Countries (2005) available at <http://www.humanrightsbusiness.org/020_project_publications.htm>; as well as Frey, Barbara A., "The Legal and Ethical Responsibilities of Transnational Companies in the Protection of International Human Rights" 6 *Minnesota Journal on Global Trade* 153 (1997), pp 180-7.

[11] Ratner, Steven R., "Corporations and Human Rights: a Theory of Legal Responsibility" 111 *The Yale law journal* 104 (2001).

[12] Greathead, Scott "The Multinational and the "New Stakeholder": Examining the Business Case for Human Rights" 35 *Vanderbilt Journal of Transnational law* 719 (2002); Ward, Halina "Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options" 24 *Hastings international and comparative law review* 24 (2001) at 453

[13] Ratner, supra note 11; Meeran, Richard, *Corporations, Human Rights and Transnational Litigation*, a lecture held for the Monash University Law Cambers, 29 January 2003 (2003); and Koh, Harold Hongju "Separating Myth from Reality about Corporate Responsibility Litigation" 7 *Journal of International Economic Law* 263 (2004).

[14] Kinley, David & Tadaki, Junko, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" 44 *Virginia journal of international law* 94 (2004); Deva, Surya "Human Rights Violations by Multinational Corporations and International Law: Where From Here?" 19 *Connecticut journal of international law* 58 (2003).

to the human rights related performance of transnational business, has loomed large in the protracted debate over whether the regulation of business and human rights ought to be voluntary or binding. Many commentators note the complementarity of the two approaches, and Steinhardt has gone so far as to describe a "rough coherence" between [f]our separate but compatible regimes" of market based regulation, domestic regulation, civil liability in domestic courts, and international regulation, as a "new *lex mercatoria*."[15]

The debate remains largely partisan, however, with much of the business community firmly opposed to binding solutions, and much of the activist community ardent in their endeavor to move "beyond voluntarism."[16] At the international register, this standoff came to a head with UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms).[17] Embraced by much of the activist community as a candidate for development into international hard law,[18] business rejected the very idea of 'norms', preferring human rights sensitive 'operational frameworks'.[19] The Norms themselves were ambiguous about their own legal status and potential,[20] and in 2005 John Ruggie was appointed Special

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[15] Steinhardt, Ralph, "Corporate Social Responsibility and the International Law of Human Rights: the New *Lex Mercatoria*," in Alston (ed.), *Non-state Actors and Human Rights*. (Oxford: Oxford University Press, 2005), pp 178 & 179.

[16] See *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies*, International Council on Human Rights Policy (2002).

[17] UN DocE/CN.4/Sub.2/2003/12/Rev.2 (2003).

[18] Kinely describes the Norms as "essentially a draft treaty." Redmond's rendition of the argument is informed and concise (Redmond, Paul, "Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance" 37 *The International Lawyer* 34 (2003)). Vagts, on the other hand, sees the norms as "of marginal utility" (Vagts, Detlev F. "The UN Norms for Transnational Corporations" 16 *Leiden Journal of International Law* 8 (2003), p 795).

[19] See e.g., Report of the United Nations High Commissioner on Human Rights on the sectoral consultation entitled "Human Rights and the Extractive Industry", held 10-11 November 2005, OHCHR (2005) .

[20] This was in fact their most contentious aspect. See Vagts, supra note 18; Weissbrodt, David & Kruger, Muria "Current Developments: Norms on the Responsibilities of Transnational Corporations and

Representative to the Secretary General on Business and Human Rights (SRSG) with a mandate to clarify their constitutive elements and legality in an effort to build consensus.[21] The SRSG's interim report of March 2006, however, dismissed the norms as "a distraction,"[22] foiling hopes that they might serve as a draft treaty or, at the very least, represent consensus on standards.[23]

1.3 The Puzzle Piece of Litigation

At the intersection of legal polemics and innovative activism lies transnational civil litigation against corporations in domestic courts for human rights malfeasance abroad. Developed primarily under the US Alien Tort Statute (ATS),[24] and with only a scattering of cases in commonwealth and civil law jurisdictions,[25] the appropriateness and efficacy of such litigation remain contentious. Praised by advocates as the only effective enforcement mechanism, litigation is widely applauded for its benefit to human rights victims and

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Other Business Enterprises with Regard to Human Rights" 97 *The American Journal of International Law* 22 (2003); and Ruggie, supra note 5, on the Norms' "doctrinal excesses" at par's 59-60.

[21] Information relating to the appointment and mandate of the SRSG is available at http://www.reports-and-materials.org/UN-Special-Representative-public-materials.htm.

[22] Ruggie, supra note 5, p 69.

[23] For a collection of civil society responses (mostly indignant) to the interim report, and SRSG responses to those responses, see the Business and Human Rights Website Section: http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative.

[24] The Alien Tort Statute grants US federal courts "original jurisdiction for a tort only committed in violation of the law of nations." (28 U.S.C. § 1350).

[25] For the suggestion that such litigation is distinctly American, see Stephens, Beth, "Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations" 27 *The Yale Journal of International Law* 58 (2002), for the contrary position and a discussion of the international prospects for such litigation, see Chpt.7.1, supra.

survivors,[26] and deterrent effect on corporate behavior.[27] These benefits are not clear, however. Restitution has been fraught with practical problems[28] and it is difficult to determine what kind of ripple-effect it has had on corporate behavior.[29] The tendency of litigation to end in settlement precludes precedence, and some commentators have argued that it discourages proactive rights promotion by corporations,[30] who are quick to decry litigation's negative consequences for trade and foreign policy.[31]

A tremendous mass of academic literature addresses the doctrinal development and historical foundation of human rights litigation. Analyses exploring its consequences or interaction with broader social contexts, meanwhile, are few, including Koh's transnational

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[26] van Schaack, Beth, "With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change" 57 *Vanderbilt Law Review* 46 (2004) at footnote 49.

[27] "We are going to spend the next couple of years suing every company we can find that is engaged in human rights violations,' declares Terry Collingsworth of the international Labor Rights Fund [and council in Doe vs. Unocal Corp]. 'And in the long run, we are going to get help from the investment community. When we win just one case, the companies are going to have to add this to their evaluation criteria. We then won't have to police this anymore. The investors will." Cited in: SustainAbility, *The Changing Landscape of Liability; a Director's Guide to Trends in Corporate Environmental, Social and Economic Liability,* a report produced by SustainAbility (2004), p27.

[28] Parker, Clive, *Wrangle Prolongs Allocation of Unocal Payout*, Irwaddady, 17 Aug 2005 available at http://www.burmanet.org/news/2005/08/17/irrawaddy-wrangle-prolongs-allocation-of-unocal-payout-clive-parker/.

[29] See Thames, H. Knox "The Effectiveness of US Litigation against MNCs in Burma" 9 *Human Rights Defender* 6 (2000).

[30] "In fact, ATCA cases force MNCs into a strategy of downplaying their ability to have a substantial impact upon their immediate social and physical environment, thereby implying a sort of diminished capacity to act responsibly in a proactive way," Shamir, Ronen, "Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility" 38 *Law & Society Review* 635 (2004), p 649.

[31] See Markels, Alex, *Myanmar-Unocal Case Could Affect Global Trade*, New York Times News Service, 15 June 2003 available at <http://www.taipeitimes.com/News/bizfocus/archives/2003/06/15/2003055364>; *Amicus Brief in Support of Certiorari. Sosa v. Alvarez-Machain,* International Chamber of Commerce (2004); and USA Engage web site at http://www.usaengage.org/MBR0088-USAEngage/default/priority%20issues/ats.htm.

legal process,[32] Van Schaack's continuum between "direct client advocacy" and "public impact models" of litigation[33] and Stephan's "expressive judicial function."[34] But these analyses all circumscribe the social effects of litigation with national boundaries. Scott and Wai have moved one step further, suggesting a potential for human rights norms to 'migrate' in litigation, and thus 'destabilize' legal doctrines, and potentially provoking dynamics of transnational change.[35] The analysis is constrained to narrating isolated incidents, however, and while theoretically compelling, no interactive pattern emerges. Elsewhere, Wai suggests an "ideational function" for human rights litigation as "inter alia, a mechanism for shining light upon private conduct, convincing third parties to join a boycott, or publicizing state interaction,"[36] but does not expand, leaving the point stranded at a level of abstraction shared by Teitel's broad and unsubstantiated assertions that "the constructive work of human rights litigation is inextricably bound up in the construction of the meaning of global rule of law."[37]

By failing to explore how litigation interacts with the larger regulatory context of business and human rights, these analyses also fail to challenge the dominant trope of human rights litigation as the isolated, independent and anomalous piece of a larger regulatory puzzle—a novel curiosity, perhaps of punitive, deterrent, or restitutive utility.

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32 See Koh, Harold Hongju, "Transnational Legal Process" 75 *Nebraska law review* 181 (1996).

33 Supra note 25 at 2309.

34 Stephan, Paul B., "A Becoming Modesty: U S Litigation in the Mirror of International Law" 52 *De Paul Law Review* 627 (2002), p 629.

35 Scott, Craig & Wai, Robert, "Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: the potential contribution of transnational 'private' litigation," in Joerges, et al. (eds.), *Transnational Governance and Constitutionalism*. (Oxford: Hart, 2004).

36 Wai, Robert, "Transnational Private Law and Private Ordering in a Contested Global Society" 46 *Harvard International Law Journal* 471 (2005), p 482.

37 Teitel, Ruti, "The Alien Tort and the Global Rule of Law" 57 *International Social Science Journal* 551 (2005).

2 Network Governance and Cooperation

2.1 Networking the Global Public Domain

Economic globalization has produced elaborate regulatory arrangements that often blur traditional distinctions between public and private actors,[38] legal and non-legal sources,[39] the law and market practice.[40] The broad rubric of 'governance' denotes a

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[38] Alston noted early on that "…impacts of TNCs on a host state's actions are increased with the privatization of public goods generally, as the ability of government to promote and protect human rights, even if protected by a constitution and enforced by an independent judiciary, then becomes more restricted." Alston, Philip, "Myopia of the Handmaidens: International Lawyers and Globalization" 8 *European Journal of International Law* 435 (1997); while Claire Cutler argues that "firms are basically behaving like governments," (cited in Ruggie, John, "Reconstituting the Global Public Domain: Issues, Actors, and Practices" 10 *European Journal of International Relations* 490 (2004), p 503); and Picciotto notes that this blurring is especially true for intergovernmental and nongovernmental organizations operating at the international register, where many organizations, "although private associations, perform quasi-public regulatory functions" (Picciotto, Sol, "Introduction," in Picciotto & Mayne (eds.), *Regulating International Business* (Basingstoke: Palmgrave, 1999)p 10).

[39] Meidinger's pithy articulation of the problematique's categorical bottom line is worth quoting: "…by developing standards which they claim further public goals, non-governmental bodies inevitably subject themselves to expanded legal requirements, regardless of whether they are fully equated to government bodies." (Meidinger, Errol, "Law and Constitutionalism in the Mirror of Non-Governmental Standards: Comments on Harm Schepel," in Joerges, et al. (ed.), *Transnational Governance and Constitutionalism*. (Oxford: Hart, 2004), p 195.

[40] Most notorious is perhaps lex mercatoria. Hailed by some as 'global law without a state', others dismiss such legal aspirations as "dangerous…undesirable…and ill-founded,"(see Teubner, Gunther, "Global

variety of literature occupied with how these phenomena lead to cooperative strategies for the production, distribution and guaranty of public goods. Implicit in this literature is the understanding that novel governance arrangements are intimately related to the powerful rise of private actors on the global stage, and a considerable amount of ink is spilt on identifying who exactly those relevant actors are and what they are doing. Haas provides a succinct first blush:

> A lot of governance is clearly already going on, the trick is…a clearer map of the actual division of labor between governments, NGOs, the private sector, scientific networks and international institutions in the performance of various functions of governance.[41]

Ruggie has argued that the debate, production and delivery of public goods takes place in a transnational arena he styles the "new global public domain," whose most relevant actors include transnational corporations, financial institutions, civil society organizations, faith-based movements, private military contractors and "such illicit entities as transnational terrorist and criminal networks."[42] Advocates of binding regulation tend meanwhile to focus on corporate behemoths and international organizations, while others stress the importance of business consortia and learning fora.[43] An immediate observation is that *which* actors are relevant depends considerably on both the type of governance under observation and the normative strategy of the analysis.

Bukowina: Legal Pluralism in the World-Society," in Teubner (ed.), *Global Law Without a State*. (Aldershot: Dartmouth, 1997), citing Mann at p 7). Steinhardt offers a middle ground, noting that "in the synergistic dynamic that was the [classic] lex mercatoria, practices affected rules which affected practices which refined rules, and so on, over centuries." (Steinhardt, supra note 15 at 225).

41 Haas, Peter M., "Addressing the Global Governance Deficit" 4 *Global Environmental Politics* 1 (2004), p 8. The 'functions' include: agenda setting, framing, monitoring, verification, rule making, norm development, enforcement, capacity building, and financing, p 6.

42 Supra note 37, at 509-10.

43 Ruggie has long championed the learning forum model exemplified by the Global Compact, which, despite its relevance, cannot be treated here.

A second observation is that actors are most relevant not in isolation, but interaction. 'Who's who' is almost ontologically accompanied by 'who does what' in governance structures, and the most pertinent question is perhaps *how* they cooperate. This introduces the centrality of network connections common both to governance and global business structures.[44]

Human rights advocacy has proven adept in exploiting this commonality through nodal interventions,[45] as well as the use of network formations.[46] Of particular interest is the way in which "civil society acts as a 'transmission belt' between deliberative processes within international organizations and an emerging transnational public sphere."[47] In such instances civil society participates in governance, and the potential for cooperative activity in the provision of public goods by diverse sectors lends network governance a value added greater than the sum of its parts. Such networks

> combine the voluntary energy and legitimacy of the civil society sector with the financial muscle and interest of businesses and the enforcement and rule-making

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[44] On how the former confounds traditional legal regulation, see Teubner, Gunther, *Coincidentia Oppositorium: Hybrid Networks Beyond Contract and Organization*, Storrs Lectures 2003/4: Yale Law School (2003-4), http://www.jura.uni-frankfurt.de/ifawz1/teubner/Publika/PublikaEngl/.

[45] Emblematic is the "coalition of more than 600 organizations in 70 countries [which] sprang into 'virtual existence' on the World Wide Web almost overnight to oppose [and eventually defeat] the Multilateral Agreement on Investment." (Ruggie, supra note 37, at 511).

[46] This is true in litigation, as will be explored below. For the efficacy of networks in influencing state compliance with human rights norms, see Risse, Thomas, et al. (eds.), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999), offering six case studies.

[47] Nanz, Patrizia, "Legitimation of Transnational Governance Regimes: Foodstuff Regulation at the WTO: Comments on Alexia Herwig," in Joerges, et al. (eds.), *Transnational Governance and Constitutionalism*. (Oxford: Hart, 2004), p 230.

> power and coordination and capacity-building skills of states and international organizations.[48]

A second important characteristic is the inherent flexibility of network organization. Ruggie notes that transnational corporations have "have gone global and function in near real time, leaving behind the slower moving state-mediated inter-*national* world of arm's length economic transactions,"[49] and they have been accompanied by a host of other actors.[50] Network governance structures thus tend to

> operate through broad, open-ended, and often informal, yet surprisingly durable commitments by diverse sets of actors to address complex problems jointly by means of ongoing multi-party collaboration…emphasizing continuous generation of new information which leads in turn to continuous adjustment, refinement, and reconfiguration of both goals and policy measures, as well as the underlying institutional arrangements themselves, in light of new learning and changing conditions.[51]

This fluidity and informality, while certainly contributing to fact that "networks are protean things, difficult to define or typologize,"[52] appears key to their efficacy in the governance

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[48] Reinkicke, Wolfgang H. & Deng, Francis M., *Critical Choices: The United Nations, Networks, and the Future of Global Governance*, UN Vision Project on Global Public Policy Networks (2000) <www.globalpublicpolicy.net>, p 24.

[49] Supra note 37, at 503, emphasis in original.

[50] See Teubner, supra note 43.

[51] Karkkainen, Bradley C., "Post-Sovereign Environmental Governance" 4 *Global Environmental Politics* 72 (2004), p 74-5.

[52] Reinkicke & Deng, supra note 47 at viii.

context.[53] In their study of polycentric environmental regulation in the Western Balkans, Antypas et al note that

> informal networks are arguably more important than the formal institutions as it is the former that drive the formation of the latter and provide both opportunities and limits to their development and reach. Transboundary Policy Networks…and the institutions they have created…reflect a gradually emerging transnational public policy-making structure in the region that is the product of a complex interplay of people and organizations characterized by heterogeneous policy.[54]

This is a concrete example of how the network organization of actors engaged in governance leads to durable cooperative structures and produces a polycentric regulatory system at the micro (placed-based) register. Granting the assumption that polycentric systems for the regulation of business and human rights will develop according to comparable dynamics, this mandates a closer look at how cooperation is built and sustained between disparate actors.

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[53] For the complications this poses to grass roots advocacy, see McDonald, Kevin "From Solidarity to Fluidarity: social movements beyond 'collective identity': the case of globalization conflicts" 1 *Social Movement Studies* 109 (2002).

[54] "…by 'policy networks' we mean informally composed linkages of politicians, civil servants, policy analysts, experts, non-governmental organizations and interest groups and so on, that provide the informal institutional forums in which public policy options are debated, negotiated and decided upon." Antypas, Alexios & Avramoski, Oliver, "Polycentric Environmental Governance: Towards Stability and Sustainable Development" 34 *Environmental Policy and Law* 87 (2004), p 12.

2.2 Coordination and Systematicity

Polycentric regulatory mechanisms are products of coordination per definition. Introducing the concept of a "polycentric political system" in their seminal article of 1961, Ostrom et al note that:

> 'Polycentric' connotes many centers of decision-making which are formally independent of each other. Whether they actually function independently, or instead constitute an interdependent system of relations, is an empirical question in particular cases. To the extent that they take each other into account in competitive relationships, enter into various contractual and cooperative undertakings or have recourse to central mechanisms to resolve conflicts, the various political jurisdictions in a metropolitan area may function in a coherent manner with consistent and predictable patterns of interacting behavior. To the extent that this is so, they may be said to function as a 'system.'[55]

Extant polycentric governance arrangements tend to entail coordination between relatively few actors and institutions with complementary mandates and specializations. This is especially true of 'place-based' environmental regulation, where focus on a specific and preexisting problem organizes the coordination of diverse actors according to shared principles and understandings ex ante. Research on polycentric governance clearly attributes this to the scope of interaction.

> Ostrom…has been at great pains to specify the conditions under which iterative processes of institution building can lead to the appearance of effective governance systems. These include: actors in the network should recognize their interdependence; they should know each other for years; there should be a relatively

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[55] Ostrom, supra note 6.

small number of actors who trust one another. If these conditions are fulfilled, than cooperation can develop.[56]

This corresponds well to 'place-based' systems, and colors cooperative developments at the international register, where actors, preferences and strategies are grossly multiplied, as much less likely. Schout and Jordan refer to the regional integration of environmental policy as "a multi-actor, multi-level problem par excellence."[57]

To imagine polycentric governance structures for business and human rights at the global level is to imagine rather grand network structures linking states, international and non-governmental organizations, business leaders and consortia, market and faith based initiatives. It is tempting to read nascent traces of such structures into the "roughly coherent" regimes described by Steinhardt.[58] But complementarities do not constitute governance systems. As Falkner notes,

> governance needs to be distinguished from mere cooperation between private actors. Cooperation requires the adjustment of individual behavior to achieve mutually beneficial objectives, and… is mostly of an *ad hoc* nature with a short lifetime. Governance, however, emerges out of a context of interaction that is institutionalized and of a more permanent nature. In a system of governance, individual actors do not constantly decide to be bound by the institutional norms based on a calculation of their interest, but adjust their behavior out of recognition of the legitimacy of the governance system. Cooperation may lead to governance,

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[56] Schout, Adrian & Jordan, Andrew, "Coordinated European Governance: Self-Organizing or Centrally Steered?" 83 *Public Administration* 201 (2005), pp 9-10, referencing Ostrom, Elinor, *Governing the commons : the Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990), pp 197-206.

[57] Ibid, p 18, emphasis in original.

[58] Supra at note 15.

> but more is required than the spontaneous convergence of private actors' interests via the coordinating function of markets.[59]

Were such systematicity possible for the global regulation of business and human rights, the resulting "interdependent system of relations" would be more in line with the kind of regime envisioned by Trubek for the transnational regulation of labor relations:

> In lieu of simplistic models that rely on the restoration of a pure national autonomy or utopian dreams of sweeping global regulation some have begun to explore prospects to strengthen and supplement national norms through a multilayered approach [of] a mosaic of normative orders and norms that would, taken together, establish a multilevel public-private, cascading transnational regime…[60]

Neither the potential form, content nor structure of transnational regulatory systems are here at issue, but rather the conditions for *any* kind of global systematicity. Assuming the hard-case of self-directed and autonomous organization, this analysis will propose modes of cooperative development for place-paced and autonomous regulatory mechanisms, themselves often transnational, and ways in which they might cohere and expand to achieve global reach.

While the activity of networks in the global public domain is essential to understanding these conditions, it is important from the beginning to make a semantic distinction between "the network as an analytical tool, which aims to map the topological structures of the social relationships, and the network as a form of governance…one with its own logic."[61] I am here using a network methodology to determine the necessary

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[59] Falkner, Robert, "Private Environmental Governance and International Relations: Exploring the Links" 3 *Global Environmental Politics* 72 (2003), p72-3.

[60] Trubek, David M., et al., "Transnationalism in the Regulation of Labour Relations: International Regimes and Transnational Advocacy Networks" 25 *Law & Social Inquiry* 28 (2000), p 1189.

[61] Dicken, Peter, et al., "Chains and Networks, Territories and Scales: Towards a Relational Framework for Analyzing the Global Economy" 1 *Global Networks* 89 (2001), p 92.

conditions of network governance, but the two concepts are as distinct as the literature from which they emerge. To avoid equivocation I will below refer to the latter as polycentric systems. The main thrust of this chapter has been to set the stage for the development of such systems in the 'global public domain', and to posit the centrality and contours of cooperative network structures thereby.

2.3 The Social Construction of Cooperative Structures

Ronen Shamir has described corporate social responsibility, not as a movement or doctrine, but as a 'discursive field', where the very meaning of corporate responsibility "must be constructed and articulated through various symbolic means,"[62] and "regulatory/disciplinary regimes are pursued and negotiated among a host of players."[63] This complements Ruggie's understanding of the global public domain as "the arena in which expectations regarding legitimate social purposes, including the respective roles of different social sectors and actors, are articulated, contested, and take shape as social facts."[64] Together these two frameworks go a long way towards delineating what this analysis refers to as the business and human rights discourse. The picture is completed by applying the logic of networks and the most salient characteristics of network structures in a discourse are naturally interactive.

Networks "are relational because they are constituted by the interactions of variously powerful social actors. These relationships can exist in the form of rules, conventions, values, regulations and so on," and this implies that networks are "both *social structures* and *ongoing processes*, which are constituted, transformed and reproduced

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62 Shamir, Ronen, "Mind the Gap: The Commodification of Corporate Social Responsibility" 28 *Symbolic Interaction* 229 (2005), p 230.

63 Supra note 29, at 659.

64 Supra note 37, at 504.

through asymmetrical and evolving power relations…"[65] These power relations strike recurrent patterns, and bring together

> as allies or adversaries, a multitude of actors who occupy a variety of strategic positions…that coalesce around certain specific understandings (and vested interests in pursuing certain understandings)[66]

Discursive networks are manifest by positioning strategic constellations of nodes, and this is in itself a jockeying for power, as the strategic meaning of each position is a function of all other positions. The organization, indeed the very identification, comprehension and mobilization of strategic positions in discursive negotiation and contest, is effected by communication between actors and fora. This observation has two important theoretical consequences. Firstly, a communicative focus allows greater analytical room for the study of norms, which are the discursive currency of business and human rights. It also prompts a critical rethinking of what social facts lurk beneath the murky surface of cooperative governance.

The global public domain may fall seriously short of Falkner's strict governance criteria: an institutionalized "context of interaction" and behavior modification based on the "recognition of the legitimacy of the governance system."[67] But it is worth looking closely at the case with which Ruggie exemplifies his argument

Ruggie's narrates a chain of reactions to the Bush administration's rejection of the Kyoto Protocol, and the litany entails a motley mix of actors and efforts—corporate lobbyists, business leaders promoting 'enlightened self interest', activist boycotts, shareholder resolutions and lawsuits, projects initiated by private philanthropic funds, pronouncements by corporate insurers, 'son-of-Kyoto bills' enacted by state legislators, and an ethical investment summit held by a coalition of public pension managers, the UN

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65 Dicken, supra note 60 at 94 and 104.

66 Shamir, supra note 29, at 648.

67 Supra note 58, at 73, but see Ruggie, supra note 37 at 519.

and Harvard University. Ruggie concludes, "[n]o central mechanism coordinates these actions, but they do play out in an interconnected manner within and across different social sectors and in domestic as well as transnational arenas."[68]

While this dynamic does not constitute an "interdependent system of relations"[69] its 'interconnected manner' approaches coordination, and I would argue that this is precisely because there *was* a 'central mechanism', though not institutionalized: the Kyoto Protocol. The Protocol provided a normative interpretive framework that functioned as sounding board for individual actions, and thereby effected indirect communication among institutionally independent actors and fora. While this coordination was not institutionalized, neither was it ad hoc or purely self interested. As a governing set of understandings that guide independent action, it greatly resembles what network theory terms "macroculture," which enables "coordination among autonomous parties [by] creating 'convergence of expectations'[70]

A sturdier example may be development discourse and policy during the 1980s-90s. This discourse was then ruled by the 'neo-liberal consensus', the content of which, despite numerous legal articulations, was not 'codified' in any single document binding on all polycentric regulatory mechanism and institutions. Shared understandings nevertheless engendered 'systemic' coherence among institutions and initiatives. Thus without prohibiting actions, the consensus established a normative framework against which all acts and actors were interpreted, and their discursive pedigree telegraphed.

This understanding of interactional coordination and inter-referential contexts recalls the concept of 'constitutive rules.' In Searle's classic formulation:

> Some rules regulate antecedently existing forms of behavior. For example, the rules of polite table behavior regulate eating, but eating exists independently of these rules. Some rules…create the possibility of or define that activity. The activity of

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68 Supra note 37 at 521.

69 Ostrom, supra note 6.

70 Jones, Candace, et al., "A General Theory of Network Governance: Exchange Conditions and Social Mechanisms" 22 *The Academy of Management review* 35 (1997), p 929.

> playing chess is constituted by action in accordance with these rules. The institutions of marriage, money, and promising are like the institutions of baseball and chess in that they are systems of such constitutive rules or conventions.[71]

Polycentric regulation represents a complicated kind of two-level game in which coordination is discursively organized according to constitutive rules, resulting in a system that articulates, applies and enforces regulatory rules. As a 'context for interaction' discursive constitutive rules are located in the shared understandings and expectations of actors, amorphous and resistant to precise articulation. Yet they are articulated, not only for the dissemination by which they achieve their constitutive function, but are embedded in regulatory rules, which perform their (collective) articulation. This is because rule making and rule articulation are among the activities coordinated by the 'macroculture' of constitutive rules. It is only against a broad normative and interpretive context that regulatory rules have any meaning at all. 'No dogs on the train' need not parenthetically distinguish between seeing eye dogs, drug sniffing dogs at a border, etc., as long as rule makers and rule followers share a set of understandings and expectations. In the current context, the rule to exclude "companies from the investment universe that produce, either themselves or through entities under their control, strategic components for…chemical weapons…"[72] only makes sense if there exist shared understandings about what *entities* and *control* actually mean. Reference might be made to a more constitutive rule, such as the rule that

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[71] Searle, John R., *Speech Acts : an Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969), p 131.

[72] Ethical Guidelines for the Norwegian State Petroleum Fund, see http://odin.dep.no/fin/engelsk/aktuelt/pressem/006071-070397/index-dok000-b-n-a.html.

> [m]ultinational enterprises include enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based…[73]

Yet even this rule relies on shared understandings, and will have effect only to the extent that they are weaved into a relatively stable and communal interpretive screen. Thus, while defying precise articulation, constitutive rules are deducible from regulatory rules, behavior, and the structural and relational characteristics of the networks about which they coalesce. Fuller's distinction between 'made rules' and 'implicit rules' provides an illustrative comparison:

> *Made rules* are…conceived prior to and projected onto conduct…*implicit rules* arise from conduct, not conception. Verbal formulations may more or less accurately capture the rules implicit in the conduct, but the formulations are always post hoc and strictly answerable to the conduct. No formulation is authoritative in virtue of its public articulation alone….Although implicit rules arise from the conduct of determinate agents, typically they have no precise date of birth and no determinate authors…Thus, implicit rules arise from and draw their practical force from the interdependence of expectations and aims...
>
> Enacted norms make sense…only when they are set in the context of concrete practices, attitudes, and forms of social interaction.[74]

While it may not be possible to locate a moment of inception for constitutive rules, this chapter has aimed to identify the structural conditions under which they may be manifest or

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[73] Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. GB.204/4/2 (1977), par 6.

[74] As described by Postema, Gerald J. "Implicit Law" 13 *Law and Philosophy* 361 (1994), pp 363-4, 375-6; internal citations omitted.

constructed. For the business and human rights discourse, this leads to the following propositions:

Following dismissal of the UN Norms polycentric regulatory systems may be the only viable mode for the global regulation of business and human rights, but are predicated on coordination and cooperation between network actors. Understanding the global public domain as a discourse casts cooperation in the role of constitutive rules, the structural conditions of which are shared understandings and expectations. The business and human rights discourse is rife with active contest, negotiation and construction of shared understandings, but the broad dissemination and consensus that would endow them with constitutive status remains a distant hypothetical, a possibility crippled by 'the tired dogma of voluntary vs. mandatory'. Against the background of this understanding, the following chapter will approach a mechanical examination of the strategic contests and negotiations through which actors in the business and human rights discourse construct the terms of their interaction.

3 The Business and Human Rights Discourse

3.1 Communicative Platforms and Norm Relay

Interactive network theory provides the basic mechanisms for understanding communicative interaction in the business and human rights discourse, suggesting that

> the global economy is constituted by 'spaces of network relations'. Individuals, households, firms, industries, states, unions or other organizations and institutions can represent social actors in the global economy. We then need to understand the intentions and motives of these social actors and the emergent power in their network relationships. These relationships are embedded in particular spaces… [which] can include localized spaces (for example financial districts in global cities) and inter-urban spaces (for example webs of financial institutions and the business media that bind together global cities). The global economy is thus made up of social actors engaged in relational networks within a variety of 'spaces'. The analytical lens we adopt can thus vary widely. It may be geographical, it may be sectoral, and it may be organizational. It may be some combination of these.[75]

The analytical lens here adopted would understand such 'spaces' as institutionalized spaces of discursive action, within which actors contest and negotiate 'specific understandings' about the very rules of the game.

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[75] Dicken, supra note 60 at 97.

These discursive spaces occupy an analytical register quite distinct from the strategic topography against which networks and actors position themselves for negotiation and contest over specific understandings. Strategic discursive positions at that register are only meaningful in paradigmatic comparison to all other positions, and organization is an interactive process of recognition and alignment that relies on communication within and between networks. Communicative platforms provide the fora at which this takes place—where proclamations, incitations, accusations, denials, admonishments, diatribes and didactics allow discursive actors to recognize the strategic landscape of discourse and position themselves within it, in order to further their own grounded and ideological interests.

Communications themselves are inevitably normative, launched from communicative fora and into the fray of discursive struggle, they compete with other normative communications, and together comprise the jumbled field of norm-war that is the business and human rights discourse. Some norms are resilient and reappear consistently in the discourse, while others die a quick death, and communicative platforms serve two determinate functions in this regard.

Firstly, they are the discourse's gatekeepers. Regardless of how germane a norm, it will not gain discursive recognition and currency unless emanating from a sanctioned platform. Because it is only through communicative platforms that actors engage discourse structures and effect the realignment of strategic positions, the success of any given norm in contest is discernable to the extent that it is subsequently communicated in other fora.

Secondly, and closely related, communicative platforms posses mutable, but perceptible authority, and this seems have a decisive effect on how well communications fare in normative contest. Thus, a norm regulating parent company responsibilities in regard to unions at independent bottling plants will be more resilient in norm contest when communicated from the platform of the World Bank Presidency than by someone interviewed at a 'Kill Coke' rally. This is not a 'one-off' phenomenon, however. The norm, if successful, will be subsequently communicated in another forum, and perhaps again, and again, at which point it will retain the authority of the World Bank presidency

(however affected by the authority of subsequent communications). This implies that the authority of communicative platforms is embedded within the norm itself.[76]

This is most recognizable as an appeal to authority—public relations statements cite an independent audit, shareholder initiatives cite an NGO report—but it is important to note that it is never the authority of the norm per se that is appealed to, but the authority of a communicative platform. This distinction is especially clear in common law legal argumentation, which necessitates reference to communications occurring within fora of a specific legitimacy—rather than norms of a specific legitimacy. The norm proclaiming a general 'right to property' is thus a substantially, politically and discursively different norm today than it way when communicated by John Locke in 1690. This is not only because social contexts have changed, but because that norm is now embedded with a vast recession of communications in philosophical treaties, international instruments, cold war propaganda and judicial and legislative specifications at the local register. These prior communications are embedded within the norm, and such baggage exerts a determinative influence on how norms are asserted, rejected and admitted. This dynamic is differentiated from an ordinary understanding of norms by referring to 'complex norms'.[77]

The authority embedded in complex norms is self-reinforcing in a manner similar to rules:

> Every time agents choose to follow a rule, they change it - they strengthen the rule - by making it more likely that they and others will follow the rule in the future.

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[76] This corresponds with Dicken et al's description of a "mutually constitutive process" whereby contexts, or territories, are embedded in network structures and vice-versa, ibid at 96-7.

[77] A standard constructivist understanding of norms as "shared expectations about appropriate behavior held by a community of actors," notes the inter-subjective aspect of norms as well as their intimate connection with action, without capturing this dynamic (Finnemore, Martha & Dessler, David, "National Interests in International Society" 103 *The American Journal of Sociology* 2 (1997), p 22).

> Every time agents choose not to follow a rule, they change the rule by weakening it, and in so doing they may well contribute to the constitution of some new rule.[78]

Substitute rule adherence with norm communication and this is a pithy description of how norms are relayed from one communicative platform in the business and human rights discourse to another. In addition to strengthening the authority and resilience of complex norms, norm relay also strengthens the pathways between communicative fora. Repeated relay among communicative platforms strengthens the network connections between those fora and participants active in them.[79] The way in which these two tendencies are manifest and influenced by the characteristics of each individual communicative platform, may be discussed in terms of that platform's articulative and iterative functions.

The self reinforcing nature of embedded authority and relay pathways can play a key role in the foundation of constitutive rules by facilitating wider dissemination of norms, understandings and interpretations of social context, and promoting repetitive communication between fora. As articulated by network theory:

> The more structurally embedded (e.g., the more connected and frequently interacting) the industry participants, the more widely they share their values assumptions, and role understandings.
>
> Since structural embeddedness diffuses information throughout a system, it also facilitates the development of macroculture—the common values, norms and beliefs shared across firms—because parties share perceptions and understandings…[80]

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[78] Onuf, Nicholas, "The Constitution of International Society" 5 *European Journal of International Law* 1 (1994), p 18.

[79] In network theory, "frequent interactions establish the conditions for relational and structural embeddedness," Jones, supra note 69 at 917.

[80] Ibid at 926, 930.

The pattern that emerges from these observations is a discursive constellation of communicative platforms from which diverse actors can mobilize normative communications for general contest. Complex norms trace paths between fora, strengthening network ties and becoming more resilient in norm competition through relay. Excessively reinforced norms and interactive network connections facilitate the development of shared social realities, here termed constitutive rules.

3.2 The Privileged Discursive Fora of Courts

Of the diverse communicative platforms within the global public domain, the institutional forum provided by transnational litigation in domestic courts is unique, privileged both strategically and functionally.

The institutional placement of transnational litigation offers a strategic advantage to discursive actors, acknowledged only implicitly by literature on norm entrepreneurship and transnational advocacy networks, often responsible for initiating human rights litigation.[81] Transnational advocacy networks exercise "soft power" on the "global norm structure"[82] from a variety of communicative platforms, including "relatively dull reports, lively street protests, [and] private meetings, but in all cases the stress is on changing discourses and practices."[83] While the effects of such communications merit real consideration, they tend

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[81] See e.g., Koh, supra note 31; Lutz, Ellen & Sikkink, Kathryn, "The Justice Cascade: the Evolution and Impact of Foreign Human Rights Trials in Latin America" 2 C*hicago Journal of International Law* 1 (2001); and van Schaack, supra note 25. For the seminal work on advocacy networks see Keck, Margaret E. & Sikkink, Kathryn, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, N.Y.: Cornell University Press, 1998).

[82] Boli, John, "Restructuring World Politics: Transnational Social Movements, Networks, and Norms Edited by Sanjeev Khagram, James V Riker, and Kathryn Sikkink Minneapolis: University of Minnesota Press, 2002 366p" 1 *Perspectives on Politics* 2 (2003), at 301.

[83] Ibid at 305-6.

to exhibit an inverse relationship between sound argumentative rationality and communicative force. As Dine wryly notes,

> It is difficult to carry a protest banner reading 'It might be a good idea to sequence trade and capital account liberalization for small economies so that domestic industries and the financial sector are protected from the worst of the "herd" behavior of the international financial sector'—but simplistic 'wrecking' answers such as 'Ban the WTO' or 'Kill Coke' are unlikely to achieve justice in the trading system.[84]

The institutional forum provided by courts transcends this strategic double bind by combining the authority inherent in judicial decisions with the fact that "courts are unusually well positioned to enunciate norms, because of both their independence and their willingness to engage in dialogue over legal meaning."[85] Courts are also strategically attractive for actors politically outmatched in other communicative fora. The presumption of equality before the law formally obviates power imbalances between corporations and individuals, and while serious power imbalances remain, and access even to courts of exorbitant jurisdiction remains fraught with procedural and practical obstacles, the successful initiation of litigatory procedures represents unprecedented access for the subaltern to communicative processes within the 'global norm structure.'

Functionally, the communicative platform provided by litigation is also distinct in that its operation is predicated upon explicit contest between specific norms. While most communicative fora produce complex norms that then engage in a larger, abstract and poorly understood normative contest in the greater discourse, litigation institutionalizes specific procedures for the competition between specific complex norms and groups of

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[84] Dine, Janet, *Companies, International Trade and Human Rights* (Cambridge: Cambridge University Press, 2005), ix-x.

[85] Koh, supra note 31 at 2397.

norms. This institutionalizes what Thomas Risse would call "argumentative logic", and structurally privileges the platform's ability to impact constitutive rules.

Risse et al distinguish the instrumental rationality of bargaining, whereby ideas are used instrumentally to achieve strategic ends, from argumentative rationality, whereby both sides accept one another as valid interlocutors, accept common premises of debate, and submit themselves to external authority.[86] In proposing "arguing and communicative action as significant tools for non-hierarchical steering modes in global governance,"[87] Risse notes that "speakers in a court room must submit to the logic of arguing in order to be able to make their case. Thus, the institutional context and setting of a court guarantees that the triadic nature of arguing can operate."[88] This is especially relevant when considering the courtroom as a platform engaged in discursive negotiations over the content of constitutive rules. Risse cites empirical research suggesting that argumentative rationality plays a critical role in the agenda-setting phase of negotiations, determining the manner in which issues are 'framed', and thus understood, contested and enacted in subsequent discourse.[89]

The strategic and functional advantages of courts per se apply to civil cases in domestic courts a fortiori, and even if international courts were given personal jurisdiction over legal persons, domestic courts, and civil litigation in particular, have a distinct relevance for the regulation of transnational corporate enterprises. Robert Wai suggests that though globalization may have led to the "lift-off" of international business from state-based regulation, "transnational private law in national courts may be able to leverage its role as a necessary touchdown point."[90]

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[86] Supra note 45 at 250-256, discussing movement from the former to the latter as "rhetorical entrapment."

[87] Risse, Thomas, "Global Governance and Communicative Action" 39 *Government and Opposition* 288 (2004), p 288.

[88] Ibid at 300; 'triadic argumentation' entails submission to external authority, a third party.

[89] Ibid, especially at 302; see also Payne, Rodger A., "Persuasion, Frames and Norm Construction" 7 *European Journal of International Relations* 25 (2001), pp 37-61.

[90] Wai, supra note 35 at 478.

> Although transnational business and financial actors have become much more mobile (and clearly more mobile that labor), most businesses still 'put down roots.' National courts are still one of the locations at which international transactions and the international economy must 'touch down' to achieve certain benefits.[91]

This is both a strategic and a functional distinction, and provides a good illustration of transnational litigation's unique position in the discourse, operating as a nexus for interactive power relationships between states, corporations and individuals, while imposing strict discursive conditions on the norm contest it entertains. The following two chapters will examine the way in which these distinctions are manifest in the articulative and iterative functions performed by transnational human rights litigation. This chapter has been occupied with establishing the business and human rights discourse as a constellation of discursive platforms from which complex norms are communicated, embedded with the context and authority of their communication, to compete in relay from one platform to another.

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[91] Wai, R. "Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization" 40 *The Columbia Journal of Transnational Law* 209-274 (2002), p 265.

4 The Articulation of Norms

4.1 Complicity in the Constitutive Rule

The closest one might come to a constitutive rule for the business and human rights discourse may be to say that business should not be complicit in human rights abuses. Of course, wide agreement on the rule's propriety is predicated on its ambiguity—consensus runs no deeper. As discursive factions align themselves in the struggle over what precisely it is that human rights have to do with business, friction, and then conflict, erupts and at the terms and conditions upon which rules are built. Debate over the meaning, nature and scope of complicity is ardent and widespread.

Legal definitions of complicity differ significantly across jurisdictions, and though the Rome Statute and international Tribunals have done much to clarify international criminal standards, this has only analogous bearing on corporate complicity.[92] Such distinctions tend anyway to be effaced by concepts such as 'silent' or 'beneficial' complicity, which have no legal pedigree, but carry considerable political weight. This lack of clarity is exacerbated by a highly partisan debate—roughly coterminous with the voluntary/binding dichotomy—as complicity is regarded by much of the human rights movement as the key means of establishing corporate accountability, and much of the business community sees the concept as one "that will be used to hunt multinationals as a

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[92] Clapham, Andrew, "The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court," in Zia-Zarifi & Kamminga (eds.), *Liability of Multinational Corporations under International Law* (The Hague: Kluwer Law International, 2000).

kind of anti-neo-liberal blood sport."[93] Academic treatments tend to take a more balanced and comprehensive approach,[94] but the lack of an authoritative standard has spawned much discussion.[95] National courts have also entered the fray, and the most authoritative articulation to date has come from the US 9th Circuit Court of Appeals in Doe v Unocal.[96]

In 1996 class action lawsuits were filed alleging that Unocal Corporation had been complicit in human rights violations committed against Burmese villagers during the construction of the Yadana oil pipeline in Burma (now Myanmar).[97] The violations, including forced labor, forced relocation, extra-judicial executions, torture and rape, were allegedly committed by the Myanmar military while providing security for the project. The 9th Circuit Court of Appeals rejected a District Court finding that Unocal's activities did not constitute the 'proximate cause' necessary to incur liability,[98] finding jurisprudence from the International Tribunals for Rwanda and the former Yugoslavia particularly

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93 Taylor, Mark, Corporate Fallout Detectors and Fifth Amendment Capitalists: Corporate Complicity in Human Rights Abuse: Keynote Address to the UN Global Compact Learning Forum 2003.

94 See especially, Ramasastry, Anita, "Corporate Complicity from Nuremburg to Rangoon: an Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations" 20 *Berkeley journal of international law* 91 (2002); Clapham, Andrew & Jerbi, Scott "Categories of Corporate Complicity in Human Rights Abuses" 24 *Hastings International and Comparative Law Review* 12 (2001).

95 Corporate complicity was recently the focus of the International Business and Human Rights Seminar held in London on Dec 18, 2005, an International Commission of Jurists Expert Legal Panel (see http://www.icj.org/) and will be the focus of an upcoming international conference hosted by the Ethical Council for the Norwegian State Petroleum Fund. Corporate complicity also featured prominently in the SRSG's interim report, supra note 5, as well as UN consultations (supra note 19), and the work of civil society (see, for example http://www.amnestyusa.org/business/index.do) and business consortia (supra note 30).

96 *John Doe I v Unocal Corp*., 395 F. 3rd 932 (2002).

97 For an overview, see Rosencranz, Amin & Louk, David, "Doe v Unocal: Holding Corporations Liable for Human Rights Abuses on their Watch" 8 *Chapman Law Review* 135 (2005).

98 *Jon Doe I et. al & Jon Roe III et. al. v Unocal Corp. et al*, Order on Motion of Summary Judgment, 110 F. Supp. 2d. 1294 (2000), Section 4, "Plaintiffs present no evidence that Unocal 'controlled' the Myanmar military's decision to the commit the alleged tortious acts."

instructive.[99] Endorsing an 'aiding and abetting' standard of complicity, the 9th Circuit determined that:

> Firstly, a reasonable fact finder could conclude that Unocal's alleged conduct met the actus reus requirement of aiding and abetting as we define it today, i.e., practical assistance or encouragement which has a substantial effect on the perpetration of the crime…[100]

> Secondly, the mens rea requirement of aiding and abetting as we define it today, namely, actual or constructive (i.e., reasonable) knowledge that the accomplice's actions will assist the perpetrator in the commission of the crime. …Unocal knew or should reasonably have known that its conduct — including the payments and the instructions where to provide security and build infrastructure — would assist or encourage the Myanmar Military to subject Plaintiffs to forced labor.[101]

Relaxing the elements required to hold a corporation liable for complicity under the ATS from 'control', 'active participation' and 'proximate cause' to 'substantial effect' and 'knew or should have known', would be a dramatic act of judicial will. A settlement was reached prior to the en banc hearing ordered by the 9th Circuit, however, vacating the judgment. Though the 9th Circuit's reasoning thus does not set binding precedent, it

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[99] The majority drew especially from reasoning in *Prosecutor v. Furundzija, Case No. IT-95- 17/1-T*, 38 I.L.M. 317 (1998), to reject the district court's complicity standard of 'active participation'.

[100] *Unocal I*, 14220 p9, [100] At 953. Unocal executives engaged in repeated meetings with activist groups documenting violations, and memos where uncovered in discovery outlining denial strategies.

[101] Ibid. at 14222. Several other liability theories are also relevant. Judge Reinhardt's concurring opinion endorsed joint venture, agency, and reckless disregard theories of liability, and the facts of the case also seem likely to invite a ratification theory (see *Larry Bowoto, et al., v. Cheveron Texaco Corp., et al. and Moes 1-50,* Order on Motion for Summary Judgment, 312 F. Supp. 2d. 1229 (2004), for this theory's application to corporate complicity in human rights violations in Nigeria). In a parallel case, Chaney J ruled in favor of an agency theory of liability that required no knowledge at all (*Doe I v. Unocal Corp., Nos. BC 237980, BC 237 679*, Not Reported (2004).

remains persuasive as dicta, and represents an important point in wider relay. A closer look at the way in which this complex norm has traveled will illustrate how the articulative function of communicative platforms is performed by domestic courts.

4.2 Relaying the Unocal Standard

Courts are distinct as communicative fora, firstly because they entertain the explicit contest of complex norms for relay, and secondly because those norms relayed into litigation, if relayed out in judgment, are embedded with an authority and clarity particular to judicial articulations.

Legal reasoning's reliance on a specific class of authority also has the tendency to fuse norms relayed from legal and non-legal platforms in res judica. Thus, of the vast number of competing norms before the 9th Circuit, a norm defining forced labor as a preemptory norm, and articulated by the ILO, defeated the norm excusing forced labor when it forwards the public good, articulated by the US Supreme Court, and when relayed in judgment was embedded in complementary and authoritative communications, including judgments and international legal instruments.[102]

The fusing of legal and non-legal communications within complex norms represents a strategic discursive advantage for norm entrepreneurs, but these dynamics also have the effect of accentuating and promoting relay between judicial fora in judgments, giving the impression of a closed circuit of relay between courts. A closer look at the 9th Circuit judgment is illustrative.

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[102] J*on Doe &Jon Roe III v UnocalCorp*, 110, F. Supp. 2d. 1294, at P5III,B,5, *& Doe v. Unocal corp*., 963, F. Supp. 880 at 14245-6. Digging into the embedded communications of complex norms may presumably proceed ad nauseum, a near infinite recession, granted only patience and a strong interpretive will.

The 9th Circuit's reasoning relies primarily and successively on three prior judgments. *Filartiga v. Pena-Irala*[103] established the precedence by which US courts may try transnational human rights cases under the ATS in the first place, *Kadic v. Karadzic*[104] established individual liability for certain international crimes, and *Prosecutor v. Furundzija*[105] provided the specific elements of the standard. This is not, however, best understood as the reference to three contained authorities by a single persuasive communication. In the very first case before the ICTY, reasoning in *Kadic* led to the assertion that crimes against humanity do not require state action.[106] In *Furundzija* the ICTY judges relied heavily on *Filartiga* to determine the nature of the international prohibition against torture.[107] The chronological sequence of the cases is *Filartiga*, *Kadic*, *Tadic*, *Furundzija*, *Unocal*; while the persuasive sequence less linear, as represented below.

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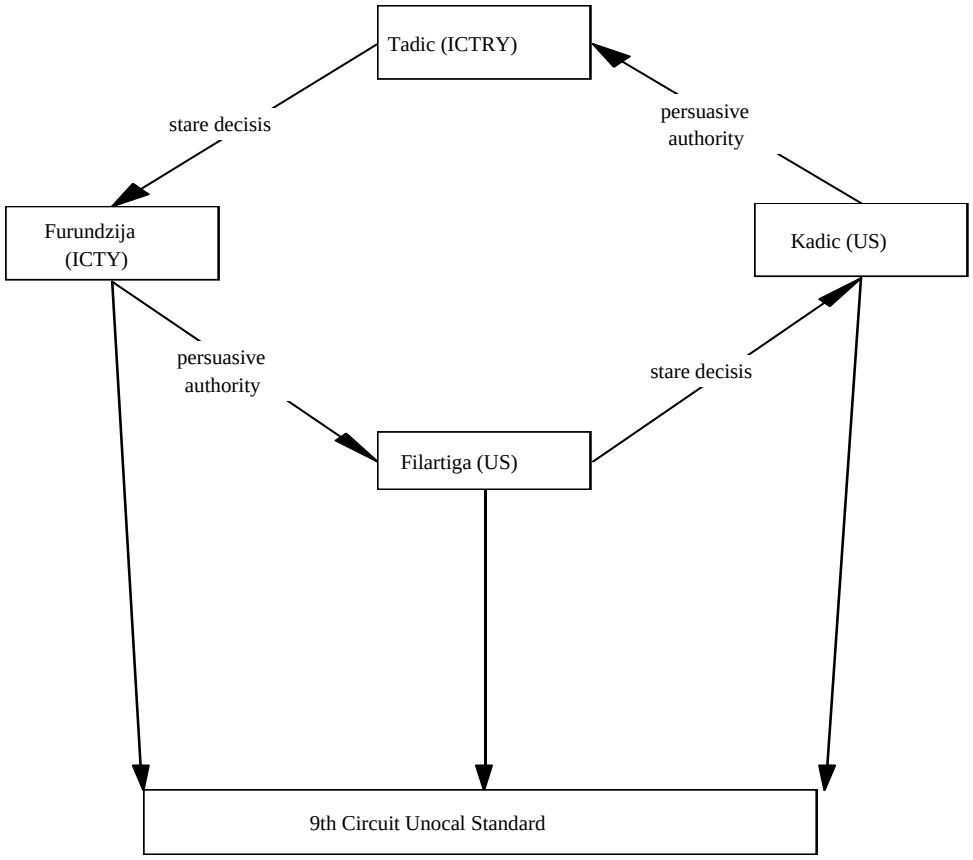
103 Supra note 98.

104 *Kadic v. Karadzic*, 70 F.3d 232 (1995).

105 Supra note 98.

106 Trial Chamber II Judgment (10 Dec 1998) at par 147

107 Trail Chamber II Judgment (7 May 1997) at par 168.



The recurrent iteration and persuasive authority in this dynamic, transcending precedential and jurisdictional bounds, significantly resemble the kind of judicial networking described by Anne Maria Slaughter, in which judges are

> engaging in a growing dialogue with their counterparts around the world…through mutual citation and increasingly direct interaction [which suggests that they] contribute to a nascent global jurisprudence on particular issues…[108]

In the terms of interactive network theory, the simultaneous recognition and assignation of persuasive authority in other communicative platforms strengthens network

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[108] Slaughter, Anne Marie, *A New World Order* (Princeton, N.J.: Princeton University Press, 2004), p 70.

connections. The articulative and iterative functions of complex norms are here intimately related, as repeated interaction between fora inevitably strengthens network connections thru their iteration. As each of these relay points represents the embedding of a platform's authority within subsequent communications, this also represents a strengthening of the norm. Thus, despite the lack of binding precedence, the persuasive authority of the 9th Circuit standard has relayed to other judgments,[109] and in a civil suit against the oil giant Talisman for complicity in genocide, Cote J. utilized the 9th Circuit's articulation of aiding and abetting as *the* standard of corporate complicity at international law, locating that standard among "the core principles that form the foundation of customary international legal norms—principles about which there is no disagreement."[110] This strong claim is a direct product of relay.[111]

This feedback loop of persuasive authority between courts has great normative power, and can even have the effect of 'legalizing' international norms, as was the case with the human rights prohibition against forced disappearance. This norm was quickly relayed from transnational civil litigation to courts in other jurisdictions, regional human

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[109] e.g., *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (2002); *Mujica v. Occidental Petroleum Corp*, 381 F. Supp. 2d 1164 (2005).

[110] Presbyterian Church of Sudan v. Talisman Energy Inc., Order and Opinion on Motion for Summary Judgment, Not Reported, Westlaw Slip Copy WL 2082846 (S.D.N.Y) (2005), 340-1.

[111] But not uncontested. Cote's dicta is not yet considered by another judge, but the Talisman ruling is at flagrant odds with that of Sprizzo J., who failed to even consider the 9th Circuit Unocal standard when rejecting the vicarious liability of multinational corporations who had supported South African Apartheid (*In re: South African Apartheid Litigation*, 346 F. Supp. 2d 538 (2004)). For a discussion of how the reasonings in each case diverge, and how they differently relate to the Supreme Court's ruling on the ATS (*Sosa v. Alvarez-Machain*, 124 S.Ct. 807 (2004)), see Chambers, Rachel, "The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses" 13 *Human Rights Brief* 14 (2005) & Sebok, Anthony J. *Unocal announces it will settle a human rights suit: What is the real story behind its decision?* (Find Law: 2005). The Sprizzo judgment is currently under appeal in the US 2nd Circuit. The tone of proceedings and the difficulties had by plaintiff council thus far suggest that the decision, expected within the next months, will not look favorably on the 9th Circuit's standard.

rights courts and international human rights treaty bodies, resulting in its common acceptance as a part of the international legal corpus.[112]

While feedback loops of persuasive authority thus represent a distinct strategy for international norm entrepreneurs, they are not closed circuits, and this dynamic should not obscure the openness of courts to relay with non-legal fora. Litigants in transnational human rights cases do in fact mobilize a wide variety of norms from a wide variety of sources, including soft law declarations, activist publicity, neo-liberal market apologies, ethical treaties, expert opinions, policy drafts, business consultancy reports, socially responsible investment exclusion decisions, standard contracts, academic analyses and shareholder initiatives, and once communicated in litigation, these norms are then 'open game. Although such judgments "claim to be resolving disputes in one case only, they are actually declaring (or not declaring) international norms that litigants transport to other fora for use in political bargaining."[113]

The 9th Circuit's liability standard has relayed widely within the communicative platforms of civil society,[114] business consortia,[115] and "multi-stakeholder initiatives" that connect the two[116]. It has also relayed to alternative regulatory mechanisms, such as the disinvestment decisions of socially responsible investment funds,[117] and figured

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[112] For a description of the actors and strategies, see Keck & Sikkink, supra note 80 at 102-10; for an overview of the relay, see Fischer-Lescano, Andreas & Teubner, Gunther "Regime-Collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law" 25 *Michigan Journal of International law* 48 (2004), at FN 170.

[113] Koh, supra note 31 at 2375.

[114] e.g., the World Social Forum (http://www.argybargy.biz/ollie/ollie_theguardian_justice.htm) and Amnesty International (http://www.amnesty.org.il/data/globalize.html).

[115] Supra note 30.

[116] Supra note 94.

[117] The Talisman Judgment supported a recent successful disinvestment motion brought before California State Teachers Retirement System (Motion Re: Investment Policy Review – Social/Geopolitical Issues', approved April 6, 2006). For reference to litigation see background document, 'Investment Policy Review – Social/Geopolitical Issues', Item #11, June 1, 2005. Both documents are available at http://www.calstrs.com/). The 9th Circuit discussion of liability was analyzed extensively in a recent decision by the Council on Ethics for the government Pension Fund of Norway. (Application of the standard was used

prominently in debate over potential international regulatory schemes. Recent consultations held by the Office of the High Commissioner on Human Rights (OHCHR) on the UN Norms solicited significant comment on the role of domestic courts in defining "what level of involvement results in complicity" and even argument that the reasoning in *Talisman* "could apply with respect to the [UN] Norms."[118] The OHCHR's final report turned toward congruent opinions of domestic courts and international tribunals for "guidance in the further elaboration" of complicity, referring to research that cites the 9th Circuit standard as authoritative.[119] This authority was affirmed in the SRSG's interim report, which described the 9th Circuit standard as "the most explicit judicial definition of complicity thus far" in conformity with "what is widely thought to be the current state of international law on this subject."[120] This communication, emitted from what is perhaps the business and human rights discourse's most authoritative platform, is enabled by relay.

The point is not to establish definitive casual links between any of these communicative moments, nor to determine the appropriateness or final authority of any given standard. The argument is rather a commonsensical assertion that norms gain

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to found a decision not to disinvest from Total SA for its involvement in the Yadana pipeline, as the Fund's Ethical Guidelines call for disinvestment only to prevent future human rights abuse, and the 9th Circuit standard was read as requiring a "direct connection" between corporate activities and the alleged abuses. See discussion at footnotes 25, 27, 34, 43, 51 & 68-9, available at http://odin.dep.no/etikkradet/english/documents/099001-990074/dok-bn.html).

118 Submission by the Castan Center for Human Rights, text at footnote 24. For the full collection of submissions, see http://www.ohchr.org/english/issues/globalization/business/contributions.htm

119 *Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights*, OHCHR (2005) , at paragraph 35, citing *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law,* FAFO (2004) <http://www.fafo.no/liabilities/index.htm>: "Although these cases do not have precedential value outside the United States, they nevertheless deserve examination, as they represent relevant interpretations…The most important of [such] cases is the Unocal case…" (Executive Summary, pg 30). The analysis treats the 9th Circuit's standard both independently and in the context of Talisman.

120 Ruggie, supra note 5, par72.

authority through wide usage and acceptance. Domestic courts are distinct as communicative fora by virtue of the clarity and authority they embed in complex norms. This gives norms a special resilience, especially at the international register, and can lead to inter-judicial dialogue and the 'legalization of norms'. The 9th Circuit judgment is of special interest, not only because it articulates a concept on which a constitutive rule will inevitably be built, but also for its lynchpin-style position in a wide web of relay, absent binding precedence.

5 The Iteration of Networks

5.1 Normative Pathways between Individuals

The seminal definition of advocacy networks distinguishes between transnational networks

> (1)…with essentially *instrumental goals*, especially transnational corporations and banks; (2) those motivated primarily by *shared causal ideas*, such as scientific groups or epistemic communities; and (3) those motivated primarily by *shared principled ideas or values* (transnational advocacy networks).[121]

This distinction has been preserved in literature on human rights litigation, which notes how advocacy thrives on the expertise-sharing and publicity engine it provides. Yet litigation tends to efface this distinction—lawsuits are, after all, instrumental for inducing causal change mandated by principles—as evidenced by the common trope of human rights suits as "part of a larger system of countervailing power and oversight by networks…"[122] This observation leads to a broader argument regarding the relationship between litigation and interactive networks, which may begin by looking at how advocacy networks emerge about litigation.

Transnational human rights litigation iterates normative pathways and novel network connections between actors in the global public domain by providing a nodal point

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[121] Keck and Sikkink, supra note 80 at 30, emphasis in original.

about which actors create, strengthen and challenge network connections in furthering their own strategic ends. The collaboration necessary to initiate and sustain a transnational lawsuit against a large corporation often requires varying expertise, engendering communication between activists, lawyers, corporate insiders and community members. Regular cooperation strengthens the connections binding networks, and can engender cooperation subsequent to litigation.[123]

Harold Koh has advocated transnational legal process as a means of explaining state compliance with international law. According to this model, international norms are internalized into state institutions and practice through a "complex process" of interaction, interpretation, internalization, and obedience,[124] largely initiated by the articulations of "law-declaring fora…capable of receiving a challenge to a nation's international conduct, then defining, elaborating, and testing the definition of particular norms and opining about their violation."[125] Though "law-declaring fora" are broadly conceived to include legislative bodies and UN treaty bodies, litigation is of special interest. Among other notable analyses, the model traces casual lines of network advocacy from *Filartiga* to the eventual ratification of the UN Convention Against Torture by the first Bush administration, and the instrumentality of civil litigation and network lobbying in the UK for incorporation of the European Conventional of Human Rights into British law with the Human Rights Act of 2000.[126]

But the heavy lifting of transnational legal process is conducted, not by norm enunciation, but rather the unnamed networks that spring up around litigation. These networks are efficacious at the transnational register precisely because they extend beyond the pale of advocacy, moving norms from the vagaries of international norm

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122 Scott & Wai, supra note 34 at 289.

123 The perennial cooperation between activist communities involved in the Bhopal initiatives, initiating litigation in successive fora with alternating divisions of labor, is emblematic.

124 Koh, Harold Hongju, "The 1998 Frankel Lecture: Bringing International Law Home" 35 *Houston law review* 623 (1998), p 644.

125 Ibid at 650.

126 Ibid at 664-4.

entrepreneurship, through the annals of civil society and along domestic legal channels, until the eventual hand-off to "in-house legal experts" who enact "bureaucratic compliance procedures."[127] This observation is crucial. By institutionalizing strategic coordination through normative pathways, litigation promotes novel network connections and strengthens active network connections, extending networks beyond demarcations of principle.

Yet pragmatic network connections necessitated by the institutional form of litigation are also embedded with the normativity inherent in human rights issues, such that the linking up of networks to parties not *prima facie* invested or engaged in normative contest (a doctor's office providing statistics from the site of an environmental disaster, a legal office responsible for drafting third party contracts or constructing subsidiary corporations, a county clerk or tax official) is *in itself* a normative act. To say that these network connections are 'normative pathways' is to say that anyone exposed to the process and facts of human rights litigation must, at some level, choose sides.

This supports and complicates the assertion that litigation is network-generative for both plaintiff and defense, a claim perhaps evidenced by the powerful rise of corporate lobbying consortia in direct opposition to human rights litigation.[128] In any case, motivation-based distinctions between transnational networks appear highly arbitrary, and the striking paucity of literature on networks emerging about corporate counsel, while seeming presupposed among human rights lawyers, merits a much closer look.[129]

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127 Ibid at 623-653.

128 Examples include 'CSR Watch: your eye on the anti-business movement' (http://www.csrwatch.com/); the Institute for Legal Reform (http://www.instituteforlegalreform.com/) and 'USA Engage' (http://www.usaengage.org/legislative/2003/alientort/). The US and International Chambers of Commerce filed a joint brief to the US Supreme Court in Sosa v. Machain-Alverez outlining their positions, (supra note 30). For a narrative describing network links from the frontlines of litigation to lobbying efforts in the UN, see "Shell Leads International Business Campaign against UN Human Rights Norms", *UN Observer & International Report*, March 15, 2004, available at http://www.globalpolicy.org/reform/business/2004/0315norms.htm.

129 See Lutz, supra note 80 on 'transnational justice networks'.

The quotidian difficulties inherent in gathering information for transnational human rights litigation are emblematic of a larger set of novel challenges posed by the 'globalization of law'.[130] As transnational litigation establishes itself as a distinct legal field, this imposes a specific set of networking exigencies on and within the legal profession.[131] The human rights community has responding to these challenges with a wave of publications disseminating expertise in transnational human rights litigation.[132] For corporate council, I am aware of no such didactic publications, though the exigencies are perhaps more acute.

While the short-term responsibility of corporate counsel to mitigate litigation liabilities necessitates a certain familiarity with international law and standards, including soft law regimes, civil society initiatives and industry practice vis-à-vis human rights, in addition to the many fields of domestic law relevant to corporate social responsibility, the long term tasks of policy and advice work aimed towards influencing the international regulatory landscape demand a quite nuanced understanding of international legal process.[133] Together, these factors make professional competence in comparative law, conflicts law and other dynamic fields of international law highly saleable, as "approaching transnational litigation in one country in disregard of these interconnections may result in

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130 Subrin, S. N. "Discovery in Global Perspective: Are We Nuts?" 52 *De Paul Law Review* 299 (2002).

131 The field's 'arrival' is perhaps best heralded by the publication of it's first textbook: Steinhardt, Ralph G., *International Civil Litigation: Cases and Materials on the Rise of Intermestic Law* (Newark, NJ: LexisNexis, 2002). For the long-term strategic implications this poses to practitioners and lawmakers, see Baumgartner, Samuel P., "Is Transnational Litigation Different?" 25 *University of Pennsylvania Journal of International Economic Law* 98 (2004).

132 e.g., Stephens, Beth & Green, Jennifer, *An Activist's Guide: Bringing International Human Rights Claims in United States Courts,* Center for Constitutional Law (2003) <http://www.ccr-ny.org/v2/legal/docs/Activists%20Guide.pdf>; Ratner, Morris A "Factors Impacting the Selection and Positioning of Human Rights Class Actions in United State Courts: a Practical Overview" 58 N*ew York University Annual Survey of American Law* 623 (2003); Kinely, David "Lawyers, Corporations and International Human Lights Law" 25 *The Company Lawyer* 5 (2004) as well as the 102 page *Human Rights Litigation Manual,* Southern Africa Litigation Centre (2006) .

133 See Kinely "Lawyers, Corporations and International Human Lights Law" for an overview of the challenges.

reactions abroad that can hamper future transnational policies in the originating country for quite some time."[134] The potentially infinite scope of legal expertise such a landscape begs can only be met by competence sharing and the interpenetration of epistemic legal communities—in short, the expansive iteration of legal networks for corporate counsel.

The implications are far from certain. It has been proposed that these developments will inevitably serve the interests of the human rights movement, given the demographic makeup of the bar[135] and fact that, 'taught law' being 'tough law', "[p]rivate international law is continually reproduced through various forms of university-based and then professional education."[136] It has also been suggested that these developments are symptomatic of "delocalized and transnationalizing legal disciplines that both reflect and facilitate the transnational expansion of capitalism and related practices" in the service of a mercatocracy or global capitalist class.[137] Whosever interests are served by these

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[134] Baumgartner, Samuel P., "Is transnational litigation different?," 25 *University of Pennsylvania journal of international economic law* (2004) 98, p 1391.

[135] Hurwitz, Deena R. "Lawyering for Justice and the Inevitability of International Human Rights Clinics" 28 *The Yale Journal of International Law* 46 (2003).

[136] Baxi, Upendra, "Geographies of Injustice: Human Rights at the Altar of Convenience," in Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*. (Hart: Oxford, 2001), pp 200-1

[137] Cutler, A. Claire, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: Cambridge University Press, 2003), p180. "…the mercatocracy is comprised of transnational merchants, private international lawyers and other professionals and their associations, government officials, and representatives of international organizations. The mercatocracy operates globally and locally to develop new merchant laws governing international commerce and the settlement of international commercial disputes and to universalize the laws through the unification and harmonization of national commercial legal orders." On the threat unification efforts pose to the human rights movement as well as doctrinal compromises, see Dubinsky, Paul R. "Human Rights Law Meets Private Law Harmonization: The Coming Conflict" 30 *The Yale journal of international law* 108 (2005); Alston, P. "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann" 13 *European Journal of International Law* 815 (2002); on the 'Transnational Capitalist Class' see Sklair, Leslie "The transnational capitalist class and global politics: deconstructing the corporate-state connection" 40 *Peace Research Abstracts* (2003)

tendencies in the long run, the most important dynamic for this analysis is the expansive and inclusive character of network iteration prompted by litigation.

5.2 Normative Pathways between Enforcement Mechanisms

Transnational litigation iterates normative pathways not only between individuals, but also between the communicative fora within which they act, as exemplified among courts in the previous chapter. Such network connections are especially relevant when they link courts to enforcement mechanisms in the private sphere, thereby enacting hybrid regulatory mechanisms.

This is especially common with suits brought not directly on human rights claims, as was Doe v. Unocal, but which rely on other causes of action. A well known example is the false advertising suit initiated against Nike in the late 1990s. NGO reports contested the veracity of Nike's public relations campaign, which asserting that "workers who make NIKE products are…not subjected to corporal punishment and/or sexual abuse (sic),"[138] and a suit was then filed "on behalf of the General Public" for "false statements and/or material omissions of fact."[139] While the legal battle culminated in a 'free speech' question, the litigatory process spawned and strengthened a number of civil society initiatives.

Litigation that relies on private initiatives for the provision of information often iterates network connections in a way that reinforces both communicative platforms. While NGO monitoring mechanisms may very well provide information on principled

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[138] Brief Amicus Curiae Supporting Petitioners (Nike Inc. et. al., petitioners v. Marc Kasky, 2003) (2003), p 2.

[139] Internal quotations omitted, *Nike Inc et al, petitioners v. Marc Kasky, Dismissal of writ of certiorari,* 539 U.S. 654, 123 S.Ct. 2554 (2003), 2555.

grounds, this investment can yield great returns. Backed by compelling sanctions, discovery processes are capable of bringing to public record documents and other sources of information inaccessible, but of great value to NGOs.[140] Civil society platforms practically strengthened by such information in terms of bargaining power, access and general overview. When this same information is relayed from the civil society platforms, hybrid network connectivity is reinforced.[141]

Securities legislation and 'right to know' statutes may also support proxy litigation contesting the truth of corporate statements. Civil liability clearly attaches to misrepresentation in financial reporting, and though company law has not traditionally required reporting on human rights related issues, socially responsible investors have litigated unflaggingly to broaden disclosure rules.[142] While this has met with quite limited success in the US, company law reforms in the UK, France, Germany and South Africa increasingly mandate social and environment reporting for transnational corporate activity.[143] The potential for litigation in light of these developments remains untested.

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[140] This was the case for the Unocal & Talisman cases. Bohpal is perhaps emblematic. See also 'Litigation and Information Flow' in Wai supra note 35 a 482.

[141] This is a strategic function of actors in other fora learning how to use and navigate legal systems. Many NGOs capitalized on the Unocal discovery process in this way, even the ILO, see the committee report, *Forced Labor in Myanmar (Burma): Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labor Organization to examine the observance by Myanmar of the Forced Labor Convention 1930 (No.29)*, International Labor Organization (1998) .

[142] This began in the US as early as 1979, see eg: *In re: Natural Resources Defence Council Inc. v. SEC*, 389 F. Supp. 689 (1979). Broad disclosure rules have also been proposed for an international 'right to know regime', see Simaika, Abdallah "The Value of Information: Alternatives to Liability in Influencing Corporate Behavior Overseas" 38 C*olumbia Journal of Law and Social Problems* 321 (2005).

[143] For discussion of the Combined Code and LSE Listing Rules in the UK, the New Economic Regulations in France, the German Accounting Law Reform Act, and the South African King Report II, see Mares, Radu, *The Incremental Institutionalisation of Corporate Social Responsibility: Synergies between the Practices of Leading Multinational Enterprises and Human Rights Law/Policy* (Lund: Institute of Law, Lund University, 2006) pp 154-89.

A third non-legal enforcement mechanism amenable to linking up with litigation is the code of conduct. Codes of conduct may presumably be subject to the same legal liability for inaccuracy as false disclosure and false advertising.[144] This potential is greater when codes are explicitly referenced in contractual arrangements, though there remains no consensus on their general legal status.[145] Total's website ambiguously proclaims that its code of conduct for activity in Burma "has legal value, since it is appended to every agreement signed with subcontractors working on the project and is binding on them. Its application is closely reviewed."[146] It is unclear what 'legal value' here might mean, as the code is perfunctory in the extreme and vague enough to make its breach a near impossibility. In contrast, Novartis has recently adopted a Third Party Code outlining "minimum requirements all [suppliers and contractors] must meet in doing business with Novartis," that is clear and specific, but without any claims to legal effect.[147]

A more clear-cut example is offered by British Petroleum (BP), which has included the Voluntary Principles on Security and Human Rights in its legally binding Host Governments Agreement for the Baku-Tbilisi-Ceyhan pipeline project, as well as amended the code to its project contract with the state-owned partner in the Tangguh LNG

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144 It is entirely uncertain what 'kinds' of statements regarding their activities corporations may, or ought to be, held to account for. In the Unocal state case, plaintiffs cited a press release referring to "the co-venturers'…in the Yadana Project" in support of a joint-venture liability theory for Unocal's complicity in the violations. J. Chaney found this compelling, ruling that "While this release itself does not create a joint venture, it is evidence of the existence of a joint venture." (supra note 100 at 7, lines 7-22), for an overview of these dynamics applied to codes of conduct in the US, see Lu, S. P. "Corporate Codes of Conduct and the FTC: Advancing Human Rights through Deceptive Advertising Law" 38 *The Columbia Journal of Transnational Law* 603 (2000).

145 Analogously, CCBE suggests that "agreements reached through collective bargaining between employers and trade unions can become legally binding through incorporation in employment contracts." *Corporate Social Responsibility and the Role of the Legal Profession*, Council of the Bars and Law Societies of the European Union (2003) <www.ccbe.org/doc/En/guidelines_csr_en.pdf. >.

146 http://burma.total.com/en/gazier/p_2_1.htm

147 The code includes labor rights, non discrimination, association, and environmental practices, and is available at http://www.novartis.com/corporate_citizenship/en/10_2004_third_party_code.shtml.

Project.[148] Whatever the relative merits of these codes as enforcement mechanisms or self imposed legal obligations, it does not seem unreasonable to assume that their increased proliferation, and the increasing regularity with which they are referenced by, or appended to, contracts, will lend credence to the actionability of code breaches in litigation.

Codes of conduct may also be important elements of judgment or settlement. This was the case in litigation against US garment retailers for labor and human rights abuses on the Mariana Islands (Saipan). The settlement, approved in April 2003, establishes a code of conduct for subcontracting garment production on the islands, obligating observance of local as well as international labor standards,[149] and supplemented by a monitoring mechanism ("the first legally mandated independent monitoring program").[150] Whatever degree of sophistication or comprehension such mechanisms exhibit, hybrid iteration by settlement will be more durable the greater the disparity among actors interconnected. This may be effected through a broad civil society sampling with correspondent 'transmission belts'[151] (e.g., the Nike settlement initiated with the Fair Labor Association, which is composed of NGOs involved in litigation, research, publicity…[152]), or a variety of state, private and international actors (e.g., the 'Remembrance, Responsibility and the Future' foundation, whose founding was prompted by litigation against corporations connected to the Nazi holocaust[153]). Such pathways exhibit a strong tendency for recurrent relay and the dissemination of expertise.

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148 See Ruggie, supra note 5, par 16.

149 Complaints not reported, see Karet, Deborah J. "Privatizing Law on the Commonwealth of the Northern Mariana Islands: Is Litigation the Best Channel for Reforming the Garment Industry?" 48 *Buffalo Law Review* 1047 (2000).

150 Saipan Sweatshop Lawsuit Ends with Important Gains for Workers and Lessons for Activists. A copy of the monitoring program is available at http://www.globalexchange.org/campaigns/sweatshops/saipan/monitoring.html.

151 Supra note 46.

152 See http://www.cleanclothes.org/companies/nike00-05-04.htm & http://www.fairlabor.org/2004report/index.html.

153 See Scott & Wai, supra note 34 at 305-10.

This chapter has illustrated how the iterative function of communicative platforms is performed by transnational human rights litigation. The institution of litigation prompts novel network connections as strategic means, but nevertheless embedded with normativity, and this has the distinctive result of expanding normative networks beyond the pale of principled motivation. Litigatory iteration is also distinct in the manner it promotes durable connections with non-legal fora. The following chapter will explore how litigation 'embeds legality in discursive structures through the articulative and iterative mechanisms, and what effect this has on regulatory design.

6 Embedded Legality

6.1 Embedding through Articulation

Legal reasoning exerts its most immediate and formative force on concepts by 'framing' them within a legal ontology.[154] 'Fisticuffs' differ from 'aggravated assault' just as 'killing' differs from 'manslaughter,' and "[t]hinking like a lawyer is to share a categorical apparatus for interpreting the world in which...language too determines what attributes of the world are to be noticed."[155] Kratochwil has observed that this is effected to a great degree by argumentative premises, referred to as 'commonplaces' by contemporary studies of argumentation, and 'topoi' in classical rhetoric.[156] Ordinary language topoi such as that of 'the good Samaritan' differ significantly from legal topoi such the common law 'duty of care',[157] and while all language employs topoi to "establish starting points for arguments [and] locate the issues of a debate in a substantive set of common understandings that provide for the crucial connections within the structure of the

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[154] For a comparison with 'framing' in Risse's constructivist paradigm that elicits many similarities, see supra note 88.

[155] Kratochwil, Friedrich, *Rules, Norms, and Decisions : on the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989), p 229, internal quotations omitted.

[156] A 'topois', in the Greek singular, was defined by Cicero as a 'seat of argument.'

[157] See chapter 7.2 supra.

argument,"[158] legal topoi represent the ontological precondition for law and legal reasoning as manifest by res judica.

> [Judicial] appraisal becomes possible only through the discursive application of more specialized (legal) topoi for which the laws of pleadings are a good example. …the enumeration of legal topoi contained in procedural rules and settled practices provides not only instructions as to how a practitioner is to go about a case, but also assurances that in the process, a case is looked at from different angles. Finally, the authoritative decision which establishes the holding…depends for its persuasiveness largely upon a careful weaving, into one strand of thought, of legal and common-sense arguments. They back the decision and its characterization of the case. It is through this embeddedness of the specialized legal language in the practical discourse that the importance of topoi as backings or groundings becomes visible.[159]

Legal topoi thus compose the infrastructure on which legal argumentation are built, determining to a significant degree the way in which arguments are framed. Litigation's procedural ins and outs exert a complimentary, superstructural force: "Legal arguments are, in addition to their rhetorical character, 'path dependent.' i.e., influenced by the sequence of pleadings and rebuttals."[160] Path dependence, moreover, resembles argumentation's 'triadic nature', and is closely linked to the perception of both clarity and authority.[161]

> Through a series of "turning points," competing interests and interpretations can be taken into account, and can then be either rebutted or accepted. Thus, judicial decisions are path dependent, and it is this characteristic which distinguishes them

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158 Kratochwil, supra note 154 at 219-20, quotation marks and footnotes omitted.

159 Ibid at 228 italics, parentheses, quotation marks and footnotes omitted.

160 Ibid at 214.

161 Risse, supra note 86.

> from mere random choices, or from an unsystematic subjection of the subject-matter to competing evaluations.[162]

The framing function of legal topoi and the 'path dependency' of legal argumentation thus operate in tandem to ontologically support legal decision-making. The utilization of legal topoi in pleadings, characterizations and interpretations, serves to transform an 'issue' into a 'case', "hammering it into legal shape through the pleas of the parties and through the decisions of the pre-trial procedures."[163] The embedding of legal reasoning and legal process in complex norms extends this "hammering" beyond single judgments by endowing complex norms with clarity and authority. Extended relay reinforces this dynamic, increasing the potential for influence on discursive structures and the foundation of constitutive rules. If we follow Kratochwil, and view the law

> neither as a static system of norms nor as a set of rules which all share a some common characteristic such as sanctions, [but as] a choice-process characterized by the principled nature of the norm-use in arriving at a decision through reasoning,[164]

then the prospect is one of embedding legality per se in the norms on which constitutive rules are founded, profoundly affecting the way in which regulation is performed, contested and understood by discursive actors at the most fundamental level.

6.2 Embedding through Iteration

While proliferation of regulatory mechanisms in the private sector has certainly contributed to an "increasingly dense regulatory environment"[165] for transnational business

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162 Kratochwil, supra note 154 at 238.

163 Ibid at 227.

164 Ibid at 18

vis-à-vis human rights, it has not been accompanied by a unitary 'context of interaction' through which independent mechanisms might cohere. By lending its 'teeth' to private and soft law standards and initiatives, litigation performs this function on a micro-scale, and these connections have the potential, if not the immediate effect of autonomous regulation, analogous to the polycentric 'place-based' systems of environmental governance. To the extent that these arrangements are sustainable, legality is embedded in their discursive structures.

A broader phenomenon is observable in the networking of legal professionals, who are 'linked up' by litigation in two ways. Firstly, lawyers are linked into issue-specific networks within the discourse. Regardless of what norms are relayed by judgment, the marshalling of discursive actors, issues and strategies for norm contest entails the dissemination of different legal expertise. These network formations tend to be governed by a loose constellation of principles, strategies and causal beliefs ex ante, and thus prima facie have the greatest potential for development into sustainable hybrid formations.

Litigation also links up discursive actors who would otherwise not have participated in the business and human rights discourse. Of the various discursive actors forced to 'choose sides' by normative iteration, corporate counsel, and the networks emanating from corporate legal departments are of special interest. The dual prongs of risk mitigation—short term and long—necessitate networking for the exchange of expertise between legal 'spheres'. The 'fragmentation' of global law[166] is thus actually riddled with dynamic iterations of substantive inter-connectivity,[167] often as an explicit response to transnational litigation, by virtue of litigation's exaggerated position as a site for interface and conflict between 'separate spheres of law'.[168]

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165 Steinhardt, supra note 15 at 193.

166 The International Law Commission's study on legal fragmentation is available at http://untreaty.un.org/ilc/summaries/1_9.htm#_ftn1.

167 The link between substantive and institutional fragmentation is thoughtfully explored in Koch, Charles H., "Judicial Dialogue for Multiculturalism" 25 *Michigan Journal of International Law* 879 (2004).

168 This dynamic is increasingly apparent in the services offered by international law firms. Kinely notes *Skadegard Thorsen Law Firm* in Copenhagen, *Foley Hoag* in Washington DC, and *Baker McKenzie* in London, as prominent firms that have incorporated the long and short term exigencies of CSR into advising

While the broader phenomenon of fragmentation has elicited a wide variety of responses,[169] legal theorists attentive to the human rights paradigm have repeatedly turned their attention to the problematic role of international private law. The esoteric domain of a "charmed circle of highly talented jurists,"[170] the tendency of conflicts law to mask the exercise of power in enigmatic doctrine leads Baxi to call for the field's 'redemption':

> [T]he inner dynamic of conflict of laws constitutes an obstacle to the promotion, protection and preservation of human rights. But the mystery and mystique of private international law still remains beyond [the] praxiological grasp [of human rights activists]… It is small consolation for activist communities that these entities also mystify conflicts practitioners…[171]

Alternatively, Moran advocates interrogating the "fundamental challenge [such cases pose] to our traditional understanding of the legal system," as emblematic.[172] According to this perspective, the private law struggles of human rights litigation are instrumental in focusing our attention on more fundamental developments in international law.

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services. Mention might also be made of the 'cottage industry' that has sprung up about human rights corporate consultancy (van Schaack, supra note 25 at 128), especially to the degree that these firms are staffed predominantly by lawyers and promote their services as such (e.g., *Multinational Monitors* in New York).

169 The Symposium entitled 'Diversity or Cacophony: New Sources of Norms in International Law' presents a wide array of perspectives, reprinted in the 4th issue of Michigan Journal of International Law Vol 25.

170 Baxi, supra note 135 at 195.

171 Ibid at 199.

172 Moran, Mayo, "An Uncivil Action: the Tort of Torture and Cosmopolitan Private Law," in ibid in Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*. (Hart: Oxford, 2001) p 661, makes reference at 662 to Koh's model, noting that "…these cases are but the cutting edge of a much broader phenomenon."

> The task of the advocate, the judge, and the law-maker no longer seems adequately captured—if it ever was—by the notion of discrete mutually exclusive spheres of binding law, conjoined through a set of rules premised on conflict and choice. And indeed, what [transnational litigation] shows is a more subtle, yet distinct, move away from this model and towards a more multi-faceted integrative understanding of sources and a broader persuasive approach to authority.[173]

The instrumental role of litigation is important. In providing a stage for "private international law in creatively attending to the regulation of transnational business conduct,"[174] litigation also enacts "a kind of 'jurisdictional interface',"[175] at which the controversies, overlaps, conflicts and accommodations of fragmentation are enacted and iterated along the networks connecting legal professionals. Herein lies the most dynamic potential for the iterative function of litigation to embed legality in the business and human rights discourse.

If long-term networking strategies follow the iterative logic of specific litigation, then expertise sharing in response to the doctrinal challenges and conflict may indeed perform what systems theory terms the "mutual irritation" of autonomous regimes.

> Following the collapse of legal hierarchies, the only realistic option is to develop heterarchical forms of law that limit themselves to creating loose relationships between the fragments of law. This might be achieved through a selective process of networking that normatively strengthens already existing factual networks between legal regimes: law-externally, the linkage of legal regimes with autonomous social sectors; and, law-internally, the linkage of legal regimes with one another.[176]

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173 Ibid at 683.

174 Wai, supra note 90, at 274.

175 Wai, supra note 35, at 484.

176 Fischer-Lescano, supra note 111, at 1018.

This embeds legality in the business and human rights discourse by linking the discourse up with legal professionals and bodies of law prima facie external to it. When such connections develop a self-reinforcing momentum, they constitute a necessary, but not sufficient condition for the construction of

> an effective pluralistic conception of regulatory governance that mixes international governmental treaties and institutions, state public laws, transnational non-governmental organization and local private actors.[177]

[177] Wai, supra note 90, at 272.

6.3 What a Difference the Law Makes

The articulative and iterative functions of litigation embed legality in discursive structures, affecting the foundation of constitutive rules, through the norms on which they are built, and the actors which do the building. Accepting this argument, the question then becomes: what difference does this make for regulatory systems?

Constitutive rules function as an interpretive framework, an "intricate network of tacit understandings and unwritten conventions, rooted in the soil of social interaction" and are common to all coordinated social activity.[178] Brunnee and Toope discuss "patterns of interaction…against which any legal norm must be postulated and interpreted," identifying

> a necessary step in distinguishing legal norms from other sociological norms…it is largely through the institutionally shaped rhetorical practices, and acceptance of reasoned argument, that law emerges from broader social practice.[179]

While Kratochwil's analysis suggests correspondence between embedded legality and 'institutionally shaped rhetorical practices', the communicative model clearly does not create positive law or hard legal systems. It may be argued, however, that it is from precisely these 'rhetorical practices' that law derives its authority.

> …law is persuasive when…as a result of the existence of basic social understandings, it can call upon reasoned argument, particularly analogy, to justify

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[178] Postema, supra note73, at 361, 363-6.

[179] Brunnee, J. & Toope, S. J. "International Law and Constructivism: Elements of an Interactional Theory of International Law" 39 *The Columbia Journal of Transnational Law* 19 (2000) p 51.

its processes and its broad substantive ends, thereby creating shared rhetorical knowledge [knowledge offered or created in dialogue, and employed in practical reasoning].[180]

The turn to interactive legal process for the persuasive force of rule systems is supported by a number of state-centric compliance theories of international law. Koh's transnational legal process model is one example.[181] Another is offered by Thomas Franck's examination of 'legitimacy' and 'process validity'.[182] Franck suggests that the 'compliance pull' international norms exert on states may be determined by four indicators: determinacy, symbolic validation, coherence and adherence.[183] Judicial articulation of complex norms may simultaneously contribute to the determinacy of rules and perform a ritual of symbolic validation. Litigation's validating function is strengthened by the expansive inclusivity of iteration, especially when corporate counsel is engaged in constructing the rules of the game, transcending the governing/governed dichotomy.[184]

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[180] Ibid at 72, 71.

[181] Supra note 31.

[182] Franck, Thomas M., *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990), a concise summation of the argument is offered at pp 48-9.

[183] Roughly and respectively: clarity and applicability to actual situations; institutions, rituals and processes that signal legitimacy; the paradigmatic harmony of rule systems; and the degree to which obligations are both perceived and observed by actors.

[184] This seems to be the preferable means for applying an interactive theory to international law, rather than reliance on the theoretically abstruse and semiotically loaded "internal morality" (see Brunnee & Toope supra note 178, pp 55-64.) Koh is especially concerned with the direct correlation between process involvement and compliance, quipping, "as those of us who live in universities all know, the tactic that works best with a student who has a disciplinary problem is to put him or her on the school disciplinary committee." Koh, Harold Hongju, "Jefferson Memorial Lecture: Transnational Legal Process After September 11th" 22 *Berkeley Journal of International Law* 337 (2004b), at 338. The validating institution of litigation remains prone to inter-*national* criticism, however, as long as it remains a predominantly American phenomenon. Accusations of judicial imperialism must be weighed against what Slaughter argues is the increasing trend towards jurisprudential cross-fertilization.

Franck's third and fourth indicators are both intimately tied up with notions of community that correspond well with this analysis' understanding of constitutive rules. As shared understandings about the norms and identities that delineate a discourse, constitutive rules operate in much in the same way as the "quest of states for coherence in the rules governing their conduct…not only assumes community, but is also evidence that states share the sense of membership in such a rule community."[185] Similarly, Franck approaches the adherence indicator from a Hartian perspective, arguing extant secondary rules of recognition. These rules "define the source of all obligation, which derives from status in the community,"[186] and this formalism allows the fairly commonsensical claim that the "degree to which a rule is obeyed affects the degree to which it is cognizable as a valid obligation."[187] Both coherence and adherence are accordingly epiphenomenal products of the shared understandings of socially constructed communities.

If the articulative and iterative functions of litigation facilitate the construction of constitutive rules to coordinate polycentric regulatory systems, then this brief survey of Franck's indicators suggests that they also contribute (directly and indirectly) to the legitimacy and compliance pull of those rule systems. Thus, while embedding legality through litigation may not create law or legal systems for the global regulation of business and human rights, it does facilitate the construction and coherence of polycentric and hybrid regulation, and may embed in those systems the legitimacy and efficacy to which all law aspires.

This conclusion should not be confused with the claim that globalization has actually made hybrid systems more efficient regulatory tools *per se*, than the "state-mediated inter-*national* world of arm's-length economic transactions and traditional international legal mechanisms."[188] Indeed, empirical research indicates that legal, hybrid and private regulation all gain in efficacy and sustainability by virtue of the same intangible

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185 Supra note 181 at 181.

186 Ibid at 191, emphasis omitted.

187 Ibid at 44.

188 Ruggie, supra note 37 at 503, emphasis in original.

resources of consensus and expertise.[189] The argument here is that embedding legality is highly efficient and strategically advantageous method for fostering and employing those resources, and that domestic courts are uniquely positioned and equipped for this task.

It is worth noting, however, that all conclusions have thus far been drawn in the hypothetical. This analysis will close by asserting the contingency of any such developments on the power, strategies and interactions manifest between empirically grounded actors.

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[189] Gordon, Kathryn, "Rules for the Global Economy: Synergies Between Voluntary and Binding Approaches" 1999 *OECD Working Papers on International Investment* (1999).

7 Contingency and Evolution

7.1 Object Contingency—Exploiting a Nascent Phenomenon

There are a number of reasons why the communicative model highlights civil litigation in domestic courts. While other 'law declaring fora' such as legal commissions, treaty bodies or legislators may exhibit similar articulative and iterative functions, litigatory procedures are unique in ensuring that multiple sides of an argument are taken into account, conducing cooperation and the foundation of constitutive rules. The transparency ensured by legal reasoning and high profile cases is, moreover, often lacking in international processes. Domestic courts are also capable of entertaining civil suits, and like international arbitrational fora, thereby function as 'touchdown points' of control for transnational business. But unlike arbitrational fora, courts are linked through the state to an international public law matrix consisting in no small part of international human rights, environmental and criminal norms, and offer unique access to individuals otherwise unable to communicate with this 'global norm structure'. Accordingly, this type of litigation has been treated as the emblematic object of analysis, despite the fact that it is a strikingly limited and uncertain practice.

In the US, where transnational human rights litigation has been most prominent and successful, ATS cases proceed on uncertain footing after an equivocal ruling by the US Supreme Court[190] and there are indications that the statute may be threatened by corporate

[190] See supra note 110.

lobby.[191] The grand majority of cases have in any case been dismissed on procedural grounds, and the three settled to date stretched out for an average of 9 years each. A handful of suits have been initiated in commonwealth countries, including Canada, Australia, India and the UK. Unlike the ATS cases, which exercise statutory jurisdiction over a "violation of the law of nations,"[192] these cases are based on common law principles of tort and negligence,[193] and have been roundly curtailed by the forum non conveniens doctrine.[194] Suits have also been brought in civil law jurisdictions such as Belgium and France through the Action Civile, which allows the combination of civil and criminal suits in a single action, though no precedence has been set.[195] All in all, the instances of transnational civil litigation against corporations for human rights offenses are strikingly few, and not a single one has ever reached judgment on merits.

There is reason to believe, however, that future efforts may be more successful and widespread. A recent interpretation of Brussels Convention Article 2[196] by the

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[191] The first such major initiative was launched in the Senate last year and quickly withdrawn in the face of widespread criticism, see http://www.laborrights.org/projects/corporate/feinsteinupdate102505.htm. It is unclear to what degree alternate statutes granting extra-territorial jurisdiction, such as RICO, ATVP and FSIA would fill the gap. See Joseph, Sarah, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart, 2004), supra, at 211.

[192] See supra note 24.

[193] Valid concerns have been raised about the characterization this implies. See Woodlock J.'s opinion in *Xuncax v. Gramajo*, 886 F. Supp. 162 (1995), arguing at 183 that this "…mutes the grave international law aspect of the tort, reducing it to no more (or less) than a garden-variety municipal tort."

[194] This doctrine stays proceedings if it is determined that another forum (often that in which the tort occurred) would be more appropriate. To date no suits have proceeded beyond this point in European or Commonwealth jurisdictions.

[195] See Engle, Eric A., "Alien Torts in Europe?: Human Rights and Tort in European Law" Discussion paper 1/05 *Center for European Legal Policy at the Universität Bremen*, available at <http://www.zerp.uni-bremen.de/english/pdf/dp1_2005.pdf> (2005), pp17-35, suggesting at 21 that homologous codes exists in "most civil law jurisdictions."

[196] "Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State." Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

International Court of Justice[197] seems to have placed a moratorium on forum non conveniens in civil suits against corporations domiciled or incorporated in European Union Member States. A European Parliamentary resolution on the same Article "requests Member States to introduce such extraterritorial jurisdiction in their national legislation."[198] Simultaneously, forthcoming research indicates that incorporation of the Rome Statute has been inadvertently accompanied by extra-territorial criminal jurisdiction over corporate activity in a number of jurisdictions.[199] This black letter law remains almost completely untested, and the degree to which criminalization entails implicit tort liability, is likely to be a point of considerable contention.

However future suits fare in relation to these developments will largely be a function of strategic and discursive contests between the same types of actors as those who litigate. It is impossible to say whether the phenomenon will be stymied in its infancy by political and commercial pressures, or whether domestic courts will have the opportunity to contribute to larger normative and regulatory developments in the business and human rights discourse. The first step towards a vision of transnational business regulation, however, and towards enabling the communicative function of litigation in its construction, is a theoretical and practical foray into the interaction of litigation with larger discourse structures.

This mandates not only research towards a broader perspective on human rights litigation, but efforts to promote, sustain and understand the practice across jurisdictions, and especially at the transnational register. International human rights organizations would

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197 *Owusu (Judgments Convention/Enforcement of judgments), Advisory Opinion*, EUECJ C-281/02 (2005)

198 *Social Responsibility of Companies: Resolution of the European Parliament on the Green Book of the Commission. Resolution* A5-0159 / 2002, 30 May 2002 (2002); for a discussion see Wouters, Jan, et al., "Tort Claims Against Multinational Companies for Foreign Human Rights Violations Committed Abroad: Lessons from the Alien Tort Claims Act?," in Slot & Bulterman (ed.), *Globalisation and Jurisdiction*. (Netherlands: Kluwer Law International, 2004), p 197.

199 *Business and International Crimes, 2nd Edition*, FAFO (2006 (Forthcoming). This was the case for all 17 jurisdictions surveyed. The results will be launched by the SRSG in Geneva, Sept 2006.

do well to note the need for dissemination of best practices in, expertise on, and technical support for litigation and lobbying efforts in its stead. It is then not such a far step from imagining litigation enabled and encouraged across jurisdictions, to domestic courts as a main driver for the development of business and human rights regulatory systems.

7.2 Discourse Contingency—Betting on Legality

The communicative model of litigation and regulatory systems has suggested a broader argument regarding the role of legal language, institutions and processes in non-legal or hybrid regulation. Embedding legality is presumed to be a good thing, facilitating consensus and regulatory legitimacy. But here too, development is thoroughly contingent on the strategic interactions, negotiations and power struggles waged by discursive actors. Fanciful invocations of a "global rule of law"[200] suffer harsh temperance at the couplet of legality and moral legitimacy,[201] and Cutler's admonitions regarding "the *juridification* of commerce…to substantiate and legitimate [private] claims to [global] political authority," merit serious consideration.

This problematique may be summarized by the mimetic characteristics of pervasivity and permeability. Embedded legality is pervasive because clarity and authority lend momentum to relay, such that legally embedded norms penetrate and exert influence on a variety of foreign discursive structures. Embedded legality is permeable to the extent that legal norms and reasoning are manipulable by powerful discursive actors. Both these characteristics are well illustrated by the legal 'duty of care' as articulated by English courts.

In the late 1990's, over 3,000 South Africans filed suit against the English based corporation, Cape plc. Cape subsidiaries had operated asbestos mines in South Africa,

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200 Supra note 37.

201 Legal slavery is the quintessential illustration.

whose operations allegedly induced injuries and death in the surrounding communities. Brought on common law tort principles of negligence, the case alleged fault with decision makers in the UK where the parent company was based.[202] A duty of care based on negligence doctrine thus entails a clear positive duty

> to protect others from damage …if the actor creates or controls a dangerous situation, or when there is a special relationship between parties or when the seriousness of the harm on the one side and the ease of avoiding the damage on the other side points towards a duty…[203]

This formulation recalls the 'spheres of influence' concept of the business and human rights discourse, which entails gradient human rights responsibilities for corporations across concentric boundaries of geography and subsidiarity. Like 'complicity', the 'spheres of influence' concept may be thought to already base a constitutive rule, while the content and scope of the concept remain hotly contested.[204] While it is certainly correct to say that the concept "has no legal pedigree,"[205] there remains a powerful influence to be had by legal norms, reasoning and processes on its development.

The first court of appeal in *Cape* described a possible a legal 'duty of care' owed by parent corporations to those affected by the operations of subsidiaries.[206] In denying a

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202 This is crucially distinct from attributing parent liability for the fault of a subsidiary; i.e., corporate veil piercing.

203 European Group on Tort Law , Principles of European Tort Law (2005), Art 4:103, www.egtl.org/principles/index.htm

204 Article 1 of the UN Norms states that "Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights," and clarification of the concept constituted an integral part of the SRSG's mandate, supra note 21.

205 Ruggie, supra note 5 par 67.

206 "Whether a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises,

forum non conveniens motion to dismiss, Justice Evans endorsed the existence of that duty of care as

> an issue of law which can be decided in either South Africa or England, although prima facie the allegation of a common law duty of care owed by an English defendant, albeit to a class of persons situated overseas, should more appropriately be decided by the English Courts.[207]

A second appeal based on forum non conveniens was also denied, and the suit settled shortly thereafter. No analogous litigation has been initiated in English courts since the Cape settlement, but following the ICJ's ruling on forum non conveniens, it seems reasonable to assume that future litigation (provided the corporation is domiciled in the UK) will proceed with relative ease to deliberations over the duty of care.

The argumentative form these deliberations will take are fairly clear: common law negligence principles dictate the 'neighbor test', which balances the foreseeability of injury, proximity between the parties, and when it is reasonable to impose the duty.[208] While the first two elements are predominantly fact-based, the third is prone to the influence of corporate practice. "In both civil and regulatory cases, conformance to industry custom is usually strong evidence of reasonableness unless the custom itself is unreasonable or the defendant's particular circumstances require more."[209] The proliferation of corporate codes of conduct and voluntary initiatives are especially relevant

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owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company?" *Lubbe & Ors v Cape Plc*, EWCA Civ 1351 Not Reported (1988)

[207] Ibid.

[208] Cane, Peter, *The Anatomy of Tort Law* (Oxford: Hart, 1997), p 125.

[209] Wood, Stepan, "Green Revolution or Greenwash? Voluntary Environmental Standards, Public Law, and Private Authority in Canada," in Canada (ed.), *New Perspectives on the Public–Private Divide*. (Vancouver: UCB Press, 2003a) at note 73.

here, and one is tempted to look towards the actions of market leaders, such as BP,[210] to establish higher standards of behavior for transnational business.

> The more powerful the market actor the more likely it is to generate the generally accepted commercial customs of that market, perhaps to go further and to enshrine those customs into standard form contracts, and, at the highest level of influence, to persuade courts and legislatures to give official legal sanction to those customs through recognition in case law and/or codification through statute.[211]

Wood discusses the relationship between single corporations' Environmental Management Systems (EMS) and 'industry practice' as cognized by public regulators, noting that "[p]ublic authorities, including legislatures, regulators and courts, are implicated in complicated ways in the establishment, shaping and operation of private authority."[212] This indicates a subtle reflexivity between market practice, judicial doctrine, and state and private regulatory mechanisms, that is intricately nuanced but well suited to analysis in articulative and iterative terms. Positing the centrality of litigation and legalism does not, however, lead directly to the conclusion that 'best practices' of business leaders will be decisive. Any signs of judicial expansion on the duty of care, and certainly the unthinkable 'judgment before settlement', would have serious repercussions in the market, likely including widespread subsidiarity restructuring to mitigate liability.

Disengagement of parent companies from subsidiary operations has very real consequences, not only for what is considered 'reasonable' behavior in specific adjudications, but for the enjoyment and protection of human rights vis-à-vis small subsidiary operations and the real people affected by them. Corporate counsel advice on

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210 Supra note 148.

211 Muchlinski, Peter, "Global Bukowina Examined: Viewing the Multinational Enterprise as a Transnational Law-making Community," in Teubner (ed.), *Global Law Without a State*. (Aldershot: Dartmouth, 1997), p. 80.

212 Wood, Stepan , "Environmental Management Systems and Public Authority in Canada: Rethinking Environmental Governance" 10 *Buffalo Environmental Journal* 129 (2003b), pp 184-7, 131.

EMS design offers a pithy summation, "the best way to ensure that the liability…stays where it belongs is to…keep corporate parents out of areas where they just don't belong."[213] This is in a sense an extension of Shamir's observation that litigation forces corporations "into a strategy of downplaying their ability to have a substantial impact upon their immediate social and physical environment, thereby implying a sort of diminished capacity to act responsibly in a proactive way."[214]

Of course, these two prognoses are stylized simplifications. Whichever the actual developments most resemble will be the result of innumerable struggles and negotiations, protracted and waged in many fora. The question of which interests are in the end served by the globalization of law or the legalization of international politics, is in the end a question of power, chance and strategic mobilization. In the business and human rights discourse it is as much as anything about agreeing on constitutive rules, and about whom it is that plays the game.

7.3 Conclusions from a Human Rights Perspective

This analysis has argued that: (1) Any global regulatory system for business and human rights will likely be of a hybrid and polycentric nature. (2) The cooperative structures upon which any such regulatory system will be built are productively theorized as constitutive rules in a discourse. (3) The argumentative rationality institutionalized by judicial proceedings facilitates the foundation of constitutive rules, while the attendant authority and clarity of judicial reasoning promotes courts as a privileged forum for negotiation and contest over the substance of those rules. (4) Through the articulation of

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[213] Bergeson, Lynn, *Legal Lookout: When a Parent's Involvement May Be Too Much*, Pollution Engineering, 1 April 2005 available at <http://www.lawbc.com/articles.shtml>. Of course, this comment responds to liabilities already developed in litigation (specifically *United States vs. Bestfoods*, 524 US 51 (1998)), namely the direct and the indirect liability of veil piercing, and not a duty of care, for which distancing strategies would be significantly more complicated.

complex norms and the iteration of network pathways, transnational human rights litigation embeds legality in discursive structures, and potentially in constitutive rules. (5) The embedding of legality does not equate regulation with law, but is likely to match law's legitimacy in the development of regulatory systems. (6) The evolution of discourse structures and the development of regulatory systems are thoroughly contingent on the mobilization and contest of discursive strategies and power struggles between empirically motivated actors.

These six points cohere into what has been termed the 'communicative model' of litigation in the business and human rights discourse. The communicative model represents a novel theoretical amalgamation, as well as a more comprehensive speculation on litigation's long term consequences than is generally offered in academic analyses. It is perhaps most importantly characterized as an alternative perspective, opportune at a time of apparent impasse in one of the most contentious and dynamic international policy issues of the turning century. In this respect, the communicative model suggests two, more general arguments, each of particular salience for the international human rights agenda.

Firstly, the contributions of domestic courts to the human rights regulation of corporate activity exceed that of immediate restitution or deterrence. While courts may indeed offer "a 'stick' that, in appropriate but extraordinary circumstances, reinforces the 'carrot' of the marketplace,"[215] a more profitable description is one of *inter*-action and mutual influence rather than reinforcement. This suggests the need for a deeper understanding of transnational human rights litigation vis-à-vis global business regulation, from theoretical, as well as practical perspectives.

Secondly, in the absence of 'hard' legal solutions, there remains a fundamental and formative role to be played by legal language, actors and institutions in non-legal or hybrid regulatory mechanisms. Exploring this role might provide the human rights movement with its most felicitous modality for moving 'beyond voluntarism'.

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214 Supra note 30.

215 Steinhardt, supra note 15 at 202.

These two arguments are more provocative than they are conclusive, offering little in the way of concrete strategies, the authoritative analyses or policy recommendations with which human rights scholarship is prone to conclude. The general contingencies discussed earlier in this chapter are, moreover, compounded by principled resistance to litigation within the human rights community. Some have voiced concern that litigation's "emphasis on those rights that are deemed justiciable has the potential to influence, and potentially distort, the normative development of the international human rights corpus."[216] Others worry that punishing corporations for involvement with oppressive regimes neutralizes their potential to positively impact the human rights situation in weak states,[217] or that civil litigation "commodifies the basic principles of human dignity and thus surrenders the moral high ground."[218] The communicative model does not directly address these concerns, valid as they are, but complicates them by forcing a more macro perspective.

This analysis has continually gestured towards broader contexts—setting litigation within a discourse, setting the powerful rise of transnational corporations within the elaborate legal framework of a global economy. To analyze the business and human rights discourse against the deeper structures of globalized commerce, is to locate that discourse within a process of juridification from which it is largely excluded. The explosive 'fragmentation' of legal instruments, frameworks and arbitrational fora which facilitate global commerce proceeds as independent of international human rights law as it is indifferent to that law's sanctity and efficacy. Yet the business and human rights discourse enjoys no comparable autonomy. The elaborate legal framework supporting global commerce has de facto access to business regulation, and commercial law topoi are assumed to be naturally germane to human rights discourse. That human rights norms meanwhile lack any standing in the discourses of international commercial law suggests the image of a discursive Bantustan where borders are porous for only one class of discursive

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[216] van Schaack, supra note 25 at 2336.

[217] The current debate on internet providers in China is emblematic, on the Burmese context, see supra note 31.

[218] Steinhardt, supra note 15 at 221.

actor. Though the metaphor is facetious, the point is material. It is a matter of history and a question of power.

Embedding legality in the business and human rights discourse represents an organic means—perhaps the only means—of linking these processes of commercial juridification up with human rights norms. It is also a means of subjecting regulatory design within the business and human rights discourse to human rights *law*, a potentially crucial reinforcement given the unequal footing shared by human rights norms and investment law, trade law, contract law, and the rest. The practical and substantive divides separating these bodies of law from the human rights regime remain chasmic, but by spanning them through the iteration of discursive structures, along which human rights norms circulate and regulatory structures for business can be constructed, human rights law might just be granted access to these negotiations.

Questions about consequences for the human rights corpus or the behavior of individual states reveal themselves as strategic issues against this broader dynamic context, not the principled issues they first appear to be. The real question is whether human rights law will play the game. Not surprisingly, this analysis suggests that whether or not human rights law plays the game has concrete consequences for how the game is played. The types of legal norms and topoi employed in international norm contest have profound impact, as do the institutional and legal auspices under which such contest takes plays. A notorious example is offered by the TRIPS negotiations, shifted from UNICEF, where 'knowledge is the common heritage of mankind', to the WTO, where knowledge is a commodity.

In this respect, the most important contribution to be made by human rights law may very well be its foundation on individual human dignity as the ultimate qualifier of substantive and procedural legitimacy.[219] Human rights are distinct as an international legal regime in this regard, and entail a wealth of jurisprudential guidance on how this principled difference is to be operationalized in legal standards and procedures. To quarantine this jurisprudence from the development of regulatory systems, or the processes

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[219] On these grounds Alston succinctly and powerfully refutes claims that the WTO would be the most effective guarantor of universal human rights, supra note 137.

of juridification taking place in the global market more generally, is to hobble the evolution of a just global order.

Emerging from an epoch of standard setting and codification, to construct mechanisms of implementation in the age of globalization, the human rights movement is confronted by a very different international landscape than that against which it originated, and reveals itself as "not at all well constructed in order to enable it to adapt, let alone transform itself to new challenges."[220] But 'command and control' tropes simply do not do the trick when "both the form and content of regulation are themselves an instrument of economic competition,"[221] and a more nuanced understanding of human rights in the global political economy is required if human dignity is to penetrate market structures and the networks of global power in the 21st century. In the final analysis, it is towards this larger end that the current model aspires to make a small contribution.

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[220] Alston, Philip, "Downsizing the State in Human Rights Discourse," in Dorden & Gifford (ed.), *Democracy and the Rule of Law*. (Washington DC: Congressional Quarterly Press, 2001) at 359, internal citations omitted.

[221] Picciotto, supra note 34, at 3.

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