

Regional integration and regional regulation in Latin America

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Abstract

Since the early 1990s the Latin American countries have pursued liberalization of the economy unilaterally, multilaterally (through the WTO) and through regional integration. As a result of this development, there is an increasing presence of transnational corporations in the Latin American economies, and Latin American businesses have themselves increased its transnational, first and foremost its regional, reach. At present, this regional business integration is not matched with regional business regulation. However, there are some mechanisms in place that may contribute to such regulation. This paper focuses on transnational regulation to protect the environment and labor rights. I identify four 'embryonic' regional 'regulatory models' in Latin America: collective national regulation, international enforcement of national regulations, transnational network regulation and transnational responsive regulation. The argument I make is that the main regulatory authority is still vested in the national states. However, transnational processes – the transnationalization of capital and the transnationalization of regulation – affect the relationship between state and capital and therefore also the ability to succeed for domestic regulators charged with making the emergent transnational capitalism compatible with other social goals.

Introduction

There is at present a flourishing literature on emerging forms of transnational regulation and governance. Most of this literature explicitly refers to studies of the European Union or it claims to speak generally for changes in governance related to globalization (Moran 2002). However, although it is clear that some forms of regulation are becoming globalized,¹ it is also clear that we are not witnessing universal conformity. Transnational networks and regimes are embedded in institutions at various levels (Djelic and Quack 2003, Duina 2004) and the global diffusion of regulatory technology produces a variety of hybrids (Christensen and Læg Reid 2001, Bull 2005a). Therefore, it is necessary to embed

¹ I am here thinking of both specific regulations as, for example, those emerging from the negotiations under the framework of the World Trade Organization (WTO), and less formal standards and norms.

the study of transnational forms of regulation in an understanding of the constellation of forces within concrete spaces. I propose that this can best be done at the regional level, although regional developments must always be understood within a global context.

This essay discusses emerging forms of transnational regulation in Latin America, with a focus on labor and environmental regulation. However, the ambition is not only to discuss the ‘how’ of regulation, but also the ‘for whom’. As argued by Sklair referring to state level regulation: “The key [...] lies not in whether the state regulates as such, but whose interests the state serves when it regulates or chooses not to” (2001, p. 90). Latin America is characterized by the world’s highest income inequality. Historically the landowners, businessmen and the organized private sector have contributed to block many reforms that could have alleviated this situation, including social reforms and tax reforms needed to pay for them.² Regional integration in Latin America has for the most part been what Holman (2004) calls ‘assymetrical’: The main component has been ‘negative’ economic regulation (removal of barriers to economic integration), and it has not been matched by ‘positive’ inter-governmental social regulation. At the global level such deregulation has been argued to have propelled the owners of transnational capital to a position of political influence from which they have been able to define new limits to what is politically expedient (Armijo 1999). Although it is unclear whether this has led to a ‘race to the bottom’ regarding environmental and labor standards, it is more clear that it has put strains on the states’ ability or willingness to tax or collect other revenues necessary to pay for reforms and provide leverage in regulation. Some have gone as far as to argue that the state itself has become transnationalized, in the sense that it has been transformed into a transnationally integrated body aimed to serve the interests of the transnational capitalist class (Robinson 2001, 2003). The question is therefore not only to what extent transnationalization processes allow for increased ‘positive regulation’, but also how the processes of transnationalization affect the relationship between state and capital crucial for the ability to regulate also at the national level.

I argue here that although capital clearly is a main resource in the process of transnationalization, transnational regulation may draw on other resources than capital, such as knowledge, information and alliances. Therefore, the outcome of the

² See Valdez and Palencia Prado (1998) for a fascinating study of the systematic and successful efforts of the Guatemalan private sector to counter any attempts by the government to raise the tax level from its extremely low level (average 7-9% of GDP).

transnationalization of capital and regulatory regimes is more open ended than what the theory of transnationalization of the state and classes would predict. Nevertheless, crucial for the understanding of the process is the way in which the state-capital relations are transformed through processes of transnationalization.

The essay discusses four ‘embryonic’ forms of regulation in Latin America, how they may serve to furthering the interest of transnational capital, and how they may serve as a platform to counter it. These I call collective national regulation, transnational enforcement of national regulation, transnational network regulation, and transnational responsive regulation. But before going into these regulatory forms, I will provide an introduction to the process of transnationalization in Latin America and the transformation of state-capital relationships.

The transnationalization of the Latin American economies and the transformation of state-capital relations

Any discussion of the emerging forms of regulation in Latin America must start by taking into account two essential facts. The first is that the Latin American states over the last have been eager privatizers and deregulators. However, this has happened along re-regulation in many areas. Between 1986 and 1999, 396 Latin American state-owned companies were sold or transferred to the private sector (IDB 2002). Although it is worth noting that of the top 10 Latin American companies, 8 are still state owned (AméricaEconomía November, 2004)³, the sale of utility companies and the closing of state owned investment corporations have removed important “rowing” tools from the governments’ toolboxes. Another aspect of deregulation relates to the labor markets. In many countries a former tripartite systems for governing work-relations in many cases have been dismantled. Moreover, reforms aimed to make labor markets more ‘flexible’ have been introduced in many countries in the region, although there are also examples of re-regulation leading to the opposite (Ciudad 2002). At the same time, new independent regulatory agencies (IRAs) have been established across the region to regulate newly privatized sectors and enforce laws (Jordana and Levi-Faur 2004). However, although reformers have gone to great lengths to ensure their financial and political independence,

³ The top five companies are all in the oil and gas sector (Petróleos Mexicanos, PDVSA, Pemex Exploración y Producción, Petrobras, Pemex Refinación). The only two private on the top ten list are foreign owned: General Motors and Wal Mart Mexico.

the operation of many has been limited due to often close relationships with politicians or the businesses they are set to operate (Bull 2005, ch.3).

The second main fact is that, partly as a result of the processes of regional and global integration, the Latin American economies are increasingly transnationalized. This does not only mean that there are significant foreign owners of Latin American companies, and that cross-border trade has increased. It means that the Latin American economies have become a part of the process of transnationalization of goods and services, which has entailed the fragmentation and decentralization of complex production chains and the worldwide dispersal and functional integration of the different segments in these chains. In this worldwide system, Latin American actors play a variety of roles.

One face of this process of transnationalization is the increasing foreign direct investment to the region, and their changing nature. FDI to the region increased from US\$6,845 million in 1990 to US\$56,377 in 2004 (CEPAL 2005). This is unevenly spread across the region. Although Brazil is at present the main attraction for foreign investors in Latin America, Chile tops the list with regards to inward foreign investment as a share of GDP (55% as opposed to 22% in Argentina, 21% in Brazil and 16% in Mexico (Dicken 2003). The major increase is found in the service sector, but investments are aimed at exploiting natural resources and cheap labor as well as domestic or regional markets. Although labor-intensive export-oriented FDI is concentrated in Mexico, Central America and the Caribbean, research shows that even in larger and more advanced countries such as Argentina and Brazil, the local affiliates of TNCs rarely undertake R&D or product and process design activities. The same goes for activities such as market development and marketing (Chudnovsky and López 2004). An important aspect of the FDI inflows is also that the strategies of foreign-owned TNCs have moved away from a national focus to a more regional one. The clearest example of this shift is reflected in the rationalization of operations in the Southern Cone, in terms of both activities and management structures. The result is that the subsidiaries of TNCs in various parts of the region have become significantly more specialized, with intra-firm trade becoming a particularly important dimension (Phillips 2004).

Another face of the process of transnationalization in Latin America is the increasing external orientation of local firms. Through exports, financial markets, and

mergers and joint ventures, Latin America's large companies are increasingly linked to global capital and the global economy at large (Fernández Jilberto and Hogenboom 2004). Also Latin American firms increasingly have a regional strategy. Thus, there has developed a significant amount of so called 'multilatinas' or 'translatinas' – transnational companies with a regional reach – while there are only a handful of Latin American companies with a truly global reach (CEPAL 2005).⁴ This regional integration between firms has created new poles of domination – most notably Mexico, Brazil, Chile and Argentina.⁵ There is, however, also integration between businesses originating in the smaller economies, for example are Central American companies increasingly of a sub-regional reach, a process in which Costa Rica and Panama are leading the way (Bull 2004a, Bull 2004b).

The impact of this transnationalization and regionalization of capital on state-society relations in Latin America is not yet well understood in the literature, and how it influences the regulatory capacity of states is hardly touched upon. There exists a rich literature that theorizes state-capital relationships in Latin America, but this has maintained a focus on state-business relationships within national borders. In the following I will briefly discuss this literature and point to how recent changes have contributed to challenge many of its assumptions.

State-business relationships in Latin America

Although there is a great variety of state-business relationships across the Latin American region and across time, one may argue that for the most part it has been characterized by close relations. However, who has been in the 'driver's seat' has varied over time and the state-business relations have undergone a deep transformation with the liberalization and privatization of the economies.

Much of the classical literature on the relationship between business and the state in Latin America understands business as capital, and envisages its influence on government decision making as based on the constraining effects of uncoordinated private-investment decisions. The relative scarcity of capital with Latin American

⁴ Examples of 'translatinas' are the regional telecommunication imperium of Carlos Slim including Telmex and América Móvil, the Mexican Brewery Femsal, Brazilian construction company Odebrecht and the Chilean retailer Falabella.

⁵ Brazilian businesses have up until recently been more inclined to invest at home. However, this is changing (CEPAL 2005, see also *AméricaEconomía* No. 303-304, 2005: *Más ancho, más lejos: Las multilatinas brasileñas hallan un mundo fuera de casa*).

businesses led authors to conclude that it was relatively weak; it was subjugated to the interests of the owners of capital at the centre of the global system. Many early analyses were influenced by dependencia analyses and viewed the Latin American bourgeoisie as the ultimate comprador class, willingly obeying the exigencies of transnational capital. In the theory of the bureaucratic-authoritarian state, which was greatly influenced by the dependencia approach, the weakness of the entrepreneurial classes as political actors was pointed to as a main reason why they resorted to support for the military to defend their interests against increasing demands from popular sectors in the 1960s (O'Donnell 1973).

Other studies concluded that capital and power was not only concentrated in the centre of the world system, but also in local landholding classes. The landholding class (in some cases agro-exporters) and the industrialists were assumed to have fundamentally different interests regarding the role of the state,⁶ and it was primarily the former that was viewed as an impediment democracy (Rueschemeyer, Stephens and Stephens 1993) and blocking any state attempts at progressive reform (Martí 1994, Paige 1998). However, developments over the course of the second half of the 20th century made this distinction less valid. In many countries a deep integration between different sectors of the economic elite occurred. For example, Zetlin and Ratcliff's classical study of the Chilean dominant classes in the 1950s and 1960s shows how the landholding class was integrated in industry and finance through complex webs of ownership. Similarly, Dosal (1995) shows that in the case of Guatemala the agricultural and the industrial sectors were so interwoven through both kinship and commercial relations that it is better to speak of an integrated oligarchy.

The import substitution strategy of the 1950s-1970s and the rise of several authoritarian regimes sharpened the distinction between traditional capitalists and the state, at the same time as it gave the rise to new businesses crowding around the state. The availability of foreign loans and grants to be deployed by the state for development purposes gave it a temporary "upper hand" in relation to local capitalists. However, although varying across the region, in many countries local businesses' ability to organize gave them significant influence on governmental policy. The formation of sector and peak organizations enabled local capitalists to counter many state initiatives that would

⁶ The agro-exporters primarily need a transportation and communication system to connect their farms with the seaports and the capital city. Therefore they should favor a minimal state. Industrialists, on the other hand, need a more sophisticated transportation and communication system as a prerequisite for the development of the domestic market.

run counter to its interest (Durand and Silva 1998, Schneider 2004). Organized business has also been shown to be a main force behind the introduction of neo-liberal reforms (Silva 1996, Bull 2005a).

However, it is clear that formal organization and institutionalized relations to the government is only one manner in which business has affected governments in Latin America. Equally important has been personal connections between governments and state officials and business leaders, which several studies have shown to have been strengthened during the period of neo-liberal reforms.⁷ I have argued elsewhere that whereas in the period of the ‘entrepreneurial state’ the private sector was crowding around state enterprises, now governmental elites are increasingly also investors and businessmen (Bull 2005a). Teichman (2001) argues that during the period of neo-liberal reforms, tightly knit “policy networks” have been formed. These have often constituted a policy network before any of their members obtain formal positions in the state, and networks may even survive after governmental network participants have lost their official positions. Members of the private sector are brought into such policy networks, either informally through chats over lunch etc, or formally through relations granted to trade associations or chambers. According to Teichman, even the latter relationships tend to be based on highly personal interactions.

However, businesses have also extended their network resources in another sense. A characteristic feature of the Latin American current economic organization is the strengthening and expansion of large conglomerates and investment groups, defined as “networks of legally independent firms, affiliated with one another through mutual shareholding or by direct family ownership under a common group name” (Rettberg 2005, p. 38).⁸ Due to their sheer size their interest in formal business associations is minimal and their preferred form of interaction with national authorities is through personal contacts. Currently, as argued above the networks formed between local businesses have also been extended transnationally. However, how this has impacted on

⁷ The networks formal and informal – that connects different businessmen and businessmen to government officials is not new. Already in 1956 C. Wright Mills argued that business influence over government in the United States came not through distant lobbying but through a shared world view, informal personal networks, and overlapping roles (quoted in Haggard et al. 1997). In Latin America, the early studies (1950s and the 1960s) of the economic elites focused on the values they espoused and the various networks they were embedded in, based on kinship, similar educational background, etc. (Cochran 1959, Lipset 1967).

⁸ Common to the conglomerates and the *grupos* is that they span a variety of sectors, the difference being that in the case of *grupos* the companies are legally independent of each others whereas conglomerates consist of formally integrated companies.

the relationship with the states is scarcely discussed in the literature. Indeed, in much of the literature on state-business relations in Latin America and other developing countries, the presence of transnational corporations is viewed as an ‘anomaly’, whose relationship with the government has totally different effects than the relationship between domestic business and the government,⁹ and the transnationalization of local capital is hardly even commented on.

The main exception is the more critical theory which takes a Marxist ontology and theory of the state as its starting point. William Robinson (2003) argues that what we are observing is a transformation of prior social conflicts into a transnational conflict. At the core of this is the formation of a transnational capitalist class of the segments of the world bourgeoisie that represents transnational capital (Sklair 2001). This means that power as the ability to shape social structures, shifts from social groups and classes with interests in national accumulation to those whose interests lie in the new global circuits of accumulation. Yet, this has not resulted in the withdrawal of the state. Rather, the state is transformed to serve global (over local) capital accumulation. It has become transformed into a larger structure – a transnational state (TNS) – which institutionalizes a new class relation between global capital and global labour. Thus, rather than as a territorially specific entity, the TNS should be understood as practice: “The TNS comprises those institutions and practices in global society that maintain, defend, and advance the emergent hegemony of a global bourgeoisie and its project constructing a new global capitalist historical bloc” (Robinson 2001, p.166).

Transnational ‘positive’ social regulation has been suggested (and attempted) as a means to counter the processes described by Robinson. In the following I will discuss various such ‘positive’ regulatory forms in Latin America, focusing on labour and the environment. A main focus will be not only the extent to which they achieve their stated goals, but also how they may change the state-capital relationship at the domestic level

Emerging forms of regulation in Latin America

⁹ Schneider and Maxwell (1997) argue that TNCs complicate relationships between business and the state: they rarely manufacture a wide range of products, are generally not integrated into encompassing business conglomerates (although they create specific alliances through joint ventures), and usually keep a low profile in business associations (p. 24). Although some of these propositions may still hold, the TNCs are currently involved in the production of a much broader range of production than before. Therefore, it is also likely that they will put more emphasis on maintaining close relationship to the state.

In Europe the term ‘regulatory state’ has been used explicitly to refer to the transnational governance functions that the EU apparatus has acquired. According to Majone: “The Union is not, and may never become, a state in the modern sense of the concept. It is at most a ‘regulatory state’ since it exhibits some of the features of statehood only in the important but limited area of economic and social regulation” (Majone 1996, p. 287). Lacking formal power and financial clout, an important resource of the European regulatory state is the availability and dissemination of credible information (Majone 1997) and the ability to form networks.

Needless to say, there is nothing resembling the European regulatory state in Latin America. However, there are several embryonic forms of regulation in which the formal regional institutions play a significant role. In the following discussion I do not make claim to give an exhaustive picture of emerging transnational regulatory mechanisms in Latin America, but will discuss examples of four different forms of regulation. The first three may be considered different versions of ‘state-centered multi-level governance’ (Levi-Faur 1999, p. 201).

Collective national regulation

There are few supranational regulation mechanisms in place in Latin America, but different regional integration schemes such as Mercosur, the Central American Integration System (Sistema de Integración Centroamericana (SICA), the Andean Community and the Caribbean Common Market (CARICOM), involve agreements aimed at gradual coordination of national policies. The agents envisaged to enforce the regulation are mostly found on the national level. Therefore this may be called collective national regulation.

The structure of Mercosur is essentially modeled on the EU, and its founding treaty envisaged integration on many fronts (Sánchez Bajo 1999). However, Mercosur cannot be compared to the EU as a regulatory state. The member states have consciously decided to keep the level of institutionalization of Mercosur quite low (Kaltenhaler and Mora 2002) and the entire annual budget for Mercosur’s administrative structure for 2002 was under US\$1 million (Hoechsteler 2003). The predominant mode of organization is to give new regionalized areas of responsibility to existing actors and institutions. Mercosur

established 11 Standing Working Groups to coordinate and harmonize national norms. The most important of these have been concerned regulations aimed at constituting a regional market, but there are also other working groups that are in charge of making the functioning of such a market compatible with other goals.

Labor has played less of a direct role in the creation of the Mercosur project than in NAFTA or the European Union. However, one of the 11 working groups is concerned with labor and social issues (SGT-10 Labor Affairs, Employment and Social Security). In addition, there is a quasi-formal forum within the Mercosur for interaction between labor ministers, which issued the Montevideo Declaration in 1991 which called for greater consideration for labor issues in the integration process. Mercosur has also meant a reinvigoration of the regional labor organization Coordinadora de Centrales Sindicales del Cono Sur (CCSCS), that has pressured for the adoption of common regional labor standards through a proposal for adopting a Social Charter based on its Charter for Fundamental Rights (Botto 2001). However, this never succeeded and consequently there is no real regional labor regulation (Phillips 2004).

With regards to environmental issues, Mercosur has a general environmental agreement and, since 1995 the regular meeting of environmental ministers of the region this has constituted the Working Subcommittee No. 6 on the Environment (Sub Grupo de Trabajo No. 6. (SGT6) charged with harmonizing legislation in the different countries. However, its agenda is set by the Common Market Council (Consejo del Mercado Común (CMC)), whose focus has been primarily on trade integration. This has therefore also dominated the meetings of the SGT6, and as the trade integration has gone through several crises, in large periods getting this on track has absorbed most of the capacity of the Mercosur system (Heochsteler 2003).

Some of the other regional integration schemes are actually more institutionalized than Mercosur. This is particularly true for SICA which is the result of the re-birth of the Central American Common Market (CACM) in the early 1990s. Much of the activities under the heading of SICA can be understood as one pillar in the insertion of the region into the global economy, along with a multilateral (World Trade Organization) and unilateral measures to reduction of barriers to trade and investment (Bull 1999). The focus has thus been mainly on economic issues, and some have argued that the regional level does not even really constitute the most important one in this process (Rodas-

Martini 2001). Nevertheless, SICA includes institutions operating in a variety of areas. A good example is the Central American Commission for the Environment and Development (Comisión Centroamericana de Ambiente y Desarrollo (CCAD) established under SICA, to be in charge of implementing regional conventions and the joint regional adoption of global conventions.¹⁰ However, also this is ultimately dependent on the implementation at the national level, and working to improve the national level capacity to implement regional policy is therefore a major priority (see <http://www.ccad.ws>).¹¹

This only provides a brief illustration of some of the more concrete and institutionalized mechanisms for collective national regulation. Also the other established integration projects have similar institutions. Moreover under a series of bilateral FTAs, of which there are a significant amount in Latin America, there are included mechanisms for collaboration and dialogue on labor and environmental issues. Although some may point to concrete achievements with regards to inducement of adoption of national legislation or joint undertaking of international commitments, for the most part the power of these regulatory institutions lies in their issuing of norms and collection of information. The question is whether these institutions may become focal points for state level regulatory activity and through that acquire features of a “regulatory state”. Although there is some evidence of national adoption of legislation emerging at the regional level, my own preliminary interviews point to regional initiatives playing a marginal role.¹² More important may be the accompanying process of formation of informal regional networks. But before turning to that, let me consider a second form of state-centered multi-level regulation.

Transnational enforcement of national regulation

The other main model of multi-level regulation in Latin America may be called international enforcement of national regulation. This emerged with the North American

¹⁰ The Central American countries did, for example, jointly sign the Kyoto Protocol in 1997 and established a Central American Environmental Fund in order to assist the countries to implement it.

¹¹ There is no similar institution for labor, but an information center for regional labor issues under the general secretariat for the economic integration system (<http://www.laboral.sieca.org.gt/Principal.html>).

¹² For example, in an interview (3 March 2004), Alvaro Zapagu, Chief of the Department of International Relations at Chile’s National Commission for the Environment (CONAME) mentioned as an illustration of Mercosur’s weak interest in and influence on national environmental policy that when the limits for submissions from cars in the metropolitan Santiago area were significantly lowered in 2004, CONAME had inquiries from all over the world about what it would mean in practice, but heard nothing from the Mercosur countries.

Free Trade Area (NAFTA) and which is continued, with some variation, under a series of new free trade agreements signed by the United States with individual and groups of Latin American countries. So far an agreement with Chile has entered into effect (January 2004), and the Central American Free Trade Agreement which also includes the Dominican Republic (CAFTA-DR) has recently been ratified by the United States and four of the six Latin American countries involved.¹³ The country-by country strategy of the United States is an explicit strategy to create a Free Trade Area of the Americas (FTAA) which is meant to follow the same model, after the collapse of the multilateral negotiations in November 2003.

The characteristic of the NAFTA model is minimal regional institution building, and a two-pronged approach to regulation. First, especially in the case of technical requirements for many complex goods and processes, market participants are referred to existing standards set by industry associations and other trade organizations (this will be discussed later). Second, the NAFTA model relies on a reactive conflict resolution system to settle cognitive disputes as they arise (Duina 2004). This latter mechanism has evolved into a form of transnational enforcement of national decision-making also found in CAFTA-DR and the Chile-US FTA, particularly in the areas of investments, labor and the environment.

In NAFTA, the labor and environment side-agreements constituted an exception to the general lack of willingness to make clear regulatory statements by the signatories of NAFTA. The North American Agreement on Labor Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC) both establish a set of norms and goals that the signatory parties (the United States, Mexico and Canada) should follow, create institutions for collaboration in order to facilitate the parties compliance with these norms and domestic laws (with available funding), and a procedure of conflict resolution in cases of failure to enforce its own laws. The conflict resolution mechanism can briefly be described as follows: The agreements permit any citizen of the signatory countries to file a complaint about a failure to comply with domestic laws to the NAALC or NAAEC secretariat. After having passed a set of criteria, the Council can order the production of a factual record. Finally, after having gone through arbitration and consultation, and no improvement has been made, a fine on up to 20 million dollars may

¹³ By the time of writing ratification was still pending in Costa Rica and Nicaragua.

be charged. In the end, if this is not paid by the accused party, the agreement states that the violating party can have its NAFTA benefits suspended, although it is not specified what exactly is meant by that.

Also the conflict resolution mechanism envisaged in case of violation of NAFTA's Chapter 11 on investments involves a form of international enforcement of domestic laws. However, here the 'conflict resolution institution' is national courts. Chapter 11 obliges the parties to give non-discriminatory treatment to investors of the other party, and it includes a paragraph that empowers investors to bring to court claims for allegations of direct injury (reduced profits) to an investor due to governmental regulation. This could, thus, have the opposite effect of the side agreements in terms of protecting the environment or labor, as, obviously also such legislation could be interpreted as having a negative effect on profits.

By February 2005, 42 cases of alleged injury due to governmental legislation had been brought by investors against governments (14 against the United States, 9 against Canada and 18 against Mexico). Of these, 5 cases were won by investors (resulting in a total US\$35 million awarded in compensation), of which 3 related to environmental regulation (Public Citizen 2005). With regards to the environment side accord, between 1995 and 2004, 43 citizens' submissions had been made and 9 factual records have been finalized and made publicly available (Tieman 2004). However, article 22 which stipulates the sanctions had never been in use (Gallagher 2004). With regards to labor issues, by 2001, 23 complaints had been filed, but not a single one had been sanctioned (Human Rights Watch 2001). Thus, in spite of having certain regulatory mechanism, several analysts have concluded that NAFTA's labor protection is weak (Stavis 2002). In the end, the weak implementation of the environmental and labor side agreements has disillusioned standard proponents (Elliott 2004).

Nevertheless, the United States has pushed for a similar structure in the new bilateral and sub-regional trade and investment agreements. The Chile-US FTA and CAFTA-DR are similar to NAFTA with regards to labor and the environment: there is a statement about general norms, are some funding mechanisms available to help the signatory parties improve their conduct, and a conflict resolution mechanism available if countries fail to enforce their own labor and environmental legislation. However, there are some significant differences. First, the labor and environmental clauses are included

in the agreements instead of being put into side agreements. Second, instead of listing principles to be followed, the signatory parties commit themselves to observe international standards and agreements (in the case of Labor, the ILO's universal declaration). Third, in order to utilize the conflict resolution mechanism, it is necessary for a party to show that failure to enforce labor or environmental law has had consequences for trade (i.e. lowered prices on export). Finally, if the accused party fails to improve the situation after a fine has been issued, the other party may introduce sanctions in any area covered by the agreement. With regards to the investment rules, in the Chile-US FTA and CAFTA-DR there are clauses specifically indented to avoid that investors file charges against governments due to stricter environmental legislation.

Many critical voices were raised against utilizing the NAFTA approach also in these agreements. Apart from issues of sovereignty and general opposition against including non-trade issues in a trade and investment agreement, there were essentially two concerns raised. Based on the NAFTA experience some have argued that the international sanctions would have little or no effect. The likelihood that the international sanctions would be made effective would be small since, among other things, the conditions that would have to be in place are quite restrictive (primarily that the failure to comply with legislation must have had a proven impact on trade). Another concern has been that it would have a conserving impact on labor and environmental legislation as legislators would be even more cautious to pass new and improved legislation in the labor and environment areas due to the threat of international sanctions. It is of course difficult to assess whether the regulations under NAFTA have decreased the willingness to introduce progressive reforms at the national level as argued by some of the NAFTA critics. However, the most authoritative study of the environmental impact of NAFTA to date, argues that the deteriorating environmental situation in Mexico has less to do with the mechanism of industrial flight envisaged as a direct consequence of free trade and investments, and more to do with the Mexican government's failure to enact appropriate legislation and allocate sufficient budgetary resources to enforce it (Gallagher 2004). Whether this is an indirect consequence of NAAEC is not commented on. The preliminary evidence from Chile does, however, not support this hypothesis. A year after the entering into effect of the Chile-US FTA, the Chilean government started to review its basic environmental law (Law 19.300) to allow for, among other things, stricter demands

for environmental assessments. Moreover, in an unprecedented case, the Chilean environmental authorities decided in May 2005 to demand a temporary closure of activities at the largest lumber factory in the country, Celco, owned by one of Chile's most influential investment groups, Grupo Angellini. This marked a watershed in Chilean enforcement of environmental law, and commentators suggested that the strict practice was a result of increased international pressure related to the free trade agreement and that it signified that investors could no longer solve problems just by inviting the minister to lunch (El Mercurio, 14. August 2005).

In spite of some positive reports, there is general consensus that the environmental and labor provisions involved in the state-centered multi-lateral regulation as described above are relatively weak. This contrasts with the provisions aimed to protect investors which has proven effectual. Thus, one could conclude that a main effect of the NAFTA regulatory regime is to strengthen transnational capital. However, several reports point to an interesting side-effect of the collaboration on these issues under the NAFTA agreement, namely the strengthening of transnational labor rights and environmental networks in North America (Compa 2001). This will be discussed below, but first let me discuss one more form of 'state-centered multi-level regulation'.

Transnational regulatory networks

The term *transnational regulatory networks* has been used by Eberlain and Grande (2005, p.100), to refer to experts and representatives of national regulatory bodies, who come to agreement among themselves, guided or supported by European bodies. On an informal basis these networks develop common 'best-practice' rules and procedures for regulation in their sector. Although the guidance by a supranational body is not as clear in other parts of the world, similar processes have been identified in the way regulatory regimes draw on global norms and rules and how regulatory policies and agents are interlinked globally (Braithwaite and Drahos 2000).

In Europe, it has been noticed a certain asymmetry between social and economic regulation. All the European agencies can be classed within the sector of so-called 'social regulation': they deal with market externalities and set standards. With regards to 'economic regulation', e.g. the regulation of public utilities, the regulatory agencies are still found at the national level (Eberlein and Grande 2005). In Latin America, the main

focus in studies of regulation has been on regulation of finance and utilities and they have almost exclusively been focused on the national level (see e.g., Levy and Spiller 1996, Rufin and Romero 2001).

However, as noted in the context of the European Union, even though regulatory authority rests with the states, state regulators form parts of larger networks of regulatory authorities through which ideas and knowledge are interchange. Contributing to this process has been made an explicit strategy in the European Unions, formulated as the open method of co-ordination (OMC), designed to support learning, exchange of knowledge and experiences. According to Borrás and Jacobson, this differs from earlier 'soft-law' by having less of a supranational aim and being more directed towards national governments (Borrás and Jacobson 2004). While such forms of governance imply a form of power exercised by the European institutions, it also may contribute to strengthening domestic regulatory agencies.

In Latin America no institution has sat down and explicitly formulated a strategy of regulating by OMC. However, the diffusion of regulatory institutions and frameworks is more prevalent across the Latin American countries than across sectors within one country, a matter which may be interpreted as a strengthening of such networks (Jordana and Levi-Faur 2004).

This is similar to the kind of networks which emerged between neo-liberal technocrats in the 1980s and 1990s. Although most analyses of the rise of neo-liberal technocrats are confined to the national sphere, some also point to the extensive transnational linkages between experts that obtained leading positions in governmental and independent regulatory agencies. The transnational linkages between these were forged through common education background, university exchanges, and common professional experience (Montecinos and Markoff 2001). But of crucial importance in forging such networks have also been development institutions such as the World Bank (Van Dijk 1998, Teichman 2000). Although many of the members of such regional networks had governmental positions, or had close contact with governments, their influence was equally based on perceived superior knowledge of the organization of the economy. As opposed to the explicit attempt to involve the political level in the OMC in Europe, the creation of networks of regulatory agencies in Latin America is mostly based on an explicit strategy of 'de-politicization' in Latin America. The aim is to strengthen

the network of technical expertise in order to stave off politicization at the regional as well as the national level.

However, although much less studied there are also regional networks between actors charged with regulating to make the market oriented economies compatible with other goals. In this, regional institutions such as the Inter-American Development Bank (IDB) play a significant role as an eager organizer of regional forums, workshops and conferences aimed at diffusing knowledge and experience region-wide.¹⁴ One example is the IDB's permanent Regional Political Dialogue which is organized in different sub-groups forming networks of state bureaucrats in different issue areas. For example, there is an Environmental Network (Red de Medio Ambiente) with periodical reunions, a network on poverty (Red de Pobreza) and one on education and human resources (Red de Educación y Recursos Humanos). Importantly, the meetings of these networks do not take place at the ministerial level, but are envisioned as technical deliberations (<http://www.iadb.org/drp>).

The question is what influence such networks may have on those that they are to regulate. Most studies on networks of technocrats and regulators have focused on their role in the domestic political setting and particularly the role of transnational networks of 'neo-liberal technocrats' is widely acknowledged to have been significant. Whether also other forms of networks work to strengthen the regulatory capacity of other formations as well is an open question. However, we may hypothesize that one way this may happen is through the emergence of regional responsive regulation.

Transnational responsive regulation

It has for a long time been acknowledged that the regulatory state is dependent on fostering norms among the regulated such that they will voluntarily comply. In order to do so, the regulatory state depends upon the creation of a constant dialogue between regulators and regulated. John Braithwaite has coined the term 'responsive regulation' in order to describe this process (Ayres and Braithwaite 1992). This also rests on a significant amount of 'self-regulation' or reflexive regulation, in which some authority is vested in the private actors themselves (Cutler, Haufler and Porter 1999). Thus, what is

¹⁴ For a discussion of the general role of the IDB in regionalization in the Americas, see Bull and Bøås (2003).

emerging is according to Lipschutz a “new international division of regulation”, in which private and semi-public regulation play a central role (Lipschutz 2005).

The emergence of private self-regulation can not be understood independently of the states. Indeed the delegation of regulatory authority to agents is a willed process executed by states either unilaterally, or as shown above in the case of NAFTA, multilaterally. Jayasuria (2004) has attempted to link the notion of responsive regulation to an understanding the changes in the state under globalization, arguing that in the context of globalization some domestic state institutions and agencies become enmeshed within a system of transnational regulation, consisting of networks relying on formal standards rather than rules, and in which both public and private actors take part. Indeed, the distinctive feature of the regulatory state lies in the diffusion of public power to private organizations creating new private or quasi-public governance regimes, for which the state provides the ‘meta-framework’. The regulatory state de-centers governance both within and outside the state, but fragmentation is not simply erosion of central policy capacities of the states; it is also a reconstitution of new policy capacities and functions.

There is quite a significant literature on the emergence of non-state transnational non-state networks in Latin America, and as mentioned above, some of the formal integration processes have served to strengthen regional networks between, for example labor organizations. However, the literature is almost exclusively focused on such networks’ role as advocacy groups operating in relation to national governments or aiming to influence regional integration projects and free trade negotiations (Keck and Sikkink 198, Korzeniewicz and Smith 2001, Tussie and Botto, undated). Little attention has been paid to the emergence of regional networked responsive regulation.

One reason for that is, of course, that such networks have been scarce, and particularly so when we are speaking of regulation in the spheres of labor and the environment. However, related to the emergent interest for Corporate Social Responsibility (CSR) in Latin America, there are examples of corporations that have taken it upon themselves to create standards in the interest of establishing a common baseline for responsible practices. One example of that is the Brazilian Abrinq Foundation that offers a logo to companies that are committed to fight the use of child labor. (Gutiérrez and Jones 2004). A more common practice is to assist regional businesses in adhering to international standards such as the SA8000, AA1000 and GRI,

or principles developed in global for a, such as those included in the UN's Global Compact (which in turn are based on a series of international conventions). Examples of that include Instituto Ethos, a business based non-governmental organization (BINGO) in Brazil which develops CSR indicators aimed to encourage businesses to adopt socially sustainable policies (www.ethos.org.br), and the Acción Empresarial, a Chilean BINGO assisting Chilean businesses in adhering to international standards and principles in the field of CSR.

However, the driving force behind CSR and the creation of private regulatory networks is not simply the good will of the individual companies, or private sector foundations and BINGOs. At the global level, equally important has been the rise of 'shareholder activism', consumer movements and transnational networks of civil society organizations. Moreover, both interaction with governments and international organizations have been important. Haslam (2004) therefore argues that CSR practices emerge within a CSR system characterized by "a set of interactions that occur between three different "systems", the national system (where the firm is located), the home country system (if the firm has links to foreign or multinational enterprises), and the international system" (Haslam 2004, p. 5). Each system consists of a variety of actors, including governments, inter-governmental organizations, firms, NGOs, and Business NHOs.

A set of the factors that have contributed to the promotion of CSR globally have not been present in Latin America. First, shareholder activism has been much less prevalent than for example in the United States (Gutiérrez and Jones 2004). This may be explained by the ownership structure of Latin American firms, in which the prevalence of many small shareholders is rare. Moreover, the kind of consumer consciousness found in other parts of the world is weakly developed (Jones 2004). Furthermore, local non governmental organizations have, at least up until recently, been weak. What has been more important in the Latin American context has been pressure from specific communities (Gutiérrez and Jones 2004). Moreover, the lack of consumer activism in Latin America may be compensated by the increasing importance of the US and European markets as the economies are increasingly export oriented. Interviews with Chilean business representatives indicated that the standards and consumer preferences in the US

market was a much more important driving force for changing practices related to the environment and labor rights than any regulatory mechanisms under the Chile-US FTA.¹⁵

Haslam (2004) argues that the point that distinguishes the way the CSR system works in Latin America is the influence of international actors on the national system – particularly private foundations, multilateral development agencies, the head offices of multinational enterprises, and international NGOs. I would argue that the CSR discourse and agenda is essentially global and that it is always influenced from abroad. However, what is indeed particular about Latin America is the significant influence by multilateral development agencies. Much of the activity by the regional multilateral agencies has related to declarations made in the process of the Summits of the Americas. As a result of the 2001 Summit of the Americas plan of action to encourage adoption of CSR practices, a series of Conferences on Corporate Social Responsibility have been organized by the implementing agencies of the Summits of the Americas: the Organization of American States (OAS) and the IDB. The IDB has also developed a project portfolio of corporate social responsibility projects. Under its Multilateral Investment Fund (MIF), it has a “cluster” of activities aimed to induce companies to adopt standards and practices. It has so far supported five CSR projects, all implemented by BINGOs or academic institutions aimed to reach a number of local companies. The most recent of these will be implemented by aforementioned Instituto Ethos and is aimed to benefit 120 local SMEs. Most of the projects are national in scope. However, the support for the also aforementioned *Acción Empresarial* is intended to be directed towards companies across the Southern Cone region (<http://www.iadb.org/mif/v2/csr.html>).

This is to underline the adoption of regulatory practices cannot be understood if the distinction between private and public actors, nor the distinction between domestic and international are upheld too strictly. The networks that are about to form to strengthen the regulation related to a set of CSR standards may be characterized as regional private-public networks to enforce global measures. They are encouraged by public institutions as well as stakeholder preferences and action, but are ultimately dependent on the voluntary good will of the companies. To what extent can that be expected? Are these “responsive networks” basically an operationalization of the transnational state, or might they

¹⁵ Interview, Jaime Dinamarca Garate, Manager Environmental Issues, Sociedad de Fomento Fabril (SOFOFA), 7 March 2005

contribute to a more just and democratic functioning of the capitalist system? To this question I will turn in the following section.

Transnational regulation and the transformation of state-capital relationships

One major conclusion from the discussion above is that most formal regulatory authority still rests with the national governments. Thus, there are two questions to ask related to the transformation of state-capital relationships. The first is, noting the quote by Sklair in the introduction to this essay: to what extent are processes of transnationalization of capital responsible for the general lack of regulation in areas aimed to make regional capitalism compatible with other goals? Another way to ask that question is: how have transnational businesses affected the outcome of negotiations between governments relating to, among other things, such regulations?

In most of the regional free trade negotiations there have been established separate mechanisms for business representation. This first happened in the NAFTA negotiations. Here the participation of Canadian and US businesses was coordinated by major TNCs through so called Business Round Tables. In Mexico it was coordinated by the Comercial Export Business Organization (COECE) established in June 1990, dominated by the largest conglomerates of the country (Tecihman 1995).

Also Mercosur has separate mechanisms for business representation. However, Phillips (2004) argues that the predominant mode of business influence has still been lobbying of domestic governments. Therefore, the nature of business influence has varied with the organization of state-business relations at the national level. This varies from Brazil and Argentina where business participation has been limited, to Chile where it was central to trade negotiations. The close involvement of Chilean business in trade negotiations is further explored by Schneider (2001) who shows that in one extreme case a representative of one of the main peak organizations (SOFOFA) was given a diplomatic passport and sent to La Paz to negotiate an agreement with Bolivia, which the government later rubber stamped.

The first evaluation of the CAFTA negotiations points to a similar conclusion. The regional body established to represent business, the Central American Business Council (Consejo Empresarial Centroamericano) was found to have had a modest direct influence on the negotiations, as opposed to the significant business influence that went

through already established contacts with national governments (Rodríguez Vargas and Sonalo Murillo 2004).

In sum, except from in a few cases, we know relatively little about the extent to which regional business forums or national businesses have influenced the negotiations. The existing accounts suggest that big business still largely utilizes the formal and informal contacts with their home governments in order to influence the regional negotiations. Thus, the form of centralized business lobbying that has developed in Europe is not yet in place. At the same time, we have witnessed in some cases that governments let business representatives take direct part in the negotiations, a position which gives them a privileged position relating to other non-state groups in the trade negotiations.

How does that impact the outcome of the negotiations? And is there a difference between influence by transnational businesses and domestic companies? The critical literature referred to above suggests that the interests of transnational companies to a decreasing extent overlap with the national interests of the governments. Transnational business would essentially be ‘offensive’, attempting to secure new markets and ensure a ‘level playing field’ for investments, whereas governments would also have ‘defensive’ interests attempting to protect vulnerable sectors.

One conclusion drawn from the Mercosur process is that the lobby by big-business with transnational linkages has indeed revolved less around national competitiveness than the issue of stability and predictability of the internal ‘rules of the game’ (Mayoral 1999, quoted in Phillips 2004). The same is observed in the NAFTA case, where the big-business dominated groups mentioned above were successful in pushing through clauses about protection of intellectual property, the investments issues mentioned above, and public procurement (Botto 2001).

In the case of the CAFTA negotiations, in spite of split between the five governments (particularly a split between Guatemala and the remaining four) during the negotiations over the schedule for reducing tariffs, the regional businesses managed to stay united (Central America Report May/June 2003). This may be interpreted as a result of the fact that big Central American business cared less for the schedule of tariff reductions (particularly related to agricultural products) than their respective governments.

What has been the attitudes of big business been towards environmental and labor regulation? Most business groups were against the attempt to introduce such legislation, but opposition against it was perhaps stronger among SMEs than among the large companies. Moreover, in general also the Latin American signatory parties have been opposed, partly for sovereignty reasons, and the main driving force for the introduction of such clauses has without doubt been the US Congress. A majority of the big-businesses regard the regional ‘positive’ regulation as relatively inconsequential, while they know that the extensive ‘negative’ regulation that the integration processes imply will strengthen their relationship towards the local governments, with whom still most of the regulatory capacity rests.¹⁶

The second question is, given that most formal regulatory authority still rests with the national governments, how does the transnationalization of businesses, but also governmental regulatory agencies, labor groups, and environmental groups, affect the relationship between those groups at the national level? Most literature on the changes in business-government relations resulting from transnationalization has focused on the transnational of capital. I have argued above that capital was not the only resource of transnational business, and that also organizational capacity and networks play a role. To judge how this triple process of transnationalization has affected the relationship between transnational business and groups aiming to regulate it at the country level prompts answers based on national contextual experience.

Experience from the most transnationalized economies shows that this process has changed the political influence of business as well as forged a split between different factions. The COECE established to represent Mexican businesses in NAFTA evolved into the most powerful business association in Mexico. As it was dominated by the most powerful conglomerate in the country, this, and other developments, led Teichman to conclude that: “[...] economic restructuring and its logical extension, NAFTA, have entailed an increasing polarization within the private sector, as the big financial-industrial conglomerates draw closer to the state and small and medium firms are increasingly excluded (Teichman 1995, p. 190).

Silva (2002) observes the same split largest corporations that usually belong to conglomerates with the financial capacity to expand into the more dynamic sectors of the

¹⁶ Interviews, business representatives, Santiago de Chile, March 2005.

economy, and small and medium sized farms and enterprises. The former are staunch supporters of the neo-liberal policies with close contacts within governments (Silva 2002).

The effect may be quite different in the smaller and weaker economies where the increased presence of transnational companies resulting from transnationalization is not matched with increasing transnationalization of domestic companies. One example is Costa Rica where the US\$600 million investment made by Intel 1998 is reported to have changed the capacity of the main peak business organization (Union of Private Enterprise Chambers and Associations (UCCAEP)) to influence government. The Intel investment has been characterized as putting an “elephant in a bathtub”, it represents about 25% of total exports, and it is now common to talk about annual growth of BNP with and without counting Intel.¹⁷ The position of Intel towards the government may thus threaten the influence of the traditional, domestic business sectors.

In sum, there is little doubt that the transnationalization of business is about to change the relationship between states and capital in Latin America. However, exactly what will be the results of this process is not yet clear. What then, about the transnationalization of regulatory agencies and the emergence of a transnational responsive regulatory form? Will it match the transnationalization of business? To this question I will turn in the follow.

Conclusion: A transnational state or regional regulatory regimes for Latin America?

The theory of the transnationalization of the state described above depicts a process in which states are increasingly inclined to services transnational capital and decreasingly willing or capable to pursue other social goals. Various contributions utilizing the concept of a regulatory state give a more optimistic view of new forms of regulation in a post-national state, in which regulatory networks are based on information and knowledge as well as control and sanctions.

It is clear from the above that most formal regulatory authority in Latin America still rests with the national governments. Therefore, this essay has underlined the need to focus not only on the formal mechanisms for ‘positive’ regulation involved in processes

¹⁷ Growth in BNP/C for 2004 was, for example stipulated to 4.5% with Intel and 4% without (IDB 2004).

of transnationalization, but also on how transnationalization affects the ability of the states to regulate at the national level. A main premise for my argument has been that in order to be an efficient regulator, the state is dependent on adequate financial resources. Neo-liberal integration has contributed to the removal of important sources of finance for many states, including customs revenue and tax revenue (cut in order to participate in the competition for investment). Thus, regarding finances, states are clearly the losing part.

However, regulation is not only dependent on financial clout. Equally important is expertise, and the establishment of transnational networks of regulatory agencies may enhance such expertise. A final important element is the existence of private self-regulation. No regulatory agency would have been able to do its job without a certain element of individual or collective self-regulation contributing to the adherence to standards and norms without intervention. The increased attention to corporate social responsibility in Latin America may as such be one step in the direction of improved business conduct.

It is nevertheless a fact that we frequently get reports on businesses' violation of basic human rights, labor standards or environmental standards from Latin America. A closer scrutiny of the global 'black lists' of companies repeatedly charged with violations of UN conventions developed by a major 'socially responsible investor' in Scandinavia showed that 61% of the charges filed in 2004 were against companies operating in Latin America (Bull 2004c). The charges were mostly made in the extractive or manufacturing industries (maquiladoras), both a main focus in the attraction of foreign direct investments under the new integration models. Thus, while keeping our eyes open to the possibility of different forms of 'social regulation', we should also not forget the underlying driving force of the current global restructuring, which is to search for new markets and increased profits. A 'positive' social transnational regulatory regime is still quite far away in the horizon.

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