

# Free Market Statism

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## I. Introduction

In remarks in honor of Milton Friedman, the late-Nobel Prize winning University of Chicago free market economist, President George W. Bush explains: 'In contrast to the free market's invisible hand, which improves the lives of people, the government's invisible foot tramples on people's hopes and destroys their dreams.'<sup>1</sup> Bush here obliquely references the eclipse of welfare states and planned economies by societies premised upon the free market (the onset of privatization). State interventionism is contrasted with laissez-fairism. More broadly, in popular imagination and scholarly treatment, the free market stands in opposition to the triad of feudalism, fascism and communism. State intervention is the cornerstone of this unholy trinity. However, this should not obscure the statism of the free market.

This paper takes free market statism as its subject-matter, while limiting itself mainly to United States foreign policy. In the 'Preface' to the 1994 50th Anniversary Edition of The Road to Serfdom by F. A. Hayek (a fellow Nobel Prize-winning free market economist who inspired Thatcherism), Friedman praised Egypt, Hong Kong, Israel, Japan, Malaysia, Singapore and Thailand as countries in which the free market has been the primary vehicle for growth.<sup>2</sup> While at times these countries were indeed on the 'free enterprise' side of the Cold War, all had statist governments that actively intervened to support specific business interests.<sup>3</sup> In fact, through bilateral and multilateral foreign aid programs, the US and its powerful allies promoted such free market statism abroad throughout the twentieth century. Notably, in the same breadth, Friedman criticized the persistence of President Lyndon Johnson's Great Society Programs and also President George Bush Sr.'s Clean Air Act and Americans with Disabilities Act. Friedman sympathized with President Ronald Reagan and Prime Minister Margaret Thatcher's frustrations with their inability to reverse the expansion of the welfare state.<sup>4</sup>

Our concern here with free market statism encompasses two related phenomena: (1) the promotion of business-friendly states abroad and (2) the use of companies to

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<sup>1</sup> George W Bush 'President Honors Milton Friedman for Lifetime Achievements: Remarks by President in Tribute of Milton Friedman' [www.whitehouse.gov/news/releases/2002/05/20020509-1.html](http://www.whitehouse.gov/news/releases/2002/05/20020509-1.html).

<sup>2</sup> Milton Friedman 'Preface' in Friedrich A Hayek, *The Road to Serfdom* (50<sup>th</sup> Anniversary edition University of Chicago Press Chicago 1994) ix.

<sup>3</sup> Hayek importantly distances himself from the 'conservative' position that governments should proactively support commercial interests beyond simply defining the basic general and non-discriminatory rules of the game. See Friedrich A Hayek *The Road to Serfdom* (50th Anniversary edition University of Chicago Press Chicago 1994) Preface; Friedrich A Hayek *The Constitution of Liberty* (Routledge London 1990) 397-414.

<sup>4</sup> Friedman xvi.

conduct US foreign policy. It is not the regulation or lack of regulation of companies *per se* that interests, but rather how we intermingle governments and companies. This intermingling manifests itself in manifold legal forms. It may have a regulatory dimension; however, it may also concern such things as government loans to private national companies operating abroad through the US Export-Import Bank.

The aim is not to condemn free market statism. This statism takes myriad forms and, given our sparse knowledge of its operation in practice, is not presently amenable to confident assessment. Before passing judgment on its desirability, we must first explore how its many forms operate in action. We know little beyond the fact that a genealogy of free market statism would reveal both diverse and common practices.<sup>5</sup> Our lacunae of ignorance, however, should not prevent us from exploring criteria by which to judge these practices. If the public good is the ultimate rationale for both free marketism and also social welfarism, then we should devise criteria by which to judge whether free market statism serves the public good.<sup>6</sup> In doing so, given the reality of statism, we should not supplant public good criteria with market efficiency dogma. Instead, we should enquire into whether certain forms of free market statism serve the public good better than others. Such an enquiry may allow us to assess and appropriately direct what is now a staple of our foreign policy. It may be that certain mixes advance the public good better than others. Regardless, ignoring state intervention in the free market impedes our understanding and undermines informed policy prescriptions.<sup>7</sup>

This paper first provides a theoretical foundation for understanding free market statism based in domestic practice mainly within the US. Since the early twentieth century, writers have scrutinized the relationship between states and markets. Although the literature spans several historical periods, common concerns animate scholars. Further, domestic and international practices are linked both ideologically and in practice which makes domestically-germinated theories further applicable to the transnational arena. Then, the next two sections turn to the international dimensions of free market statism. This involves looking at not only the government/company relationships at point of export, but also at the promotion of parallel government/company relationships among importing countries. To do so, the first section looks at how the US and its powerful allies have promoted market statism within governments abroad through foreign aid programs and

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<sup>5</sup> For a canvassing of the use of government procurement to achieve social goals see Christopher McCrudden 'Using Public Procurement to Achieve Social Outcomes' 28(4) *Natural Resources Forum* 257 (2004).

<sup>6</sup> For an elaboration of such an approach in the early twentieth century see Morris R Cohen 'Property and Sovereignty' 13 *Cornell Law Quarterly* 827 (1927-8). For an historical treatment of this position that extends to its application in the privatization and globalization context see Michael B Likosky, *The Silicon Empire: Law, Culture and Commerce* (Ashgate Aldershot 2005a) Chapter 2. On the public interest and privatization see Paul Verkuil 'Public Law Limitations on Privatization of Government Functions' 84 *North Carolina Law Review* 397 (2006).

<sup>7</sup> Our approach runs counter to legal theories that posit a new *lex mercatoria* existing independent of nation-states. For such a position see Gunther Teubner "'Global Bukowina": Legal Pluralism in the World Society' in Gunther Teubner, ed, *Global Law Without a State* (Dartmouth Aldershot 1997) 3. For discussions of Teubner that emphasize the need to take the role of governments in transnational commerce into account see Michael B Likosky 'Compound Corporations: The Public Law Foundations of *Lex Mercatoria*' 3 *Non-State Actors and International Law* 251 (2003); Francis G Snyder 'Governing Globalisation' in Michael B Likosky, ed, *Transnational Legal Processes* (Cambridge University Press Cambridge 2002) 65, 71-72.

inter-governmental organizations. Related, the following section turns to the use of corporations as foreign policy organs. The final section takes stock. It begins to assess the public interest implications of free market statism.

## II. Theoretical Foundations

Discussions of state intervention in the US economy during the twentieth century generally focus on the rise and fall of the welfare state. However, free market statism has also spanned the last hundred years (extending back also to the Gilded Age with its public-private partnership-based railway projects).<sup>8</sup> From the *Lochner* period to the massive military mobilization for the Second World War,<sup>9</sup> government-company collaborations occupied scholars and policy-makers. Similarly, in the post-War period, collaborations pervaded the defense sector as the country did battle in the Cold War. They were also present elsewhere. Most recently, privatization has progressively supplanted the welfare state. Despite contrary representations, privatization itself is premised upon free market statism. This section provides a brief menu of instances of this statism in the US over the last century. It in no way is meant to be comprehensive. Instead, the aim is to point to the prevalence of free market statism within the US during this period and also to identify some common concerns that animate scholars and policy-makers who have looked at the relationships between governments and companies.

In the early twentieth century, legal scholars critical of *laissez-fairism* pointed to the role of government in fortifying the free market. These writers countered the radical freedom of contract position represented by *Lochner*.<sup>10</sup> Many also sought to counter opposition to the social reforms associated with the New Deal.<sup>11</sup> Most notable among these scholars for our purposes are Morris R. Cohen,<sup>12</sup> Robert L. Hale,<sup>13</sup> Louis L. Jaffe<sup>14</sup>

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<sup>8</sup> On railroads during the nineteenth and early-twentieth century see Dorothy R Adler, *British Investment in American Railways 1834-1898* (The University of Virginia Press Charlottesville 1970); John Coatsworth 'Railroads, Landholding, and Agrarian Protest in the Early Porfiriato' (February 1974) 54(1) *The Hispanic Historical Review* 48; Steven Salsbury, *The State, the Investor, and the Railroad* (Harvard University Press Cambridge 1957); Augustus J Veenendaal, *Slow Train to Paradise: How Dutch Investment Helped Build American Railways* (Stanford University Press Stanford 1996).

<sup>9</sup> For a bibliography of legal literature on World War Two defense procurement see Law Branch, The Army Library, *Bibliography on Government Procurement and Contractual Procedure and Related Materials* (March 1953/Revised March 1954).

<sup>10</sup> *Lochner v New York* 198 US 45 (1905). Justice Oliver Wendell Holmes wrote in a famous dissent: 'The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics.' *Lochner* 75. A strong parallel exists between this *Lochner* position and present-day 'right to free trade' positions. For a critique of the latter see Philip Alston 'Resisting the Merger and Acquisition of Human Rights Law by Trade Law: A Reply to Petersmann' 13(4) *European Journal of International Law* 815 (2002).

<sup>11</sup> The adaptation of the Continental European 'free law doctrine' was important here and not without controversy. See H L A Hart *Essays in Jurisprudence and Philosophy* (Clarendon Press Oxford 1983) 265-277; Hermann Kantorowicz 'Some Rationalism About Realism' 43 *Yale L J* 1240 (1934). For more recent studies drawing on the insights of these Legal Realists see Roderick M Hills 'The Constitutional Rights of Private Governments' 78 *New York University Law Review* 144 (2003); Arthur J Jacobson 'Private Use of Public Authority: Sovereignty and Association in the Common Law' 29 *Buffalo Law Review* 603 (1980) ('Courts and legislatures have used the law of associations to distribute a portion of sovereignty to private persons.' 601).

<sup>12</sup> See e.g. Cohen (1927-8); Morris R Cohen 'The Basis of Contract' 46 *Harvard Law Review* 562 (1932-3).

and Roscoe Pound.<sup>15</sup> Three insights are important here. The first insight is the observation that companies have benefited from a proactive government. The second insight concerns the public law foundations of private corporate organization. A third insight that the Realists focused on, the question of how appropriately to guide government-company collaborations, will be drawn on also in the conclusion to this paper. Importantly, they did not presume that free market statism was an unqualified bad. Instead, the aim was to guide such statism so as to advance the public interest.

Cohen relates the first insight that companies are against government intervention in the market selectively, arguing that ‘the theory of *laissez faire*, of complete non-interference of the government in business, is not really held consistently by those who frequently invoke it.’ This ‘group . . . protests against child labor law, or against any minimum wage law intended to insure a minimum standard of decent living’. At the same time, it ‘is constantly urging the government to protect industry by tariffs.’<sup>16</sup> Expressing the third insight of interest, rather than urging a return ‘to medievalism’,<sup>17</sup> the issue for Cohen is then ‘what interests should be protected and who should control the government.’<sup>18</sup> Likewise, Hale argued that ‘[s]ome sort of coercive restriction . . . is unavoidable’ and that ‘[t]here is accordingly a need for the development of economic and legal theory to guide the process.’<sup>19</sup>

Jaffe argued also that the government was being directed by private groups. He articulated the second insight, asking whether the government had made too generous of a grant of sovereignty to companies.<sup>20</sup> In 1935, pointing also to the public law basis of private contract, Hale put the underpinnings of this position neatly: ‘absolute state power is the background norm upon which private power is exercised.’<sup>21</sup> Like Cohen, Jaffe urged a greater openness:

Participation in law-making by private groups under explicit statutory ‘delegation’ does not stand then in absolute contradiction to the traditional process and conditions of law-making; it is not incompatible with the conception of law. It exposes and brings into the open, it institutionalizes a factor in law-making that we have, eagerly in fact, attempted to obscure.<sup>22</sup>

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<sup>13</sup> See e.g. Robert L Hale ‘Coercion and Distribution in a Supposedly Non-Coercive State’ 38 *Political Science Quarterly* 470 (1923); Robert L Hale ‘Force and the State: A Comparison of “Political” and “Economic” Compulsion’ [1935] *Columbia Law Review* 149.

<sup>14</sup> See Louis L Jaffe ‘Law Making by Private Groups’ 51 *Harvard Law Review* 201 (1937-8).

<sup>15</sup> See Roscoe Pound ‘Liberty of Contract’ [1909] *Yale Law Journal* 454. Pound grew into an opponent of the New Deal reforms. David Wigdor, *Roscoe Pound: Philosopher of Law* (Greenwood Press Connecticut 1974).

<sup>16</sup> Cohen (1932-3) 562.

<sup>17</sup> Cohen (1911) 11.

<sup>18</sup> Cohen (1932-3) 565.

<sup>19</sup> Hale (1923).

<sup>20</sup> He ‘attempt[ed] to examine the extent to which the grant of such powers is within the traditions of our legal and constitutional system.’ Jaffe 203.

<sup>21</sup> Hale (1935) 199.

<sup>22</sup> Jaffe 220-1.

Thus, in focusing on the intermingling of sovereignty and corporate behavior, these Realists urged a more factually based public debate and also greater scrutiny of how this mixing operates in practice in light of public values and principles.

Similar concerns were raised by post-War scholars and policy-makers. Charles A. Reich argued in 1964 that the growth of the post-War state was so extensive that a 'new property' had arisen, distinct from public and private property. Among other synergies, according to Reich, the Cold War period was characterized by a sharing of 'sovereign power . . . with large private interests'.<sup>23</sup> Reich explained:

First, the impact of government power falls unequally on different components of the private sector, so that some gain while others lose. Second, the government largess often creates a partnership with some sectors of the private economy, which aids rather than limits the objectives of those private sectors. Third, the apparatus of government power may be utilized by private interests in their conflicts with other interests, and thus the tools of government become private rather than public instrumentalities.<sup>24</sup>

Similarly, in 1963, Michael D. Reagan had spoken of the merging of public and private sectors, arguing,

While public attention has been largely directed at conflicts between government and business, a much more significant development has gone relatively unnoticed: the gradual erasure of long-standing distinctions between private and public activities, and, as a result, the increased amalgamation of the sectors.<sup>25</sup>

Related, back in 1954, Don K. Price had spoken of an emerging 'federalism by contract'.<sup>26</sup> Writing in 1980, Arthur Jacobson argued that, although '[n]o one yet knows the shape of institutions that would sustain a socially responsible, decentralized economy',<sup>27</sup> fiduciary relations should be reconstructed to guide behavior including 'notions of both social benefit and social responsibility.'<sup>28</sup>

Much of this amalgamation occurred in the defense sector, dating back mainly to the Second World War itself which saw a mass privatization of the military.<sup>29</sup> The scale of

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<sup>23</sup> Charles A Reich 'The New Property' 73 Yale Law Journal 733, 764 (1964).

<sup>24</sup> Reich 764.

<sup>25</sup> Michael D Reagan, *The Managed Economy* (Oxford University Press Oxford 1967) 190.

<sup>26</sup> Don K Price, *Government and Science: Their Dynamic Relation in American Democracy* (New York University Press New York 1954) 65-94. On how governments and universities intermingled during the Cold War see Noam Chomsky, Laura Nader, Immanuel Wallerstein, Richard C Lewontin, Richard Ohmann, Howard Zinn, Ira Katznelson, David Montgomery and Ray Siever, *The Cold War and the University: Toward an Intellectual History of the Postwar Years* (New Press New York 1998).

<sup>27</sup> Jacobson 664.

<sup>28</sup> Jacobson 665.

<sup>29</sup> On the renegotiations following the War and their use as a potential model today see William E Kovacic and Steven L Schooner 'A Modest Proposal to Enhance Civil/Military Integration: Rethinking the Renegotiation Regime as a Regulatory Mechanism to Decriminalize Cost, Pricing and Profit Policy' George Washington University Law School Public Law Research Paper Number 178 (December 2005).

the wartime effort was unprecedented in the US and it involved an extensive contract-based effort whereby private companies carried out the country's defense function. This privatization persisted after the War and into the Cold War period. Here too, the government made extensive use of federal contracts with private companies. As Reagan explained, the resultant public/private network was vast and irreducible to a single industry or product:

A kind of decentralization by contract ('federalism by contract' Don K. Price has called it) is involved here, with national policies carried out to local areas through contracting firms rather than through subordinate layers of government. Each prime contractor, for example, has been required in recent years to maintain a subcontracting office whose public task is to seek out small business suppliers. This is done in order to counteract the main trend in defense contract awards, which concentrates prime contracts among a very small number of firms--for example, each year approximately two-thirds of such contracts go to 100 firms. Whether such a program can be very effective may be doubted, but that is irrelevant to the fact that private business firms are acting as de facto antitrust administrators under this system.<sup>30</sup>

This intermingling of the public and private sectors was accelerated in a number of ways. For instance, congressional committees charged with disbursing private sector contract awards were staffed by members of the private sector. Also, the government financed private sector lobbying for government defense contracts.<sup>31</sup> High technology is a well-known product of this partnering, resulting eventually in the rise of the Internet and the commercial application of myriad other defense-subsidized technologies.

This intermingling of the Defense Department and private companies concerned many scholars. Generally scholars aimed to make sure that the mixing was in line with the public interest. By no means were these discussions limited to academic books and journals. In a now famous speech, President Dwight D. Eisenhower warned about the result of this mixing, what he termed the 'military industrial complex':

This conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence – economic, political, even spiritual – is felt in every city, every State house, every office of the Federal government. We recognize the imperative need for this development. Yet we must not fail to comprehend the grave implications. Our toil, resources and livelihood are all involved; so is the very structure of our society.

In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military industrial complex. The potential disastrous rise of misplaced power exists and will persist.

We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and

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<sup>30</sup> Reagan 193.

<sup>31</sup> Reagan 194-5

military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.<sup>32</sup>

Thus, in Eisenhower's statement as well as in the work of Reagan and others, we see an echoing of the Realist call for a revisiting of government/company mixing in order to counter false representations and also to ensure that mixing is judged by the yardstick of the public interest.

Since the late 1970s, the defense sector model of free market statism has spread more widely with the onset of privatization.<sup>33</sup> Privatization was first introduced by Prime Minister Thatcher, followed by President Reagan. It has since spread throughout the world. Once again, a similar set of concerns crop up. The welfare state here has been partially dismantled, while free market statism has emerged unscathed. Privatization has witnessed a dramatic extension of federalism by contract and other government/industry synergies into almost all walks of life. Just as with the *laissez-fairism* of the early twentieth century, the advocates of privatization have downplayed market statism, focusing instead on the introduction of the logic of the free market into public sector activities.

Nonetheless, in practice, despite the shift away from a public service model towards privatization, the government has often maintained itself as the financier and licensor of many enterprises. For instance, in the United Kingdom, the government has established the Public Finance Initiative which determines which companies will be granted lucrative public service contracts.<sup>34</sup> In the US and elsewhere, the government insures privatized infrastructure projects against risks of terrorist attacks.<sup>35</sup> The United States' *National Strategy for the Physical Protection of Critical Infrastructures and Assets* speaks of a 'paradigm of partnership'<sup>36</sup> as underpinning infrastructure protection (over eighty-five percent of which are nominally in the private sector). In other words, privatization is in practice premised upon public-private partnerships, whereby

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<sup>32</sup> President Dwight D Eisenhower 'The Military Industrial Complex Speech' (1961)

<http://www.yale.edu/lawweb/avalon/presiden/speeches/eisenhower001.html>.

<sup>33</sup> For extended discussions of the development of the public-private law divide and also an assessment of the relevance of Legal Realist insights for privatization see Likosky (2005a) Chapter 2; Verkuil. On the divide generally see Alan Freeman and Elizabeth Mensch 'The Public-Private Distinction in American Law and Life' [1987] *Buffalo Law Review* 237; Morton Horwitz 'The History of the Public/Private Distinction' 130 *University of Pennsylvania Law Review* 1423 (1981-2); Duncan Kennedy 'The Structure of Blackstone's Commentaries' 28 *Buffalo Law Review* 205 (1979); Duncan Kennedy 'The Stages of the Decline of the Public/Private Distinction' 130 *University of Pennsylvania Law Review* 1349 (1982).

<sup>34</sup> See e.g. Mark Freedland 'Government by Contract and Public Law' [1994] *Public Law* 86; Christopher McCrudden, ed, *Regulation and Deregulation: Policy and Practice in the Utilities and Financial Services Industries* (Clarendon Press Oxford 1999). In the US context see Alfred C Aman, *Democracy Deficit: Taming Globalization Through Law Reform* (New York University Press New York 2004); Jody Freeman 'The Contracting State' 28 *Florida State Law Review* 155 (2000); Gillian Metzger 'Privatization as Delegation: Reforming State Action in Private Delegation Terms' 103 *Columbia Law Review* 1367 (2003); Verkuil.

<sup>35</sup> The US legislation is the Terrorism Risk Insurance Act of 2002. On Australian insurance see Michael Bradford 'Aussies May See Terror Cover Mandate' 37(17) *Business Insurance* 17. On Israeli insurance see Mark Phillips and Adam Eytan 'A Deeper Look?' 16 *Project Finance* 16 (September 2002).

<sup>36</sup> United States, *The National Strategy for the Physical Protection of Critical Infrastructures and Key Assets* 8.

governments and companies share the responsibility for financing, building and operating projects. More will be said about this public-private partnership model of privatization when we turn to the international dimensions of market statism.

Free market statism has not been limited to fully-industrialized countries. These powerful countries have actively also exported this statist model in the twentieth and now twenty-first centuries. In doing so, they have encouraged proactive government support in developing countries and transition societies for the interests of ‘western’ and Japanese businesses traveling abroad. Further, powerful governments have subsidized their own corporate nationals operating abroad.

### III. Exporting Market Statism

In the wake of decolonization, newly independent states in developing countries instituted planned economies. Gunnar Myrdal, the Swedish sociologist who won the Nobel Prize in Economics along with Hayek in 1974, defined a planned economy as one in which ‘the state shall take an active, indeed the decisive role in the economy’. It shall do so ‘by its own acts of investment and enterprise, and by its various controls—inducements and restrictions—over the private sector’. Over-arching government plans cover the direction of the economy for a specified number of years.<sup>37</sup>

However, despite the proliferation of plans among these countries, the US and its allies presented many of these countries as free market economies. Accordingly, the US ignored, downplayed and distanced itself from the planned dimensions of these countries in public pronouncements. At the same time, in the area of foreign assistance, powerful countries on the free enterprise side of the Cold War actively promoted plans among their developing country allies. Myrdal explains:

both private businesses and governments in the West . . . are interested in the existence of an overall plan into which the special projects are fitted and which can render it more likely that they will not fail. Quite apart from, and often contradicting, their ideological preferences at home, all Western governments as well as their business people are supporters of state planning. . . Where planning has lagged . . . the International Bank has been prepared to send experts to help formulate a plan. . . the intergovernmental organizations, governments, private foundations, and universities have supplied personnel for planning.<sup>38</sup>

Support for this underlying market statism of the planned economies has not limited itself to the plan. It has extended to many areas of commercial and political life in developing countries. Here, we focus on two areas: the promotion of free zones (the cornerstone of export-led growth) and privatization abroad.

A free zone, according to its advocates, is a hived-off area within a country which is

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<sup>37</sup> Gunnar Myrdal, *Asian Drama: An Inquiry into the Poverty of Nations* (Twentieth Century Fund New York 1976) 709.

<sup>38</sup> Myrdal 728.

free from the burdensome government regulation that exists in the rest of the country. It is a zone in which the free market flourishes. Over one-hundred-and-twenty countries have zone programs.<sup>39</sup> Most controversial of these zones is the export processing zone, which refers to a manufacturing-based free zone. Many companies locate parts of their production processes in these zones, most famously clothing and shoe manufacturers. The labor practices of the zones have come under regular scrutiny over a number of decades.<sup>40</sup> Powerful governments on a bilateral basis and through inter-governmental organizations have systematically promoted free zones, territorially delimited jurisdictions with a regulatory regime distinct from the rest of the country. Among the most well-known of these zones are the Mexican Maquila program<sup>41</sup> and also China's Shenzhen Free Trade Zone.<sup>42</sup> Zones are the cornerstone of export-led growth which has been lauded as the preferable international model of development by institutions such as the World Bank.<sup>43</sup>

In spite of the use of 'free' as a descriptor of these hived-off zones, host governments are in fact devoted to catering to business, collectively creating a 'world factory system'<sup>44</sup> for transnational companies. The government does this by building infrastructure, enacting labor legislation and banking laws, granting licenses, and many other law-based means. The US government has widely advocated employing these free market statist technologies through the World Bank,<sup>45</sup> the United Nations Industrial Development Organization, the Organization for Economic Cooperation and Development<sup>46</sup> and also other institutions. The role of these institutions in promoting free zones has been detailed elsewhere.<sup>47</sup>

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<sup>39</sup> World Free Zone Convention website *see* [www.freezone.org/FrameUpdate.htm](http://www.freezone.org/FrameUpdate.htm).

<sup>40</sup> *See e.g.* International Labour Organisation and Centre on Transnational Corporations *Economic and Social Effects of Multinational Enterprises in Export Processing Zones* (International Labour Office Geneva 1988); FA Rabbani, ed, *Economic and Social Impacts of Export Processing Zones* (Asian Productivity Organization Japan 1983).

<sup>41</sup> *See e.g.* LIC. Carlos Angulo Parra 'How to Use Maquiladoras in Mexico Today' 6 *United States-Mexico Law Journal* 111 (Spring 1998).

<sup>42</sup> On the Zone *see* <http://www.szftz.gov.cn/sze/index.htm>.

<sup>43</sup> World Bank, *The East Asian Miracle: Economic Growth and Public Policy* (Oxford University Press Oxford 1993).

<sup>44</sup> Folker Froebel, Jurgen Heinrichs and Otto Kreye, *The New International Division of Labour: Structural Unemployment in Industrialised Countries and Industrialisation in Developing Countries* (Cambridge University Press Cambridge 1977). On global commodity chains *see* Gary Gereffi 'Capitalism, Development and Global Commodity Chains' in Leslie Sklair, ed, *Capitalism and Development* (Routledge New York 1994) 211; Gary Gereffi and Miguel Korzeniewicz, eds, *Commodity Chains and Global Capitalism* (Praeger London 1994). On the legal issues *see* Dijaya L U Jayawardena 'Free Trade Zones' (1983) *Journal of World Trade Law* 427; Likosky (2005a) Chapter 4; Snyder.

<sup>45</sup> Industry Development Division, Industry and Energy Department and Trade Policy Division Country Economics Department, *Export Processing Zones* (Policy, Research and External Affairs, The World Bank 20 The World Bank Washington, DC 1988).

<sup>46</sup> Antoine Basile and Dimitri A Germidis, *Investing in Free Export Processing Zones* (Development Centre of the Organisation for Economic Cooperation and Development Paris 1984).

<sup>47</sup> International Labour Organisation and Centre on Transnational Corporations, *Economic and Social Effects of Multinational Enterprises in Export Processing Zones* (International Labour Office Geneva 1988); Likosky (2005a) Chapter 4.

The most recent incarnation of the free zone is the science park.<sup>48</sup> It is a conscious effort to export the Silicon Valley idea abroad--to grow from scratch high technology economies. Once again, for public consumption these science parks are presented as government-free havens in which high technology firms are free to pursue their company goals without regulatory impediment. This presentation comports with popular representations of Silicon Valley itself as a government-free, bottom-up economy. Nonetheless, just as with the export processing zones (and Silicon Valley and its support from the Defense Department), this new generation of free zones require large scale government action on behalf of business in order to succeed. Indicative of this government/industry collaborative approach, in Malaysia an executive of a leading US firm involved in its science park described the government as its 'business partner'.<sup>49</sup>

The infrastructure needs, for one, are larger for the high tech economy than for its industrial predecessors.<sup>50</sup> This involves government-supported projects in power, transportation and telecommunications. Also, governments must train 'knowledge workers' for high tech companies. For example, the Malaysian government, in the context of its mega-science park, speaks of producing such workers 'custom made' for foreign firms locating operations within its corridor.<sup>51</sup> Further, government agencies must sometimes be set up to police the intellectual property rights of foreign investors. In addition, science parks, like their predecessors, often employ government-controlled zone authorities charged with using state power to lure investors and, once they locate operations in the zone, then to cater to their needs and solve their problems.<sup>52</sup> So, powerful governments have promoted free zones as a free market enclave for developing countries. In fact, these zones are premised upon free market statism.

Likewise, in developing countries and transition societies, privatization is typically presented as move away from state-centrism and towards free marketism. For example, a state-owned enterprise might be dissolved, replaced by a private company organized for profit. Similarly, the rationale for privatization itself is that the market logic of competition is a better means for delivering public services. However, despite these representations, privatization creates public-private partnerships. For instance, a very popular technique in developing countries and transition societies for carrying out a privatized project is the build-operate-transfer (BOT) contractual scheme. It was used also to link London and Paris by the Channel Tunnel. Under this popular scheme, a company builds a project, then operates it long enough to recoup sunk costs and to garner an agreed upon profit. It

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<sup>48</sup> On science parks see *Id*; Manuel Castells and Peter Hall, *Technopoles of the World: The Making of 21<sup>st</sup> Century Industrial Complexes* (Routledge London 1994)

<sup>49</sup> Frank S Smith 'Letter to Business Week by Ernst and Young' (1997) Business Week

<sup>50</sup> Michael B. Likosky 'Infrastructure for Commerce' 22(1) Northwestern Journal of Law and Business 1 (2001).

<sup>51</sup> Asia Inc 'Silicon Island' [9/1999] Asia Inc Malaysian Edition and Ministry of International Trade and Industry *Malaysia: Investment in the Manufacturing Sector: Policies, Incentives and Facilities* (MIDA Kuala Lumpur, Malaysia) 61

<sup>52</sup> Wolfgang G Friedmann and Richard C Pugh 'Comparative Analysis' in Wolfgang G Friedmann and Richard C Pugh, eds, *Legal Aspects of Foreign Investment* (Stevens and Sons Limited London 1959); E I Nwogugu *The Legal Problems of Foreign Investment in Developing Countries* (Manchester University Press Manchester 1965); M Sornarajah *The International Law on Foreign Investment* (Cambridge University Press Cambridge 1994).

then transfers the project to the government. Thus, the ultimate resting point of this privatization technique is with ownership and control of the infrastructure asset in public not private hands. Further, the government is involved in the BOT scheme even during the tendering, building and operating stages.<sup>53</sup> So important is the government role in BOT projects, that the United Nations Industrial Development Organization has published a book instructing governments on how to carry-out such projects, detailing a proactive role for governments throughout the project lifecycle.<sup>54</sup>

Foreign support for privatization has not been limited to publishing how-to books. Powerful governments, including the US, have promoted privatization through numerous national and inter-governmental organizations. These include export credit agencies, the Multilateral Investment Guarantee Agency, the International Center for the Settlement of Investment Disputes, the International Finance Corporation, the International Monetary Fund, the Inter-American Development Bank, the Asian Development Bank and many others.<sup>55</sup> In the next section the role of the US in promoting the interests of its corporate nationals both bilaterally and multilaterally through many of these and other institutions will be detailed.

#### IV. Corporations as Foreign Policy Organs

During colonial times, the Levant Company charter of 1600 indicated that company merchants could ‘place in the top of their ships and other vessels the arms of England in a red cross and white’.<sup>56</sup> Certainly most companies no longer travel waving the flags of their states of incorporation.<sup>57</sup> Nonetheless, today the US government, and many of its powerful

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<sup>53</sup> David A Levy ‘BOT and Public Procurement: A Conceptual Framework’ 7 *Indiana International and Comparative Law Review* 95 (1996-7); Don Wallace Jr ‘Private Capital and Infrastructure: Tragic? Useful and Pleasant? Inevitable?’ in Michael B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005b) 131, 132-134.

<sup>54</sup> United Nations Industrial Development Organization, *UNIDO BOT Guidelines* (United Nations Industrial Development Organization Geneva 1996).

<sup>55</sup> International law firms have also played a role. See Richard L Abel ‘Transnational Law Practice’ 44 *Case Western Reserve Law Review* 737 (1994); John Flood ‘Capital Markets, Globalization and Global Elites’ in *Transnational Legal Processes* 114. Further, economists, university professors and others have contributed to the spread of privatization-related policies. See Yves Dezalay and Bryant Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (University of Chicago Press Chicago 2002).

<sup>56</sup> Compiled in Cecil T Carr, ed, *Select Charters of Trading Companies, A.D. 1530-1707*, Volume 48 (Selden Society London 1913) 38. This clause echoed a similar one in a related earlier grant. Cecil T Carr ‘Introduction’ in *Select Charters of Trading Companies, A.D. 1530-1707* i, xxxviii. On chartered companies see also W H-J Leue ‘Legal Expansion in the Age of Companies: Aspects of the Administration of Justice in the English and Dutch Settlements of Maritime Asia, c. 1600-1750’ in Wolfgang J Mommsen and J A De Moor, eds, *European Expansion and Law: The Encounter of European and Indigenous Law in 19<sup>th</sup>- and 20<sup>th</sup>-Century Africa and Asia* (Berg Oxford 1992) 129; M F Lindley, *The Acquisition of Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (Longmans, Green & Company London 1926); R Robert, *Chartered Companies and Their Role in the Development of Overseas Trade* (G Bell and Sons London 1969); R E Tindall, *Multinational Enterprises: Legal and Management Structures and Interrelationship of Ownership, Control, Antitrust, Labor, Taxation and Disclosure* (Oceana Publications, Inc. New York 1975) 1-8; J H W Verzijl, *International Law in Historical Perspective Part II: International Persons* (A W Sijthoff Leyden 1969).

<sup>57</sup> For contra see airlines such as United and Delta which place flags on their planes.

allies, use corporations as foreign policy organs.<sup>58</sup>

Perhaps the highest profile case in recent memory is the use of companies to reconstruct post-war Iraq.<sup>59</sup> The US General Accounting Office concisely stated the private corporation-oriented approach towards Iraq: ‘The United States has relied heavily on private-sector contractors to provide the goods and services needed to support both the military and reconstruction effort in Iraq.’<sup>60</sup> The controversy that has arisen there from relates mainly to the use of private military companies<sup>61</sup> and to the tendering process of two US government reconstruction contracts.<sup>62</sup> It extends to the execution of the reconstruction contracts generally.<sup>63</sup> Our concern here will be with the two reconstruction contracts.<sup>64</sup>

The first was a no-bid award to Kellogg, Brown & Root, a subsidiary of Halliburton which was the company that Vice President Dick Cheney headed before stepping down to run for Vice President.<sup>65</sup> The second contract involved an award to Bechtel which was invited with seven others to put in bids for non-oil based reconstruction projects.<sup>66</sup> The

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<sup>58</sup> This section limits itself mainly to the US and inter-governmental organizations of which it is an active member. However, other countries engage in similar behavior. For example, the European Union promotes its transportation companies in newly-accessing states.

<sup>59</sup> On this controversy see Laura Dickinson ‘Public Law Values in a Privatized World’ 31 *Yale Journal of International Law* 383 (2006); Naomi Klein ‘Pillaging Iraq in Pursuit of a Neocon Utopia’ *Harper’s Magazine* (September 2004); Michael Likosky, *Law, Infrastructure, and Human Rights* (Cambridge University Press New York 2006) Chapter Four.

<sup>60</sup> United States General Accounting Office, *Report to Congressional Committees: Iraq Contract Costs: DOD Consideration of Defense Contract Audit Agency’s Findings* (September 2006) 4.

<sup>61</sup> Steven Schooner ‘Contractor Atrocities at Abu Ghraib: Compromised Accountability in Streamlined Outsourced Government’ 16 *Stanford Law and Policy Review* 549 (2005). See also conference program of event organized by the New York University School of Law’s Institute for International Law and Justice ‘Market Forces: Regulating Private Military Companies’ available at [http://iilj.org/documents/3-24-06PMCCConferenceProgram\\_000.pdf](http://iilj.org/documents/3-24-06PMCCConferenceProgram_000.pdf).

<sup>62</sup> The subsequent carrying-out of the reconstruction contracts have been controversial as well and the subject of scrutiny by both government and the popular press.

<sup>63</sup> Several oversight reports have been issued on private contractors in Iraq, including audits by the Department of Defense’s Contract Audit Agency of Kellogg and also ones by the General Accountability Office. See e.g. Coalition Provision Authority, *Federal Deployment Center Forward Operations at the Kuwait Hilton* (CPA IG Report Number 04- 003); Department of Defense Contract Audit Agency, *Audit Report on Restore Iraqi Oil Task Order 5* (October 8, 2004); KPMG Bahrain, *Development Fund for Iraq: Report on Factual Findings in Connection with Disbursements For the Period from 1 January 2004 to 28 June 2004* (September 2004); United States Government Accountability Office, *Report to Congressional Committees, Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers* (July 2005); United States Government Accountability Office, *Rebuilding Iraq: Fiscal Year 2003 Contract Award Procedures and Management Challenges* (2004).

<sup>64</sup> Some commentators also argued that the decision to go to war itself was driven by the interests of private oil companies. The role of oil in US national defense within the region dates back at least to the so-called ‘Carter Doctrine’ which was the subject of his 1980 State of the Union Address. President Jimmy Carter ‘State of the Union Address 1980’ available at <http://www.jimmycarterlibrary.org/documents/speeches/su80jec.phtml> (January 23, 1980).

<sup>65</sup> The oil-based infrastructure contracts were tendered in a second wave. This was an open tender and Kellogg was awarded one of two contracts.

<sup>66</sup> ‘Fixing Iraq’s Infrastructure: U.S. Contractors Restored Power and Bridges while Repairing Neglected Water and Sewage Systems Vital to Iraqi’s Health’ in US. Agency for International Development, *A Year in*

Halliburton contract was an Indefinite Delivery Indefinite Quantity (IDIQ) contract. These umbrella contracts consolidate multiple orders into a single tender. This only compounds corruption risks in the procurement process.<sup>67</sup> The Bechtel contract at issue is a cost plus fixed fee arrangement.<sup>68</sup> Such contracts are criticized because they do not include an incentive to keep costs down. The US government's Federal Acquisition Regulation here makes the point: 'This contract type permits contracting for efforts that might otherwise present too great a risk to contractors, but it provides the contractor only a minimum incentive to control costs.'<sup>69</sup> The Center for Public Integrity has charted the extensive circulation of officials from the prime contractors to the administration and also the numerous campaign contributions.<sup>70</sup> These connections only further reinforce claims that the interests of government officials and these companies are difficult to disentangle.<sup>71</sup>

Less high profile is the extensive use of government loans and insurance policies to subsidize corporate nationals overseas.<sup>72</sup> For example, the US government offers war insurance and reinsurance for commercial marine vehicles. It allows the government to insure vessels carrying out 'the interest[s] of the national defense or the national economy.'<sup>73</sup> Ships must be owned by US nationals and be engaged 'in essential water transportation or in the fishing trade or industry, except watercraft used exclusively in or for sport fishing.'<sup>74</sup> In 2001, President Bush reinforced this coverage so as to address the attacks of September 11<sup>th</sup> and how they might impact upon commercial vessels in the Middle East. The Presidential Memo on Marine War Risk Insurance Coverage provides:

Approve the provision by the Secretary of Transportation of insurance or reinsurance of vessels (including cargoes and crew) entering the Middle East

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*Iraq: Restoring Services* 5, 6 (May 2004). The subsequent tender was open and Bechtel was awarded one of two winning contracts.

<sup>67</sup> See 48 CFR 16.504 'Indefinite-quantity contracts'; Eric Aaserud 'GSA Scheduled Contracts: Opportunities and Obligations' 39 *Procurement Lawyer* 4 (Summer 2004); D Farriss 'Checking Your Indefinite Delivery/Indefinite Quantity (IDIQ) IQ' 22 *Construction Lawyer* 24 (Fall 2002); David W Lannetti 'The Confluence of Convenience Terminations and Guaranteed Minimums in Government Contracts: What is the Proper Remedy When the Government Fails to Order the Minimum Quantity Specified in an Indefinite-Delivery, Indefinite Quantity Contract' 13 *Federal Circuit Bar Journal* 1; Michael J Lohnes 'Note: Attempting to spur Competition for Orders Placed Under Multiple Order and MAS Contracts: The Journey to the Unworkable Section 803' 33 *Public Contract Law Journal* 599 (Spring 2004); Denise B Sirmons 'Federal Contracting with Women-Owned Businesses: An Analysis of Existing Challenges and Potential Opportunities' 33 *Public Contract Law Journal* 725 (Summer 2004); Karen D Thornton 'Fine Tuning Acquisition Reforms Favorite Procurement Vehicle: The Indefinite Delivery Contract' 31 *Public Contract Law Journal* 383 (Spring 2002).

<sup>68</sup> See both Bechtel contracts Contract No. SPU-C-00-04-00001-00 between USAID and Bechtel National Inc. 01/05/04; Contract No. EEE-C\_00-03-00018-00 between USAID and Bechtel National Inc. 04/17/03.

<sup>69</sup> General Services Administration, Department of Defense, National Aeronautics and Space Administration, *Federal Acquisition Regulation* (March 2005) 16.306.

<sup>70</sup> See [www.publicintegrity.org/wow](http://www.publicintegrity.org/wow).

<sup>71</sup> Representatives Carolyn Maloney and Henry Waxman have introduced legislation aimed to stem contracting abuses see 'Clean Contracting In Iraq Act' HR 3275. On Iraq reconstruction investigations see <http://www.democrats.reform.house.gov/investigations.asp?Issue=Iraq+Reconstruction>.

<sup>72</sup> Other forms of corporate aid such as subsidies for farmers in the context of USAID grants exist. These grants are controversial when they promote GMO crops. Medical aid is another area that receives attention.

<sup>73</sup> 46 USC 1283(a).

<sup>74</sup> 46 USC 1281(a).

region against loss or damage by war risks . . . for purposes of responding to the recent terrorist attacks, whenever, after consultation with the Department of State, it appears to the Secretary of Transportation that such insurance adequate for the needs of the waterborne commerce of the United States cannot be obtained on reasonable terms and conditions from companies authorized to do an insurance business in a State of the United States. . . . I hereby delegate to the Secretary of Transportation, in consultation with the Secretary of State, the authority vested in me . . . , to approve the provision of insurance or reinsurance for these purposes<sup>75</sup>

Similarly, in response to terrorist threats, the government has provided terrorism risk insurance to its corporate nationals at home<sup>76</sup> and also abroad in the case of air travel.<sup>77</sup> In an effort to ensure that government contractors are properly insured, in situations like Iraq reconstruction, the government requires contractors to carry Defense Base Act insurance.<sup>78</sup> This requirement extends to subcontractors, American or otherwise, in Iraq.<sup>79</sup>

Many other US agencies and programs use businesses to conduct foreign policy.<sup>80</sup> These include: the Department of Agriculture (Commodity Credit Corporation,<sup>81</sup> Foreign Agricultural Service<sup>82</sup>), the Department of Commerce (Trade Information Center, the Manufacturing and Services Unit, US Commercial Service, BuyUSA Program), the Department of Defense (Defense Security Cooperation Agency's Foreign Military Sales program), the Department of Health and Human Services (Office of International Affairs), Department of State (Foreign Military Financing Program, Trade Policy and Programs Division, Direct Commercial Sales Program), the Domestic International Sales Corporation,<sup>83</sup> the Patent and Trademark Office, the Securities and Exchange Commission (Rule 144A),<sup>84</sup> the Small Business Administration, United States Agency for International Development (Commodity Import Programs<sup>85</sup>) and also the US Trade and Development Agency. For example, the US Department of Commerce organizes trade missions with select participants from government and the private sector to promote business interests abroad.<sup>86</sup>

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<sup>75</sup> President George W Bush 'Presidential Memo on Marine War Risk Insurance' (12/12/01) *available at* <http://www.whitehouse.gov/news/releases/2001/12/20011214-9.html>.

<sup>76</sup> *See e.g.* Terrorism Risk Insurance Act of 2002.

<sup>77</sup> Terrorism Risk Insurance Act Section 102(1)(A)(iii).

<sup>78</sup> 42 USC 1651-4.

<sup>79</sup> *See e.g.* Contract No. SPU-C-00-04-00001-00 between USAID and Bechtel National Inc. (1/5/04) H15 SAFETY OF CONTRACTOR PERSONNEL.

<sup>80</sup> Related, Gregory Shaffer looks at the relationship between governments and firms in the context of WTO disputes. His work does not presume that governments and firms always have identical interests. Instead, he 'evaluates how private firms collaborate with governmental authorities in the United States and the European Union (EU) to challenge foreign trade barriers before the WTO legal system and within its shadow.' Gregory Shaffer, *Defending Interests: Public-Private Partnerships in W.T.O. Litigation* (Brookings Institutions Press Washington, DC 2003) 5.

<sup>81</sup> *See e.g.* Title 7 Subtitle B Chapter XIV Subchapter C 'Export Programs'.

<sup>82</sup> *See e.g.* Title 7 Subtitle B Chapter XV Part 1570 'Export Bonus Programs'.

<sup>83</sup> 'Domestic International Sales Corporations' 26 USC 991-997.

<sup>84</sup> On the SEC and its efforts to become a global regulator *see* Flood.

<sup>85</sup> United States Agency for International Development, *ADS 307* 'Commodity Import Programs'.

<sup>86</sup> For the Department of Commerce's Trade Mission Policy *see* U.S. Department of Commerce 'Trade Mission Policy' *available at* <http://www.ita.doc.gov/doctm/tmpol.html>. The US is not unique in this respect.

Further, the US government may take retaliatory measures against countries that expropriate the property of its corporate nationals.<sup>87</sup> With regard to inter-governmental organizations, the government may respond to expropriations in the following way:

The President shall instruct the United States Executive Directors of each multilateral development bank and international financial institution to vote against any loan or other utilization of the funds of such bank or institution for the benefit of any country to which assistance is prohibited under subsection (a) of this section, unless such assistance is directed specifically to programs which serve the basic human needs of the citizens of that country.<sup>88</sup>

Such a public response to expropriations of private property has been controversial and has its roots in expropriations of US corporate property in Cuba<sup>89</sup> and Latin America.<sup>90</sup>

Many US corporate subsidy programs occur in the context of the recent wave of privatization in developing countries and transition societies discussed in the previous section. Importantly however, the transnational network of institutions that subsidize these private corporate nationals of fully-industrialized countries predates the late 1970s.<sup>91</sup> Government insurance programs is one important area.<sup>92</sup> In fact, the origins of the insurance programs in the post-War period is traceable to the Marshall Plan.<sup>93</sup> It provided insurance for US companies operating under its auspices. This insurance initially covered

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In addition, government officials may go on road shows to promote foreign direct and indirect inward investment.

<sup>87</sup> On government/industry collaboration in the interests of private corporate actors with regard to government insurance programs covering expropriation risks *see* Lipson.

<sup>88</sup> 22 USC 2370a(b).

<sup>89</sup> The Hickenlooper Amendments arose here. 22 USC 2370(e). The second amendment was a response to the Supreme Court ruling in *Banco Nacional de Cuba v Sabbatino*, 376 US 398 (1964).

<sup>90</sup> The relevant legislation are the Gonzalez Amendments. Section 21 of the Inter-American Development Bank Act, P.L. 92-246; Section 12 of the International Development Association Act, P.L. 92-247; Section 18 of the Asian Development Bank Act, P.L. 92-245 (March 10, 1972). On the Hickenlooper and Gonzalez amendments *see* Richard W Barrett 'Avoiding the Expropriation Nightmare – Tax Consequences and Asset Protection Techniques' 52 University of Miami Law Review 831 837-842 (1998). President Richard Nixon in 1972 stated that the government would follow through with retaliatory measures *see* Richard Nixon '13-Statement Announcing United States Policy on Economic Assistance and Investment Security in Developing Nations' (1/19/72) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=3385>; Foreign Affairs Division, Congressional Research Service, Library of Congress, *The Overseas Private Investment Corporation: A Critical Analysis: Prepared for the Committee on Foreign Affairs* (U.S. Government Printing Office Washington D.C. 1973) 103. *See* the Helms Amendment in 1994 for its impact upon the Hickenlooper and Gonzalez Amendments

<sup>91</sup> For a discussion of US insurance programs for private national corporations that predates privatization *see* Theodor Meron, *Investment Insurance in International Law* (Oceana Publications Dobbs Ferry, New York 1976).

<sup>92</sup> Charles Lipson argues here that 'the basic identity between corporate preferences, state initiatives, and policy outcomes' directs itself towards the goal of 'private capital accumulation'. Charles Lipson 'The Development of Expropriation Insurance: The Role of Corporate Preferences and State Initiatives' 32(2) *International Organization* 351, 375 (1978).

<sup>93</sup> Foreign Assistance Act of 1948, Public Law 472, 60<sup>th</sup> Congress, Ch. 169, 2d Sess (S. 2202) (4/3/48).

the risk of dollar incontrovertibility.<sup>94</sup> The President's Committee for Financing Foreign Trade, chaired by Winthrop Aldrich of Chase Bank, came up with the idea for this insurance.<sup>95</sup> With time, this corporate subsidy program was transferred to the Agency for International Development (AID) under its Office of Private Resources where it expanded such programs considerably. In 1959, these programs shifted their mission solely to offering inducements for US corporations doing business in developing countries.<sup>96</sup>

After twenty-two years, these AID programs were transferred in 1971 to the newly-created US Overseas Private Investment Corporation (OPIC)<sup>97</sup> with strong support from the private sector.<sup>98</sup> It is under the direction of the Secretary of State and 'mobilize[s] and facilitate[s] the participation of United States private capital and skills in the economic and social development of less developed countries and areas, and countries in transition from nonmarket to market economies'. Specifically, it 'conduct[s] financing, insurance, and reinsurance operations'. OPIC may also participate in the 'identification, assessment, surveying and promotion of private investment.'<sup>99</sup> It aims to have 'positive trade benefits for the United States'.<sup>100</sup> OPIC is a public corporation; however, its board is made up of both public and private officials.<sup>101</sup> Eight out of fifteen directors come from outside of the government. Of these '[a]t least two' must 'be experienced in small business, one in organized labor, and one in cooperatives.'<sup>102</sup> This requirement is reminiscent of the Defense Department programs discussed in Section II of this paper. Much is made of the fact that OPIC operates on a self-sustaining basis. However, this should not obscure the fact that its guarantees are 'backed by the full faith and credit of the United States.'<sup>103</sup>

At its inception, the idea of OPIC was subject to controversy relevant to our concerns. It was an effort to remake foreign assistance so as 'to reflect new priorities and new directions—primarily the increased use of private enterprise in development'.<sup>104</sup> For

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<sup>94</sup> Foreign Assistance Act of 1948 Section 111(b)(3) (providing up to 15,000,000 dollars in guarantees).

<sup>95</sup> Lipson 354. At the same time, there was disagreement within the corporate community over whether these policies were appropriate. *Id.* 357. These disagreements gave way to a more uniformly friendly position towards such insurance programs as they expanded in their scope over time. *Id.* 358-362.

<sup>96</sup> Foreign Affairs Division 5.

<sup>97</sup> Foreign Affairs Division 11 (discussing the implications of Executive Order 11579). On the subsequent evolution of political risk insurance in the US see Kenneth W. Hansen 'PRI and the Rise (and Fall?) of Private Investment in Public Infrastructure' in *Privatising Development* 105.

<sup>98</sup> Lipson 365.

<sup>99</sup> 22 USC 2194(d).

<sup>100</sup> 22 USC 2191.

<sup>101</sup> Many countries have modeled their overseas agencies on OPIC. These agencies vary in the emphasis put on the aim of promoting corporate nationals overseas and the aim of promoting the interests of developing countries. Foreign Affairs Division 25, Appendix C. However, related programs existed in the colonial context. For example, in 1946 the French government issued loans to its companies operating in colonial territories. Likewise, the British instituted a program in 1948 relating to the Commonwealth countries. Foreign Affairs Division 33.

<sup>102</sup> 22 USC 2193(a).

<sup>103</sup> 22 USC 2197(c).

<sup>104</sup> United States Committee on Foreign Affairs, *Foreign Assistance Act of 1969: Report of the Committee on Foreign Affairs together with Minority, Supplement and Additional Views on H.R. 14580: To Promote the Foreign Policy, Security, and General Welfare of the United States by Assisting the Peoples of the World to Achieve Economic Development within a Framework of Democratic, Economic, Social, and Political*

example, in a House of Representatives Report on legislation proposing OPIC, Congressmen John C. Culver, Benjamin S. Rosenthal, Edward R. Roybal and Jonathan B. Bingham argued that ‘U.S. investment has come to be viewed too often as a form of economic colonialism which extracts more than it contributes.’ For this reason, ‘[b]efore the U.S. Government enters the business of supporting the export of American capital, it should assure itself that each project is both commercially feasible and beneficial to the long-range development goals of the country.’ They worried that OPIC would undermine foreign aid objectives, instead ‘be[ing] guided by business motives.’ These ‘interests of U.S. business’ they argued ‘are not necessarily congruent with the needs of the developing countries or with U.S. interest’. They worried that ‘[a]dditional problems will arise through an increased identification of the U.S. Government with business interests.’ As a result, they argued ‘[f]oreigners, suspicious that US. motives in the developing world are solely to support private American business, may well see vindication of their views in the activities of a separate corporation largely run by business.’ American private enterprise, they underscored, might ultimately not benefit from the ‘public image’ implications’ and ‘additional stigma of being subsidized by the U.S. Government and of having come at its behest.’<sup>105</sup> Representatives H. R. Gross, Edward J. Derwinski and J. Herbert Burke tied the OPIC subsidies to a broader approach: ‘Over the years foreign aid has been used to help industry, the farmers, and labor as well as to subsidize professors who are otherwise ungainfully employed . So maybe we should not be too surprised that OPIC wants to cut in some bankers and businessmen on this round for a piece of the foreign aid pie.’<sup>106</sup> Members of the Senate Committee on Foreign Relations argued ‘that the free enterprise system was subverted when the Government, in effect, underwrote foreign investment risks.’<sup>107</sup>

OPIC is required to abide by environmental and worker rights standards and also social development objectives in the projects that it finances. It does so through its Office of Investment Policy which reviews projects<sup>108</sup> and works also with the US Department of State’s Bureau of Human Rights and Labor.<sup>109</sup> The country in which the supported project is located must at least be ‘taking steps to adopt and implement laws that extend internationally recognized worker rights’.<sup>110</sup> This requirement can be waived by the President in situations in which s/he determines that it is ‘in the national economic interests of the United States.’<sup>111</sup> With regard to worker rights, contracts generally include the following clause:

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*Institutions, and for Other Purposes*, 91<sup>st</sup> Congress, 1<sup>st</sup> Session, House Report No. 91-611 (United States Government Printing Office Washington 11/6/69) 3.

<sup>105</sup> ‘Supplemental Views of Hon. John C. Culver, Hon. Benjamin S. Rosenthal, Hon. Edward R. Royball, and Hon. Jonathan B. Bingham’ in United States Committee on Foreign Affairs 179, 182.

<sup>106</sup> Representatives H. R. Gross, Edward J. Derwinski and J Herbert Burke ‘Minority Views’ in United States Committee on Foreign Affairs 192, 1934.

<sup>107</sup> *Quoted in* Foreign Affairs Division 11.

<sup>108</sup> On this Office *see* [www.opic.gov/doingbusiness/investment](http://www.opic.gov/doingbusiness/investment).

<sup>109</sup> Overseas Private Investment Corporation ‘Doing Business With Us: Worker and Human Rights’ [www.opic.gov/doingbusiness/investment/workersrights/index.asp](http://www.opic.gov/doingbusiness/investment/workersrights/index.asp).

<sup>110</sup> 22 USC 2191a(a)(1).

<sup>111</sup> 22 USC 2191a(a)(3).

The investor agrees not to take actions to prevent employees of the foreign enterprise from lawfully exercising their right of association and their right to organize and bargain collectively. The investor further agrees to observe applicable laws relating to a minimum age for employment of children, acceptable conditions of work with respect to minimum wages, hours of work, and occupational health and safety, and not to use forced labor. The investor is not responsible under this paragraph for the actions of a foreign government.<sup>112</sup>

OPIC also holds public hearings to decide whether projects should continue to be supported<sup>113</sup> and to give an opportunity for interested members of the public to be heard.<sup>114</sup> OPIC hears complaints about projects through its Office of Accountability which is geared towards problem-solving and compliance review.<sup>115</sup>

Another important government organization in promoting the interests of US businesses abroad in the privatization context and beyond is the US Export-Import Bank, which fosters the international competitive advantage of US firms vis-à-vis foreign corporate nationals. The US Ex-Im Bank aims to ‘aid in financing and to facilitate exports of goods and services, imports, and the exchange of commodities and services’ abroad and ‘to contribute to the employment of United States workers.’ To do so, it has the powers of ‘authorizing loans, guarantees, insurance, and credits.’<sup>116</sup> Among other things, the Ex-Im Bank is to promote the interests of small US businesses.<sup>117</sup> At least one of the President’s five appointees to the Board of Directors must be ‘from among the small business community and shall represent the interests of small business’<sup>118</sup> and at least three members from this community must sit on the Advisory Committee.<sup>119</sup> Similarly, OPIC offers special treatment to small businesses.<sup>120</sup>

The Ex-Im Bank too predates the recent wave of privatization. It dates back to 1934 with the Roosevelt Administration’s Depression Era efforts to encourage ties with the Soviet Union and also to address the failure of the banking sector to finance exports.<sup>121</sup> It is the result of the merger of two banks: one directed at Soviet trade and the other at Cuba. The Bank quickly broadened its scope.<sup>122</sup> Then-President Franklin D. Roosevelt underlined its function ‘to aid in financing and to facilitate exports and imports and the

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<sup>112</sup> 22 USC 2191a(a)(1).

<sup>113</sup> 22 USC 2191a(c)(1).

<sup>114</sup> 22 USC 2191a(c)(2).

<sup>115</sup> Office of Accountability, Overseas Private Investment Corporation (brochure available at [www.opic.gov](http://www.opic.gov)).

<sup>116</sup> 12 USC 635(a)(1). On the protection of workers’ rights through international trade agreements *see* Benjamin N Davis ‘Note and Comment: The Effects of Worker Rights Protections in United States Trade Laws: A Case Study of El Salvador’ 10 *American University Journal of International Law and Policy* 1167 (1995).

<sup>117</sup> 12 USC 635(a)(2)(E).

<sup>118</sup> 12 USC 635a(c)(8)(B).

<sup>119</sup> 12 USC 635a(d)(2)(A).

<sup>120</sup> 22 USC 2191(3)(c)(1).

<sup>121</sup> William H. Becker and William M. McClenahan, Jr., *The Market, the State, and the Export-Import Bank of the United States 1934-2000* (Cambridge University Press Cambridge 2003) 3.

<sup>122</sup> Becker and McClenahan 10-17.

exchange of commodities between the United States and other Nations or the agencies or nationals thereof”.<sup>123</sup> William H. Becker and William M. McClenahan, Jr. tell us that ‘[o]rganized American exporter and banker groups applauded the founding of the’,<sup>124</sup> Bank. Many countries have similar banks, some of which predate the Ex-Im Bank like banks in Germany, Great Britain, France, Italy and Japan.<sup>125</sup> These banks both compete with one another and also coordinate their subsidies for multinational consortium-based commercial endeavors.<sup>126</sup> Although coordination is an increasing reality, it is important not to lose sight of the fact that the background norm is competition-based. As David M. Trubek, Yves Dezalay, Ruth Buchanan and John R. Davis argue, the broader playing field of globalization is characterized by ‘competition between national fields seeking dominance and fledging “extra-national” regimes (both public and private) with varying degrees of authority and effectiveness.’<sup>127</sup> The Ex-Im Bank coordinates its activities also with private banks.<sup>128</sup>

Many export credit agencies belong to the International Union of Credit and Investment Insurers, the Berne Union, which dates back to 1934 and includes both governments and companies.<sup>129</sup> The Organization for Economic Co-operation and Development also has a division devoted to the work of national export credit agencies.<sup>130</sup> Export credit agencies are allowed some freedom under the World Trade Organization regime,<sup>131</sup> and have been subject to their own informal ‘gentlemen’s agreement’ since 1978.<sup>132</sup> At times, their activities have come under scrutiny from non-governmental organizations, many of whom have formulated the Jakarta Declaration for Reform of Official Export Credit and Investment Insurance Agencies.<sup>133</sup>

The US does not just act through national agencies. More broadly, through inter-governmental organizations, the government promotes the interests of its private corporate nationals. This happens in many ways. For instance, regional and international

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<sup>123</sup> Franklin D Roosevelt ‘Executive Order 6581 Creating the Export-Import Bank of Washington’ (2/2/34) available at <http://www.presidency.ucsb.edu/ws/print.php?pid=14772>.

<sup>124</sup> Becker and McClenahan 17.

<sup>125</sup> Becker and McClenahan 18-19.

<sup>126</sup> Similarly, OPIC can work with foreign governments and multilateral institutions. 22 USC 2194(a)(2).

<sup>127</sup> David M Trubek, Yves Dezalay, Ruth Buchanan and John R Davis ‘Global Restructuring and the Law: Studies of the Internationalization of National Legal Fields and the Creation of Transnational Legal Arenas’ 44 Case Western Reserve Law Review 411, 407 (1994).

<sup>128</sup> Becker and McClenahan 6.

<sup>129</sup> On the Berne Union see [www.berneunion.org.uk](http://www.berneunion.org.uk).

<sup>130</sup> The Export Credit Division see [http://www.oecd.org/departement/0,2688,en\\_2649\\_34169\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/departement/0,2688,en_2649_34169_1_1_1_1_1,00.html).

<sup>131</sup> World Trade Organization ‘Agreement on Subsidies and Countervailing Measures’ 33 ILM 1144 (4/15/94) Article 3 and Annex I(j) and (k). See also ‘Brazil – Export Financing Programme for Aircraft: Report of the Panel’ WT/DS46/R (14 April 1999) (dispute between Canada and Brazil); Janet Koven Levit ‘The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Credits’ 45 Harvard International Law Journal 65, 120-121 (Winter 2004); Janet Koven Levit ‘A Bottom-Up Approach to International Law-Making: The Tale of Three Trade Finance Instruments’ 30 Yale Journal of International Law 125, 144-173 (2005).

<sup>132</sup> The agreement is the ‘Arrangement on Guidelines for Officially Supported Export Credits.’ Levit (Winter 2004) 66; Levit (2005) 128.

<sup>133</sup> [www.eca-watch.org/goals/jakartadec.html](http://www.eca-watch.org/goals/jakartadec.html).

development banks offer subsidies to corporations. Likewise the IMF, through its conditionalities, advances policies that promote the entrance of such companies into developing country markets. Also, US government representatives to multilateral development banks are, for example, to report potential procurement opportunities to the Secretary of Treasury, Secretary of State and Secretary of Commerce so as to encourage US companies to take advantage of these international inducements.<sup>134</sup> The US government joins these organizations in part to promote the interests of their corporate nationals, as do other governments. Through what Boaventura de Sousa Santos terms ‘sovereignty-pooling’,<sup>135</sup> they coordinate and collectivize their interests.

In 1988 the World Bank Group established the Multilateral Investment Guarantee Agency (MIGA). The idea of MIGA is traceable to decades earlier;<sup>136</sup> however, governments were skeptical about whether the interests that they advanced through their domestic insurance agencies like OPIC would be preserved through the introduction of such an inter-governmental organization.<sup>137</sup> For example, they feared competition between their own agencies and MIGA.<sup>138</sup> Its aim is ‘to encourage the flow of investments for productive purposes among member countries, and in particular to develop member countries’. To do so, it offers the following inducements for companies:

- (a) issue guarantees, including coinsurance and reinsurance, against non-commercial risks in respect of investments in a member country which flow from other member countries;
- (b) carry out appropriate complementary activities to promote the flow of investments to and among developing member countries; and
- (c) exercise such other incidental powers as shall be necessary or desirable in the furtherance of its objective.<sup>139</sup>

MIGA insures against a host of risks, including: currency transfer, expropriation and similar measures, breach of contract and also war and civil disturbance.<sup>140</sup>

The US sought to influence the early activities of MIGA so as to conform to a series of commerce- and human rights-related goals. Since MIGA is essentially an organization devoted to subsidizing corporate activity, these goals should be understood as shaping the nature of the interface among governmental and inter-governmental action and the promotion of US corporate enterprise. Specifically, the US sought to discourage the issuing of guarantees on ‘proposed investments that would –

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<sup>134</sup> 22 USC 262s-1.

<sup>135</sup> Boaventura de Sousa Santos, *Towards a New Legal Common Sense* (Cambridge University Press Cambridge 2002) 96.

<sup>136</sup> On the history of MIGA see Ibrahim F I Shihata, *MIGA and Foreign Investment: Origins, Operations, Policies and Basic Documents of the Multilateral Investment Guarantee Agency* (Martinus Nijhoff Dordrecht 1988) 29-99.

<sup>137</sup> Foreign Affairs Division 32.

<sup>138</sup> Early feasibility studies of MIGA situated MIGA within the context of national programs see Shihata 49-50.

<sup>139</sup> MIGA Convention Chapter 1, Article 2.

<sup>140</sup> MIGA Convention Chapter 3, Article 11.

- (1) be in any country which has not taken or is not taking steps to afford internationally recognized workers' rights to workers in that country;
- (2) be subject to trade-distorting performance requirements imposed by the host state that are likely to result in a significant net reduction in –
  - (A) employment in the United States or other member countries; or
  - (B) other trade benefits likely to accrue to the United States or other member countries from the investment' or
- (3) increase a country's productive capacity in an industry already facing worldwide capacity for the same, similar or competing product, and cause substantial injury to producers in another member country.<sup>141</sup>

MIGA is an institution established to shift international assistance towards the privatization model and coincides with a move away from financing state-based projects within the World Bank.

The International Finance Corporation (IFC) is another World Bank Group institution devoted to promoting corporate activity in developing countries through which the US uses corporations as foreign policy organs. It was established in 1956. The IFC's overall aim 'is to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas.'<sup>142</sup> It does so by working with private companies in a number of ways:

- (i) in association with private investors, assist in financing the establishment, improvement and expansion of productive private enterprises which would contribute to the development of its member countries by making investments, without guarantee of repayment by the member government concerned, in cases where sufficient private capital is not available on reasonable terms;
- (ii) seek to bring together investment opportunities, domestic and foreign private capital, and experienced management; and
- (iii) seek to stimulate, and to help create conditions conducive to, the flow of private capital, domestic and foreign, into productive investment in member countries<sup>143</sup>

Importantly, unlike other World Bank Group institutions, MIGA and the IFC directly aim to promote private investment in developing countries. Activities by the World Bank such as the New Comprehensive Development Framework may reinforce private sector investment; however, they do so indirectly.<sup>144</sup>

At times, US government involvement in overseas commercial activity through inter-governmental organizations has been tied to environmental and human rights

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<sup>141</sup> 22 USC 290k-2.

<sup>142</sup> IFC Articles of Agreement Article 1.

<sup>143</sup> IFC Articles of Agreement Article 1(i)-(iii).

<sup>144</sup> On this Framework see Lan Cao 'An Evaluation of the World Bank Group's New Comprehensive Development Framework' in *Privatising Development* 27.

conditions—the result of effective environmental and human rights campaigning. For example, MIGA and the IFC must incorporate such conditions into their subsidy practices. The IFC has guidelines in this regard which have become the industry standard. Claims against IFC and MIGA projects may be brought to the Compliance Advisor Ombudsman within the World Bank Group.<sup>145</sup>

More broadly, ‘The United States Government, in connection with its voice and vote . . . shall advance the cause of human rights’.<sup>146</sup> This requirement covers US participation in several inter-governmental institutions: the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, Inter-American Development Bank, the International Bank for Reconstruction and Development, the International Development Association, the IFC and the International Monetary Fund.<sup>147</sup> The Secretary of the Treasury is responsible for reporting on all loans considered by the international financial institutions ‘to the Chairman and ranking minority member of the Committee on Banking, Finance and Urban Affairs of the House of Representatives, or the designees of such Chairman and ranking minority member, and the Chairman and ranking minority member of the Committee on Foreign Relations of the Senate’.<sup>148</sup>

Further, the Pelosi Amendment of the International Development Finance Act 1989 aims to tie US involvement in projects through multilateral development banks to respect for the ‘environment, public health, and the status of indigenous peoples in developing countries’.<sup>149</sup> The Pelosi Amendment addresses the failure of multilateral banks ‘in some cases to provide adequate safeguards for the environment, public health, natural resources, and indigenous peoples’.<sup>150</sup> The safeguards have an economic rationale, ‘sustainable resource use and consultation with affective communities’ should be used ‘where costs could be reduced’.<sup>151</sup> Importantly, for our purposes, the Pelosi Amendment was amended in 1997 to make clear that it applied to loans made by the international banks to private companies,<sup>152</sup> clarifying also that International Finance Corporation-financed private projects would be included.<sup>153</sup>

These regulations dictating the nature and form of US government involvement in overseas private commercial activity must be judged not only by their pronouncement. They derive their meaning ultimately from social practice. Studies of such practices are few. Further, in at least one instance, the spirit of the Pelosi Amendment has been

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<sup>145</sup> For an argument that ‘third parties’ should be able to bring claims against privatized international projects generally see Carl S Bjerre ‘Project Finance and Consent’ in *Privatising Development* 221. Related, see the denial of standing by the International Centre for the Settlement of Investment Disputes to non-governmental organizations in the context of a privatized Bolivian water project. *Aguas del Tunari SA v. Republic of Bolivia* (Case No. ARB/02/3) 15-18.

<sup>146</sup> 22 USC 262d(a).

<sup>147</sup> 22 USC 262d(a).

<sup>148</sup> 22 USC 262d(c)(1).

<sup>149</sup> 22 USC 262m-7(a)(2)(A)- amended by Public Law 105-118, Section 560(b)(2).

<sup>150</sup> 22 USC 262m-7- amended by Public Law 105-118, Section 560(b)(3).

<sup>151</sup> 22 USC 262m-7.

<sup>152</sup> Public Law 105-118 §560(b)(1).

<sup>153</sup> Public Law 105-117 §560(b)(3).

undermined in a project financed by the Inter-American Development Bank. That project, the Camisea natural gas pipeline in Peru, was funded by the Bank despite human rights and environmental objections. These objections had initially been voiced in the context of an application for loans within the US Export-Import Bank which denied funding. Most commentators attributed the declination to environmental problems with the project. At the same time, Philip Merrill, the Chairman of the Ex-Im Bank, simply referenced 'situation specific' concerns, making clear that the Bank still is 'interest[ed] in financing U.S. exports for energy projects throughout the world.'<sup>154</sup> Despite the inability to garner support from the Ex-Im Bank, when the project sought financing through the Inter-American Development Bank such concerns resulted in an abstention by the US board member to the Bank, rather than to a US veto which would have been in line with the Ex-Im Bank denial and perhaps the spirit of the Pelosi Amendment.<sup>155</sup> Nonetheless, it is important to stress again that our knowledge of the use of corporations as foreign policy organs is limited. Assessment are at this point mainly impressionistic. Further, the fact that governments and companies collaborate with one another should not itself be sole grounds for condemning the resultant public-private enterprise.

#### V. Where Do We Go From Here?

In 1995, US West finalized an agreement for the construction of the Fiber-Optic Link Around the Globe (FLAG).<sup>156</sup> This one-point-five billion US dollar project now runs a fiber optic cable from the United Kingdom to Japan. In doing so, it links up twenty-five political jurisdictions. While underwater telegraphic cables had been laid at the close of the nineteenth century, this project represented the first ever privately initiated and financed transnational communications link of this size and scale. FLAG forms part of the hard infrastructure of the emerging global information economy. Although privately initiated, FLAG was only as strong as the public guarantees of the twenty-five licensing authorities involved in legitimizing the project.

At conception, private actors stood to benefit financially from this undertaking. At the same time, governments were heavily involved in ensuring its success. Not only did each jurisdiction along the way have to grant valuable licenses to run cable through their sovereign territories, but also insurance was provided by the US Export-Import Bank. The licensing system provides private companies with the privilege of selling their products to consumers. These licenses thus represent a state cessation of public property to private actors. Unbeknownst to citizens of the constituent states, their governments had offered them up as consumers to private companies.

Regardless of whether FLAG is ultimately advantageous to citizens of the participant nations, its success depends upon the ongoing political acquiescence of each

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<sup>154</sup> 'News Release: Ex-Im Bank Declines Financing Request to Back Peru's Camisea Gas Development Project' (8/28/03) available at <http://www.exim.gov/pressrelease.cfm/49A54DF9-A3ED-883F-0CB97EF3DB2F5423/>.

<sup>155</sup> On Camisea see Likosky (2006) Chapter Six.

<sup>156</sup> This section draws from Henry A Davis, *Project Finance: Practical Case Studies* (Euromoney Publications London 1996).

government and its population. To mitigate risk that a government would grant a license and then repeal it, the private companies sought insurance from the US government through its Ex-Im Bank, a provider here of ‘political risk insurance’. As licensing approval of many states, under customary practice, involved not responding to faxed applications to licensing authorities, such risk was palpable. The feared volatility of this endeavor was acknowledged by A. Jay Baldwin, the Vice President and Chief Financial Officer of FLAG, who, when asked about what the company would do if a constituent country revoked its license, responded: ‘Let’s hope we never have to find out.’<sup>157</sup>

The fear expressed by Baldwin derived from the project’s reliance upon potentially democratically- or public interested-attenuated states. This may be a feature of some instances of market statism. The FLAG project has been chosen here to illustrate the volatility of free market statism rather than because the project itself necessitated a disaster for the publics involved. Although these publics may not have been appropriately internalized into the decision-making of the project, an evaluation of whether the project will produce public goods will have to wait for some time. In the meantime, however, it is clear that governments and companies have together pursued FLAG with the aim of ensuring its profitability. This goes for both the US Export-Import Bank and also for local governments. Whether the project was conceptualized and carried-out so as also to advance the public interest of the twenty-five countries and the US is not certain.

As Jaffe told us many years ago: ‘In these situations there is also the interest of the public, difficult to define and evaluate, and having no effective organization.’<sup>158</sup> Likewise, Paul Verkuil makes the point: ‘When government delegates public powers to private hands, as when it “privatizes” regulatory activity, the impact on the public interest is hard to measure.’<sup>159</sup> This difficulty is compounded in the realm of foreign affairs where multiple governments and publics are involved. At the same time, in the situations in which the principle/agency relationship between publics and governments appears attenuated and also when corporations appear not to serve the public good, we may perhaps be heartened by the fact that the transnational economic system itself presents many opportunities for strategic intervention. Control over governments and companies may be reasserted by the owners of these institutions. It is a matter of ‘pick[ing] out of this infinity of intersecting strands a useful point at which public pressure can be placed’, so as to ‘bring about . . . a better course of conduct.’<sup>160</sup> That is, for example, the FLAG project could be redirected at multiple points by commandeering the state machinery of any of the twenty-five licensing states or the US government’s Export-Import Bank. At the same time, the architects of free market statism often control multiple institutions and may subvert gains made in one institution through the strategic use of another.

In many areas, ‘extra-territoriality is largely accepted as a legitimate tool of a

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<sup>157</sup> *Quoted in Davis 178.*

<sup>158</sup> Jaffe 252.

<sup>159</sup> Verkuil 405.

<sup>160</sup> Felix S Cohen ‘Field Theory and Judicial Logic’ 59 *Yale Law Journal* 238, 252 (1949-1950)—Felix S. Cohen is here speaking about determining causation in a chain of events.

nation’.<sup>161</sup> Does globalization, as Eleanor M. Fox argues, pose too large of a challenge for our theories of extraterritoriality?<sup>162</sup> When, national public institutions take on a transnational reach, then it seems fair, depending upon their institutional configuration, to view them as global agencies.<sup>163</sup> As we have seen, the agencies of free market statism have both an entrepreneurial and regulatory aspect. There is a blurring of the regulator and the regulated as a single institution may serve a dual function—‘[a]s in the domestic setting, administrative action at the global level has both legislative and adjudicatory elements.’<sup>164</sup> For example, OPIC may advance insurance to facilitate private corporate activity while at the same time regulating how subsidized companies may behave. Within OPIC, the Office of Investment Policy might itself serve a dual function, while the Office of Compliance Review is entirely regulatory-oriented.

In addition, a government contract or loan agreement might include a clause that is tantamount to global administrative regulation. We see this in the worker rights boiler plate clauses included in many OPIC contracts. The effect of such clauses might extend abroad to the regulatory life of the host state. Related, in the Camisea case, the Inter-American Development Bank helped to create a national ombudsman to handle complaints whose purpose was wholly regulatory. Whether this ombudsman is a subsidiary institution of the Inter-American Bank or instead of the Peruvian government is not clear. Regardless, host state regulation might be imposed on national regulators from abroad—‘the laying down of conditions into a quasi-legislative act’ wherein ‘a command is conceived as if it were a contract.’<sup>165</sup> Does this mean that free market statism in its facilitative and regulatory functions is too much the product of powerful countries and companies? Certainly the foreign affairs institutional aspects of free market statism may ‘stem from northern and western initiatives’ and thus have to overcome ‘the challenge of intellectual and political bias.’<sup>166</sup> Does it matter though that local Peruvian human rights groups in part spearheaded the drive to create the national-level ombudsman? Was this ombudsman simply an institution aimed at asserting, modest at best, control over the foreign-facilitated public-private commercial regime that produced the Camisea project? What of powerful companies in developing countries which receive a public law boost either through the growing number of export credit agencies in such countries or even more directly through acts of state?

As indicated at the outset, in the field of foreign affairs, the institutions of free

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<sup>161</sup> Eleanor M Fox ‘Global Markets, National Law, and the Regulation of Business—A View from the Top’ in *Transnational Legal Processes* 135, 136.

<sup>162</sup> Fox 136.

<sup>163</sup> Benedict Kingsbury, Nico Krisch and Richard B Stewart speak of ‘national regulatory bodies operating with reference to an international intergovernmental regime’ as one category of global administrative agency. Here, domestic agencies ‘take decisions on issues of foreign or global concern.’ They thus break ‘down the domestic-international dichotomy’. Benedict Kingsbury, Nico Krisch and Richard B Stewart ‘The Emergence of Global Administrative Law’ 68 *Law and Contemporary Problems* 15, 17 and 21 and 23 (2005).

<sup>164</sup> Kingsbury, Krisch and Stewart 17. On the dual nature of US domestic agencies as contractors and regulators in the privatization context see Freeman 208.

<sup>165</sup> Sally Falk Moore ‘An International Legal Regime in the Context of Conditionality’ in *Transnational Legal Processes* 333, 351 and 336.

<sup>166</sup> Kingsbury, Krisch and Stewart 51.

market statism are legion. Assessments of the competencies of this constellation of global actors are still in their infancy. Nonetheless, discussions of multinational enterprise responsibility often overlook the national public law basis of private corporate action. *Lex mercatoria* is at its foundations public. Subsidy programs are but one means of exercising extraterritoriality. What are the formal and informal mechanisms for coordination among diverse national institutions, inter-governmental organizations, companies and others; that is, what are the ‘factors encouraging the development of common approaches, and to mechanisms of learning, borrowing, and cross-referencing, that are contributing to a degree of integration in the field’?<sup>167</sup> Perhaps these inter-locking institutions that make up the international dimensions of free market statism should be scrutinized and, as appropriate, their machinery redirected to serve the public good. Responsibilities for global administrative regulation might be channeled to existing institutions either individually or as groups. For now, however, a more modest prescription would be to canvass further the successes and failures of free market statism and also to build upon projects, academic and otherwise, that seek to develop public interest-grounded criteria to evaluate and direct government-industry enterprise taking place concurrently in more than one jurisdiction.

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<sup>167</sup> Kingsbury, Krisch and Stewart 15. *See also* Michael M Cernea ‘The “Ripple Effect” in Social Policy and its Political Content: A Debate on Social Standards in Public and Private Development Banks’ in *Privatising Development* 65.