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The financial crisis that began in 2007-08 has opened the door to the critical role of public-private hybrid institutions and regimes in global regulatory capitalism. These forms of regulation and governance have been particularly central to the world of global finance where, for the past two decades, an intricate set of understandings, norms, institutions, and networks increasingly blurred the line between public authority and private interests and priorities. By demonstrating the inability of these arrangements to provide the stability they promised, the financial crisis has led policy-makers, experts, and parts of the broader public to question the wisdom and legitimacy of such patterns of financial “governance” at the national and transnational levels. But public-private hybrid forms of governance are not confined to the world of finance; over the past two decades, they have become a central part of the way transnational fields of action have been constituted and regulated. In this paper, I use the crisis in financial regulation to explore the way other areas of hybrid governance may experience the same challenges to their legitimacy. My aim is to explore the question of whether the current crisis heralds significant changes in the forms of regulatory capitalism or will produce only minor adjustments in the nature of transnational political and economic practices.

The paper begins with an analysis of the role of hybrid governance in regulatory capitalism, with an emphasis on their unique dynamics in the areas of finance and law. I then turn to an exploration of the basic principles of transnational financial regulation as they stood at the beginning of the crisis, and identify the ways in which the crisis has challenged these principles. My discussion here focuses on three key elements of this regime – the close intertwining of public and private actors in opaque transnational networks, the reliance on the principle of self-regulation, and the key role of private
experts and expertise. I then turn to an analysis of another key area of transnational regulation – the regimes of private commercial law and dispute resolution – in which these same principles are equally constitutive of the governance of commercial practices. Here, I identify the emergence of questions and conflicts very similar to those shaping the debates over financial reform, and assess their impact to this point in shaking up established patterns of governance. The paper then turns to an attempt to evaluate the potential impact of developments in both areas for the future patterns of transnational regulation. While all such judgments must be tentative, I suggest that for the moment we are seeing a pattern of increasing assertions of public/state authority in the attempt to restructure parts of the systems of hybrid regulation, but no fundamental challenges yet to its centrality in transnational capitalism. The success and direction of such efforts, I argue, will be determined by the following factors: the balance between national regulation and international cooperation, the role of new participants in governance institutions, and the degree to which existing transnational networks of power and expertise have become imbricated into the essential infrastructure of contemporary capitalism.¹

Regulatory Capitalism and Hybrid Governance.

The notion of “hybrid” governance – the subtle mixing of public and private agents in the making and enforcing of law and regulation – has always played a key role in our understanding of regulatory capitalism. As Levi-Faur (2005) argued, regulatory capitalism is not about the “growth” or “retreat” of the state but a reconfiguration of the relationships between the state and business (and other non-state actors); the state may

¹ This paper is an initial attempt to work out an argument, and it is meant as a set of suggestions. Critical comments and suggestions are heartily welcomed.
retain its “steering” capacities, but encourages private agents and institutions to play a more active role in the actual “rowing” – the development, interpretation, and enforcement of rules. Moreover, scholars of international political economy (IPE) have emphasized the particularly central role this form of governance plays in contemporary capitalism as a global or transnational system. (Cutler, et al., 1999; Hall and Biersteker, 2002;) Where the providers and subjects of regulation operate simultaneously within and across borders, it seems that both sides have developed similarly cooperative relationships. IPE scholarship has added to this form of analysis an emphasis on the key role of national and transnational networks that subtly link public and private actors around common goals, projects, and understandings and through this actuate the system hybrid governance in particular issue areas. It is through these networks that “public” and “private” are brought together and in them that we see the actual workings of “hybridity”. (Folke Schuppert, 2006; Picciotto, 2006; Sassen, 2006) Seen in this light, and reflected I think in most of the literature, the notion of regulatory capitalism is a framework for thinking primarily about the changing nature of governance, and the evolving patterns of the exercise of public and private authority. (Braithwaite, 2005)

My analysis in this essay begins from this perspective, but tries to advance the framework in three major ways. First, I suggest that regulatory capitalism and hybrid governance need also to be understood in the context of key structural features of contemporary transnational capitalism. These are often noted, but not theorized in enough depth in the existing literature. While the changing practices of regulation have helped to constitute this system, and thus a simple reference to “neo-liberalism” is unsatisfactory, developments in the organization of capitalism itself have played a key
role in the emergence of these new forms of governance. I am thinking here especially of
the creation of transnational spaces in the global economy through which capital and
goods (and sometimes people) move in unprecedented ways. Over the past two or three
decades, these spaces have often been constituted at the initiative and with the direction
of business firms, associations, and professionals (lawyers, accountants, etc.) working
through and around existing but often weak political structures. Examples of this process
abound in areas such as financial innovation, infrastructure and extractive industry
investments, the creation of product production chains, and commercial law practice.
(Braithwaite and Drahos, 2000) To an important degree, I suggest, the governance
practices of regulatory capitalism at the international level develop as responses to the
emergence of these kinds of transnational spaces. But this marks them at the outset with
a set of tensions and inequalities. Private actors have already structured these spaces
around practices that embody a certain set of norms, rules, and priorities, to which
regulatory structures have to adjust if not fully accept. (Strange, 1996) Networks of
public and private actors often grow out of these intersections, and can help manage the
different priorities, but they are often embedded in structured spaces already defined by
private actors.

Second, in key areas of contemporary transnational capitalism – finance, resource
exploration, law and accounting – these spaces are partially constituted by certain sorts of
knowledge or expertise. (Quack, 2010) It is not simply that certain kinds of expertise are
necessary to understand a particular industry or practice, but that this expertise helps to
create the very industries, conglomerations of property rights, and forms of contracting
that define the field that becomes the object of regulatory projects. The world of
derivatives and collateralized debt obligations, transnational money markets, auditing
practices, forms of biotechnology, and commercial contracting and dispute resolution
structures are just some of the major examples of this phenomenon. Control over these
forms of expertise are thus a key part of any actor’s ability to exert regulatory authority
over transnational economic spaces, but this in turn brings us back to the fundamental
imbalance in regulatory capitalism. Most of this expertise is housed in, and indeed has
been created by, the private agents which have created the markets and industries in the
first place. Where there exists significant and potentially independent academic expertise
in the particular area, such as finance, accounting, commercial law, and the biological
sciences, the same private actors have demonstrated the ability to enroll much of it to
advance their own projects and understandings. The production and reproduction of such
expert knowledge, then, is embedded in the same already-structured spaces whose rules
and priorities have often been defined prior to the involvement of public agents
attempting to govern the same spaces.

My discussion focuses on the way these dynamics work in the areas of finance
and law. There are of course important differences between these fields, but there is a
fundamental similarity which goes to the heart of how we understand what regulatory
capitalism is about. The creation and control of money and law are two of the central
elements of “stateness” (or sovereignty) as it has been understood in the modern era; they
are essential parts of the definition of property rights, the boundaries between public and
private, and the claims actors have on each other. When banks/financial institutions are
empowered to create credit, and lawyers to design and approve new forms of finance,
products, and markets, they are acting with the support and “aura” of the state and are in
an important sense endowing these relationships with public authority. This dynamic, I think, sheds a more precise light on the role of “private” experts in transnational spaces. The power of expertise in the construction of transnational action is centrally linked to their role in creating structures of property and obligation for which private actors can turn in making claims on public authority, and from which they can demand some deference from regulatory agents. Transnational hybrid governance, then, has emerged in and depends on a context in which financial and legal expertise and authority is used to “already-structure” and imprint on these spaces forms of rights and obligation that may derive from public authority but face it in an ambiguous way. This process allows states to focus on “steering” activities and leave the detailed process of governance to agents. But it also gives these agents the autonomy to create relationships of power and rights that may confront public agents with unanticipated and unwelcome results. To put it another way, financial and legal expertise is at the same time the power to create the basic credit and legal structures of capitalist economics. This renders the role of such expertise central to the challenges of regulation in a manner often missed in contemporary discussion.

In transnational spaces, then, hybrid governance has emerged as international networks of regulators have developed, identified key problems for particular sectors, and then become increasingly intertwined with the private networks of actors and experts that had been created prior to or simultaneously with the regulatory networks. As Julia Black has said of these regulatory regimes, “(t)hey are marked by fragmentation, complexity and interdependence between actors, in which state and non-state actors are both

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regulators and regulated, and their boundaries are marked by the issues and problems which they are concerned with, rather than necessarily a common solution.” (2008: 137) Together, the public-private networks that drive these regimes can be seen as “transnational policy communities” which work in formal and informal contexts to pursue the combined aims of advancing the development of, while ensuring some sort of oversight regarding, key commercial spaces. (Cohen, 2008; Tsingou, 2010) This phenomenon raises the third suggestion I want to make. Over the past two decades, the emergence of these networks has taken place in the context of a particular geo-political-economic context. The major private commercial interests, expert communities, and regulatory networks in this system have flourished in the context of the advance of a political economic project of market-creation led by the US and UK. Not all of the actors hail from these two states – though the others tend to be of North Atlantic origin as well – but their activities are embedded in what Sassen (2006) identified as the hegemonic project of the US state since the late 1970s. When consolidated, as I will suggest, these policy communities and the spaces they have structured can and have developed a degree of autonomy and authority in relationship to the specific geo-political context of their origins. But a significant change in geo-political power relationships and dominant projects may have the potential to “pull the rug out from under” these communities and spaces, and it remains to be seen how resilient they would be under such conditions.

What are the implications of these considerations for analyzing the impact of the financial crisis on transnational hybrid governance? The crisis, I argue, has generated deep strains on the autonomy and legitimacy of transnational policy communities. These strains come from two major directions. On the one hand, the failure of the community
to provide stability and prevent financial panics has raised fundamental questions in the eyes of states and other public actors regarding the claims to expertise and responsibility on which the public-private networks have relied to secure their authority. This is the crisis of “political” legitimacy that Glenn Morgan (2010) has described well. On the other hand, the crisis has coincided with – and to some extent advanced – the emergence of some emerging market states as key players in the governance of the global economy, as recognized in the new status of the G-20 and its related implications. Together, these developments have the potential to challenge the structural conditions under which transnational hybrid governance has proliferated. At the same time, however, these policy communities and institutions have shown the ability to resist some of these challenges, rooted in the ways in which private authority and expertise in finance and law normatively, cognitively, and empirically structure contemporary capitalism. In Morgan’s terms, this resistance generates the challenge of “pragmatic” legitimacy and their interactions with the broader political contexts. In the next sections of this paper, I explore these developments in the context of both global financial regulation and transnational commercial law, and try to draw some initial conclusions regarding the future of hybrid governance.

The Financial Crisis and Global Financial Regulation.

The emergence of the world of contemporary global finance was the result and product of a number of key political, economic, and technological changes. The collapse of the classic Bretton Woods system, the “Big Bang” that opened up the City of London as a source of global financial innovation, and the gradual process of reforms that

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3 The following general account is based on Porter’s (2005) overview.
led to the demise of the New Deal system of financial regulation in the US all created a context in which capital could flow much more freely across borders, financial institutions could develop new international structures of operation, and limits on the types of financial products these institutions could offer were lifted. Economically, the (re-)emergence of London and New York as centers of unmatched financial resources, expertise, and power – able to operate and generate significant profits increasingly independently from the “national” economies to which they were ostensibly tied – allowed the new banking and investment powerhouses to create, extend, and transform markets of transnational reach and coordination. (Sassen, 2001) Technologically, the combination of advanced and globally-linked computer networking, new “sciences” of financial and risk analysis, and new legal techniques enabled global financial institutions to rapidly invent and disperse financial innovations, create new markets and institutions, and generate new sources of profit while promising the ability to carefully monitor and control the potential risk of the new markets. Together, these developments led to the constitution of a deeply interconnected, rapidly changing, and increasingly wealthy and powerful global financial industry, with substantial claims on state power.

These challenges this presented were varied but intertwined, and made a cohesive response difficult. A first group of challenges came directly from the markets themselves. The innovation unleashed by the new worlds of global finance created all sorts of markets, institutions, and products for which regulators had no established rules or tools that were adequate for exerting some control. Closely connected to this phenomenon, regulators quickly began to fall behind markets in their ability to match the technical analysis and capacities of private actors in these new practices. Rapidly
increasing private salaries and neglect of key agencies by legislature and executives only exacerbated this problem. At the same time, while capable of significant wealth creation and central to the competitive positions of the UK and US, emerging global financial practices were subject to regular and significant crises – the Third World debt crisis, the S & L crisis in the US, the near collapse of Long Term Capital Management, the Asian financial meltdown of 1997-98, the dot-com boom and bust, the Enron and related collapses – that threatened to undermine a now deeply interconnected transnational financial system. As regulators attempted to figure out responses to these developments, though, they faced a second group of challenges growing out of the practices of state power itself. In the US, the division of authority over financial markets inhibited cohesive regulatory responses. Internationally, the existing IMF structure proved inadequate as a vehicle to govern these new markets, but the creation of new coordinating institutions was hampered by differences in national interests and regulatory style and ideology among the major states. Perhaps most importantly, global finance became increasingly central to political economic power in the US and UK, and supported a growing emphasis on “free markets” and “self-regulation” in both states as tools to advance the interests of this industry. The construction of a regulatory framework for global finance would require ways to overcome the tensions between the promotion of finance and the management of risk, competing national interests, and the limits of existing state and international capacity.

A set of regimes for financial governance did emerge by the 1990s, and they were based on three fundamental elements. The first was the construction of a set of formal and informal transnational networks and institutions that brought together public and
private actors from key parts of the North Atlantic financial world. (Slaughter, 2004) These began primarily as inter-governmental organizations of regulatory officials – the Basle Committee on Banking Supervision (BCBS), the Bank for International Settlements (BIS), the International Organization of Securities Commissioners (IOSCO), etc. – along with more informal regulatory cooperation. By the later 1990s, the establishment of the Financial Stability Forum under the aegis of the G-7, working along with the International Monetary Fund (IMF), added an additional supervisor or coordinating layer to this structure. But this set of regimes also came to develop and work through extensive coordination with networks of key private actors – large financial institutions, key financial industry organizations (the Institute of International Finance (IIF), the International Swaps and Derivatives Association (ISDA)), and formal (i.e. the Group of Thirty) and informal groups of academic and professional experts. Together, this “transnational policy network” (Tsingou, 2010) was characterized by significant cooperation among, and movement between, the public and private sectors, participation restricted to only the most influential industry actors and public sector regulators, and little oversight from public authorities – nationally or internationally – outside of the complex and opaque world of finance.

The second key element was the increasing role of industry self-regulation as a guidepost for financial governance. This came in two related forms. One was the incorporation of industry-developed standards – and in some cases the solicitation of such standards – as the basis of standards regulator would promote and enforce in the particular sector. The most well known example of this is the provision in the “Basel II” agreements, developed by the BCBS in 2004, which placed substantial reliance on the
internal risk-assessment models of the wealthiest and most “sophisticated” global banks as defining the standards that all banks should follow to ensure financial soundness. (Porter, 2010) But there are other cases of this as well, such as the standards developed by the private International Auditing and Assurance Standards Board (IAASB) for the auditing of public forms, which were promoted as global standards by the G7 beginning in the late 1990s. (Helleiner and Pagliari, 2010) The other form of the emphasis on self-regulation was more or less direct – the delegation of responsibility for the development and enforcement of standards to a private sector institution. Most important in this area has been the role of ISDA in developing the standard form contracts – especially the ISDA “Master Agreement” – that have governed the creation and trade in derivatives since the late 1990s. This emphasis on self-regulation had three major effects: it deepened the role and increased the weight of private actors in the increasingly intertwined public-private networks already described, allowed these actors to gain further initiative in creating structures of property rights and claims, and gave the substance of the standards and rules being developed and disseminated an emphasis on facilitating the aims and understandings of the financial industry itself.

The third and final element of these regimes was the unique role played by financial expertise, much of it located outside of public institutions. By the late 1990s, it had become clear that the explosion of financial innovation among private firms was quickly outstripping the ability of most policy-makers to understand what was going on in the various markets. In addition, a good deal of this innovation was reliant on fast-developing academic and private theory in the area of finance, which was closely monitored by and quickly integrated into the strategies of banking and investment firms.
This expertise promised at the same time to identify heretofore unknown profit opportunities, while ensuring that risk was distributed throughout the system to those institutions most able to understand and manage it. Increased reliance on this form of knowledge brought key experts into the relatively small and tight-knit networks of those public and private actors with the ability to understand and recognize their importance. The inevitable effect, though, was to further shift the balance of power in the direction of the private agents in these networks, and support the growing inclination of regulators to defer to the judgments of these agents in determining what kinds of strategies best promoted stability and growth in the global financial order.

Together, the pieces of this regime or set of regimes provided a seemingly reasonable response to the challenges facing public authorities in the context of the quickly changing global financial system. (Pauly, 2002) Public authorities at the national level seemed unable to match the expertise of private agents and/or missing the tools to respond to the flood of new financial inventions, markets, and strategies, but needing to develop some framework for stabilizing the increasingly risky and interconnected global financial markets. In response, the construction of a variety of formal and informal transnational policy networks – working in close collaboration with the key financial institutions that generated new markets and would best understand their operation – provided a workable approach to governance. The inevitable result of these kinds of arrangements was the increasing centrality of the interests, power, and understandings of private actors. (Piccotto and Haines, 1999) But this proved to be an advantage as well. Increasing deference and delegation to private agents fit well with the broad emphasis on “self-regulation” and “collaborative” regulation that dominated the ruling understandings
of the role of the state during this era. As importantly, these regimes relied on the active promotion of models of financial practice and regulatory governance that reflected the norms and interests of the two states most central to this system – the US and UK. In turn, these models received the imprimatur of the leading financial “experts” who were at the same time key to the construction of these markets and practices. All told, the combination of elements or principles of the pre-2007 global financial order worked to solve the governance dilemmas posed by this regime, while advancing the interests of the key public and private actors involved and protecting this order from any significant oversight by potentially critical forces and the larger public.

The Impact of the Crisis: Change and Persistence?

The global financial crisis that began 2007 has shaken most of the pillars of this regulatory regime. It demonstrated that this set of arrangements and principles could not deliver on its main promise, to provide stability and control in the inherently risky context of closely intertwined and fast-moving financial markets. While some initial reaction focused on the role of fraud and abuse (the Madoff case), it soon became clear that the problems were much deeper. As it turned out, no key institution or actors within the regime fully understood the nature of the risk and instability that was being created or had anticipated ways to deal effectively with a large-scale crisis of credit and liquidity. Moreover, the crisis showed both that the “consensus” financial expertise that drove the system was fundamentally flawed, and that some of the very mechanisms of self-regulation that were relied upon to provide stability – i.e. Basel II's use of the banks internal risk assessment models – in fact proved pro-cyclical, worsening the instability once it emerged. Perhaps most broadly, the past three years have undermined the broad,
global consensus (within the key financial policy networks) behind the hegemony of models of Anglo-American financial practices and structures as the most “efficient” and “sophisticated”. These experiences have put back on the table the fundamental questions of the role of finance in contemporary capitalism and the proper role of the state in regulating markets.

But how far have these challenges to the existing governance regimes really gone? To this point, Tsingou’s (2010) judgment that the transnational financial policy community has been “stressed” but not “broken” seems the fairest assessment. These stresses have brought three clear changes in the regime. First, public authorities in all of the major states and the networks of regulatory officials have re-asserted the necessity of imposing clear new regulations on the major financial institutions and markets, recognizing that the previous deference to industry-led self-regulation could no longer secure the stability necessary to preserve a functioning financial system. The ongoing attempts in the US, EU and member states, and at the Basle institutions and IMF to respond to the crisis, and the clear statements in all corners of the problems with self-regulation, mark a clear break with the dominant approaches of the past decade. Second, a variety of new actors have been brought into the global financial regulatory regime, potentially opening up the policy community to a variety of new interests and approaches. This is partly the result of the emerging financial strength of the emerging economies (i.e. China and India) and their ability to weather the storm more successfully than the advanced states. The re-creation of the G-20 and its associated institutions

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4 Of course, some of these arguments had always been there, especially among actors critical of the “Anglo-American” model of finance in Europe and among certain academics. The crisis provided an opening and hearing for some of these arguments in place where they had long been dismissed.
marks a crucial shift in the structure of global financial governance. The combination of these two developments will likely mean that the development of a cohesive international alternative regulatory scheme will be more difficult, and highlights the possibility of increased national divergence in financial models and governance structures. Finally, the failures of dominant experts and expertise have opened the public dialogue – at least at the national level – to more critical voices from outside the established networks and/or to more critical evaluations from some established figures. These openings allow public actors to more effectively challenge expert opinion and assert understandings of a “public interest” that may run counter to the priorities of the closed networks that had dominated the regulatory regime.

The central theme here is an emerging re-constitution of global financial regulation, in which public national and international actors will assert more oversight and direction in shaping rules, standards, and enforcement. This could lead to the construction of a new but still multi-lateral governance regime for finance, or the proliferation and competition between different national models. But it is important as well to note the limits of these changes. First, the transnational public-private financial policy community remains intact and closely involved in shaping the responses to the crisis. Major financial institutions, markets, industry associations, and private experts have remained central players in defining the nature of the crisis and developing potential solutions. Groups such as the IIF, ISDA, the Group of Thirty, and the US Financial Services Roundtable continue to play an active role in working with national and international public actors to determine “workable” strategies to redesign the system of financial regulation. At the same time, the public institutions they are working with have
yet to change fundamentally. The US and the EU (together and member states) continue to dominate the policy-making process, and are attempting to work through the BIS, BCBS, and IMF to define internationally accepted principles and rules to reform the financial order. To be sure, the latter institutions have been restructured, but the evidence to this point suggests that there has yet to be substantial change in the structure of power and initiative in this work.

Second, where we do see more impact on the part of voices and actors “outside” of the established policy networks, it is – as Morgan (2010) emphasizes – at the national level. There are two dimensions of this phenomenon. The first is illustrated by the fate of current legislative reform efforts in the US. The dominant proposals to redesign financial system regulation have been shaped by key executive agency regulators, legislators with close ties to the existing regulatory networks and interests, and the lobbying activities of private institutions and experts. Much of the resulting legislation reflects the dominant understandings of these groups, but has been challenged by certain legislators and groups/experts demanding a more fundamental re-design of the financial system. The former groups – particularly the Obama Administration – have generally worked to forestall these demands while conceding more than the existing financial and regulatory actors would like, but not more than they can accept. (NYT, 5/23) The second dimension of possible challenges that has been identified by commentators is the role of the emerging financial powers in Asia, the Middle East, and Latin America. To this point, however, none of these states seems to have made a play to reshape the structure of finance at the global level; even China seems at this point to be content to remain a “rule-
taker,” preferring to manipulate this status to advance its national interests rather than seeking a multilateral strategy to advance these interests. (Walter, 2010)

What we are left with for the moment, it seems, is a multi-level game of financial system reform. The key players in the pre-existing transnational policy community are working simultaneously to accommodate and deflect domestic pressures for more radical reforms, while attempting to negotiate different national interests and approaches into a coherent international response. While we cannot know the outcome of these efforts, it seems that it is in the interaction of these strategies that the political and economic structure of the global financial system will be determined. But the resilience of the pre-existing structures of hybrid governance may indicate a fundamental constraint on the nature of policy change. As Duncan Wigan (2009) has argued, this system is rooted in the central role of “financialization” in contemporary global capitalism. The position of the financial system is such that financial institutions, markets, and experts are able to create forms of property and power that continually outstrip the abilities of states and inter-governmental networks to structure the system on their own. This situation creates for financial institutions and markets what he calls “(t)he exorbitant privilege of financial production” (2010: 116), and allows them to continue to define the nature of the problem and the range of possible solutions. Unless and until the nature and position of contemporary finance is more fundamentally challenged, this analysis suggests, assertions of public authority will remain dependent upon the cooperation of private agents and interests.

Hybrid Governance and International Commercial Law.
While the concept of hybrid governance has been extensively studied in finance and other areas of regulatory capitalism, it offers much potential as well for the study of private international commercial law, the law that governs commerce between private agents across state borders.\(^5\) Despite the unique and opaque elements of this area of legal practice, careful analysis indicates that it too demonstrates the key characteristics of integrated private-public networks, deference to private priorities, and a reliance on private expertise typical of other sites of rule-making and enforcement in regulatory capitalism. Indeed, patterns of hybrid governance emerged even earlier in the area of international commercial law, which indicates that this field may be essential for a full understanding of the role of hybrid governance in contemporary capitalism. In this section, I explore one key site/practice in the structure of international commercial law – the relationship between contractual choice and dispute resolution through arbitration – in order to highlight both the origins of hybrid governance and to discuss the emergence of a push-back by public agents over the past few years, one that is very similar to what we are witnessing in the area of financial regulation. In both cases, I suggest, it is the control and mobilization of specialized expertise (legal, in this case) that is at the center of emerging tensions in the way markets are constituted and governed.

*Contractual Choice: Party Autonomy and Arbitration.*

Although it had played a key role in the “first wave” globalization of the late 19th-early 20th century, the regimes and practices of private commercial law were deeply

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\(^5\) As this is a bulky term, I will usually refer either to just “international commercial law” or “private international law” (PIL) as shorthand. Technically, though, these are not equivalent terms. “Private” indicates that the objects of the law are non-public actors, as opposed to trade law with deals with commerce but primarily addresses the actions of states. But it is also broader than just commercial law, as it involves estates, family law, etc. I hope that my use of the shorthand does not create confusion. This discussion is based heavily on my own ongoing research into the politics of private international law.
submerged by the economic nationalism and state-dominated economies from 1914-1945. (Cutler, 2003) As part of the attempts of the US to re-start the global trading system in the late 1940s, a small but still cohesive network of private commercial lawyers, law firms, and institutions began to work intensively to re-establish the two core principles of classic PIL – party autonomy and private dispute resolution through arbitration. 6 “Party autonomy” is the notion that private commercial actors should be able to structure their contractual relationships in ways that best advance their mutual goals, and thus commerce more generally, as long as these arrangements do not violate fundamental principles of “public policy” in the states where their activity takes place. A crucial element of this autonomy is the ability to choose to submit contractual disputes to private commercial arbitration, rather than resort to national courts. This technique, it is argued, allows the parties to avoid resort to court systems where they feel their interests may not get a fair hearing, and offers a quicker, more efficient, and more discreet mechanism to resolve complex technical disputes. In this system, the parties can choose the national law under which their disputes will be resolved, the location of the arbitration, and the arbitrators who will conduct it, usually distinguished judges or private lawyers paid by the parties. (It is also subject to the “public policy” exception noted above.) Together, these principles create a regime of “contractual choice” through which private agents are able to create their own legal structures to govern commercial transactions. (Muir Watt and Radicati di Brozolo, 2004) This is, of course, quite similar to the way financial institutions can create structures of credit and property on their own initiative.

6 These networks had been dominated by Continental European lawyers and institutions, but their revival after 1945 depended to a great deal on the more active involvement of UK and especially US legal agents.
A contractual choice regime, however, requires the support of states through the sanction of national court systems that will uphold contracts and arbitral rulings. While elements of the regime had re-emerged in the 1950s, it was only fully established with the conclusion of the “New York Convention” under the auspices of the United Nations in 1958. Under this treaty, to which over 140 states are now signatories, states commit themselves to enforcing almost all private commercial arbitration awards in international commerce, with narrowly defined “public policy” exceptions. The success of this treaty was the result of the combined efforts of the International Chamber of Commerce (ICC) in Paris, which had been working to promote and standardize arbitration since the 1920s, a newly active and influential US-based community of international commercial legal experts, practitioners, and associations based in New York, and the crucial support of the US government, which had long resisted direct involvement in the arena of private international law. Through the work of this combination of public and actors, and multiple networks which emerged out of it, by the 1980s private commercial arbitration became the preferred and dominant approach to the resolution of contractual disputes in international business. (Dezalay and Garth, 1996) Indeed, over these decades national courts in the US and Europe/EU advanced the practice by issuing steadily narrowing interpretations of the scope of challenges that could be made to arbitral awards, in effect allowing commercial actors and arbitrators much more autonomy in defining commercial law and gradually opening the door to the arbitration of business disputes that deeply engaged classic questions of national “public policy”. (Carbonneau, 2008)

The upshot of this system is the creation of a quasi-private structure of commercial rules and dispute settlement procedures that pervades the transnational
economic spaces. A key result of this system has been the development of a complex and powerful transnational policy community in the field of arbitration, dominated by private actors, that develops, interprets and allies the norms and rules of commerce. (McLachlan et al., 2007) These include a number of major arbitral institutions (including the ICC, the Stockholm Chamber, the London Court, etc.) that accredit arbitrators, standardize arbitral practice, and promote standard contracting language; large US, UK, and now EU law firms with specialized arbitration practices; a significant transnational academic expert community from which arbitrators are often recruited; and the development in 1976 of a set of Rules for Commercial Arbitration by the United Nations Commission on International Trade (UNCITRAL) – in whose deliberations this community plays a crucial role – that are now widely used in various commercial arbitral contexts. Encouraged by most major states and international organizations, this community of networks has developed a complex and increasingly cohesive set of norms that guide not only contractual interpretation but the analysis and application of various national commercial rules and norms in evaluating particular commercial disputes. Hovering over this policy community are national courts and judges – separately and acting through cross-national judicial networks – which retain ultimate authority over the enforcement of these rules and interpretations, but exercise this authority with a generally light hand. Indeed, there is some evidence that the work of the arbitral community has exercised significant impact on judicial interpretation of national contract law itself.

Contractual Choice and Investor-State Arbitration: The Limits of Hybrid Governance?

As a system for the creation, diffusion, and enforcement of private international commercial law, this contractual choice regime has been highly successful and has faced
little direct challenge. (Indeed, the expansion of significant international actors in global commerce may have only deepened its influence.) What has generated tensions in the transnational PIL policy community, however, has been the increasing intersection between the arbitral community and the world of Investor-State treaties. (van Harten, 2007) The key step here was the creation in 1966 by the World Bank of the International Centre for the Settlement of Investment Disputes (ICSID). In the context of the fragile and unpredictable status of many newly independent states, the goal of ICSID was to promote foreign investment in developing economies by providing an independent forum for the resolution of disputes between foreign investors and host states. While its work was of little note for its first two decades, the spread of Investor-State and Bi-lateral Free Trade agreements beginning in the 1980s transformed the situation. (Simmons, et al., 2006) Most of these treaties included clauses transferring most foreign investor-host state disputes to ICSID’s arbitration process, bringing the worlds of private commercial arbitration and state regulatory policy into direct contact. This development was reinforced with the conclusion of the North American Free Trade Agreement (NAFTA) in 1993. NAFTA referred a number of crucial types of investment conflicts – including property rights and “regulatory takings” claims – to arbitration, either in ICSID or to arbitration under the guidance of the UNCITRAL rules (since the three states were not equal members of the ICSID regime).

The intersection of these two regimes led to unanticipated but crucial conflicts. While ICSID has its own distinctive norms and rules for arbitration, in practice investor-state arbitrations have been conducted by experts deeply immersed in the norms and techniques of private commercial arbitration. Commercial interests involved in these
disputes also advanced claims and strategies familiar from private arbitration, and expected to be treated as claimants of equal status to states. It did not take long for some states to begin to re-think this arrangement. The first major controversies and push-backs came in the context of NAFTA, where private arbitrators following UNCITRAL rules issued holdings overturning key pieces of regulatory policy in the US states and Canadian provinces. Positions that may have been acceptable in private disputes proved unacceptable to state officials, and the US and Canada were able by the end of the 1990s to amend relevant sections of NAFTA to “correct” what were considered mis-applications of international law under the treaty. Significantly, these amendments focused on the ways in which arbitrators were interpreting aspects of customary international law, the evolving standards of “fairness” and “equitable treatment” of property owners in contractual contexts. Since the 1960s, these norms had shifted to a position of more absolute protection of investor property rights, and the arbitrators were simply transplanting this practice – common to a private transnational network – to the new context. When these norms clashed with the aims of powerful states, however, the latter were able to mobilize public authority to re-define the acceptable standards of commercial law as applied to their own interests. (van Harten, 2007) Moreover, in 2004 the US also moved to re-write the language regarding arbitration and customary international law in the standard form bi-lateral investment and trade agreements it signed around the world, fearing that similar problems could emerge in these contexts as well.

These kinds of conflicts have emerged beyond the NAFTA context since the late 1990s. One complex and ongoing example is the set of arbitration judgments handed down against Argentina under various bi-lateral investment treaties – most in the context
of ICSID arbitrations – as a result of the country’s financial default and radical financial reforms in the early 2000s. (Stone Sweet, 2010) These claims found for foreign investors whose rights were held to be violated by the policy and regulatory shifts amounted to tens of billions of dollars, and the Argentine government has not simply resisted these judgments but used them to raise questions concerning the structure of the arbitration regime itself. These questions, increasingly voiced in other Latin American states, focus on the qualifications and personal interests of the arbitrators, the legal and policy reasoning used in their decisions, and the tendency to consider state policy interests/priorities and the claims of private investors on the same plane of legitimacy.

Another example is the conclusion of the Australia-US Free Trade Agreement of 2004. While the US initially proposed the inclusion of its standard provisions protecting investor rights through recourse to arbitration, a domestic political campaign led the Australian government to successfully resist this provision, referring all such disputes to the appropriate national court systems to be resolved according to dominant national legal and public policy rules and standards. (Capling and Nossal, 2006) In both cases, though via different mechanisms, considerations of domestic politics and national interests led to attempt to use public authority to define the limits of standards of property rights and equitable treatment developed in the heavily privatized commercial arbitration community.

These tensions have involved a clash between national politics and the norms and influence of a legal-policy community operating on a transnational basis, with the implicit sanction of states themselves. Another kind of conflict may well be emerging in this area, however. Over the past few years, an UNCITRAL working group has been
tasked with updating and modernizing the UNCITRAL arbitration rules to reflect emerging practices and norms. As is common in UNCITRAL’s structure, the work of this group is heavily shaped by the involvement of the international expert community of arbitrators and arbitral institutions, under the oversight of state delegations. In 2007/08, however, two international non-governmental organizations – the Center for International Environmental Law (CIEL) and the International Institute for Sustained Development (IISD) (2007) – were able to gain access to this working group, and offered a proposal to amend the rules to adjust them to reflect their heavy use in the specific context of investor-state arbitration. In particular, this proposal raised questions about the appropriateness of the use of key strategies of commercial arbitration – secrecy of proceedings, the limits put on who can “legitimately” participate, and the resistance to publication of arbitral decisions – when crucial issues of public policy and the discretion of public authority are at stake. The ensuing debate led to sustained resistance from the expert community against the attempt of “outside” non-experts to “interfere” in their work, a position which had the support of significant state delegations. While their efforts were successfully rebuffed in the context of the working group’s ongoing work, the CIEL/IISD proposal did gain the support of the US, Canadian, and other delegations, which tasked the group with returning to the questions of the unique issues posed by investor-state arbitration in subsequent work.\footnote{This account is based on my own observations of the incident.}

This is the first case in which challenges to the authority of this international expert community has been used at the international level, but it illustrates the more general dynamic. Over time, states empowered the mostly private expert networks of
international commercial arbitration to help structure global commercial relations. With their ability to establish and regulate contractual and property relationships, these networks and institutions were able to construct a regime for the governance of investment that seemed to “work” and substituted for the inability and/or unwillingness of states to develop a public framework. When the norms and practices of this policy community unexpectedly came in conflict with the policy priorities and authority claims of national states, however, states began to push back and limit its autonomy. But the ability of states to act in this way is significantly constrained. While worried about its impact, states have come to rely on the transnational arbitration system to govern global investment practices and have often used it to their own ends. In addition, key norms of this system have migrated into national legal systems, so that states are forced to recognize the legitimate property and process claims generated by arbitration regimes. And, while some emerging states have challenged elements of the system, others are quietly working to expand its role in advancing their own commercial ends. As with the power to create credit, the power of private expertise and interests to create legal claims in transnational fields generates a powerful structural constraint on the ability of public or state actors to develop alternatives to hybrid governance in regulatory capitalism.

**Conclusions.**

The development of strong, complex, and supple systems of hybrid governance in the areas of international finance and international commercial law are defining features of the current era of global capitalism. Based on the gradual intersection of private market-creating and public regulatory networks, these governance structures were increasingly blessed with the support and imprimatur of public authority as the most
appropriate to the complex realities of global commerce. Over the past few years, however, both systems have experienced forms of crisis. The crisis is more severe and widespread in the area of finance, as it seems that the governance structure failed at the achievement of its main goal – the preservation of security and stability (and thus growth) in the management of financial markets. The situation in commercial law is less public or intensive; it is not the result of a failure with dramatic consequences for the larger system, but of a growing suspicion of the ability of private actors to structure markets and regulation according to their own priorities and contrary to those of public agents. In both cases, though, state authorities have come to question their ability to rely on hybrid governance networks to provide promised public goods. In both cases, as a result, we are witnessing crises of power and expertise, in which the public challenge to the power of private actors is inextricably tied to a questioning of the reliability and trustworthiness of private expertise.

In neither case have the embedded hybrid networks and structures been defeated. There has been some significant reconstruction in the area of finance, though any such process has only begun in commercial law, and pre-crisis commitments to “self-regulation” and deference to private expertise are now routinely renounced. But the changes to this point seem to have primarily attempted to establish more checks and oversight on public-private networks, institutions, and expertise, rather than an attempt to replace them with any alternate model of governance. Instead of trying to make any bold predictions regarding outcomes, it seems at this point more appropriate to try to draw together some considerations regarding the play of contesting forces that may determine
the future of transnational hybrid governance, and the sources of its likely strength. I will conclude by identifying three of these:

1. At the transnational level, hybrid governance arrangements proved crucial to structuring and managing fields of action that individual states can rarely hope to dominate on their own. Whatever coordinated international action did emerge in these areas – the G-7, FASF, UNCITRAL – seems to have depended on the deference and delegation of authority from these public institutions towards private actors. While states are now more actively asserting public priorities and authority, it is unclear how far they can go in this direction and how detailed their management of transnational spaces can be while preserving the ability to coordinate policies. To a great extent, the pressures for more public action are driven by the need to respond to and/or placate distinctly national political dynamics. These pressures, in turn, have already produced some testy exchanges between divergent national and regional approaches, and it is by no means clear that attempts to push coordination strategies to a more specific and detailed level of control would not shatter the very possibility of cooperation. The alternative of competing national models of regulation and control is an outcome that most public actors understand would guarantee even more uncertainty.

2. These dynamics are further complicated by the emergence of new state actors as important players in regulation. The growing importance of emerging states in global finance has been clearly recognized in the new status of the G-20, and similar developments can be seen in a more diffuse way in commercial law, where these states are playing a more active role in attempting to shape the
investor-state arbitration regime. Clearly, the involvement of more states adds potentially more variety to the divergent national interests and priorities at play in regulation, and makes policy coordination that much more difficult. At the same time, it is unclear exactly where this will take us. To this point, as Walter (2010) had demonstrated regarding China, these states have made clear steps to attempt to reshape the rules and principles of the global regulatory regime in finance, a trend that is also applicable to the area of commercial law (though it may not be universally true). Given their ability to use the existing system to advance development goals, such states may indeed have a stake in preserving while manipulating forms of public-private governance in the key areas of finance and law. Paradoxically, then, the impact of emerging states may just as easily work to limit rather than advance more fundamental change.

3. These considerations, I think, bring us back to the issue of the constitutive role of hybrid governance in contemporary capitalism. In the context of the plurality of fields and jurisdictions in the global economy, the unique ability of financial and legal actors to generate structures of rights, property, claims, and obligations may make engagement with networks of private agents essential to any form of governance that does not radically transform the system. The changing pressures and distribution of public authority may modify the constraints and opportunities faced by these actors, but the latter’s essential role in constituting markets and creating and distributing wealth – and indeed creating powerful claims on state actors – may serve to constantly regenerate their claims to authority and expertise. This is particularly likely if states are running up against the limits of coordinate
action. If there is some truth to this notion, and I think there is, it suggests that we need to look more closely at the ways in which hybrid governance is fundamental to regulatory capitalism. In addition to the problems of expertise and the limits of command, hybrid governance may be inescapable because of the ways in which money and wealth, law and authority are constituted in current forms of capitalist enterprise.
BIBLIOGRAPHY.


