

## **Regulatory Architectures for a Global Democracy: *On Democratic Varieties of Regulatory Capitalism***

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Should we worry about the future of democracy given the acceleration of economic, social and political globalization? Does globalization, and the liberalization processes that are associated with it, constrain or invigorate democratic policy making? These are not easy questions to answer, and there are many fruitful strategies to confront them. This chapter places these questions in the context of the emergence of a global order of 'regulatory capitalism' (Levi-Faur 2005; Braithwaite 2008). The answers the chapter provides for the above questions, the challenges it identifies and the solutions it suggests - all demand an attentive view of the global expansion of rule-based governance. All are contingent on the characteristics of hundreds, or even thousands, of micro-regimes at the global level that govern many aspects of our daily lives. These regimes are never entirely private or entirely public but are hybrids. They have some aspects of public governance and some aspects of the private governance at the same time. The different elements that make the hybrids are likely to co-exist, mutually adjusting, cooperating, complementing and competing with each other.

The production and delivery of the products we consume, of the services we buy and our environment are all shaped by hundreds and thousands of regulations that were decided outside our respective national parliaments and executives and beyond the jurisdictions of our national courts (Braithwaite and Drahos 2000). These regulations shape the medicines and food we consume, the quality of the air we breathe and the water we drink, and the safety of our kids' toys. Many of these regimes have been established, and flourish, beyond the nation state, yet they exert influence within its borders. These global regimes are often created and maintained by business corporations and trade associations but also by non-profit advocacy groups. Whatever the motives of these organizations and groups - be they moral or material - the scope of their operation and the institutions they create go well beyond the nation state. Consequently, scholars have identified the emergence and proliferation of

'private authority regimes' and 'private governments', and discuss the effects they have on effective governance, democratic legitimacy and quality, and the changing balance of power between corporations and states (Strange 1996; Weiss 1999; Haufler 2002; Hall and Biersteker 2002).

Private regulatory regimes however do not exist in vacuum. They are part of complex hybrids that includes private and public. It is the effect of these hybrids that determines the characteristics and qualities of these regimes. On the basis of this assumption, we pose the question: does the emergence of the global, in the form of these multitudes of international micro regulatory regimes, suggest a renewal of democratic policy making, or does it attest to its stagnation or decay? Two very different responses are often given to these questions. The pessimistic response stems from the expectation of decay in the role and authority of public institutions. Accordingly, the democratic challenges identified suggest that the global is the domain of business; liberalization implies deregulation; civil and voluntary regulation<sup>1</sup> replace coercive state regulation; and the retreat of the nation state signifies a decline in popular sovereignty. In such a world, the scope for public control, the demand for and supply of accountability, and the options for participation are either limited or in decline. The optimistic response, meanwhile, flows from the expectation of an institutional renewal of democratic practices at the global level. Accordingly, the democratic challenges that the optimists identify are grounded in the assertion that the global is *not* primarily the privileged domain of business but *the* place where new forms of civil action emerge; liberalization is not only or mainly about *deregulation* but mostly about *reregulation*; civil regulation co-expands rather than replaces state regulation; and global governance represents an opportunity to reinvigorate popular sovereignty. In this fairly bright world, the scope for public control, the demand for and supply of accountability, and the options for participation are considerable and even expanding.

**Table 1:**  
**Democratic challenges in the age of globalization: the antipodes**

<b>Pessimists</b>	<b>Optimists</b>
Decay in the role and authority of public institutions	Expectation of institutional renewal at the global level. Global democracy is emerging
The global is the privileged domain of business	The global is <i>not</i> primarily the domain of business but the place where new forms of civil action emerge
Liberalization implies deregulation	Liberalization is not only or mainly about deregulation but mostly about reregulation
Civil regulation replaces coercive state regulation	Civil regulation co-expands rather than replaces state regulation
The retreat of the nation state signifies a decline in popular sovereignty	Global governance represents an opportunity to reinvigorate popular sovereignty.

This chapter presents a point of view that is neither pessimistic nor optimistic. A measure of optimism might be gained from the recognition that the intellectual hegemony of neoliberalism blurs in all that concerns the regulatory dynamics of present-day capitalism. We are supposed to live in an era of *deregulation*, and yet the empirical evidence of the expansion of regulation does not support this gloomy assumption. There are wide gaps between the dominant narrative on neoliberal deregulation and the emerging realities of a regulatory explosion (Levi-Faur 2005). Braithwaite (2008) bluntly calls this narrative the ‘neoliberal fairy tale’, suggesting that regulation is too important a feature of the current order simply to be left out of political economy and public policy accounts of change. Similarly, to note a couple of recent examples, both Moran (2003) and Levy (2006) reported findings that the state ‘after statism’ remains an activist state. Its missions are evolving rather than eroding, and ‘reinventing government’ is mainly or significantly a process of the transformation of the service-provision state into the regulatory state (Moran 2002, 391; Loughlin and Scott 1997; McGowan and Wallace 1996; Hood et al. 1999). Our pessimism, or a better recognition of the scope of the challenges, is not motivated so much by the privileged position of business (or its structural power). The gravest challenges is derived from the fragmentation of policy and politics into a multitude of decentralized arenas of regulation, which give rise to technocratic politics and also to

a culture of distrust. This in turn result in punitive forms of accountability and panopticonic forms of transparency.

This chapter makes two major assertions. First, the rise of the regulatory state at the national level and the emergence of a multitude of issue-specific regimes at the global level consolidate a regulatory order that may best be described as 'regulatory capitalism'. The architecture of regulation is increasingly also the architecture of global governance, and it is in this context that democratic stalemate, decay or renewal should be evaluated. To put it more bluntly, the chapter asserts that theories of democratic control and democratic participation cannot deal properly with the challenges of global democracy without taking into account the emergence, consolidation and expansion of the new order of regulatory capitalism. In this new global order, rule making, rule monitoring and rule enforcement are becoming major instruments of governance. The interaction between different types of regulators exercising powers of varying scope gives rise to four varieties of regulatory capitalism: laissez-faire, pluralist, corporatist and étatist.

Second, the chapter asserts that one of these four varieties, namely, 'regulatory corporatism', may best align public and business interests within international regulatory regimes. A major conceptual effort is directed, therefore, at clarifying the meaning and the implications of the notion of regulatory corporatism. In this sense, the chapter contributes to the renewal of corporatist theory, but it significantly departs from the association of corporatism with the tripartite arrangements of labor, business and the state (on this post-war neo-corporatism, see Schmitter 1974; Katzenstein 1984). The "neo-neo" global regulatory corporatism is more consensual, voluntary and deliberative than its predecessors. It is rule-based in the sense that its direct and immediate effects are mainly procedural rather than distributive, and it reflects the co-expansion and co-functioning of state and civil rules at different and multiple levels of analysis. At the same time it serves as an alternative theoretical framework to realist and liberal conceptions of the global order.

The first section of the chapter presents the notions of regulatory capitalism and regulatory state. The second focuses on the civil aspects of regulatory capitalism and discusses certain forms of civil regulation that are very rarely brought together in the

literature. The third section proceeds to develop some distinctions between different varieties of regulatory capitalism – in particular, between *laissez-faire*, corporatist, pluralist and *étatist* types of regulatory capitalism. The arguments and discussion in these three sections are mostly analytical and theoretical. Empirical examples are provided with regard to the governance of food safety, and especially with regard to the democratic challenge of a particular private governance regime – GLOBALGAP (known as EurepGap before September 2007<sup>2</sup>). GLOBALGAP is a private sector body that is said to set "voluntary standards" for the certification of agricultural products (see also Fuchs and Kalfagianni, this volume). It brings together agricultural producers and retailers who want to establish certification standards and procedures for Good Agricultural Practices (GAP). Certification covers the production process of the certified product from before the seed is planted until it leaves the farm. As a so-called business-to-business label, it is not directly visible to consumers, nor does it attract the direct scrutiny of governments. GLOBALGAP's advocates suggest that it leads to an upgrade of food-safety standards and reduces both red-tape and compliance costs. Its opponents point out that GLOBALGAP is taking over state functions, and is a form of private government that is neither accountable to the public nor transparent to important stakeholders (Campbell 2005; 2006; Freidberg 2007; Guthman 2007). The fourth section of the chapter examines and evaluates the basic democratic qualities of regulatory corporatism, especially with regard to participation, transparency and accountability. The fifth section concludes.

### **I. Regulatory Capitalism and the Regulatory State**

The way capitalism is organized and governed is changing (Rosenau and Czempiel 1992; Braithwaite and Drahos 2000; Slaughter 2004). A regulatory explosion – the proliferation of different mechanisms of control at both the national and the global level – is balancing the effects of neoliberal reforms and is creating a new global order that is characterized in important ways by regulation (Levi-Faur 2005). Our democratic worries and hopes, constraints and opportunities, strategies and ad hoc reactions are all defined to a significant extent by this new, emerging order of regulatory capitalism.

How should we best define the new global order of regulatory capitalism? One definition was offered in a lecture by then the Chairman of the US Federal Communication Commission (FCC), William E. Kennard. For Chairman Kennard, regulation is too often used as a shield to protect the status quo from new competition, as well as a sword to cut a pathway for new players to compete by creating new networks and services. It is always easier for business to prowl the corridors of Congress, Chairman Kennard claims, than to compete in the rough and tumble of the marketplace. Accordingly, he suggests that regulatory capitalism is when companies work to change the regulations instead of working to change the market. Or, more succinctly: 'Regulatory capitalism is when companies invest in lawyers, lobbyists and politicians, instead of plants, people and customer service... Regulatory capitalists would rather litigate than innovate... it works best for companies that have the resources and know-how to play the regulatory game.' Chairman Kennard thus presents a morbid view of regulatory capitalism, not much different from the portrayal of 'interest group liberalism' offered by Theodore Lowi in the late 1960s, whereby single-issue groups pursue their narrow and short-term interests at the expense of the overall public interest. This, together with the sprawling, unaccountable and octopus-like bureaucracy, represents *The End of Liberalism* (Lowi 1969). Leave aside the different era and context and the different ideological bent of the two: Lowi and Chairman Kennard are expressing the same sentiment, namely, that the interaction between government and big business is leading to the degradation of democracy.

Unlike both Lowi and Kennard, this chapter suggests a more open-ended and often contradictory view of regulatory capitalism, one which allows regulation to be both strong and weak, derived from public but also civil demand, with positive as well as negative results. This view contrasts relational-based to rule-based governance and does not reduce rules and rule-making to a mere instrument of the powerful (Li 2003). Rule-based governance, to the extent that it is effective and legitimate, constrains both the powerful and the powerless, though not necessarily to the same extent. In order to elaborate such an open-ended concept of regulatory capitalism, this chapter defines regulatory capitalism as a political, economic and social order where it is regulation, rather than the direct provision of public and private services, that is the expanding part of government, and where legal forms of domination are increasingly organized

around functional roles and problem solving rather than national demarcation lines. The distribution of power and the corresponding form of interest intermediation in each issue arena and functional arena are shaped by the particular interaction of civil and state forms of regulation.

The notion of regulatory capitalism challenges and complements the notion of the regulatory state (Moran 2002, 391; Loughlin and Scott 1997; McGowan and Wallace 1996; Hood et al. 1999). One of the major manifestations of the rise of the regulatory state is the creation of autonomous agencies to regulate social and economic life. A recent survey of the establishment of regulatory agencies across 16 different sectors in 63 countries from the 1920s through to 2007 reveals that it is possible to find an autonomous regulatory agency in about 73 percent of the possible sector-country units that were surveyed (Jordana, Levi-Faur & Fernandez i Marin, 2008). The number of regulatory agencies rose sharply in the 1990s. The rate of establishment increased extremely dramatically: from fewer than five new autonomous agencies per year from the 1960s to the 1980s, to more than 20 agencies per year from the 1990s to 2002 (rising to almost 40 agencies per year between 1994 and 1996). Probably more than anything else, it is the establishment of these agencies that makes the regulatory state an attractive concept for social scientists (Majone 1994; 1997), Latin America (Manzetti 2002; Jordana and Levi-Faur 2006), East Asia (Jayasuriya 2001), Germany (Muller 2002), Britain (Moran 2003), and even China (Pearson 2005).

A useful definition of the term regulatory state suggests that 'modern states are placing more emphasis on the use of authority, rules and standard-setting, partially displacing an earlier emphasis on public ownership, public subsidies, and directly provided services. The expanding part of modern government, the argument goes, is *regulation...*' (Hood et al. 1999, 3). Alternatives to regulation, mostly distributive and redistributive policies, according to this view, are either stagnating or altogether in decline.<sup>3</sup> While the regulatory state signifies most often governance at the national level, in the European context the notion of the 'regulatory state' often indicates a European Union-centered policy analysis where the steering functions are mainly located in Brussels rather than in the member states. This understanding of the European regulatory state is mostly associated with the work of Giandomenico

Majone, who suggests that regulatory functions are migrating upwards toward the European Union (Majone 1997). This migration challenges, of course, the notion of national and popular sovereignty, and therefore calls for discussion of its democratic qualities. To a large extent it mirrors the agenda of this book on the democratic challenges of economic, social and political globalization.

Before I turn the reader's attention to the notion of civil regulation, let me exemplify the notions of regulatory capitalism, the regulatory state and the European regulatory state as they apply to the issue of food safety and, more concretely, to the GLOBALGAP regime. Recall that GLOBALGAP is a private sector body that sets voluntary standards by bringing together agricultural producers and retailers who want to establish certification standards and procedures for Good Agricultural Practices. Certification covers the production process of the certified product from before the seed is planted until it leaves the farm. Note that it covers crops, livestock and aquaculture, and covers over 80,000 certified producers in no fewer than 80 countries. Yet what we have had to say so far on regulatory capitalism doesn't directly apply to it. As a business-to-business standard, it does not directly represent what Chairman Kennard was warning against. It does not mainly or directly rely on lobbying government or using political capital in national or intergovernmental arenas. It also does not involve the creation of, or reliance on, regulatory agencies that serve as the major signifiers of the emergence of the regulatory state. GLOBALGAP, despite its European origins, is not part of the EU governance structure. It is therefore more a challenge to than a validation of Majone's notion of the European regulatory state. To better understand GLOBALGAP, we need to turn our attention from state and intergovernmental politics to the 'regulatory society' and, more concretely, to a new type of social movement, namely, the business movement.

## **II. Civil Regulation: Beyond the Regulatory State**

Regulatory capitalism is not only a political or economic order. It reflects sociological developments that are best expressed via the term "Regulatory Society" (Clarke 2000; Braithwaite 2003). The regulatory society represents the arena where non-state actors demand and supply their own regulatory solutions. These non-state actors can act within national boundaries or beyond them. In either case, they represent the

existence and the importance of civil forms of regulation. The regulatory society interacts with the regulatory state and this interaction makes the order that we label as 'regulatory capitalism'. Yet, before we deal with this interaction, it might be best to discuss it on its own and to portray the different mechanisms of civil regulation that are associated with it.

Civil regulation (often also described as private regulation) refers to the institutionalization of global and national forms of regulation through the creation of private (non-state) forms of regulation to govern markets and societies (cf. Vogel 2005; 2006). Civil regulations are the product of the advocacy of non-state groups: non-governmental organizations (NGOs), international non-governmental organizations (INGOs), corporations, formal and informal networks of professionals, lobby groups, industry associations, terrorists, criminals and the like. While the boundaries between civil and state organizations are often blurred, we expect civil organizations to have significant degree of autonomy and formal constitution as societal organization (Hall and Biersteker 2002, 3). The literature on international private-interest regimes (Cutler, Haufler and Porter 1999; Cutler 2003, Hall and Biersteker 2002; Sell 2003), private legal orders (Williams 2006) and global civil society (Kaldor 2003) probably reflect the growth of civil forms of organization and regulation (Cutler, Haufler and Porter 1999, 3; Büthe 2004, 282).

Civil regulations attempt to embed markets and social groups in a normative and regulatory order that prescribes responsible business conduct and citizenship. 'What distinguishes the legitimacy, governance and implementation of civil regulation', tells us David Vogel, 'is that it is not rooted in public [i.e., state] authority. Operating beside or around the state rather than through it, civil regulations are based on "soft law" rather than legally binding standards: violators are subject to market and civil penalties rather than legal ones' (Vogel 2006, 2-3). Market and other civil penalties should be understood here not only as direct and immediate economic outcomes, but also as penalties that are related to the standing and reputation of business corporations, civil organizations and their managers and employees. Because penalties can be high, even if they are not based on legal norms and state enforcement, it might be useful to distinguish between voluntary and coercive forms

of civil regulation. Coercive regulation derives from various forms of power that market and other social actors possess vis-à-vis other actors, sometime even vis-à-vis state actors. Coercive power is not only a property of the state and thus can be used by civil regulators to enhance their interests and world views. This is exactly the type of power that increasingly acquired by big retailers in Europe and North America vis-à-vis domestic and international growers (see, Fuchs and Kalfagianni, this volume).

Voluntary regulation is a not new and precedes modernity and is recognized in wide areas of business and social activity (Potoski and Prakash, this volume). Scholarly and public interest in voluntary regulation derives from four shortcomings of 'regulatory formalism', including (a) expensive and cost-ineffective regulatory strategies (Breyer 1993); (b) inflexible regulatory strategies that encourage adversarial enforcement (Bardach and Kagan, 1982); (c) legal constraints on the subject matter, procedure and scope of regulatory discretion; (d) and *regulatees'* resentment, which leads to non-compliance or 'creative compliance' (McBarnet and Whelan 1997). While the turn to voluntary regulation is partly a response to the failures of formal regulation, it has its own flaws and weaknesses. The basic puzzle of why firms and other social and economic organizations would take upon themselves responsibilities that are not mandated by law is still in need of more scholarly attention, and the scope and implications of voluntary regulation need to be more clearly delineated (Arora and Cason 1996; Prakash 2001; Porter and Ronit 2006).

Consider GLOBALGAP, it is tempting to accept its self-presentation as a voluntary organization. But this can be done only while turning a blind eye to apolitical, non-state forms of power. GLOBALGAP was established by retailers in an increasingly concentrated retail market which allows retailers to exert significant control over producers. These retailers are generally located in the North and are organized as giant corporations, while the producers often come from the South and are organized in family farms. Better food safety in the North may come at a high price to the South. Civil regulation does not necessarily mean voluntarism. In the food sector and the power of retailers over other parts of the food industry is very significant and coercive aspects are at least part of the convergence of producers on stricter standards.

GLOBALGAP is also a form of self-regulation. According to Porter and Ronit, self-regulation 'has recently come of age. In governments and in intergovernmental organizations, as well as among many private organizations in business and civil society, self-regulation is seen as an alternative to market and state' (Porter and Karsten 2006, 41). Self-regulation is a basic and common form of civil regulation and is often, but not always, voluntary. Figure 1 therefore distinguishes between self-regulation (when the regulator is voluntarily also the regulatee) and enforced self-regulation (when the regulatory is also the regulatee under some form of coercion).

**Insert figure 1 about here**

Enforced self-regulation occurs where 'the government would compel each company to write a set of rules tailored to the unique set of contingencies facing that firm. A regulatory agency would either approve these rules, or send them back for revision if they were insufficiently stringent' (Ayres and Braithwaite 1992, 106). Rather than the government enforcing the rules, most enforcement duties and costs would be internalized by the *regulatee*, which would be required to establish internal independent compliance administration. The primary function of government inspectors would be to ensure the integrity and transparency of the work of the compliance group of the regulatees. State involvement would not stop at monitoring, however. Violations of the privately written and publicly ratified rules would be punishable by law (Ayres and Braithwaite 1992).

The self-regulatory regimes, enforced or voluntary, are based on a certain level of agreement and will to cooperate among various stakeholders, including professional and business competitors. Self-regulation may include a wide variety of techniques and instruments covering various facets of collective action. It may be defined in terms of one or all of the following aspects: entry regulation (e.g. having a license to operate a service); exit regulation (e.g. the withdrawal of a license to operate a

service); cost regulation (e.g. the price of professional services); service regulation (e.g. the level of service expected from the provider); content regulation (e.g. degree of violence); and standard regulation (e.g. degree of acceptable noise). It should be obvious by this stage that GLOBALGAP is a self-regulatory mechanism of control. Legally it is owned by FoodPlus, a not-for-profit limited company based in Cologne, Germany. As a system of food-quality certification, it includes a set of normative documents. The standards and requirements of certification are approved by working committees in each sector. These committees have 50% retailer and 50% producer representation. Membership and participation are on the basis of expertise rather than nationality.

Third-party regulation is yet another common form of civil regulation. Again it can come as in a voluntary form but also as a coercive form as Enforced Third-Party Regulation. Here processes of accreditation by third parties are a central enforcement strategy and 'a voluntary contractual relationship between regulated entities and the party auditing the facility in place of relying solely on the regulatory agency as enforcer' (Kunreuther, McNulty and Kang 2002, 309). Third-party regulation is a prevalent feature of modern life. One of its more popular forms is 'auditing'. Indeed, the notion of auditing is now used in a variety of contexts to refer to growing pressures for verification requirements (Power 1997). Third-party regulators are sometimes called 'gatekeepers' (Kraakman 1986). These include senior executives, independent directors, large auditing firms, external lawyers, securities analysts, the financial media, underwriters, and debt-rating agencies (Ribstein 2005, 5-6). Volunteerism is a measure and characteristic, however, of the *regulatee*, and not necessarily the third party. The incentives to the third party to enter into these relations might be economic, and indeed they often are, but they can also be enforced by the legal regime (either by the state or by the civil organization that shapes the regulatory regime). Note that, in the context of the GLOBALGAP regime, the accreditation of the 80,000 or so producers is delegated to independent certifiers. In this process these certifiers are the third party that provides the accreditation for the producers. Yet, at the same time they are going accreditation process themselves by GLOBALGAP.

The particular dynamics of these various forms of civil regulation – in particular, whether they are on the rise or in decline – and the question of their origins, effects and democratic legitimacy are still mostly open and subjects for further empirical research. Yet it is certain that at least in theory they can constitute an alternative arena and method of democratic governance. While the theory and practice of democracy always had close historical ties with the state, we are living in an age of globalization, and at least some theorists are suggesting that the major challenges we face are in the global or transnational arenas (Dryzek 1996; 2000). Transnational democracy suggests increasing use and application of civil regulation where state regulation is on the margins rather than at the center of regulatory regimes. However, in order to fully appreciate the challenges and promises that it represents, the interaction between civil and state regulation is discussed.

### **III. Varieties of Regulatory Capitalism**

The consolidation of the regulatory state and regulatory society, and the more general expansion in the number of rules, orders, by-laws, administrative guidelines, statutory instruments and the like, are the preconditions for the emergence of regulatory capitalism. This order is defined, sustained and legitimized by the expansion in the number and scope of rules, rule making, rule monitoring and rule enforcement. The dynamics and content of such rule activity is shaped by the interaction of varying degrees of civil and state regulation. A typology of the modes of regulation, as they emerge from this interaction, is presented in Table 2. For the sake of convenience, a simple distinction is drawn between ‘strong’ and ‘weak’ forms of regulation. This scheme not only offer some order in the various forms of regulation that govern business and society but also allow us to suggest that GlobalGap, the civil regulator that stood at the center of our empirical examples, can not be analyzed on its own. Its interaction with state regulation is what makes the current order more complex, more hybrid and yes, also, potentially more effective and open than the proponents and opponents of neoliberalism often suggest.

		<b>Civil Regulation</b>		
<b>State Regulation</b>			<b>Strong</b>	<b>Weak</b>
	<b>Strong</b>	<b>Regulatory Corporatism</b>		<b>Étatist Regulatory Capitalism</b>
	<b>Weak</b>	<b>Pluralist Regulatory Capitalism</b>		<b>Laissez-faire Regulatory Capitalism</b>

**Table 2: Varieties of Regulatory Capitalism**

This distinction gives rise to four types of regulatory capitalism. Under **étatist** regulatory capitalism, civil regulation is weak and state regulation is strong. It represents the adaptation of the Westphalian order to the regulatory arena, and in particular the expectation of its adaptation to the realities of multi-level governance. The ideal types of supranational and intergovernmental forms of European public policy *both* fall within this category of regulatory order. In the literature on regulation, étatist forms of regulation are often described as systems of command and control with prescriptive types of rules. Prescriptive rules tell regulated entities and individuals what to do and how to do it, and tend to be highly particularistic in specifying required actions and the standards for adhering to them (May 2007, 9). This variant of regulatory capitalism usually enjoys a high degree of capacity to impose sanctions, as well as clear-cut lines of responsibility and thus accountability. Yet these advantages come at a price: strict authoritarianism, unreasonable rule and capricious enforcement practices impose needless costs and generate adversarial relations between regulators and regulatees.

**Laissez-faire regulatory capitalism** emerges from the interaction of weak forms of civil and state regulation. Both civil and state regulations are rudimentary elements of the regulatory order, which rests on rather limited, soft forms of rules. This variety of regulatory capitalism represents the ideal of the neoliberal enthusiast, who sees both

state and civil forms of regulation as constraining economic and political liberties, and therefore advocates deregulation. Laissez-faire forms of regulatory capitalism represent the contraction of the political (and not only the state) and the expansion of market mechanisms of control. The dynamics of governance in this type of regulatory capitalism either face backwards to the transformation of rules into principles (that is, unspecified or vague rules, often also known as standards), or forwards, toward the consolidation of regimes that are based on principles from their very outset (Braithwaite 2003)

**Pluralist regulatory capitalism** emerges from the interaction of weak forms of state regulation and strong forms of civil regulation. This variety of regulatory capitalism represents the Americanization of the global order in the sense that group competition and contestation create public arenas of regulation that do not rest on public sanctions and public authority. The growth in scope and diversity of voluntary forms of regulation suggests that this variety of regulatory capitalism is gaining ground at the expense of other forms of regulatory capitalism. When compared with other forms, this particular type of regulatory capitalism is characterized by adversarialism, frequent changes within the regulatory regime, and high rates of regime demise. The types of rule that may best represent this kind of regulatory capitalism are process-based regulation (sometimes also called management-based regulation) or performance-based regulation. Process-based regulation advances systems for monitoring risks by the regulatees (May 2007, 10; Coglianese and Lazer 2003); performance-based regulation emphasizes regulatory outcomes and focuses on results, while leaving it to the regulated entities to determine how best to achieve the desired results (Coglianese et al. 2002). In doing so, these two types of rule avoid conflicts that may arise from prescriptive behavior and reduce enforcement and monitoring costs. These types of rule are most likely to proliferate in systems where state-coercion and other sanctions are limited.

Finally, **corporatist regulatory capitalism** results from the interaction of strong forms of both civil regulation and state regulation. In arenas of redistribution these conditions may lead to the consolidation of a corporatist order. In arenas of distribution, and especially in the context of issues of economic development, they

may lead to the creation of coordinated forms of capitalism. The type of rule that is most likely to result from the interaction between strong civil regulation and state regulation varies with the particular hybrid form of regulation. In what follows I explore the democratic qualities of this last variant of regulatory capitalism. It might well be, and this should be a subject for further research, that it is not only that civil forms of regulation such as GlobalGap are on the rise but also state and intergovernmental forms of regulation are expanding. If this is the case, we may expect the emergence of corporatist forms of regulatory capitalism for the governance of the food-safety industry.

#### **IV. On the Democratic Qualities of Regulatory Corporatism**

To what extent is regulatory corporatism a participatory order? I suggest that participation is best expressed and sustained in the coexistence of various forms of state and civil regulators side by side and in a way that does not threaten the autonomy or the scope of the responsibilities of the civil regulators. Four participatory variants are of particular importance. The first is co-regulation, where responsibility for regulatory design or regulatory enforcement is shared by the state and civil actors. The particular scope of cooperation may vary as long as the regulatory arrangements are grounded in cooperative techniques, and the legitimacy of the regime rests at least partly on public-private cooperation.

A second form of participatory regulatory corporatism is manifested in enforced self-regulation which was discussed already earlier. A third form of regulatory corporatism is meta-regulation. The notion of meta-regulation is closely related to the notion of enforced self-regulation as formulated above; however, unlike enforced self-regulation, it allows the *regulatee* to determine its own rules. The regulatory role of the state is confined to the institutionalization and monitoring of the integrity of the work of the compliance group of the regulatees. In this sense, it is about meta-monitoring (Grabosky 1995). In Christine Parker's formulation, the notion of meta-regulation has been used as a descriptive or explanatory term within the literature on 'new governance' to refer to the way in which the state's role in governance and regulation is changing (Parker 2002). Meta-regulation 'entails any form of regulation (whether by

tools of state law or other mechanisms) that regulates any other form of regulation' (Parker, forthcoming). Thus, it might include the legal regulation of self-regulation (e.g. putting an oversight board above a self-regulatory professional association), non-legal methods of 'regulating' internal corporate self-regulation or management (e.g. voluntary accreditation to codes of good conduct), or the regulation of national law-making by transnational bodies (such as the EU) (Parker forthcoming). In the words of Bronwen Morgan, it captures a desire or tendency 'to think reflexively about regulation, such that rather than regulating social and individual action directly, the process of regulation itself becomes regulated' (Morgan 2003, 2).

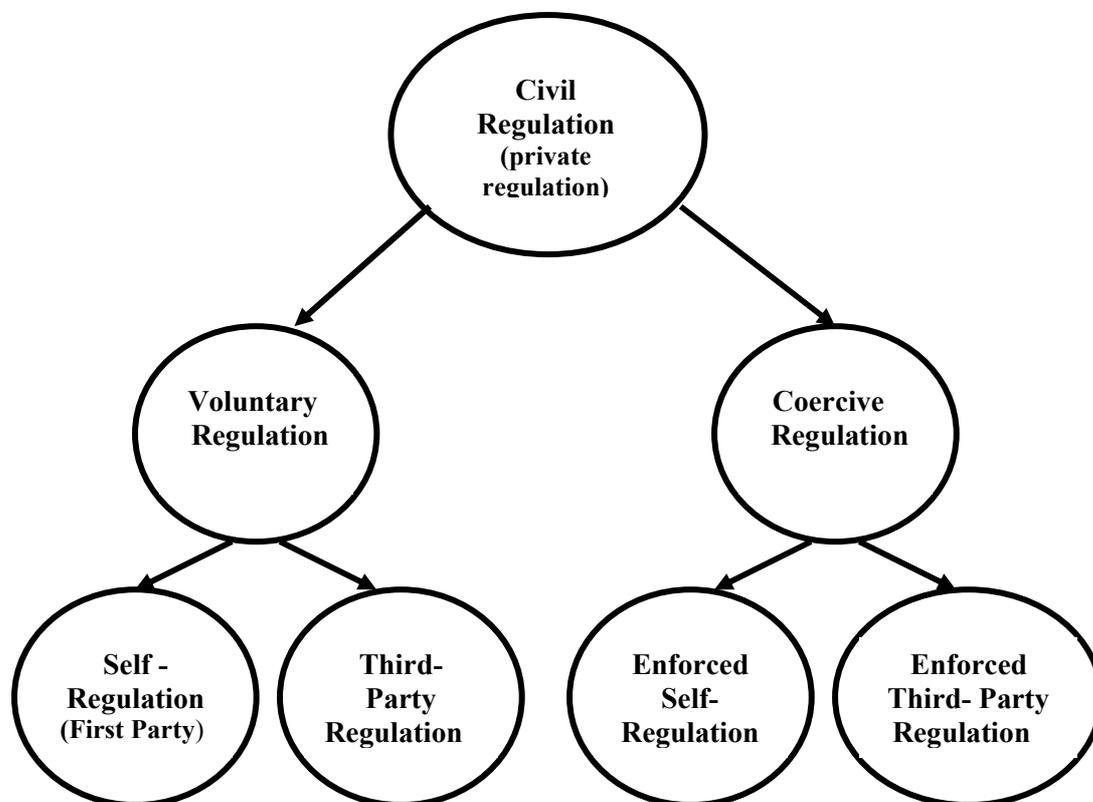
Finally, a fourth form of regulatory corporatism is often known as 'multi-level regulation'. Here regulatory authority is allocated to different levels of territorial tiers - supranational (global and regional), national, regional (domestic) and local (Marks and Hooghe 2001). There are various forms of multi-level regulation depending on the number of tiers that are involved and the particular form of allocation. Regulatory authority can be allocated on a functional basis (whereby regulatory authority is allocated to different tiers according to their capacity to deal with the problem), or on a hierarchical basis (where supreme authority is defined in one of the regulatory tiers); alternatively, it may simply be a product of incremental, path-trajectory processes (where the regime is the result of the amalgamation of patches, each designed to solve a particular aspect as it occurred on the regulatory agenda). While much of the discussion on multi-level governance (which is a broader term than multi-level regulation) focuses on the transfer of authority between one tier and another, one should also note that the overall impact of multi-level regulation can be that of accretion. Indeed, the possibility that multi-level regulation may involve the co-development of regulatory capacities in different tiers is only rarely recognized. To summarize, these four forms of hybrid regulation allow participation of civil regulators without confining civil politics to lobbying, pressuring or plain submission.

## **V. Conclusions: Towards Regulatory Corporatism?**

A major assertion of this volume is that it is important to bind business to global policy processes in such a way that its interests and the interests of citizens are aligned to the maximum possible extent. This chapter provides some support and elaboration of this assertion from the angle of regulatory governance. It asserts that, in order to assess business power in the context of democratic policy making, and in order to design institutions that best align business and public interests, it is necessary to understand the regulatory features of national and global governance. Most intriguing among these regulatory features are the varieties of institutions and governance structures that emerge from the interaction of civil regulation and state regulation. Participation, regulation and capitalism are increasingly intertwined, and new forms of capitalism are associated with new forms of regulation as well as with new forms and arenas for business and civil participation. Regulation – rather than privatization and deregulation – best captures the political aspects of the environment where business and civil actors are interacting with governmental actors.

In this spirit, and with some caution, it is suggested here that we should allow for the possibility that civil regulation and state regulation are not only competing forms of governance but also complementary. That their growth and co-expansion may reflect common general social trends – be they a declining tolerance of risk (Beck 1992; Furedi 1997), a continued quest for fairness and efficiency in the operation of markets, or harmonization of international rules (Vogel 1995; Vogel 1996). The notion of regulatory corporatism allows for farther conceptualization and empirical assessment of this possibility of positive-sum relations between various sources of regulation. It is also intended to challenge the zero-sum assumptions that have characterized much of the debate on global regulatory change so far. These assumptions impair our understanding of the relations and interactions between the private and the public, the global and the local, the statist and the civil. First, what we conceive as private or public is constantly changing. The relations between the two can be, and indeed may often be, those of mutual reinforcement and mutual growth, and thus positive-sum. Second, the global is not a distinct arena which takes over the local. Regulatory controls at the local level can reflect and strengthen controls at the global level and

vice versa. Third, the relations between civil regulation and state regulation can also be positive-sum, supporting and mutually enforcing each other rather than the opposite. While it is still too early to conclude that civil regulation and state regulation are both expanding, we need to adopt a broader analytical view than is usual in social scientific research. The notion of regulatory corporatism allows us to assess regulatory developments in a more coherent and open way but also to experiment with institutional hybrids that may better align business and public interests. These hybrids are less likely to upgrade state-level command-and-control systems of governance to the global level than to create new forms of governance. The notion of regulatory corporatism requires us to revisit the theory of democracy itself. Civil organizations, business included, are the suppliers of government functions such as rules and regulations, but this does not necessarily mean less democracy; sometimes it means more. Iterative interactions and exchanges that are based on both competition and cooperation may produce better results than the alternative options of étatist, laissez-faire or pluralist forms of regulatory capitalism. Global democracy in the age of regulation should be less about the creation of one centralized authority at the global level than about the development of general principles of accountability, transparency and participation as well as about some general mechanisms and instruments for monitoring and regulating the application of those principles.



**Figure 1: Types of Civil Regulation**

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<sup>1</sup> The notion of civil regulation is not identical or a derivative of the notion of civil law. Instead it draws on the notion of civil society as non-governmental source of regulation.

<sup>2</sup> EurepGap is the acronym for Euro-Retailer Produce Working Group for Good Agricultural Practice.

<sup>3</sup> The regulatory state should first be differentiated from the welfare state and the developmental state. The politics, policies and administration of the welfare state are primarily geared toward redistribution. Similarly, the developmental state focuses on distribution policy to a degree that marginalizes other instruments of policy making, such as regulation and redistribution.