Strengthening International Regulation Through "Transnational New Governance"

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Abstract:

A new kind of international regulatory system is emerging: “Transnational New Governance” (TNG). TNG is emerging spontaneously, largely out of dissatisfaction with the failure of international “Old Governance” (OG) – acting through treaties and intergovernmental organizations (IGOs) – to adequately regulate international business. NGOs, business firms and other actors, singly and in novel combinations, are creating a plethora of innovative institutions to apply transnational norms to business, especially on worker rights, environmental protection and human rights. These institutions are predominantly private, and operate through voluntary codes and standards: private transnational “soft law.”

We depict the range and diversity of the new institutions on the “Governance Triangle,” which locates regulatory schemes according to the roles played by different types of actors, private and public, in their governance. To analyze this complex system, we draw on the “New Governance” (NG) model of regulation, which has been developed and applied primarily in domestic settings; scholars have not fully recognized its potential for international regulation. We develop a model of TNG and use it to evaluate the emerging system. TNG provides many benefits of NG, and is particularly suitable for international regulation because it is less demanding of states and IGOs than mandatory OG. However, TNG requires states and IGOs to act more subtly as orchestrators of the system, which currently suffers from a significant orchestration deficit. By expanding “facilitative” orchestration of the new institutions, states and IGOs could strengthen the entire international regulatory system and better achieve their own regulatory goals. Of course, TNG is no panacea, and we discuss its limitations.

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I. Introduction

Regulation of transnational business has become a dynamic area of international governance.\(^1\) Non-governmental organizations (NGOs) have demanded stricter regulation of international firms,\(^2\) especially with regard to worker rights, human rights and the environment – the areas we address in this article.\(^3\) Revelations of politically salient problems such as sweatshops and child labor, and high-profile crises such as the Bhopal disaster and Exxon Valdez oil spill,\(^4\) have stimulated significant public support for these demands.\(^5\) Yet business has for the most part vigorously resisted mandatory (and even less than mandatory\(^6\)) regulation in

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1 The developments analyzed here have occurred over the past two decades. They build on a smaller wave of international regulatory action in the 1970s, spurred by early concern over the power of multinational enterprises.

2 The tactics by which NGOs influence state and international decision makers are the subject of a substantial literature. See, e.g., The Third Force: The Rise of Transnational Civil Society (Ann Florini, ed. 2000); Margaret E. Keck & Kathryn Sikkink, Activists Beyond Borders: Transnational Advocacy Networks in International Politics (1998); Ronnie Lipschutz, Reconstructing World Politics: The Emergence of Global Civil Society, 21 Millennium: Journal of International Studies 389 (1992); Richard Price, Transnational Civil Society and Advocacy in World Politics, 55 World Pol. 579 (2003); Thomas Risse, Transnational Actors and World Politics, in Handbook of International Relations 255 (Walter Carlsnaes, Thomas Risse & Beth A. Simmons, eds. 2002). In the areas discussed here, NGOs mounted “social movement campaigns” to create public and stakeholder pressure, often around corporate scandals. Erika N. Sasser, Aseem Prakash, Benjamin Cashore & Graeme Auld, Direct Targeting as an NGO Political Strategy: Examining Private Authority Regimes in the Forest Sector, 8 Bus. & Pol. #3 1 (2006), focuses on market- and media-based campaigns that targeted specific firms (e.g., Nike); other campaigns targeted industries (e.g., chemicals, tropical timber) and “downstream” firms (e.g., retailers that could impose standards on suppliers). Id. at 3. Tim Bartley, Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions, 113 Am. J. Sociol. 297, [4], [22] (2007).


4 For discussion of “demonstration effects” in stimulating demand for regulation, see In Whose Benefit? Explaining Regulatory Change in Global Politics (Walter Mattli & Ngaire Woods, eds. forthcoming 2009).

5 Some national and international officials have supported modest transnational regulation to soften the harsh effects of globalization and preserve it against critics.

these areas, even as an increasing number of mainly large firms\(^7\) have responded to public 
demand, reputational concerns and the possibility of “win-win” innovations\(^8\) to embrace 
corporate social responsibility (CSR)\(^9\) and varying degrees of self-regulation.\(^10\) In addition, the 
evolving structures of global production – multinational enterprises and global supply chains\(^11\) – 
pose major challenges for conventional “regulation:” action by the state – or at the international 
level by groups of states, acting primarily through treaty-based intergovernmental organizations 
(IGOs) – to control the conduct of economic actors through mandatory legal rules with 
monitoring and coercive enforcement.\(^12\) As these opposing forces have collided, actors on all 
sides have established a plethora of innovative institutions,\(^13\) with the expressed goal of 
controlling global production\(^14\) through transnational norms\(^15\) that apply directly to firms.\(^16\)

\(^7\) In a survey of the Fortune Global 500 by the UN Secretary-General’s Special Representative on Business and Human Rights, virtually all respondents indicated that they had human rights policies or management practices in place. Ruggie, supra, at 836.

\(^8\) In “win-win” situations, a firm’s responses to social or environmental problems also increase its profits; examples include less frequent laundering by hotels and industrial energy efficiency. See Aseem Prakash & Matthew Potoski, The Voluntary Environmentalists: Green Clubs, ISO 14001, and Voluntary Regulations 48 (2006).

\(^9\) Vogel distinguishes “new” CSR, in which firms address social and environmental externalities of their business practices with an eye to increasing profits, from “old” CSR, involving philanthropy largely unrelated to core operations and motivated by corporate citizenship. David Vogel, The Market for Virtue: The Potential and Limits of Corporate Social Responsibility 17-24 (2005).

\(^10\) Some firms have tried to avert mandatory regulation by instituting weak, largely symbolic codes of conduct, some of which have been exposed as shams. Bartley, supra, at [22]. Business does support regulation that facilitates its activities – e.g., the trade-liberalizing rules of the WTO and NAFTA – and individual firms support regulations that benefit them economically.

\(^11\) “[S]eventy-seven thousand transnational firms span the global economy today, with some 770,000 subsidiaries and millions of suppliers--Wal-Mart alone is reported to have more than sixty thousand suppliers.” Ruggie, supra, at 823.

\(^12\) Julia Black, Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World, 54 Current Legal Problems 103, 128-40 (2001), reviews other definitions of “regulation.”

\(^13\) Many institutions were newly created with the goal of adopting regulatory standards; where appropriate institutions (e.g., NGOs, industry associations) already existed, only the standards were newly created.

\(^14\) Most of the new arrangements are primarily concerned with transnational business. However, other actors including universities, landowners, national government agencies and cities adhere to certain schemes.

\(^15\) Stepan Wood, Voluntary Environmental Codes and Sustainability, in Environmental Law for
The new regulatory initiatives have two particularly striking features. The first is the central role of private actors, operating singly and through novel collaborations, and the correspondingly modest and largely indirect role of “the state.” Unlike traditional inter-state treaties and IGOs, and unlike more recent transgovernmental networks of state officials, most of these arrangements are governed by (a) firms and industry groups whose own practices are the targets of regulation; (b) NGOs and other civil society groups, including labor unions and socially responsible investors; and (c) combinations of actors from these two categories. States and IGOs support and even participate in some largely private schemes, yet the state is not central to their governance or operations. Other arrangements resemble public-private partnerships, with states or IGOs collaborating on a more or less equal footing with private actors. Finally, a few IGOs -- such as the United Nations, through its Global Compact, and the Organization for Economic Cooperation and Development (OECD), through its Guidelines for Multinational Enterprises -- have adopted norms for business conduct that aim to influence firms directly (rather than indirectly, through rules governing states). Many of these initiatives also

Sustainability (Benjamin J. Richardson & Stepan Wood, eds., (2006) at 229, 230, notes that the new institutions and rules are “normative” in two senses: they both prescribe and standardize behavior.


17 Referring to sustainable forestry schemes, Benjamin Cashore, Graeme Auld & Deanna Newsom, Governing Through Markets: Forest Certification and the Emergence of Non-State Authority 4 (2004) calls these private arrangements “one of the most innovative and startling institutional designs of the past 50 years.”

18 In the transnational context, we use the abstract concept of “the state” to refer to actions both by individual states and by groups of states acting in ad hoc fashion or through IGOs.


20 Anne-Marie Slaughter, A New World Order (2004).

21 We use “NGOs” to refer broadly to all nonstate actors except IGOs and firms that are the targets of regulation.

22 Private schemes thus reflect a “cosmopolitan” view of global governance, not limited to inter-state arrangements. See Kingsbury, Krisch & Stewart, supra, at 43.

23 Meidinger refers to such arrangements as “supragovernmental,” because they are established by private actors with governments playing only minor roles. Errol Meidinger, Competitive Supragovernmental Regulation: How Could It Be Democratic?, 8 Chi. J. Int’l L. 513, 516 (2008).

24 The draft Norms on the Responsibilities of Transnational Corporations, supra note, apply directly to business firms; the failed UN Draft Code of Conduct for Transnational Corporations would also have done so.
engage private actors in the regulatory process. Thus even traditional international regulatory modalities have begun to take new forms.

The second striking feature is the voluntary rather than state-mandated nature of the new regulatory norms. It is natural for private institutions formed by firms and/or NGOs to adopt voluntary norms, as they lack the authority to promulgate binding law. But even the new public-private arrangements and IGO initiatives such as the UN Global Compact operate through “soft law,” rather than the traditional “hard law” of treaties.

We refer to these novel private, public-private and IGO initiatives as “regulatory standard-setting” (RSS). We define RSS as the promulgation and implementation of non-legally binding, voluntary standards of conduct for business, in situations that reflect Prisoners’ Dilemma (PD) externality incentives (the normal realm of “regulation”), rather than Coordination network externality incentives (the realm of voluntary technical “standards” such as those set by ISO). RSS potentially involves all the functions of administrative agencies in domestic regulatory systems: rule-making, rule promotion and implementation, monitoring, adjudication of compliance, and the imposition of sanctions.

25 These norms are “voluntary” in the sense that they are not legally required; however, firms often adhere because of coercive pressure from NGOs, customer requirements, industry association rules and other forces that render them mandatory in practice.

26 Other scholars characterize these developments solely in terms of their private character. See, e.g., Bartley, supra, at [1] (“transnational private regulation”); Cashore, Auld & Newsom, supra (“private governance systems” and “non-state market driven governance systems”); Private Authority and International Affairs (A. Claire Cutler, Virginia Hafler & Tony Porter, eds. 1999), Rodney Bruce Hall & Thomas Biersteker, The Emergence of Private Authority in Global Governance (2002), and Cashore, Auld & Newsom, supra (“private authority” regimes). We also address private institutions but argue that there is (and should be) a role for the state in these schemes. For these positive and normative reasons, we use the broader term RSS, which encompasses more than purely “private” activity.

27 Kenneth W. Abbott and Duncan Snidal, International “Standards” and International Governance, 8 J. Eur. Pub. Pol. 345 (2001), distinguishes the broad categories of PD versus Coordination externalities. A key difference is that incentives to participate in a (regulatory) scheme increase with the number of other participants for Coordination but not for PD problems. Sean D. Murphy, Taking Multinational Corporate Codes of Conduct to the Next Level, 43 Colum. J. Transnat’l L. 389 (2005), refers to these categories as “public welfare” and “private transactional.”

28 Margaret M. Blair, Cynthia A. Williams & Li-Wen Lin, The Roles of Standardization, Certification, and Assurance Services in Global Commerce, draft paper available at http://ssrn.com/abstract=1120503, at 15-17, argues that regulatory standards, like technical standards, reduce the transactions costs of market interactions. ISO is currently considering social responsibility guidelines, tentatively designated ISO 26000.

schemes is creating a new kind of transnational regulatory system, one that demands a broader view of “regulation” and a more nuanced view of the state as regulator.  

To gain analytical leverage on this complex emerging system, we look to the model of regulation known as New Governance (NG), which was developed to characterize a diverse range of innovative domestic regulatory practices. The diversity of practices encompassed within NG makes it difficult to define precisely – indeed it is often defined by contrast to traditional forms of regulation. To focus our discussion, we identify four central elements of NG, each reflecting a modification of the state’s traditional role. In NG, the state:

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30 Some definitions of “regulation” attempt to encompass such developments. For example, Errol Meidinger, Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems, in Law and Legalization in Emerging Transnational Relations (Christian Brutsch & Dirk Lehmkuhl, eds. 2007), at 2, analyzing voluntary schemes, defines “regulation” as “a purposive, organized and sustained effort to establish a general and consistent order in a field of human activity.” It “typically centers on rules defined in terms of rights and duties, with differentiated official roles and normative justifications … characterized by a reliance on credentialed experts.” Similarly, Julia Black, Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation, 2003 Pub. L. (Spring) 63, 65 (2003), defines “regulation” as “the sustained and focused attempt to alter the behavior of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, and which may involve mechanisms of standard-setting, information-gathering and behavior-modification.” Even more broadly, Wood defines “regulation” as “all calculated efforts at social control, whether undertaken by state agents or not.” Wood, Sustainability, supra, at 229.

31 For discussions of NG from a public administration perspective, see The Tools of Government: A Guide to the New Governance (Lester M. Salamon ed., 2001). NG is related to other recent developments in regulation. One is the growing use of non-traditional regulatory instruments. See, e.g., Neil Gunningham & Darren Sinclair, Regulatory Pluralism: Designing Policy Mixes for Environmental Protection, 21 Law & Pol’y 49 (1999); New Instruments for Environmental Policy in the EU (Jonathan Golub, ed. 1998). In environmental regulation, for example, states increasingly rely on economic instruments such as taxes and charges, deposit/refund schemes, and tradable emissions permits. Even closer to NG are “suasive” instruments such as ecolabels and ecoaudits. Jonathan Golub, New Instruments for Environmental Policy in the EU: Introduction and Overview, in Golub, supra, at 5. These approaches are “a response to the most influential critique of traditional regulation, which holds that it is needlessly inefficient, costing more than is necessary to achieve a given level of social benefits.” Errol Meidinger, Forest Certification as Environmental Law-Making by Global Civil Society, in Social and Political Dimensions of Forest Certification (Errol Meidinger, Chris Elliott & Gerhard Oesten, eds. 2002), at 293, 304. Market instruments can also lead to inefficiencies, e.g., if property rights are inadequate. Prakash & Potoski, supra, at 12-14.


Many practices seen as part of NG, such as government-business negotiations over rules, have in fact been used for years; NG represents a modification and intensification of traditional approaches. See Wood, Sustainability, supra, at 236.

32 Black, supra, at 105; Grainne de Burca & Joanne Scott, Introduction: New Governance, Law and Constitutionalism, in Law and New Governance in the EU and the US (Grainne de Burca & Joanne Scott, eds. 2006)
1. incorporates a *decentralized* range of actors and institutions, public and private, into the regulatory system, for example by negotiating standards with regulatory targets, encouraging and supervising self-regulation, or sponsoring voluntary environmental management systems;

2. relies on this range of actors for regulatory *expertise*;

3. modifies its regulatory responsibilities to emphasize *orchestration* \(^{34}\) of diverse public and private actors and institutions rather than direct promulgation and enforcement of rules; and

4. utilizes “*soft law*” to complement or substitute for mandatory “*hard law*.”

The NG model was developed and is still predominantly applied in domestic contexts. NG approaches such as government-industry pollution control agreements have been widely adopted in industrialized countries. Braithwaite argues that NG may be even more valuable for developing countries that lack essential capacities for traditional regulation. \(^{35}\) To date, however, neither scholars nor public officials have fully recognized the potential of NG for the international system – what we label “transnational new governance” (TNG). NG cannot be uncritically transferred to the very different circumstances confronting the international system, where the role of the state is even more attenuated, but it does provide key insights for improving international regulation through TNG.

In this article we develop a model of TNG to analyze the emerging patterns of RSS and its potential for improving international regulation. We advance both positive and normative arguments. Positively, we argue that the expanding array of RSS schemes is developing into a system of TNG for business: as in the NG model, these schemes form a decentralized but

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**Notes:**


33 Orly Lobel, The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought, 89 Minn. L. Rev. 262 (2004) synthesizes the literature on NG and related approaches to regulation and identifies eight “organizing principles.”

34 We draw the term “orchestration” from, supra, at 320.

35 John Braithwaite, Responsive Regulation and Developing Economies, 34 World Development 884 (2006). NG is undermined in developing countries by weak markets and civil society, but Braithwaite still finds it more workable than OG. Id. at 886.
increasingly dense and interlinked\textsuperscript{36} constellation of private and public-private rule-making arrangements, drawing on many sources of expertise and relying on soft law, which surround and complement traditional state-based regulatory structures. We also argue positively that states – and especially IGOs – have incentives to promote TNG as the best means of achieving their regulatory objectives. Normatively, we argue that states and IGOs should promote TNG because it has significant potential to ameliorate the persistent regulatory inadequacies of international “old governance” (OG), which created the space for RSS to develop.\textsuperscript{37} Whether TNG can fulfill its potential, however, depends upon the willingness and ability of states and IGOs to provide the necessary orchestration and support.

In theory and in domestic contexts, NG is a tool \textit{deployed and orchestrated by governments}; it requires significant state capacity.\textsuperscript{38} Most transnational RSS schemes, in contrast, have been created from the bottom up by societal actors,\textsuperscript{39} often in response to perceived \textit{failures of state action};\textsuperscript{40} they are private institutions operating largely free of state orchestration or support.\textsuperscript{41} Absent a global “state” to manage TNG, RSS schemes must compete for authority\textsuperscript{42} from target

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\textsuperscript{36} On emerging linkages among schemes in the system, see Meidinger, Beyond Westphalia, supra, at [9-11].
\textsuperscript{38} See Ian Ayres & John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate 4 (1992) (public regulators should “promote private market governance through enlightened delegations of regulatory functions”); Gunningham & Sinclair, supra, at 49-50 (viewing regulatory instruments as tools for policy-makers); Cashore, Auld & Newsom, supra, at 29 (private regulation literature focuses on institutions selected and empowered by state).
\textsuperscript{39} Black, Enrolling, supra, analyzes modern regulation as a process of “enrolling” those actors best able to contribute to the regulatory project; she recognizes, however, that in a decentralized regulatory system neither the state nor any other actor can control the enrolling process.
\textsuperscript{40} Some state actions have encouraged RSS. Most significantly, WTO rules have been seen as limiting the ability of governments to impose standards on foreign production processes, as opposed to characteristics of imported goods; this has provided an incentive for the creation of private standards, less constrained by WTO rules. Aseem Prakash & Matthew Potoski, Racing to the Bottom? Trade, Environmental Governance, and ISO 14001, 50 Am. J. Pol. Sci. 350, 359 (2006).
\textsuperscript{41} No scheme is entirely private, as its participants and the institution itself are legal entities operating under legal constraints.
\textsuperscript{42} On the importance for RSS schemes of obtaining authority from audiences connected to relevant supply chains, see Steven Bernstein & Benjamin Cashore, Nonstate Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?, in Kirton & Trebilcock, Hard Choice, Soft Law, at 33, 36.
\end{flushright}
firms and from public audiences, including consumers, NGOs, “downstream” firms and socially responsible investors, which can create incentives for firms to comply with RSS norms. These processes are weaker and more uncertain than state action. As a result, TNG falls short of the NG ideal: TNG is not and may never be as effective as NG within advanced states.

Yet states and IGOs can play substantial if non-traditional roles in TNG, enhancing its effectiveness. We argue that states and IGOs can (positively) and should (normatively) more actively support and steer RSS schemes, embracing them as valuable components of the international regulatory system. Although states and IGOs can draw on fewer and less powerful techniques of orchestration than are available domestically, relatively modest actions can significantly enhance the effectiveness, legitimacy and global public interest orientation of RSS. Nonetheless, our expectations remain modest. The political weaknesses that undercut international OG also constrain TNG, and their extent is massive: TNG can do no more than ameliorate the problems of international regulation in certain areas.

The article proceeds as follows. Section II introduces the Governance Triangle, a heuristic device that depicts the multiplicity and diversity of RSS schemes in terms of participation by three main actor groups: States, Firms and NGOs. This array of RSS schemes constitutes the emerging system of TNG and is the empirical basis for our analysis. Section III develops basic analytic building blocks, contrasting the “ideal type” of NG to that of OG – with both framed at the domestic level. Unlike OG, NG emphasizes state orchestration of decentralized actors, engages dispersed expertise, and relies on soft law. Section IV analyzes how these two ideal types have been transferred to the international level: OG through IGOs and unilateral state actions, NG through the RSS schemes on the Triangle. TNG is even more decentralized and

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43 Prakash & Potoski, Voluntary Environmentalists, supra, at 2-3, characterizes RSS schemes as “clubs” of participating firms that provide members with private benefits – primarily superior reputations and public goodwill – and simultaneously provide NGOs, consumers and other audiences a low-cost way to identify “good” firms.

44 As discussed further below, these two “legitimacy communities,” firms and public audiences, are likely to have quite different criteria for granting authority, such that a gain of legitimacy with one may reduce the authority granted by another. Black, Enrolling, supra, at 10.

45 Cashore, Auld & Newsom, supra, at 28 presents a valuable typology of governance modes, placing most private RSS schemes – typified by forestry schemes – in the “non-state market driven” category, in which authority is derived from market audiences. In terms of this typology, we argue for greater support and involvement by states and IGOs, which would move such schemes out of the pure “non-state” category and toward their next category, “shared public-private governance.” However, they define that category to include only schemes whose authority is derived from government; we would not move private schemes that far.
suffers a severe “orchestration deficit” compared to the NG ideal type. Section V evaluates the strengths and weaknesses of TNG in light of this analysis. Section VI analyzes how the orchestration deficit that weakens TNG might be overcome, especially through “facilitative orchestration,” a more practical option than the “directive orchestration” of domestic NG, especially for IGOs.

II. The Governance Triangle

We begin by introducing the major transnational RSS schemes that constitute the emerging TNG system. We present these diverse institutions systematically through the Governance Triangle in Figure 1; the schemes shown on the Triangle are identified in Table 1. Points on the Triangle locate individual RSS schemes according to their most salient and innovative feature: the relative “shares” that Firms, NGOs and States exercise in scheme governance. These three actor groups – the potential participants in regulatory governance – also define the Triangle as a whole; its surface thus represents the potential “regulatory space.” For convenience we divide that space into seven zones representing situations in which one (Zones 1-3), two (Zones 4-6) or three (Zone 7) actor groups dominate RSS governance.

FIGURE 1, TABLE 1 ABOUT HERE

The three actor groups should be understood as general, abstract categories. In particular, in this context the very broad “NGO” category covers all private actors except the firms that are the targets of regulation; it thus includes not only NGO advocacy groups but also labor unions.

46 The more important the role an actor plays, the closer a scheme is placed to that actor’s vertex. For a detailed description of the Triangle and placement criteria, see Kenneth W. Abbott and Duncan Snidal, The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State, forthcoming in Mattli & Woods, supra. Placement of schemes is a summary representation of complex arrangements and should be viewed as only approximate, because of measurement issues and, more importantly, because actor groups typically play different roles in different aspects of a scheme’s operations and at different points in its development. Cf. Cashore, Auld & Newsom, supra, at 220. For a similar conceptualization of the universe of voluntary environmental codes – presented as a social space defined by three partially overlapping fields representing “polluters,” “public authorities” and “third parties” – see Wood, Sustainability, supra, at 237. We include some OG schemes in Zone 1 for purposes of the ensuing discussion.

47 This resembles the “global administrative space” introduced in Kingsbury, Krisch & Stewart, supra, at 25-27.
nonprofits, student groups and other civil society organizations, as well as socially responsible investors, which might be considered “firms” in other contexts. The other two categories also contain significant variations. “Firms” includes multinationals selling branded consumer products, small firms selling intermediate goods, and many variants in between; “States” includes both developing and developed countries. Each group also includes both individual and collective actors, such as firms and industry associations or states and IGOs, which may have distinct characteristics. Differences like these may be crucial in addressing particular issues, but setting them aside provides a clearer depiction of the emerging TNG system as a whole.

A tour around the Governance Triangle reveals both the multiplicity and range of RSS schemes and the emergence of TNG. We begin with the single-actor institutions at the vertices of the Triangle. Zone 1 is dense with traditional national laws and regulations on labor, the environment and human rights; these are forms of domestic OG. We represent them by the Indian Employment of Children Act of 1938 (IECA++), with ++ indicating the many other national enactments that could be included. Zone 1 also includes many voluntary state programs reflecting NG. We represent these by the early German “Blue Angel” eco-label (ECO++) (1978) and the British Eco-Management and Audit Scheme (EMAS++) (1992), with ++ again indicating the many additional domestic NG initiatives.48 Note the absence in Zone 1 of treaties and other traditional forms of international regulation: we define the Triangle to include only schemes that regulate firms directly. Zone 1 does include a few IGO schemes that meet this criterion, such as the OECD Guidelines.

Zone 2 has recently become dense with Firm schemes.49 Two early initiatives – by The Body Shop (BS++, 1991) and Gap, Inc. (GAP++, 1992) – represent the subsequent cascade of firm self-regulation. The chemical industry’s Responsible Care program (RC, 1987), a response to Bhopal, is an early industry-wide self-regulatory scheme. Zone 3 contains a smaller number of NGO schemes, including the pioneering Sullivan Principles (1977), the CERES Principles (1989) and Rugmark (1994).

48 Wood, Sustainability, supra, documents the large number of such arrangements.
49 These typically include a code of conduct and more or less extensive procedures for implementation and monitoring; they may be linked to broader corporate structures and procedures for addressing business ethics and stakeholder concerns. See Amiram Gill, Corporate Governance as Social Responsibility: A Research Agenda, 26 Berkeley J. Int’l L. 452 (2008).
The remaining zones include RSS schemes governed jointly by two or more types of actors. Zone 6 schemes are joint efforts between NGOs and Firms. Examples include the Forest Stewardship Council (FSC), which promotes sustainable forestry, the Fairtrade Labeling Organization (FLO), an umbrella for national fair trade programs, and the US Fair Labor Association (FLA), which promotes worker rights in transnational apparel production. While many of these schemes entail some *indirect* state role (e.g., many use state-created standards), a few involve more substantial state participation. For example, the Global Reporting Initiative (GRI) is located relatively high in Zone 6 to reflect the support of the United Nations Environment Programme (UNEP). Zone 6 has arguably been the most vibrant area of RSS in recent years. By contrast, Zones 4 and 5, which contain hybrid public-private arrangements, are relatively unpopulated. Zone 4 contains the UN Global Compact (UNGC); the Equator Principles (EQP), a banking initiative encouraged by the International Finance Corporation and based on IFC environmental and social standards;\(^{50}\) and the ISO 14001 environmental management standard. Zone 5 is virtually empty; TCO Development is our only example. Finally, Zone 7 schemes share governance among all three actor groups. Examples include the ILO Declaration on Multinational Enterprises (ILO), where the tripartite structure of the ILO engages labor and business, and the Voluntary Principles on Security and Human Rights (VPSHR), drafted by national governments, energy firms and human rights NGOs.

While Figure 1 does not show every transnational RSS scheme, it clearly reveals their multiplicity and diversity.\(^{51}\) Some issues, such as child labor in apparel production, are addressed by schemes in multiple zones: OECD and IECA++ in Zone 1, GAP++ and WRAP in Zone 2, WRC and CCC in Zone 3, FLA, SAI and GRI in Zone 6, and ILO in Zone 7. The density of zones varies widely: Zones 1 and 2 are especially dense, with far more schemes than can be shown on Figure 1; Zones 3 and 6 are only moderately dense; while Zones 4, 5 and 7 are relatively sparse.

RSS is evolving toward a system of TNG. Prior to 1985, labor, environment and human rights regulation was almost exclusively the province of states and IGOs in Zone 1; mandatory

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\(^{51}\) See Abbott & Snidal, Governance Triangle, supra, on case selection issues.
law predominated, along with a growing number of domestic NG initiatives and a few IGO programs with NG elements, such as the 1976 OECD Guidelines. NGO efforts to address domestic and international regulatory gaps led to the proliferation of Zone 3 schemes in the mid-1980s, about the same time as the firm and industry codes in Zone 2. The latter rapidly accelerated until, by the late 1990s, it had become de rigueur for large multinational firms to adopt codes of conduct on social and environmental issues. The last fifteen years have seen the emergence of multi-actor schemes, initially firm-NGO collaborations, then more recently a few truly trilateral schemes. Thus, in addition to the generally increasing number of RSS schemes, we see a progression: first among different types of single-actor schemes, then into increasingly complex multi-actor schemes. This evolving pattern constitutes the emerging TNG system represented by the Triangle as a whole.52

III. NG and OG

We begin by systematizing NG and its analytical opposite, traditional regulation or OG, as ideal types. We also present the major arguments in favor of NG and highlight limitations of both ideal types.

OG and NG Ideal Types

Table 2 compares the four principal features of the two ideal types. These depictions are analytic “caricatures” in the good sense – designed to highlight the key properties of the two visions of regulation and the differences between them. Although actual schemes vary, these ideal analytic properties are nevertheless useful guides to the key differences between the two approaches.53 We discuss each feature in turn in this section.

52 Abbott and Snidal, Governance Triangle, supra, traces the evolution of RSS in more detail, and analyzes the strengths and weaknesses of different types of single- and multi-actor schemes based on the “competencies” of participating actors. See p. infra.

53 Black, Enrolling, supra, at 105 correctly calls the ideal type of traditional command and control regulation a “caricature” – but that’s the point!
OG | NG
---|---
State-centric | State orchestration
Centralized | Decentralized
Bureaucratic expertise | Dispersed expertise
Mandatory rules | Soft law

Table 2: OG and NG as ideal types

Role of the State

OG and NG are fundamentally distinguished by the differing roles of the state in regulation; other features largely flow from this distinction. In OG, the state is central. While actual regulatory systems are more complex, in ideal OG the state regulates from the top down, adopts legally binding regulations, often exercises “command and control” over regulated activities, and coercively enforces its rules when necessary. The central role of the state and state coercion is justified by the incentives firms and other targets of regulation face in PD externality situations. Standard examples in US law include environmental regulations that limit certain forms of pollution or prescribe certain pollution control technologies, and laws mandating specific labor relations procedures. EU regulation of member state activities through the “Community Method” of rule-making, based on Commission initiative and action by the Council and European Parliament, is also a variety of OG. Through the Community Method the EU realizes the OG ideal for IGOs to operate as central “governments,” perhaps in federal style, vis-

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55 Prakash & Potoski, Voluntary Environmentalists, supra, at 1.
56 Golub, supra, at 2, presents early European environmental regulation as another paradigm case of OG and notes: “The command and control approach is characterized by direct regulation: the government prescribes uniform environmental standards across large regions, mandates … abatement methods …, licenses production sites which adopt the required methods, and assures compliance through monitoring and sanctions.”
57 The EU is a peculiar hybrid that falls between “domestic” and “international.” Stijn Smismans, New Modes of Governance and the Participatory Myth, European Governance Papers No. N-06-01 (006) at 4, writes that the Community Method “… is mainly associated with binding legislative and executive acts…, the imposition of more or less uniform rules for all Member States, and the role of courts…. The Community Method … [is built on] hierarchy in terms of generally binding provisions, hierarchy of norms, and public control on their respect.” Scott & Trubek 2002 refers to the development in the EU of “new, old governance,” which adds to the Community Method elements such as a greater role for committees and enhanced “civil dialogue.”
à-vis participating states. Whether or not the EU is itself en route to becoming a “state,” however, it is certainly an exception among IGOs, most of which have had little success with centralized OG.

In NG, the state remains a significant player, but as an orchestrator rather than a top-down commander. The state pursues public goals by promoting and empowering a network of public, private sector and civil society actors and institutions, all of which are encouraged to engage in various “regulatory” (including self-regulatory) activities. State “orchestration” includes a wide range of steering processes, such as initiating voluntary and cooperative programs; convening and facilitating private collaborations; persuading firms to self-regulate; building the capacities of private actors; negotiating regulatory targets with firms; providing incentives to exceed mandated performance levels; and ratifying or scaling up successful approaches.\footnote{58 Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. Rev. 1, 31-3 (1997-98); Lobel, supra, at 320-24. For a valuable typology of interactions between the state and private rule-making bodies, see Stepán Wood, Environmental Management Systems and Public Authority in Canada: Rethinking Environmental Governance, 10 Buff. Env. L.J. 129, 131 (2002-03).}

A domestic US example is the EPA’s National Environmental Performance Track, which offers public recognition, less stringent substantive rules and fewer inspections for firms that voluntarily commit to enhanced environmental performance, adopt internal environmental management systems (EMS) subject to external auditing, and engage with civil society.\footnote{59 For other examples of domestic NG techniques, see Trubek & Trubek, New Governance, supra (Wisconsin Green Tier program); Katharina Holzinger, Christoph Knill & Ansgar Schafer, Rhetoric or Reality? "New Governance" in EU Environmental Policy, 12 EUR. L.J. 403, 420 (2006); Freeman, supra (U.S. EPA and OSHA negotiated rule-makings); Cary Coglianese, Jennifer Nash & Todd Olmstead, Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection, 55 Admin. L. Rev. 705, 707 (2003) (Exec. Order No. 12866, U.S. programs adopted by EPA, Federal Highway Admin., Nuclear Regulatory Commission; Dept. of Transportation); Miriam Seifter, Rent-a-Regulator: Design and Innovation in Privatized Governmental Decisionmaking, 33 Ecology L.Q. 1091 (2006).}

A parallel EU procedure\footnote{60 The EU adopted EMAS to reduce confusion caused by multiple member state EMS programs, such as the UK EMAS in Zone 1.} is the Environmental Management and Audit System (EMAS), under which the EU certifies factories that voluntarily make environmental commitments and adopt qualified EMS.\footnote{61 See Francesco Perrini, Stefano Pogutz & Antonio Tencati, Developing Corporate Social Responsibility: A European Perspective 106-08 (2006); Karola Taschner, Environmental Management Systems: The European Regulation, in Golub, supra, at 215.} Because many firms and states preferred global harmonization, EMAS also
recognizes EMS standards deemed to “correspond” with its own rules, including ISO 14001.\textsuperscript{62} Similarly, the EU has created a procedure for implementing regulation within its member states, the Open Method of Coordination, which relies on guidelines and targets, action plans and benchmarks, reporting, exchange of best practices, evaluation and peer review.\textsuperscript{63} As these examples suggest, the state often initiates NG programs. While firms and other private actors may create their own schemes or approach the state with proposals for collaborative regulation, in the ideal type the state treats NG as an important regulatory tool and uses it proactively.

Even though the state in NG eschews most mandatory actions, moreover, it retains its authority and power and can use them in significant ways. It can establish accountability mechanisms for private actors and institutions (such as the Performance Track external auditing requirement);\textsuperscript{64} require them to abide by procedural and substantive norms applicable to public law (such as due process); and set minimum standards, default rules and other substantive parameters. And state power often lurks in the background. If necessary, the state can step in with mandatory regulation; the threat of such intervention reinforces softer NG measures.\textsuperscript{65}

\textsuperscript{62} Golub, supra, at 17-19; Taschner, supra, at 222-23. For a comparison of the EU EMAS and ISO 14001, see Kelly Kollman & Aseem Prakash, Green by Choice?: Cross-National Variations in Firms’ Responses to EMS-Based Environmental Regimes, 53 World Pol. 399, 411-16 (2001).

\textsuperscript{63} Kerstin Jacobsson, Between Deliberation and Discipline: Soft Governance in EU Employment Policy, in Soft Law in Governance and Regulation: An Interdisciplinary Analysis 81 (Ulrika Morth, ed. 2004); Trubek & Trubek, \textit{Hard and Soft Law}, supra, at 343. The OMC grew out of earlier procedures to coordinate member state economic and employment policies; these were extended to implement the 2000 “Lisbon strategy” for economic and social reform. Kenneth Armstrong & Claire Kilpatrick, Law, Governance or New Governance? The Changing Open Method of Coordination, 13 Colum. J. Eur. L. 649, 650 (2007). In some fields, OMC encourages civil society participation, although Smismans, supra, at 18 casts doubt on the actual extent of civil society involvement. Armstrong & Kilpatrick, supra, criticize the association of the Community Method and OMC with OG and NG – and with hard and soft law – respectively. For other examples of EU NG in relations with member states, see Trubek & Trubek, New Governance, supra (Water Framework Directive, Stability and Growth Pact).

\textsuperscript{64} Such measures cannot simply replicate public law requirements, as the private context is much different. Jody Freeman, Extending Public Law Norms through Privatization, 116 Harv. L. Rev. 1285, 1325-26 (2003), recommends contextually appropriate measures such as private accreditation, auditing, ombudsmen, disclosure, and management systems.

\textsuperscript{65} Lobel, supra, at 372; Freeman, supra, at 32; Ayres & Braithwaite, supra, at 158 (delegations of regulatory authority “reinforced by traditional forms of regulatory fiat – if delegation fails”). Many scholars favor hybrids of OG and NG, in which the state maintains a baseline of mandatory rights and procedures, adopts default rules for actors that do not engage in NG standard-setting, or uses NG techniques to implement mandatory law. See de Burca & Scott, Introduction, supra; Trubek & Trubek, New Governance, supra.
Centralization vs. Decentralization

OG is hierarchical, with regulatory authority centralized in state organs – typically legislatures, executive departments and administrative agencies. OG views societal actors as self-interested and unaccountable, and thus incapable of self-regulation or any direct role in regulation. To further the public interest, the state must restrict authority to public regulators, presumed to be independent, disinterested and public-spirited. To preserve regulators’ independence, regulatory procedures more or less strictly insulate them from the influence of private actors: private groups may compete to influence regulatory decisions, but only at arm’s length, through carefully designed procedures. The potential agency costs of delegating broad authority to independent regulators are constrained by administrative procedures and the formal and informal mechanisms of representative democracy. Once decisions are made, private actors become objects of regulation.

In NG, regulatory authority is decentralized, with regulatory responsibilities shared among private actors as well as state agencies. Firms are encouraged to regulate themselves, and civil society actors are encouraged to participate in regulating others, through varied forms of private ordering and relationships with state agencies. Decentralized regulation draws on the often greater resources and capacities of private actors; for example, inspections of suppliers may be more effective when performed by knowledgeable firms and/or NGOs than by public regulators.

66 Freeman, Extending, supra, at 1303; Freeman, supra, at 13.
67 This is not typically true of legislatures, but US scholars in particular view it as characteristic of the independent administrative agencies created since the Progressive era.
68 Freeman, supra, at 10-12, 18-19. The pluralist processes by which societal actors influence decisions (e.g., comments on proposed regulations) nevertheless provide important information to state regulators and help legitimize agency decision-making.
70 Black, supra, at 113-21 reviews multiple definitions of “self-regulation.”
71 Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267, 292-314 (1998), argues that OG in the 20th century was shaped by the centralized, hierarchical nature of target firms. Now that firms are more open, networked and collaborative, NG approaches are more appropriate. In the approach they recommend, “directly deliberative polyarchy,” “citizens [in sub-national locales] participate directly in determining and assessing the utility of the services … government provides.” Id. at 288.
inspectors.\textsuperscript{72} Decentralization also reduces demands on the state, significant in an era when many states and agencies face both shrinking resources and growing demands for action.\textsuperscript{73} However, decentralization is not a retreat by the state from its public responsibilities, but rather a means of enlisting private actors as partners in pursuit of public goals.\textsuperscript{74} In particular, state orchestration in NG can extend public law principles such as due process into the regulatory activities of private institutions.\textsuperscript{75}

With authority decentralized, NG becomes collaborative or “networked,” with the state coordinating and engaging with business and civil society groups throughout the regulatory process.\textsuperscript{76} The state helps create and acts within a web of relationships\textsuperscript{77} – convening, facilitating, legitimating, negotiating, publicizing, ratifying, supervising, partnering and otherwise interacting with private actors for regulatory purposes.\textsuperscript{78} The state thus views firms and NGOs as partners in governance, not mere interest groups or objects of regulation.\textsuperscript{79} This softens the adversarial nature of regulation, reducing its social costs.\textsuperscript{80}

\begin{thebibliography}{99}
\bibitem{72} Ayres & Braithwaite, supra, at 104-6.
\bibitem{73} Cashore, Auld & Newsom, supra, at 10; O’Rourke, supra, at 4.
\bibitem{74} Ayres & Braithwaite, supra, at 103 (contracting regulatory functions to private actors for greater efficiency)
\bibitem{75} Freeman, Extending, supra, at 1285, 1290, 1314-15, 1327-28.
\bibitem{76} Lobel, supra, at 297-300; Braithwaite, supra, at 889-90 (era of networked governance); Black, supra, at 111; de Burca & Scott, Introduction, supra, at 3. Adelle Blackett, Codes of Corporate Conduct and the Labour Regulatory State, in Kirton & Trebilcock, supra, at 123, 129, notes that labor law has long involved tripartite collaboration, and argues that NG approaches to worker rights must preserve this democratic participation element.
\bibitem{77} There are two significant forms of collaboration in which the state is passive. First, many private RSS schemes rely on, and gain authority from the use of, public norms, such as those of the ILO. O’Rourke, supra, at 7; Benedicte Bull & Desmond McNeill, Development Issues in Global Governance: Public-Private Partnerships and Market Multilateralism 33 (2007). Second, many schemes require compliance with national law as a basic element of their standards. Meidinger, Beyond Westphalia, supra, at 12. Background property rights, contract and tort rules are also critically important to RSS. Cashore, Auld & Newsom, supra, at 20-21.
\bibitem{78} Freeman, supra, at 31-2.
\bibitem{79} Lobel, supra at 296. Freeman, supra, argues that OG regulatory procedures are based on interest group representation, whereas NG fosters meaningful participation by private actors and joint responsibility for regulatory outcomes. Some see such collaboration as part of a broader post-regulatory era of “networked governance,” in which private “gatekeepers” such as accounting firms, lawyers and other professionals, financial rating agencies, NGOs and other private actors are the most effective “regulators.” Braithwaite, supra, at 889-90.
\bibitem{80} Prakash & Potoski, Voluntary Environmentalists, supra, at 8-9.
\end{thebibliography}
Collaboration is more conducive than OG procedures to information sharing and learning, an important benefit given the bounded rationality of state regulators.\textsuperscript{81} NG allows the state to work with regulatory targets and other actors to tailor policies to their specific needs and local conditions, rather than forcing uniform rules on disparate circumstances, to create incentives for firms to exceed mandated standards, and to reduce its own costs of monitoring and enforcement.\textsuperscript{82} More broadly, state regulators, state-sponsored NG programs and private schemes observe one another, borrow techniques, compete and otherwise co-evolve over time.\textsuperscript{83}

Importantly, collaboration in NG is not just about the state. Private actors and institutions also collaborate with one another in multi-stakeholder arrangements. Such collaborations allow actors to pursue complementary goals and combine complementary competencies.\textsuperscript{84} For example, NGOs that favor high labor standards, and firms that are willing to accept higher standards but prefer self-regulation, may create a joint standard that is more effectively implemented than a pure NGO scheme (because of the firms’ business expertise and management capacity) and more legitimate than a pure industry code (because of the NGOs’ normative expertise, commitment and independence).

Participation by diverse private and public actors and actor combinations in NG produces multiple regulatory approaches. The sum of multiple varied actions pursuing common goals may be more effective than a single centralized regulation. Decentralization also promotes experimentation. Competition, demonstration effects and other interactions help the system as a whole to learn from the successes and failures of regulatory experiments, in a “permanent strategy for innovation.”\textsuperscript{85} Ideally, competitive pressures and public support will lead to the

\textsuperscript{81} Freeman, supra, at 22-3, 28-9.
\textsuperscript{82} Golub, supra, at 3-6; Prakash & Potoski, Voluntary Environmentalists, supra, at 73-4
\textsuperscript{83} Meidinger, Democratic, supra, at 519-20.
\textsuperscript{84} Abbott & Snidal, Governance Triangle, supra; Black, Enrolling, supra. For similar reasons, NPM theory has led many states to provide domestic “public” services through public-private partnerships, service contracts and similar arrangements. Historically private actors provided many such services. Freeman, supra, at 595; Freeman, Extending, supra, at 1289.
replication or scaling up of the most successful approaches. Like collaboration, multiplicity also facilitates fine-tuning regulation to local circumstances. Of course, multiplicity entails transactions costs, but NG advocates see the benefits as outweighing them in most cases.

Finally, by breaching the OG divide between officials and interest groups, decentralization promotes stakeholder engagement, providing new avenues for participation and voice, enriching democracy and enhancing the legitimacy of regulation. In this, NG draws on the deliberative tradition of democratic theory, which emphasizes participation, deliberation and individual rights rather than representation and accountability, as in the liberal tradition. NG sees decentralization and collaboration as empowering societal actors; promoting dialogue and deliberation; and fostering tolerance, interdependence and mutual accountability. NG also views participation as an end itself, as well as a valuable supplement to other forms of democratic engagement.

87 Ayres & Braithwaite, supra, at 101 (negotiated regulation “particularized to each firm”); Dorf & Sabel, supra, at 315 (“effective government … regulations must be continuously adapted … to respond to diverse and changing local conditions”); Lobel, supra, at 300. Some schemes maintain additional levels of particularization. For example, the FSC establishes basic principles and criteria, but requires regional and national groups to develop specific local indicators. Bernstein & Cashore, supra, at 39.
88 Meidinger, Democratic, supra, at 521.
89 Freeman, supra, at 18, 27. Ayres & Braithwaite, supra, at 57-8 suggests a policy of tripartism in which public interest groups are granted access to all information available to regulators and to all regulator-firm negotiations.
90 Stakeholder engagement is a longtime goal of labor regulation, but participation is generally limited to employers and unions. Blackett, supra, at 125-26, 129. RSS could enhance engagement even in relatively participatory labor regimes.
91 Cashore, Auld & Newsom, supra, at 5 argues that private RSS schemes could come to be seen as more legitimate than public regulation.
92 Drawing on Habermas, Frykman and Morth elaborate three conceptions of democracy: the liberal or aggregative; the republican or communitarian; and the cosmopolitan or deliberative. The republican tradition also emphasizes participation, but requires a relatively strong, self-conscious community based on shared ethnicity or values. Henrik Frykman & Ulrike Morth, Soft Law and Three Notions of Democracy: The Case of the EU, in Morth, supra, at 155.
93 Golub, supra, at 6.
94 Ayres & Braithwaite, supra, at 82-3, 84-6; Freeman, supra, at 23-4; Lobel, supra, at 298-99, 304-05. Minow, supra, at 1244-45, suggests that these effects are especially valuable in large countries, where deep engagement through traditional processes is problematic.
95 Ayres & Braithwaite, supra, at 82 (“An opportunity for participation by stakeholders in decisions over matters that affect their lives is a democratic good independent of any improved outcomes that follow from it.”); Fung & Wright, supra, at 27-9. In fact, some NG schemes lack strong public participation. Smismans, supra, at 5 (“more
Bureaucratic vs. Dispersed Expertise

Expertise is essential for effective regulation and is a major source of authority – for private actors as well as for the state. Because of the complexity of regulatory problems, multiple areas of expertise are relevant: technical, about social or environmental problems and regulatory solutions; normative, about social values and the normative context; economic, about the operations of target firms; and social, about the effects of regulation on intended beneficiaries and the public. In OG, the conceit is that professional regulators possess or can develop all the expertise necessary to implement appropriate policies. NG, in contrast, recognizes that the required expertise is often dispersed, and seeks to harness a wide range of stakeholders who may have “local” expertise otherwise unavailable to the state. This includes firms that are targets of regulation, which have unique information about their own industries and internal operations, where regulations must be implemented. Mobilizing the expertise of societal actors makes regulation better-informed, better-adapted to local circumstances, more open to new knowledge and more innovative.

In addition, it is important to emphasize that the required expertise is not just about “how” to regulate, but also about “who” and “what” (and thus “whether”) to regulate. The differing state roles in OG and NG derive in part from different assumptions about what the state “knows” in these areas. OG is predicated on the state’s knowing the “public interest” and hence the appropriate regulatory goals – perhaps based on prior legislative action. By contrast, NG does not assume that the state possesses complete a priori knowledge of regulatory goals. Rather, the collaborative procedures of NG act as a public interest revelation mechanism: NG engages the stakeholders on all sides of a regulatory issue and with them determines what actions are

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97 Lobel, supra, at 293-94.
98 Lobel, supra, at 294-95. Trubek & Trubek, New Governance, supra, at 557 notes that similar arguments may support EU NG efforts that draw on the expertise of member states.
100 Freeman, supra, at 22-3, 27, 28-9.
desirable. In this respect, NG represents a “third way,” responding not only to market failures but also to government failures, here the “bounded rationality” of the state.\textsuperscript{101}

**Hard vs. Soft Law**

OG is rooted in “hard law;”\textsuperscript{102} its regulations are legally binding and mandatory. Hard law rules are generally uniform across regions and categories of actors and are enforced by legal procedures backed by civil, administrative or criminal sanctions.\textsuperscript{103} Command and control regulations, moreover, are often precise and detailed, mandating specific processes, designs or actions (“input” or “technological” regulation) or outcomes (“output” or “performance” regulation).\textsuperscript{104} In the OG ideal type, compliance is monitored by state-operated “police patrols,” but in practice “fire alarm” citizen complaint mechanisms are also widely used.\textsuperscript{105} The latter have a NG flavor insofar as they mobilize the informational advantages of local actors.

NG relies on more flexible norms and procedures throughout the regulatory process.\textsuperscript{106} Private schemes in Zones 2, 3 and 6 of the Triangle necessarily promulgate non-legally binding standards,\textsuperscript{107} although from a legal pluralist perspective these may be seen as “law” for participating firms.\textsuperscript{108} State regulatory actions are also relatively soft. Regulations may be

\textsuperscript{101} Prakash & Potoski, Voluntary Environmentalists, supra, at 2, 9.


\textsuperscript{103} Trubek & Trubek, Hard and Soft Law, supra, at 344.


\textsuperscript{106} Lobel, supra, at 308. Referring to these normative forms as “soft law,” as in Table 2, elides complex questions regarding the nature of “law” arising in both rationalist and constructivist approaches. See, e.g., Abbott et al., The Concept of Legalization, supra; de Burca & Scott, supra. We do not address those conceptual questions here.

\textsuperscript{107} Kirton & Trebilcock, supra, at 9, defines soft law, unusually, as private standards, those that rely “primarily on the participation and resources of nongovernmental actors in the construction, operation, and implementation of a governance arrangement.”

\textsuperscript{108} See Meidinger, Environmental Law-Making, supra, at 299-300; Wood, Sustainability, supra, at 229.
phrased in general terms, or establish flexible standards, targets, guidelines or benchmarks rather than precise requirements. They may mandate management practices (e.g., EMS) rather than specific inputs or outputs, or call for disclosure or dialogue. Examples include “performance-based” and “management-based” regulation. Often state agencies grant relief from substantive mandates, inspections or sanctions – e.g., by waiving enterprise liability – or grant a benefit – e.g., an “ecolabel” certification – for firms that accept voluntary obligations or otherwise cooperate in achieving public goals. In all its forms, reliance on flexible standards supports the central tenets of NG: multiplicity, experimentation and learning; particularization to local circumstances; broad expertise; and stakeholder engagement.

Even soft norms are nested in a formal legal system. Binding legal rules and procedures coexist with softer NG approaches, complementing or competing with one another. In addition, law and NG frequently interact, as when the state sets baseline rules or other substantive parameters for private regulators, or oversees or ratifies self-regulatory and negotiated arrangements. And the state can step in with mandatory regulation if firms fail to comply with soft measures. Firms can also incur legal obligations by accepting NG

110 For a valuable analysis of EMS, see Wood, Environmental Management Systems, supra. Recent studies conclude that ISO 14001 implementation leads to improved environmental performance and legal compliance. Prakash & Potoski, supra, at 351.
111 Kerstin Sahlin-Andersson, Emergent Cross-sectional Soft Regulations: Dynamics at Play in the Global Compact Initiative, in Morth, supra, at 129, 134.
112 See Coglianese, Nash & Olmstead, supra.
113 Coglianese & Lazer, supra.
114 See Eva Eiderstrom, Ecolabels in EU Environmental Policy, in Golub, supra, at 190.
115 Such arrangements are more attractive to firms if governments can legally bind themselves not to defect and return to mandatory regulation, but that power is in doubt in many legal systems. Golub, supra, at 15.
116 NG views rules as provisional, easily revised to reflect new information – more easily, at least, than hard regulations that require complex procedures to modify. de Burca & Scott, Introduction, supra, at 3; Freeman, supra, at 28-9, Smismans, supra, at 5.
117 Lobel, supra, at 310.
118 See Trubek & Trubek, supra, at 544-48.
119 Id. at 548-49.
120 Ayres & Braithwaite, supra, at 102 (important to embed self-regulation in system of public detection and punishment); Freeman, supra, at 32.
undertakings. In some forms of “regulatory negotiation” (Reg-Neg), for example, the state asks a multi-stakeholder group to propose a regulatory approach.\textsuperscript{121} The resulting agreements are legally binding, even if they are flexible as to means and timetables.\textsuperscript{122} Finally, soft private commitments can feed back to hard law: they play an important role in the discourse affecting the adoption and application of mandatory law, and can be incorporated directly into state law.\textsuperscript{123}

*Limits of Ideal Types*

Both the OG and NG ideal types rely on assumptions that limit their applicability in both domestic and international settings. First, both ideal types assume significant state capacity and active state involvement. This is obvious in OG, where state commands and enforcement are central. In NG, although the state plays more subtle roles, its ability to catalyze, orchestrate and set parameters for decentralized regulatory actions -- and its readiness to step in with mandatory action where softer methods fail -- are still essential to effective, legitimate regulation.\textsuperscript{124} Yet these capacities are lacking in many countries and in the international system. Second, both ideal types assume effective procedures for making choices in the public interest: OG assumes effective representative democracy, NG effective stakeholder representation, participation and deliberation. But here again, many states, the international system and many private regulatory arrangements lack such procedures. Third, even more fundamentally, both ideal types assume an independent state that furthers the public interest (in their different ways).\textsuperscript{125} This assumption is vulnerable to the economic or public choice critique, which argues that there is no “public

\textsuperscript{121} Meidinger, Environmental Law-Making, supra, at 306. The results of these processes are highly controversial. Id.

\textsuperscript{122} Some supporters of public regulation see such agreements as particularly threatening, as they appear to replace disinterested regulatory decisions with the kinds of deal making predicted by public choice theory. Freeman, Extending, supra, at 1303, n. 67.

\textsuperscript{123} Private standards can also take on hard law authority through other channels, such as references by courts interpreting broad tort standards and expectations of best practices by inspectors and regulators. Meidinger, Beyond Westphalia, supra, at [13]. Courts and legislatures sometimes mandate the observance of voluntary standards. Wood, Sustainability, supra, at 248.

\textsuperscript{124} Ayres & Braithwaite’s influential proposal for “responsive regulation” requires “pyramids” of regulatory strategies and sanctions, with public regulators able to escalate to more coercive measures when softer approaches fail. Ayres & Braithwaite, supra, at 35-8.

\textsuperscript{125} See Mattli & Woods, supra, for critiques of this presumption.
interest,” but only private interests with varying degrees of influence. Interest groups lobby, contribute to campaigns, pay bribes and otherwise seek to persuade regulators to advance their interests; they may even “capture” regulators outright.\textsuperscript{127} Regulators, in turn, are not public-spirited and disinterested, but respond to the highest bidders in pursuit of their private goals, such as remaining in office, expanding their bureaucracy or enriching themselves. As we evaluate the OG and NG models, it is important to consider how each deals with these political forces.

IV. OG and NG at the International Level

In this section, we address how the OG and NG ideal types have been translated to the international plane. For most of the 20\textsuperscript{th} century, efforts by activists and states to regulate the social and environmental impacts of transnational production focused on OG. Over the past two decades, international regulatory activity has moved increasingly towards something resembling NG. Because of the very different characteristics of the international system, however, neither effort to transpose an essentially domestic model has been wholly successful: international OG has not fulfilled its advocates’ hopes, and TNG falls short of the NG ideal.

\textit{International OG}

i. IGOs

Twentieth century efforts to build international OG were part of a long-standing project to move international governance closer to the OG ideal type, exemplified by calls for world federalism\textsuperscript{128} and world peace through law.\textsuperscript{129} Many early international public unions and IGOs involved attempts to transpose the regulatory structures, procedures and powers of the state in areas such as labor rights to international institutions.\textsuperscript{130} Such efforts have continued with recent


\textsuperscript{127} See Stigler, Peltzman, supra.

\textsuperscript{128} The world federalist movement was created in 1947 through the amalgamation of independent citizen groups. “World federalists support the creation of democratic global structures accountable to the citizens of the world and call for the division of international authority among separate agencies, a separation of powers among judicial, executive and parliamentary bodies.” http://www.wfm.org/site/index.php/pages/1

\textsuperscript{129} See Grenville Clark & Louis B. Sohn, World Peace through World Law (2d ed. 1960).
attempts to incorporate a binding “social clause” into the rules of the WTO. Yet these idealistic aspirations have not been fulfilled, outside the EU at least, and seem as remote as ever.

The difficulty of replicating domestic OG stems from the anarchic structure of the international system. No global “state” has authority to adopt mandatory regulations or impose sanctions. States are jealous of their sovereignty and freedom of action, and resist delegating authority to international institutions. Widely differing preferences make inter-state agreements costly to negotiate, while the divergence between individual and collective interests impedes collective action. Power differentials further shape collective action away from at least some conceptions of the global public interest.

The most significant attempt to internationalize OG has been the creation of an array of issue-specific IGOs – including the UN specialized agencies, Bretton Woods institutions and WTO. Although IGOs might seem analogous to national regulatory agencies, all are far weaker than the ideal type OG agency because of the systemic features just noted. Table 3 summarizes the analytic differences between IGOs and the OG ideal type defined in Table 2.

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<th>OG</th>
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<td>State-centric</td>
<td>Member-centric</td>
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<td>Centralized</td>
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<td>Bureaucratic Expertise</td>
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<td>Mandatory Rules</td>
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Table 3: International OG through IGOs

First, although IGOs are created and governed by their member states, they are not state-centric as in the OG ideal type. To conform to the OG model, IGOs themselves would have to possess state-like authority for mandatory regulation and enforcement. But states have been

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131 Stone, supra, at 105-06.

132 Increasing civil society participation in many IGOs does not change this basic principle.
unwilling to grant such authority. In addition, powerful member states exercise substantial, often disproportionate influence over IGOs; this undermines their representativeness, independence and global public interest orientation, among the most normatively attractive features of OG.

IGO centralization is also limited. While IGOs often centralize administrative and operational functions as well as the initial formulation of international rules, they rarely centralize the actual approval and implementation of rules. Even when formal decision procedures are available, moreover, many IGOs operate by consensus among member states, often paralyzing their already limited authority. More typically, important issues remain within the political and financial control of member states, which exercise it primarily in pursuit of national interests.

IGOs are important centers of bureaucratic expertise, much as in the OG model. Many of their most common and significant functions – e.g., collecting and analyzing information, technical assistance – depend on the expertise of IGO secretariats. These are made up of international civil servants, typically selected on the basis of knowledge and experience as well as geographic representation and other political considerations. National delegates are also frequently selected for their technical expertise.

Even when granted rule-making authority, IGOs are rarely authorized to adopt mandatory rules, as states do in domestic OG. Treaties and other legally binding rules require state ratification to take effect, even after adoption by IGO organs. Some IGOs are authorized to adopt regulations (e.g., the Standards and Recommended Practices of the International Civil Aviation Organization), but in almost all cases states may choose to opt in or out. Other IGO rules take the form of recommendations or other nonbinding soft law. In addition, most IGO efforts to encourage rule adoption and implementation are “managerial,” not coercive. Finally, whereas the OG ideal type assumes that “the state” can directly regulate private actors,


international OG is typically indirect, requiring or urging states to implement regulations governing private actors in their jurisdictions.\textsuperscript{135}

The ILO, the central international agency on labor rights, illustrates how IGOs fall short of the OG model. While its tripartite character – worker and employer representatives participate in its political organs – renders the ILO atypical, in most respects it is the strongest manifestation of international OG in the issue areas we consider.\textsuperscript{136} The ILO is member-centric: under its Constitution (a treaty) its only members are states\textsuperscript{137} (states nominate worker and employer delegates by agreement with representative organizations).\textsuperscript{138} Although the ILO’s central purpose is to adopt international labor standards – forms of regulation – the organization has far less regulatory authority than any state.\textsuperscript{139} Its main labor standards take the form of treaties that require state ratification, supplemented by recommendations, and its implementation procedures rely on peer and expert review and other managerial techniques.\textsuperscript{140} Similarly, the ILO has limited centralized authority. Member states have largely retained that authority through their voting power in the political organs (subject to that of worker and employer delegates),\textsuperscript{141} their ratification power and their financial control.\textsuperscript{142} The International Labor Office has greater authority than many secretariats, but still less than domestic regulatory agencies.

\textsuperscript{135} The point is not that IGOs can never address private actors – although they do so infrequently – but that in doing so they deviate from international OG. Initiatives such as the OECD Guidelines and UN Global Compact are innovative in part because they address firms directly and in part because they do so in novel ways. The EU more closely resembles the OG model, in that it can adopt rules with direct effect.

\textsuperscript{136} In many respects, the ILO operates like a state-based organization in spite of its tripartite character; most of its activities, including its conventions, fit squarely within Zone 1. In some areas its tripartite character has greater influence; we place the ILO Declaration on Multinational Enterprises and Social Policy, a soft law instrument that addresses firms directly, in Zone 7.

\textsuperscript{137} ILO Constitution, Art. 1:2.

\textsuperscript{138} ILO Constitution, Art. 3.

\textsuperscript{139} At the 1996 WTO Ministerial Conference in Singapore, member states rejected calls for a “social clause” and declared that the ILO was the proper venue for considering labor rights. Labor organizations responded by urging governments to grant the ILO greater rule-making authority, but state and employer delegates rejected these proposals. The ILO did reassert its leadership by adopting the softer Declaration on Fundamental Principles and Rights at Work in 1998. See Stone, supra, at 105-08.

\textsuperscript{140} Stone, supra, at 106-07.

\textsuperscript{141} State delegates constitute 50\% of those organs, worker and employer delegates 25\% each.

\textsuperscript{142} The expenses of the ILO are borne by its members under its Constitution, Art. 13, and agreement with the UN.
**Bureaucratic expertise** is a major ILO strength. The Labor Office collects and disseminates information on labor issues, studies proposals for ILO action, conducts investigations and provides technical assistance; its expertise is highly regarded. It also collaborates with private actors such as worker and employer organizations more than many IGOs. Finally, although the ILO seeks to establish labor standards as mandatory rules, even conventions approved by the Conference require state consent to take effect.\(^{143}\) Non-binding recommendations guide convention implementation.\(^{144}\) The ILO Constitution establishes “supervision” and complaint procedures to enforce labor standards, but only supervision is regularly used, and it relies on persuasion, publicity and peer pressure; no ILO procedure entails mandatory sanctions.

ii. Unilateral state action

While IGOs were created in large part as responses to failures of domestic OG, their inadequacies have led to continuing calls to extend domestic OG transnationally. Advocates for this form of regulation argue that states having authority or leverage over firms responsible for transnational production externalities should unilaterally regulate their conduct.\(^{145}\) Although states are highly diverse, for simplicity we consider two sets of potential regulators: developing countries, which feel the brunt of most transnational production externalities, and developed countries, which are the home of most MNEs, the source of most foreign investment and the largest global markets.

Developing countries are often inadequate regulators due to insufficient capability and/or willingness.\(^{146}\) If developing countries could effectively regulate their own economies (including

\(^{143}\) The ILO had adopted 188 conventions as of June 2007. The Constitution requires member governments to present approved conventions for consideration by the appropriate national authorities. Yet ratification remains a state decision, and it has been highly uneven. Because of this poor track record, the ILO now focuses on gaining broad adherence to eight “fundamental” and four “priority” conventions. The ILO regards its 1998 Declaration on Fundamental Principles and Rights at Work as binding even on members that have not ratified those conventions, but its implementation procedures are merely promotional.

\(^{144}\) The ILO had adopted 199 formal recommendations as of June 2007.


\(^{146}\) Rawls uses the terms “burdened societies” and “outlaw states” to refer to these categories. John Rawls, *The Law of Peoples* (1999).
transnational firms operating there), their domestic OG could satisfactorily control many production externalities.\textsuperscript{147} Unfortunately, developing countries have relatively limited regulatory capacity.\textsuperscript{148} Even though many have satisfactory laws on the books in areas such as labor rights – as reflected in IECA++ in Zone 1 of the Triangle – their lack of enforcement capacity undermines the effectiveness of these laws.

Advocates argue that international competition creates a “race to the bottom,” which limits how strictly developing countries are willing to regulate.\textsuperscript{149} Scholars have found little empirical evidence of such a race, and many suggest that the costs of investing in DCs largely offset the benefits of lax regulation.\textsuperscript{150} However, even without a downward race, international competition and demand for economic growth limit the willingness of developing (and other) countries to enforce existing regulations, let alone to strengthen them. Even more fundamentally, many developing country governments do not view strengthening labor and environmental regulation as a vital policy goal, because of its potential impact on economic growth.\textsuperscript{151} This shifts the issue from capacity and will to the difficult normative question of what standards are appropriate. While the principle of subsidiarity might suggest that developing countries should be allowed to choose lower standards to promote growth or meet other local needs, the questionable level of democracy in many of those states – coupled with problems of corruption and capture – undermine their legitimacy for making these decisions.\textsuperscript{152}

An alternative is for developed countries to regulate the foreign conduct of national MNEs and investors; forbid imports of goods produced abroad under poor social or environmental conditions; and/or require domestic importers, retailers and firms with transnational supply


\textsuperscript{148} Id. at 195-99; Braithwaite, supra, at 884, 888-89; Graham & Woods, supra, at 868-69.


\textsuperscript{151} Graham & Woods, supra, at 869.

\textsuperscript{152} See, e.g., Margaret Levi & April Linton, Fair Trade: A Cup at a Time?, 31 Pol. & Soc’y 407, 414 (2003) (“Interlocking [government] relationships and interests with agribusiness make it unlikely that governments in coffee-producing countries will voluntarily regulate the coffee industry in ways that benefit small growers and workers.”)
chains to impose high standards on foreign suppliers. But this strategy also faces issues of capability, willingness and legitimacy.\textsuperscript{153} Transnational regulation strains the regulatory capacities of developed country governments, given the difficulty of collecting information about firms’ foreign operations. Indeed, some firms choose to “exit” their home countries by moving domestic operations offshore precisely because they become more difficult to observe and control. Moreover, transnational regulation is difficult to implement: for example, Southern workers protected by a developed country law face legal and practical obstacles in attempting to sue companies that harm them in that country’s courts.\textsuperscript{154}

The problems go beyond capacity to willingness. Since foreigners do not vote in national elections and domestic publics are naturally less attentive to far-off problems, developed countries lack any strong political interest in regulating externalities felt abroad. Costly altruistic actions – especially policies that undermine national growth or competitiveness – may even be viewed negatively by certain national publics.\textsuperscript{155} Domestic firms will resist regulation and seek to avoid or weaken it through capture.\textsuperscript{156} Conversely, transnational regulation might be captured (and unduly strengthened) by protectionist interests that seize on foreign production conditions as an excuse to limit imports.

Finally, transnational extension of domestic OG raises significant legal and normative issues. Legal constraints, both domestic and international, limit the approach. US courts, for example, generally presume (absent clear expressions of Congressional intent) that statutes apply

\textsuperscript{153} Drezner argues that powerful developed countries have the capacity to regulate internationally and unilaterally set many rules that bind developing countries. However, the financial and other areas Drezner examines differ substantially from transnational production. Whereas developed countries feel the effects of financial externalities, production externalities generally flow in the opposite direction, reducing developed country incentives to regulate. Moreover, Drezner’s largely positive argument focuses on power politics and does not address normative issues. Daniel W. Drezner, All Politics is Global: Explaining International Regulatory Regimes (2007).

\textsuperscript{154} Bridgeman & Hunter, supra, at 200-05; Stone, supra, at 115-16.

\textsuperscript{155} “Not only are [governments] not well placed to define the common interests of populations that fall outside their national boundaries, but they also have a vested interest in creating or maintaining conditions that ensure national economic stability and growth regardless of the impact of their policies on the welfare of people in other national jurisdictions.” Cragg, supra, at 220.

\textsuperscript{156} For example, Levi & Linton, supra at 414, argues: “[The interest of Northern MNEs that process coffee] is in buying coffee beans at the lowest price. They are often effective lobbyists against domestic legislation for new standards.”
only within national territory to avoid interference in foreign affairs.\footnote{E.g. Foley Bros. v. Filardo, 336 U.S. 281 (1949) (refusing to apply wage and hour law to laborers working abroad). In labor law, only a few US statutes extend to the foreign conduct of national firms. Stone, supra, at 114-15.} There has also been a long-standing dispute in international law over the lawfulness of extraterritorial regulation that interferes with the policy preferences of foreign states.\footnote{Stone, supra, at 117. See Restatement of the Law Third, Foreign Relations Law of the United States (1987), sec. 401-03. These provisions reflect the difficulties in resolving conflicts of jurisdiction when states act independently.} WTO rules have exacerbated the difficulties by suggesting that states cannot lawfully impose import restrictions based on foreign production processes -- although more recent cases provide greater regulatory leeway.\footnote{The most significant decision is US-Shrimp (“Shrimp-Turtle”). For an NGO summary of current WTO law suggesting the expanded scope for “process and production method” regulation, see Jason Potts, The Legality of PPMs under the GATT: Challenges and Opportunities (2008), available at http://www.iisd.org/pdf/2008/ppmsGatt.pdf.}

Even if developed countries were willing and had legal capacity and authority to regulate, their legitimacy would be a concern. Whatever their own characteristics, individual states are not globally representative; given the sharp policy differences between North and South, developed countries’ legitimacy for unilaterally making international policy choices is questionable.\footnote{“Democratic governments can speak for … only the common interests of those who elect them.” “The problem with democratic regimes is that ‘the publics’ whose interests the regimes are justified in protecting and advancing are national publics.” Cragg, supra, at 219.} Because developed country regulation would most often influence business activity in developing countries, moreover, it might impose inappropriate standards or cultural values.\footnote{For an effort to assess possible responses to the issue of Northern regulatory “imperialism,” see Meidinger, Democratic, supra, at 26-31.} Such concerns feed back into willingness to regulate: in 2001, for example, an Australian parliamentary committee recommended against adopting the Corporate Code of Conduct Bill 2000, which would have governed national firms operating abroad, in part because it might be viewed as “arrogant, patronizing, paternalistic and racist.”\footnote{Parliamentary Joint Committee on Corporations and Financial Services, Report on the Corporate Code of Conduct Bill 2000, June 2001, available at http://www.aph.gov.au/SENATE/committee/corporations_ctte/completed_inquiries/1999-02/corp_code/report/index.htm (viewed Sept. 3, 2008).}
Transnational New Governance (TNG)

The shortcomings of international OG have led concerned actors to develop the alternative of transnational RSS. The increasingly dense constellation of private and public-private RSS schemes on the Governance Triangle is developing into a system of TNG that complements, competes with and sometimes substitutes for national and international OG. This emerging system closely resembles the NG ideal type on several important dimensions: decentralization, dispersed expertise and reliance on soft law. However, the system differs significantly in terms of its most basic feature: the role of the state. Table 4 summarizes these similarities and differences.

<table>
<thead>
<tr>
<th>NG</th>
<th>Emerging TNG</th>
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<td>State orchestration</td>
<td>Limited state orchestration</td>
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<td>Decentralized</td>
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<td>Dispersed expertise</td>
<td>Dispersed expertise</td>
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<td>Soft law standards</td>
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Table 4: Transnational NG

We begin by analyzing the areas of similarity and then turn to the relative lack of state orchestration, which constitutes the greatest current weakness of TNG.

i. Decentralization

The most striking feature of the system depicted on the Triangle is the decentralization of regulatory authority from the state to private and public-private schemes. The degree of decentralization is greatest across the base of the Triangle. Schemes in its lower tier (Zones 2, 3 and 6) primarily entail actions by and collaboration among private actors; the role of centralized public actors – states or IGOs – is very limited. Schemes in the middle tier of the Triangle (the central and lower portions of Zones 4, 5 and 7) involve formal collaborations between states or IGOs and private actors at one or more stages of the regulatory process; they closely resemble NG public-private partnerships. Schemes in the upper tier of the Triangle (Zone 1 and the upper
portions of Zones 4, 5 and 7) are more centralized, involving complete or at least significant state participation through OG national laws, through domestic NG schemes such as national eco-labels or through voluntary IGO schemes with NG features.

Even more important is the decentralized character of TNG as a whole. The emerging system is highly pluralized, with a significant and growing number of diverse schemes, none of which has authority over any others.163 This multiplicity and diversity is promoted by relatively low “barriers to entry,” which offer significant new opportunities for participation and engagement by firms, NGOs, and the beneficiaries of regulation. Even NGOs with limited resources, such as the Clean Clothes Campaign and Rugmark, can promulgate and promote codes. The result is that different types of schemes frequently operate in parallel in pursuit of a shared objective – such as improving worker rights in apparel industries – albeit with significant variations in norms and procedures. These schemes often compete, but sometimes collaborate in partnerships such as ISEAL.

ii. Dispersed expertise

Effective RSS requires all the forms of expertise identified earlier: normative, technical, economic, and social. Emerging TNG is similar to the NG model in not relying solely on state or IGO regulators for needed expertise, except within some Zone 1 schemes.164 Instead, private RSS schemes draw primarily on the expertise of the societal actors that govern them. As a result, however, the range of expertise found within any single scheme depends on the actors it engages. Schemes located near the vertices of the Triangle have a limited range of expertise (e.g., pure Firm or NGO schemes in Zone 2 or 3), whereas schemes further from the vertices engage a wider range of expertise. A major rationale of multi-stakeholder schemes like those in Zone 6 is to combine complementary sources of expertise.

iii. Soft law

The emerging TNG system relies heavily on voluntary codes and (to the extent states and IGOs are involved) soft law. Private schemes lack authority to promulgate hard law and so must

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163 On the diversity of RSS schemes, see O’Rourke, supra, at 18-20.
164 Even some NG-influenced schemes in Zone 1 involve consultation with business and civil society groups and collaboration with target firms.
rely on voluntary norms. Private schemes also lack capacity for coercive enforcement, and so rely on economic and social pressure from consumers and other constituencies – as well as the implicit threat of state regulation – to induce firms to adopt and comply with their norms. Even when the state is involved, TNG relies on NG techniques rather than OG coercive regulation. Thus IGOs including the OECD, ILO and UN have increasingly used soft law to address firms directly and to increase the flexibility and attractiveness of the norms they promote. As in the NG model, however, some TNG norms have been embodied in legally binding instruments.\textsuperscript{165} Complementarily, private RSS schemes rely heavily on state-generated rules and norms as the principal benchmarks for their own (voluntary) norms. This has the interesting consequence that state-generated norms that fail to become hard law may find a second life with private RSS schemes. In addition, private RSS schemes promote many of the same norms as are found in treaties, serving as “force multipliers” for traditional legal rules.

iv. State Orchestration

The role of the state is the major distinction between the emerging TNG system and the NG ideal type. In the NG model, the state authorizes, empowers and orchestrates the public and private actors and institutions to which it assigns regulatory responsibilities. Moreover, the state acts to structure the regulatory network, e.g., to limit excessive influence by firms or other groups within private schemes, or to require that schemes observe basic procedural and substantive norms. Finally, the domestic state has the capacity to intervene effectively when necessary to correct the actions of private regulators. Most transnational RSS schemes, in contrast, have been created from the bottom up, with little direct state involvement, by private actors: notably NGOs frustrated by the inability of states and IGOs to address perceived transnational regulatory problems, and firms and industry groups seeking to preempt or shape stricter regulation.\textsuperscript{166} Furthermore, as with international OG, states have limited means to correct bottom-up regulation in the transnational context.\textsuperscript{167}

\textsuperscript{165} For example, the Voluntary Principles on Security and Human Rights (Zone 7) have been incorporated into binding agreements between multinational investors and host governments. Ruggie, supra, at 835.

\textsuperscript{166} See Abbott & Snidal, Governance Triangle, supra.

\textsuperscript{167} Kingsbury, Krisch & Stewart, supra, at 54-5.
Two types of orchestration can be observed in TNG, although in most cases their extent is modest. First, several schemes in the upper tier of the Triangle involve “directive orchestration” by states and IGOs. Thus, the EU enforces mandatory conditions for firms that participate in EMAS; the IFC Safeguard Policies are enforceable requirements for clients in its financing programs.\(^{168}\) Second, even though states and IGOs are not centrally involved in the predominantly private schemes in the lower tier of the Triangle, they sometimes engage in “facilitative orchestration.” For example, in the AIP the US Department of Labor convened a broad range of apparel industry stakeholders, thereby setting the initial framework for private participation. Material and moral support for schemes that meet public standards is another form of facilitation: the Department of State has financially assisted several transnational labor rights schemes. Even indirect contributions – such as ILO promulgation of labor standards on which private schemes can build – can facilitate RSS. In the public-private partnerships across the middle tier of the Triangle, states and IGOs collaborate in variants of both approaches.

TNG is clearly evolving with a different balance among these forms of orchestration than is contemplated in NG theory: directive orchestration is less prominent, facilitative orchestration more so. Overall, however, there is little doubt that states and IGOs do not provide the level of orchestration for TNG that the NG ideal type calls for. We explore the implications of this deficiency in Section V.

V. Evaluating TNG

Introduction

TNG remains a nascent system, emerging gradually and spontaneously from the expanding network of RSS schemes on the Governance Triangle. Even in its current form, TNG shows real promise for strengthening international regulation: filling regulatory gaps, enhancing the impact of IGOs, treaties and other instruments of OG, and providing other benefits of NG. As currently constituted, however, TNG differs substantially from the NG ideal type, primarily in the limited degree of centralized orchestration at the international level. This orchestration deficit prevents

\(^{168}\) Other IGOs involved in RSS explicitly eschew directive orchestration. The UNGC asks participating firms to satisfy only very weak conditions, principally making a formal commitment; UN procurement guidelines encourage – but do not require -- suppliers to participate in the UNGC; and the OECD enlists national officials to promote its Guidelines, yet national efforts vary widely and are almost always very soft.
today’s TNG from achieving all the benefits of NG, yet it also suggests that the potential of TNG can be more fully realized if states and IGOs provide more effective orchestration and support.

As this discussion indicates, the most significant strengths and weaknesses of TNG relate to the first two elements of the NG ideal type, decentralization and orchestration. We organize this section around those categories, briefly addressing the other two elements, dispersed expertise and soft law, within that analysis.

**Decentralization**

Decentralization is a hallmark of the NG model, but that decentralization is to some degree centrally orchestrated by the state. Decentralization in TNG, in contrast, has been largely spontaneous and unplanned. Far from being deployed by the state, most RSS schemes have been initiated by private actors pursuing individual goals.\(^{169}\)

TNG thus shares the strengths and weaknesses of spontaneous social orders. Consider the closely related but generally simpler issue of technical product standards.\(^{170}\) Because firms are close to production processes, they are usually better positioned than centralized state agencies to develop technical standards and adapt them to changing circumstances. But a wholly decentralized and spontaneous standards process often produces a cacophony of incompatible standards. This outcome can be costly for an industry even though it results from the actions of individual firms within that industry, each advancing standards that serve its particularistic (e.g., monopolistic) interests. To improve social outcomes, states often coordinate technical standards -- although earlier top-down efforts have progressively given way to more bottom-up approaches, in which the state orchestrates primarily private regimes such as the American National Standards Institute (ANSI) and ISO.\(^ {171}\) Such coordination is desirable even though product standards, while technically complex, are relatively simple in terms of their stakeholders and social consequences. By contrast, RSS involves much more challenging regulatory issues.

\(^{169}\) Significant exceptions include the UNGC, ILO Tripartite Declaration, AIP and ISO 14000. To varying extents, such efforts demonstrate the advantages of IGO and state roles in RSS.

\(^{170}\) For a fuller discussion of the relation between technical and other standards, see Abbott & Snidal, International “Standards,” supra.

\(^{171}\) Directive orchestration of ISO is limited, largely because of the predominantly technical issues it issues. But states were instrumental in its formation, facilitate participation by private standards bodies, collaborate in its operations and present a background threat of intervention if it acts improperly.
Here we address the advantages and disadvantages of strong decentralization in TNG. We first consider the distribution of regulatory authority that results from highly decentralized RSS, and then analyze several effects of the multiplicity of RSS schemes and the opportunities for participation they create.

i. Distribution of regulatory authority

In TNG, regulatory authority is distributed across a wide variety of RSS schemes, themselves governed by a broad range of actors. States and IGOs are involved in many of these institutions, most directly in the upper and middle tiers of the Triangle; outside of Zone 1, however, the state has initiated relatively few schemes. Far more striking is the role of private ordering across the lower tier of the Triangle, the locus of recent TNG activity. This distribution of authority engages two major goals of NG: bringing the dispersed expertise, resources and capacities of private actors into the regulatory system, and reducing the demands on public institutions. Because of the international orchestration deficit, however, these advantages are coupled with certain shortcomings.

Unplanned decentralization has created significant gaps and overlaps in regulatory coverage, especially across products and industries. While firm self-regulation is extensive, its emergence, content and strength depend heavily on idiosyncratic factors such as normative commitments of top executives, strategic decisions to emphasize CSR, organizational cultures, and especially characteristics of specific markets.\footnote{Sasser et al., supra, at 11-12. Cary Coglianese, Jennifer Howard-Grenville & Jennifer Nash, Constructing the License to Operate: Internal Factors and their Influence on Corporate Environmental Decisions, 30 L. & Pol’y 73 (2008), finds that individual firms subject to similar external pressures respond differently due to internal cultures and management incentives.} For example, producers of differentiated consumer products such as designer apparel are more likely to see marketing advantages in pursuing socially- and environmentally-conscious strategies (and to see potential dangers in not doing so) than are producers of undifferentiated intermediate hardware products. The former also are likely to be less tightly constrained by bottom-line concerns (because of differentiated markets). For the same reasons, NGO and collaborative schemes focus their limited resources on these vulnerable targets: consumer goods firms that rely on brand reputation (e.g., Nike), “branded” retailers (e.g., Home Depot), and actors in similar situations (e.g., universities selling “branded”}
merchandise). Thus in the apparel industry multiple schemes target major producers; two even focus on university apparel. But sectors such as hardware, especially those dominated by small firms, remain “under the radar” of activists and largely untouched by TNG.\footnote{See O’Rourke, supra, at 22.}

TNG is also characterized by a high concentration of single-actor RSS schemes in Zones 2 and 3 of the Triangle. Even if their participants are normatively motivated, these schemes reflect particularistic interests or values that do not necessarily coincide with the broader public interest. Although many firms and executives are committed to ethical values and most seek good reputations, firms must focus primarily on profit and so oppose regulation that threatens it.\footnote{Firms favor regulation that enhances profit, e.g., by limiting competition. For example, highly-capitalized British industrialists supported early child labor legislation to limit competition from smaller firms dependent on cheap labor. In the areas we consider here, regulation typically threatens profit, although some social or environmental branding strategies may enhance it, allowing firms to “do well by doing good.”} Firms also prefer self-regulation for its business-friendly standards, low compliance costs and limited intrusion by outsiders. Thus self-regulation is often limited in depth and breadth\footnote{For discussion of the limited effectiveness of business codes, especially on the environment, see Wood, Sustainability, supra, at 254-65. Cashore, Auld & Newsome, supra, at 15 argues that firms see business codes as opportunities to communicate the virtues of existing practices.} and relatively opaque to outsiders. Opacity leaves many openings for opportunism,\footnote{On opportunism, see Kimberley Krawiec, Cosmetic Compliance and the Failure of Negotiated Governance, 81 Wash. U.L.Q. 487 (2003).} in turn creating credibility problems for sincere firms.

Similar problems arise with single-actor NGO schemes. NGOs are usually motivated by values, although some, such as labor unions, are motivated by interests. But even value-driven NGOs such as human rights groups must attend to organizational goals in order to succeed.\footnote{Abbott & Snidal, Values and Interests, supra.} They may choose policies that please vocal activists or attract donors rather than all concerned stakeholders. More broadly, even value-driven NGOs do not necessarily represent the public interest: worker rights groups, for example, typically discount interests such as economic growth more heavily than would the hypothetical median voter either in the affected state or globally.

Second, single-actor schemes do not possess all the “competencies” necessary for effective regulation: expertise of several kinds, concrete operational capacities (including resources),
independence from the targets of regulation, and representativeness. Firms (and thus Firm schemes) have unparalleled business expertise and managerial capacity, but lack independence and represent only narrow economic interests. NGOs have normative expertise, important operational capacities (e.g., for influencing and mobilizing public opinion and monitoring business activities), and substantial independence. Yet NGOs (and NGO schemes) have little business expertise, managerial capacity or resources; their representativeness varies substantially and is frequently challenged. Even States lack important competencies for regulation in transnational settings: their expertise and information on business practices are limited; their regulatory authority and capacity are reduced; and their independence and representativeness are compromised (from a global perspective) to the extent they promote national interests. IGOs fare better on many of these issues, but have limited regulatory authority, resources and management capacity.

Collaborative schemes address both problems by including actors who possess a more representative range of motivations and a fuller range of complementary competencies. Zone 6 schemes such as FSC, SAI, GRI and FLO bring together private interests with diverse expertise and operational capacities. They are more representative than single-actor schemes and their multi-stakeholder structure reinforces independence, while business participation strengthens their operational capacities for agenda-setting, norm promotion and monitoring. A few Zone 4 schemes involve modest IGO efforts to promote socially responsible firm behavior, and so resemble the NG ideal type. The UNGC promotes normative learning, disclosure and

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178 See Abbott & Snidal, Governance Triangle, supra. For a different but similar effort to identify actors’ “regulatory capacities,” see Black, Enrolling, supra.

179 Developed states possess most competencies for domestic regulation.

180 Meidinger, Beyond Westphalia, supra, at [9-11], characterizes schemes like FSC as networks, bringing together firms, activists, forestry professionals, government officials, indigenous groups and other actors. O’Rourke, supra, at 4-6, suggests that the collaborative network form of such arrangements is designed to match the new structures of global production.

181 In some of these schemes, states or IGOs have acted as facilitator, as UNEP has in GRI. We place such schemes higher in Zone 6.

182 These schemes involve a range of orchestration approaches. As an IGO initiative, UNGC may appear suitable for directive orchestration, but in fact concentrates on facilitating learning. The IFC facilitated action by banks drafting the EQP, but may have been implicitly more directive. Collaborative schemes like TOI involve complex and subtle forms of orchestration. ISO, made up of private and governmental standard-setting bodies, has involved little directive orchestration beyond its founding. However, although ISO even now bills itself as an NGO, it retains
business-NGO interactions. The IFC provided “extensive advice and guidance” to banks drafting the Equator Principles, which are based on IFC rules.\textsuperscript{183} However, because schemes like UNGC are voluntary, are supervised by weak IGOs and provide limited roles for countervailing interests, NGOs doubt their independence and fear they “bluewash” unsatisfactory conduct.\textsuperscript{184} Zone 5 is sparse, as firms strongly resist exclusive state-NGO regulatory arrangements; such schemes would in any case lack business expertise and managerial capacity.

Two-actor schemes have their own shortcomings. Bringing together disparate, often adversarial actors necessarily entails a degree of mutual suspicion, as well as the costs of bargaining and compromising. An even greater cost from the NG perspective is that such schemes do not engage the preferences and capacities of all relevant actors. Zone 7 schemes, which include all three actor groups, would seem best able to assemble all essential competencies and a range of motivations approximating the public interest.\textsuperscript{185} Yet bargaining costs and suspicion make this area quite sparse, especially considering that some Zone 7 schemes were temporary (AIP) or are relatively weak (EITI, VPSHR).

ii. Multiplicity

The large number of RSS schemes within the TNG system helps it engage another key strength of NG – the ability to address regulatory issues in multiple and diverse ways, including through complementary interactions with OG. Again, consider worker rights in Southern apparel industries, which are only imperfectly protected by the ILO and by states. TNG offers an additional array of RSS schemes to address the issue -- IGO initiatives, firm and industry codes regulating foreign suppliers, NGO schemes and multi-stakeholder institutions. These schemes also introduce varied and often innovative techniques, including certifying plants, products and firms; external monitoring; product labels and logos; and social and environmental reporting.

\textsuperscript{183} http://web.worldbank.org/WEBSITE/EXTERNAL/NEWS/0,,contentMDK:20193065~menuPK:34480~pagePK:34370~theSitePK:4607,00.html
\textsuperscript{184} NGOs express similar concerns about the broader engagement of UN agencies with business, such as the encouragement of public-private partnerships at the Johannesburg World Summit for Sustainable Development.
\textsuperscript{185} Even successful RSS initiatives suggest the importance of involving all three actor groups. Cragg, supra, at 224-25.
Because RSS supplements rather than displaces treaties, IGO rules and state regulation, the cumulative effect of TNG and international OG exceeds that of OG alone. RSS schemes act as force multipliers for international regulation: they apply mechanisms like private certification and labeling in support of international norms, amplifying the impact of the state-centric mechanisms of OG. Furthermore, many RSS schemes fill gaps in international regulation: they address issues, sectors and regions where OG has limited impact, and promote norms that are more extensive or demanding than OG rules, such as payment of a “living wage.”

However, multiplicity can also undermine TNG, both by increasing costs for firms and by creating opportunities for them to subvert it. Firms pressured to adhere to multiple RSS schemes face heightened transactions, implementation and organizational costs. Suppliers in sectors targeted by activists bear especially severe costs: each customer might demand compliance with its unique standard as well as one or more industry, multi-stakeholder or NGO schemes. Other participants in multiple schemes bear similar costs. Even more significantly, firms that face multiple schemes of different degrees of stringency can “shop” for the most business-friendly among them, creating incentives for competing schemes to relax their standards.

Multiplicity can have other adverse effects. Developing country actors (including governments) opposed to standards they view as economically harmful or politically inconvenient may use multiplicity to minimize or evade regulatory standards. Consumers and other public audiences face high transactions costs and potential confusion in assessing the relative merits of multiple schemes, which can undermine their interest and commitment. Thus multiplicity has the potential to strengthen regulation, but also to undermine it. Below we discuss the role of orchestration in maximizing the benefits of multiplicity.

We now highlight three more specific effects of multiplicity.

Facilitating Adaptation

Multiplicity allows RSS standards and procedures to be fine-tuned to individual circumstances, in contrast to the relative uniformity of international OG; this is even more important in the highly diverse international economy. Self-regulatory codes are by nature designed for specific firms or industries; many NGO and collaborative schemes take the same approach: e.g., FSC, MSC, RUG, WRC and IFOAM. Other external schemes make special
provision for specific sectors (e.g., GRI sector supplements), actors (FLA for large, small firms), or regions (FSC regional standards). Many schemes also rely on input from affected firms, engaged NGOs and other actors with superior local information, bringing advantages akin to those of subsidiarity.\textsuperscript{186} The advantages of adaptability are tempered, however, by the possibility that firms may use the rationale of fine-tuning to weaken RSS standards.

\textit{Promoting Experimentation}

TNG offers a powerful laboratory for regulatory experimentation, although strong decentralization makes it a somewhat different laboratory than domestic NG. Indeed, because low costs of entry and the flexibility of soft law allow private actors to create RSS schemes spontaneously, TNG may produce even greater experimentation than does domestic NG.\textsuperscript{187}

Decentralization also offers opportunities for learning across schemes. Business groups and consultants disseminate lessons of successful self-regulation among firms. Norm entrepreneurs learn from other schemes, even borrowing entire templates, such as the “fair trade” and “stewardship council” models, for new industries. ISEAL promotes learning and harmonization among like-minded certification schemes and provides technical assistance to new ones. Mutual learning occurs in formal collaborations and other interactions: for example, NGOs consult with firms about standards (GSULL, TCO) or contract with them for external monitoring; firms study and participate in NGO schemes (CERES); and UNGC sponsors learning forums and encourages firms to engage with NGOs.\textsuperscript{188} Even institutions that vigorously compete for public and industry support observe, learn from and borrow from one another.\textsuperscript{189} In effect, competing schemes co-evolve through continuous interaction. In forestry, for example, NGO and industry schemes have begun to converge on common procedures in areas such as stakeholder input and external monitoring.\textsuperscript{190} Governments also learn from RSS experiments, improving public regulation.\textsuperscript{191}

\footnotesize
\begin{itemize}
\item \textsuperscript{186} Lobel, supra, at 302-03.
\item \textsuperscript{187} Low entry costs may also facilitate the appearance of relatively extreme schemes, both pro- and anti-business.
\item \textsuperscript{188} See Sahlin-Andersson, supra, at 140-41.
\item \textsuperscript{189} Such interactions facilitate accountability in a non-hierarchical regulatory system. Kingsbury, Krisch & Stewart, supra, at 58-9.
\item \textsuperscript{190} Meidinger, Beyond Westphalia, supra, at [8-9]; Sahlin-Andersson, supra.
\item \textsuperscript{191} Meidinger, Environmental Law-Making, supra, at 315; Meidinger, Democratic, supra, 519-20.
\end{itemize}
However, these benefits are diminished by the absence of any centralized agency in TNG to promote learning and consolidate the lessons of experimentation, all the more important given the sheer range of experiments in TNG. A central agent such as the state is better positioned to assess regulatory experiments systematically and to scale up, replicate or enact into law the most successful. As it stands, diffusion of successful approaches in TNG depends largely on demonstration effects – the willingness and ability of schemes to observe and learn from one another and modify their own approaches – and on competition, discussed further below.

Avoiding Capture

Multiplicity helps protect the international regulatory system against capture, even while TNG provides extensive authority to the targets of regulation. Reliance on multiple regulatory institutions diminishes the risk of capture: if one institution is captured, the activities of other schemes can compensate for it. Even if an IGO or state agency is captured, private RSS schemes retain substantial regulatory independence. Moreover, TNG relies heavily on soft law. As a result, regulatory capture neither places the full coercive power of the state behind the resulting distortive measures, as it does under OG, nor allows the captured institution to trump other schemes. These protections are reinforced by the intense competition among RSS schemes for legitimacy and public support; if one institution were captured, its competitors would quickly reveal and criticize that fact.

Countervailing interests in multi-stakeholder schemes also limit capture. In a Zone 6 scheme, for example, NGO or union participants resist capture by firms, and vice versa; if either group begins to succeed, the other can easily exit, challenge the legitimacy of the scheme, and even establish a competitor. Public actors can play similar roles in Zone 4, 5 and 7 schemes.

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192 Because of this access, NGOs wary of capture are often suspicious of NG programs. Kollman & Prakash, supra, at 417. NGOs can also capture regulation.

193 This effect can be seen in the mutual criticism between NGO and Firm schemes, which are “captured” by design.

194 Cf. Kingsbury, Krisch & Stewart, supra, at 59. The history of FLA reflects a similar dynamic: aggressive unions and NGOs left the FLA and created WRC, while conservative firms left and formed WRAP. NGO or business participants might be co-opted by the other so they would not resist capture, but some protection is still offered by the multiplicity of competing schemes and the ease of creating new ones.
Multi-stakeholder composition also makes collaborative schemes quite transparent, allowing interested outsiders to monitor their internal politics.\textsuperscript{195}

iii. Participation and engagement

TNG has created new avenues of participation for many diverse actors: NGOs, firms and their employees; unions (WRC); universities (FLA, WRC); socially responsible investors (CERES); organic and small farmers (IFOAM, FLO); indigenous groups and forest owners (FSC); scientists, advocates and numerous concerned individuals. Participation allows these individuals and groups to engage directly with regulatory issues and exercise greater voice in their own destinies and the destinies of others they seek to help. Such engagement is both an independent good and more empowering than the typical OG roles as lobbyists and objects of regulation.\textsuperscript{196}

Evaluating the social or collective benefits of TNG engagement is more difficult. Broad participation arguably renders TNG more “democratic,” enhancing its legitimacy as a regulatory system. However, this claim has been called “the most vexing normative implication” of NG,\textsuperscript{197} in part because participation is rarely representative in the ways called for in liberal democratic theory.\textsuperscript{198} Deliberative theory provides an alternative rationale, although there is no consensus on what constitutes adequate public participation and deliberation. Even with “convincing democratic theories for the global sphere … lacking,”\textsuperscript{199} many collaborative RSS schemes have developed mechanisms and procedures that pragmatically further the goals of both representative and deliberative democracy. Perhaps the best example is the FSC, which incorporates representatives of virtually all sustainable forestry stakeholder groups and reaches decisions

\textsuperscript{195} RSS schemes are not subject to legal transparency requirements found in advanced democratic states, such as open meeting and freedom of information laws, but some private schemes have begun to develop analogous procedures. The ISEAL Code of Good Practice details extensive transparency requirements.

\textsuperscript{196} See Ayres & Braithwaite, supra. Blackett, supra, at 125-27, argues that labor law promotes worker agency through participation, whereas many worker rights schemes deemphasize freedom of association and other participatory issues in favor of visible issues such as child labor.

\textsuperscript{197} Meidinger, Beyond Westphalia, supra, at [24], argues that theoretical examination of the democratic implications of NG is “a conceptual hodgepodge.”

\textsuperscript{198} More broadly, while Western states, at least, agree on liberal democracy as the appropriate framework for national regulation, there is no equivalent consensus on appropriate transnational governance. Cragg, supra, at 214.

\textsuperscript{199} Kingsbury, Krisch & Stewart, supra, at 49.
through deliberations within and among distinct environmental, social and economic “chambers,” each with Northern and Southern components. Other schemes have adopted stakeholder advisory councils, comment procedures and other means to promote transparency, participation and deliberation. Even in areas such as worker rights, where direct private roles in governance have long been confined to workers and employers, these arrangements render entire global regimes more participatory. Pragmatic steps like these constitute a sensible approach to developing democracy in an arena where the very meaning of the concept is in doubt; over time, they could have significant consequences for global democracy. Finally, TNG as a whole is implicitly deliberative in a different sense, as RSS schemes learn from one another, compete, bargain and collaborate.

Yet TNG still falls short of both liberal and deliberative democratic ideals. Liberal critics argue that democratic states are the sole legitimate regulators: only they grant each citizen an equal electoral voice and establish clear standards and procedures for representation and accountability. From this perspective, RSS can be seen as bypassing and weakening democratic decision-making. Even from a less purist perspective the quality of participation and deliberation in TNG remains uneven. Firm and industry schemes are only narrowly participatory, limited to economic stakeholders, and not highly deliberative, although a few incorporate significant input from other groups. Other schemes vary widely in engaging those ultimately affected by regulatory decisions – such as developing country workers – rather than elite groups that claim to speak for them. For example, decisions in CERES are made by

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201 For example, these developments are consistent with de Burca’s proposal for making transnational governance democratically legitimate: begin with an effort to enhance the participation and representation of those affected, and “strive” for greater democracy over time. See Grainne de Burca, Developing Democracy Beyond the State, 46 Colum. J. Transnat’l L. 221 (2008).

202 Joshua Cohen & Charles F. Sabel, Global Democracy?, 37 N.Y.U. J. Int’l L. & Pol. 763 (2005), speculates that the development of new accountability mechanisms for institutions of “global politics” (including IGO and other public regulation as well as TNG) could over time democratize global governance by developing the necessary global “demos” and public sphere.

203 Meidinger, Democratic, supra, at 531, describes competition for public acceptance as the “hidden democratic genius” of RSS.


205 Id. These critics level the same objections at IGOs that allow civil society participation.
representatives of international NGOs, socially responsible investors and other elite groups; in contrast, WRC includes Southern worker representatives on its board, gathers information from workers and involves them in monitoring. In general, even though many RSS schemes make an effort to include Southern voices, most are dominated by Northern elites.

Disparities in participation reflect a deeper collective action problem: social groups face highly uneven barriers to organization and action, systematically skewing participation. As operating entities, firms begin with a significant organizational advantage; they also place a high priority on influencing regulation. Industry groupings are relatively concentrated, are often organized in associations, and like firms can devote significant resources to lobbying and self-regulation.\textsuperscript{206} By contrast, social and environmental activists face problems of organization, although some can piggy-back on preexisting NGOs.\textsuperscript{207} Once formed, activist groups benefit from intense member support and often attract significant resources, if rarely equal to those of business. However, because norm entrepreneurs with concentrated values initiate most NGO schemes, and these depend on support from public audiences, the concerns of affluent, well-organized and vocal advocates and constituencies strongly influence the priorities of TNG, perhaps at the expense of less influential groups and issues of equal social value.\textsuperscript{208} Many potential schemes never emerge: consumers and Southern workers, for example, have diffuse interests and few organizational resources, so their voices are less likely to be reflected in RSS.

Although deficient compared to the NG ideal, TNG nevertheless represents a substantial overall improvement in the quality of transnational participation. In evaluating TNG, the appropriate counterfactual is not hypothetical representative democracy or “ideal speech” deliberation, but the prevailing regulatory setting. Many states involved in worker rights, human rights and environmental issues are not democratic, but authoritarian and corrupt. Even in

\textsuperscript{206} A strong industry association helped U.S. forestry companies overcome collective action problems and create SFI as a competitor to FSC. Sasser et al., supra, at 9.

\textsuperscript{207} For example, the business unit of Amnesty International UK drew on the resources of the larger organization to propose human rights standards for business, and WRC was created by United Students Against Sweatshops, an established NGO.

\textsuperscript{208} A possible example is organic food, which is less important to poor Southern consumers than to affluent Northern advocates. Graham & Woods, supra, at 873.
democracies, elite groups and leaders, not ordinary individuals, dominate politics; collective action problems pervasively influence interest group competition, even in OG.

The participatory advantages of TNG are magnified by the transnational nature of the issues it addresses. Decisions by a single state, even if democratic, cannot take account of interests that are widely distributed internationally; independent decisions by multiple states reflecting national interests may be inconsistent. In this situation, moving regulatory decision-making to a broader arena, such as an IGO, may produce more representative decisions. IGOs, however, are often dominated by powerful states, and their claims to democratic legitimacy depend in turn on the democratic quality of their member states, which varies widely. Even with its many problems, then, TNG enhances transnational civic engagement, participation and voice.

Orchestration

i. The international orchestration deficit

In principle, (T)NG is well suited to international regulation, but it faces a fundamental dilemma. As Braithwaite argues with respect to developing countries, the agents of international OG – states and IGOs – lack essential competencies for regulation; successful NG could produce superior outcomes at lower cost. Yet NG is premised on state orchestration and support of private regulatory actors, whereas the international system lacks a central “state” to provide equivalent steering and assistance. IGOs and states do provide limited directive and facilitative orchestration, but currently at modest levels. The resulting orchestration deficit is TNG’s greatest divergence from the NG ideal type and its most serious limitation.

Greater orchestration could enhance the impact of individual RSS schemes. It could prescribe substantive principles as minimums or defaults and require private schemes to observe public law principles and maintain transparency and accountability, enhancing their legitimacy. It could add the imprimatur of the state to schemes that meet such requirements. It could modulate the composition, internal structures and procedures of schemes to maximize their participatory and deliberative character and public interest orientation. It could actively assist weaker and more diffuse groups to participate, empowering them in internal decision-making.

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209 Many IGOs have broadened societal participation in response to democratic deficit concerns and other rationales of NG.
and acting on their behalf where necessary. By promoting broad participation and a rough balance of power among countervailing interests – along with transparency – orchestration would lower the risk of capture.

Greater orchestration could also strengthen TNG as a system. Orchestration could help rectify the uneven and suboptimal distribution of RSS schemes, including the absence of some alternatives. It could reduce the bargaining problems that hamper collaboration by initiating desirable regulatory arrangements, convening private actors, and facilitating the formation and operation of private institutions. Conversely, orchestration could manage overlaps in coverage caused by excessive multiplicity, thereby reducing forum-shopping and adverse competition. It could disseminate, replicate, scale up or enact into law the most successful innovations of RSS.

Many RSS schemes recognize the value of connections to state institutions. Many already incorporate international law rules as the heart of their standards. Virtually all labor rights schemes, for example, echo core ILO principles. Many collaborative schemes also follow governance procedures consistent with due process, public participation and other public law principles. ISEAL has accelerated this process. Yet all these moves are voluntary, decentralized and uneven. The NG model suggests that modest strengthening of orchestration and support could significantly improve the performance of TNG. Orchestration and support would also provide opportunities for IGOs and state agencies to enhance the transnational impact of their operations. We consider these possibilities in Section VI.

ii. Reliance on voluntary action by firms and public audiences

In the absence of state authority and orchestration, TNG must rely on voluntary actions by firms – which decide whether or not to adhere to and comply with RSS standards – and by consumers and other commercial and public audiences – which provide the incentives, both

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210 Ayres & Braithwaite, supra, at 59 (state can give weaker parties decision-making power and resources to use power effectively).

211 This is consistent with Ayres and Braithwaite’s recommendation for “tripartism” in decentralized regulation: because diffuse publics cannot offset organized economic interests, schemes must incorporate organized countervailing interests. Ayres & Braithwaite, supra, at 81-4. Cf. Fung & Wright, supra, chapter 11.

212 Examples include AIP and EITI.

213 Some analysts would still be unsatisfied with this outcome, viewing government as the only legitimate and effective force to advance progressive ideals. Freeman, Extending, supra, at 1301-03.
“carrots” and “sticks,” for firms to act.\textsuperscript{214} The most common form of voluntary adherence by firms is self-regulation; external schemes must convince firms to adopt their usually more stringent standards. In either case, profit-oriented firms make their decisions by comparing anticipated costs and benefits.\textsuperscript{215} Some perceive significant competitive advantages from participation: premium prices, brand loyalty, improved employee recruitment and morale, and other benefits, including a continuing “social license to operate.”\textsuperscript{216} Conversely, reliance on brand reputation makes firms vulnerable to pressure from consumers, employees, investors\textsuperscript{217} and the public, and sometimes to boycotts or legal proceedings.\textsuperscript{218} Downstream firms provide especially strong incentives by conditioning purchase contracts on suppliers’ adherence to the downstream firms’ individual codes or to external standards; such requirements are common among large firms in many industries.\textsuperscript{219} Indeed, much of the transnational impact of RSS, especially in sectors such as forestry in which business-to-business transactions dominate,\textsuperscript{220} has resulted from pressure on vulnerable downstream firms (e.g., branded retailers) to induce them to require foreign suppliers to accept external standards.\textsuperscript{221}

\textsuperscript{214} For this reason, Cashore, Auld & Newsom, supra, at 4, calls such regulation “non-state market-driven.”

\textsuperscript{215} Cashore, Auld & Newsom, supra, at 237; Wood, Sustainability, supra, at 49. Gunningham & Sinclair, supra, at 52 observes that local culture shapes the effectiveness of approaches such as self-regulation; firms in an adversarial society like the US may be more cost-benefit oriented than in Europe. However, firms in competitive markets face competitive constraints regardless of local culture.


\textsuperscript{217} Pressure comes from both socially responsible investors and economic investors seeking to avoid catastrophic risks like Bhopal. Blair, Williams & Lin, supra, at 9-10.

\textsuperscript{218} Graham & Woods, supra, at 872.

\textsuperscript{219} See Michael P. Vandenbergh, The New Wal-Mart Effect: The Role of Private Contracting in Global Governance, 54 UCLA L. Rev. 913 (2007). The author examined publicly disclosed policies and supply contracts for the largest firms in eight sectors; over half the firms, typically the largest, impose some environmental standards on suppliers. Other inter-firm contracts, such as acquisition, credit and insurance agreements, can also contain such standards. Id.

\textsuperscript{220} Cashore, Auld & Newsom, supra, at 238-39. Consumers rarely have opportunities to select FSC-certified wood over competing lumber.

\textsuperscript{221} Erika Sasser, Gaining Leverage: NGO Influence on Certification Institutions in the Forest Products Sector, in Forest Policy for Private Forestry 222, 236-37 (Lawrence W. Teeter, Benjamin Cashore & Dao Zhang, eds. 2003). Misty L. Archambault, Making the Brand: Using Brand Management to Encourage Market Acceptance of Forestry Certification, 81 N.Y.U.L. Rev. 1400 (2006), argues that in the U.S. this approach has had limited effect, and suggests marketing strategies to stimulate demand by consumers for certified products.
Ayes & Braithwaite observe that commercial and public audiences could replace the state in “responsive regulation” if they could reliably respond to firm misfeasance.\textsuperscript{222} However, reliance on such audiences poses major challenges for TNG. Consumers and other audiences may favor or oppose certain behaviors once recognized, but they are often poorly-informed about business behavior and confused by multiple opaque schemes and standards. Moreover, their values are frequently latent. Audiences must be informed and “activated” to serve as demandeurs and sanctioners for RSS;\textsuperscript{223} to do so, advocates and schemes must establish legitimacy in the eyes of these audiences.\textsuperscript{224} In addition, many consumers are not able or willing to pay extra for high-standards products.\textsuperscript{225} Those that are often have short attention spans and quickly redirect their interest to new issues. Organized actions such as boycotts depend on collective action by highly diffuse groups.

As a result, firms’ reliance on cost-benefit calculations significantly limits the regulatory potential of TNG: for most firms the costs of participation outweigh the perceived benefits. If a RSS scheme wishes to successfully promote strict standards, it must modify firms’ calculations by providing economic carrots – market or reputational benefits for adherents – or sticks – costs for non-adherents.\textsuperscript{226} Since both carrots and sticks depend on the actions of consumers and other audiences, however, they are uncertain and variable. Business groups such as Business for Social Responsibility, RSS schemes such as UNGC, and other advocates promote CSR in the hope of muting the dominance of cost-benefit calculations or at least revealing additional benefits. By most independent accounts, however, this is a long-term prospect at best.\textsuperscript{227}

Sticks (such as consumer boycotts or terminations of supplier contracts) are also costly to use and can have perverse consequences.\textsuperscript{228} Applied by a labor rights scheme, for example, they

\textsuperscript{222} Ayres & Braithwaite, supra, at

\textsuperscript{223} Abbott & Snidal, Values and Interests, supra.

\textsuperscript{224} See Bernstein & Cashore, supra, at 33-35. Competencies such as independence, normative expertise and representativeness are central to the quest for legitimacy. Cf. Black, Enrolling, supra, at 10.

\textsuperscript{225} “Approximately 80% of US coffee consumers . . . are indifferent to quality and sensitive to price.” Levi & Linton, supra, at 415.

\textsuperscript{226} Id.; Cashore, Auld & Newsom, supra, at 23-4, 236-37.

\textsuperscript{227} See, e.g., Vogel, Market for Virtue, supra.

\textsuperscript{228} Similar issues arise with enforcement actions. Prakash & Potoski, Voluntary Environmentalists, supra, at 21-2.
may harm the very workers the scheme aims to benefit. Sticks also strengthen incentives for firms to seek more flexible standards by “forum shopping” among multiple schemes or creating alternative self-regulatory schemes to defuse consumer and public pressure. In turn, these options create pressure on external schemes to relax their standards. While TNG advocates hope that RSS standards will be “ratcheted up” over time through competition for legitimacy and public support, as has in fact occurred in certain sectors, schemes also face strong incentives to “ratchet down” their standards.

Similarly, it is difficult for external schemes to appeal simultaneously to public audiences and the firms they seek to regulate. A scheme that sets strict standards to match the moral commitments of its core supporters may draw few business adherents; in turn, the scheme’s small size will limit the reputational benefits it can offer to attract additional firms. Conversely, if a scheme adopts business-friendly standards to attract adherents, it may lose legitimacy among concerned audiences. Similar problems arise when RSS schemes seek resources. Firms typically control the greatest resources, which schemes tap through voluntary dues, certification fees and the like. Relying on business support, however, may damage credibility with committed audiences. Public contributions, on the other hand, are difficult to acquire and uncertain. Most RSS schemes survive (modestly) through varying combinations of business and public sources, plus similarly unreliable foundation and government grants.

Thus, in some cases competition for legitimacy and audience support leads Firm schemes to strengthen their standards; in other cases competition for adherents leads external schemes to

229 Sasser et al., supra, at 3, finds that aggressive NGO targeting of forestry firms created a “confrontational atmosphere” that led firms to create the SFI industry scheme rather than adhere to FSC. This strategy depends on limited transparency and the inability of audiences to distinguish more or less stringent regulation.

230 Fung, O’Rourke and Sabel, supra, propose a structured ratcheting-up process based on disclosure and ratings by independent monitors, fueling competition for responsible reputations.

231 Examples include the competing forestry and worker rights/apparel schemes.

232 Cashore, Auld & Newsom, supra, at 5, 8; Meidinger, Beyond Westphalia, supra, at 8.

233 Cashore, Auld & Newsom, supra, at 240-43.


relax them. Still other cases are mixed: in forestry, industry schemes formed to compete with FSC have strengthened certain standards, while FSC has relaxed some to accommodate business concerns. The outcomes of such cross-cutting competition are extremely difficult to predict.\footnote{Cashore, Auld & Newsom, supra, at 8; Meidinger, Beyond Westphalia, supra, at 21-22.}

VI. Realizing the Potential of TNG

*Overcoming the orchestration deficit*

From both positive and normative perspectives, the emergence of TNG is a significant and potentially transformative development in international regulation. Yet the current orchestration deficit prevents TNG from realizing its full potential. While TNG may never match the NG ideal, states and IGOs can substantially strengthen it through expanded orchestration and support. Although the tools of transnational orchestration are less powerful than those available domestically, even modest forms of support and steering can enhance TNG’s effectiveness and contribution to the global public interest.

TNG is equally a boon for states and IGOs supportive of transnational regulation. Orchestration offers a way to attain transnational regulatory goals that are not achievable through domestic or international OG. Compared to international OG, moreover, orchestration requires less extensive state involvement, avoids the legal and political snares of extraterritorial regulation and requires fewer capacities and resources. For states, it entails more limited delegations of authority to IGOs than does OG. Support for and engagement with RSS schemes allow government agencies (e.g., labor or environment ministries) and subnational units (e.g., federal states or regions) to enhance their transnational regulatory impact without obtaining high-level political approval. For IGOs, orchestration offers ways to achieve their regulatory aims that are within their capacities and generate less state opposition than does international OG. TNG thus provides the most viable route to improving the international regulatory system.

To be sure, not all states and IGOs will wish to strengthen TNG. Developed states have limited incentives to incur national costs to improve social and environmental conditions abroad. They may also face domestic resistance from powerful firms, and at least implicitly from
consumers seeking cheaper goods, that will overwhelm pressures from civil society.\textsuperscript{237} To the extent TNG is promoted by Northern states and NGOs, many developing countries will oppose it as an imposition of inappropriate first world standards or as disguised protectionism.\textsuperscript{238} IGOs may be constrained by influential member states, and some may fear that TNG will displace them from their rightful roles. Nevertheless, many states, state agencies and IGOs already support RSS schemes in some areas. Given the benefits of TNG just described, we would expect this support to grow over time.

In this section, we identify potential techniques of orchestration for states and IGOs.\textsuperscript{239} We organize our discussion around the categories of orchestration introduced above: directive, the closest to the NG ideal, and facilitative, which is far more feasible – and more prevalent – in the international system. Of course, these categories are not strictly distinct, but blend into one another, especially in the collaborative relationships in the middle tier of the Triangle. We draw on a selection of existing examples but extrapolate from them based on NG theory. Similarly, our approach is both positive and normative: we discuss techniques already in limited use, and suggest what more states and IGOs might do to enhance TNG. Our goal is to explore the frontiers of orchestration and to suggest how it can promote the effectiveness of TNG.

\textit{Directive orchestration}

i. States

States have the authority and capacity for directive orchestration, and exercise them on occasion.\textsuperscript{240} To further support TNG, states can follow the domestic NG approach of relaxing legal and administrative requirements for firms that adhere to transnational RSS schemes. To steer TNG, states can mandate baseline substantive principles, operational procedures and other institutional parameters for RSS schemes subject to their jurisdiction. States might similarly support and regulate the NGOs, auditing firms and other actors that monitor firm compliance

\textsuperscript{237} That is, state support for TNG is constrained by the limits to the NG and OG models discussed in section III.

\textsuperscript{238} US Secretary of Labor Robert Reich’s proposal for an ILO social label died because of Southern charges of protectionism. Bartley, supra, at [25].

\textsuperscript{239} Our discussion overlaps, but does not exactly follow, the typology of public-private interactions in Wood, Environmental Management Systems, supra.

\textsuperscript{240} See Meidinger, Environmental Law-Making, supra, at 315-16; Meidinger, Beyond Westphalia, supra at [12-13]; Cashore, Auld & Newsom, supra, at 243-44.
with RSS schemes.\textsuperscript{241} Even a meaningful threat of mandatory regulation – or enhanced enforcement of existing regulations – creates an incentive for firms, schemes and monitors to adopt appropriate principles and procedures.

Credible threats are more difficult in the transnational context: states face significant legal and practical limits on extraterritorial exercises of jurisdiction.\textsuperscript{242} Yet they can avoid many of these constraints by adopting domestic requirements that influence the transnational behavior of national firms and RSS schemes. For example, rather than directly regulating the foreign conduct of national firms, a state can influence that conduct by imposing reasonable duties on home-based parent companies, directors and senior executives, or by requiring transparency or balanced participation in decision-making within its jurisdiction.\textsuperscript{243} The state can monitor such requirements through regular supervision procedures or newly mandated corporate reports. Other disclosure techniques might also be feasible: the state could even require national firms to disclose the conditions under which products were made, perhaps through certification by approved RSS schemes. While it may still be difficult for states to verify foreign conduct fully, transparency requirements empower NGOs to monitor firms and hold them accountable for their reports and actions. Developed countries can also initiate RSS schemes applicable to their firms’ foreign operations and use NG tools to support and orchestrate them. Such techniques help states avoid limits on jurisdiction, as they “exert subtler regulatory pressures … in relation to … foreign social and environmental performance, short of actually prescribing and enforcing standards.”\textsuperscript{244}

Other forms of direct support are also available. States can condition public benefits for firms, such as government procurement opportunities, on participation in approved RSS

\textsuperscript{241} See Murphy, supra, at 431. Many groups monitoring compliance with RSS schemes began as inspectors of goods in international trade; their role is largely unregulated by the state, although many schemes accredit monitors. See Blair, Williams & Lin, supra, at 4.

\textsuperscript{242} See generally Jennifer A. Zerk, Multinationals and Corporate Social Responsibility (2006).

\textsuperscript{243} A modest example is the UK Companies Act 2006, sec. 417, the subject of the CORE coalition campaign, supra note 4. This provision requires that a firm’s annual report include a “business review,” which for a quoted company must include information about “environmental matters, including the impact of the company’s business on the environment,” and about “social and community issues” – all to the extent necessary for understanding the firm’s business.

\textsuperscript{244} Id. at 134.
They also can scale up successful approaches, as by mandating other schemes to adopt equivalent techniques. In some cases, a state may enact successful approaches into law or adopt them as part of governmental programs.

As noted earlier, many developing countries lack the resources and capacities for directive action; even developed states lack the regulatory reach and capacity to direct the transnational activities of firms and RSS schemes; and individual states are globally unrepresentative, reducing their legitimacy and thus their effectiveness. To address these limitations, developed states can promote RSS through international agreements, as by linking bilateral trade or investment agreements and related technical assistance to developing country support for private standards and monitoring. States can also coordinate their approaches to orchestration with one another and with IGOs, leveraging complementary capacities and jurisdictions. For example, states have limited territorial jurisdiction, while IGOs have global reach; states have greater resources and capacities for directive action, while IGOs have greater regulatory legitimacy because of their global representativeness and mission and their relative independence from particular national interests. Thus directive orchestration by states and IGOs is highly complementary.

ii. IGOs

Strong directive orchestration by IGOs is rarely feasible for the same reasons that international OG has often failed: IGOs generally lack authority for mandatory action without state consent and for mandatory action addressed to private actors. But TNG opens other avenues of influence. IGOs can most effectively steer RSS schemes by inducing desired actions rather than compelling them, setting conditions on benefits they offer. Perhaps their most feasible and powerful technique is to require participation in approved RSS schemes to qualify as a vendor for IGO procurement. UN agencies alone procure over $6 billion in goods and services.

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245 This strategy may pose legal problems for some states, which under international agreements may impose only conditions relating to characteristics of procured products, not to the processes by which they are produced. See European Commission, Buying Green: A Handbook on Environmental Public Procurement (2004), available at http://ec.europa.eu/environment/gpp/pdf/buying_green_handbook_en.pdf.

annually, a substantial incentive, although limited to certain sectors.\textsuperscript{247} The UN Procurement Division now “strongly encourages all vendors to actively participate in the Global Compact.”\textsuperscript{248} This action is a good beginning, but is both hortatory and limited to a single scheme. TNG would be strengthened if IGOs did not limit procurement conditions to schemes they themselves sponsor, but instead integrated additional equivalent schemes in order to encourage (and even orchestrate) beneficial “race-to-the-top” competition.

Financial IGOs can require participation in approved schemes for firms seeking financing opportunities. Two examples reflect partial adoption of this strategy and suggest how it can be strengthened. First, since 2002 the World Bank has promoted sustainable forestry by encouraging certification based on internationally agreed criteria and indicators, including those of the FSC. Yet the Bank developed its own certification criteria, and resists endorsing particular schemes.\textsuperscript{249} This increases the complexity of TNG and misses a prime opportunity to strengthen existing RSS schemes. Second, IFC, the private sector arm of the World Bank, requires clients to meet demanding social and environmental conditions.\textsuperscript{250} With IFC support, major banks apply equivalent conditions through the Equator Principles. But IFC does not prescribe participation in approved RSS schemes as a way to satisfy its conditions. In addition, while IFC “coordinates” with other initiatives, it mentions only the Global Compact and Equator Principles. Here too, integrating additional schemes would enhance the impact of IFC standards, strengthen TNG and encourage beneficial competition.

Few IGOs provide sufficient financial benefits to employ these powerful forms of directive orchestration, and some of those that do – such as the World Bank – face complaints over their

\textsuperscript{247} Doing Business with the UN System (2005), available at \url{http://www.ungm.org/Pages/Information/Documents/tips.pdf}

\textsuperscript{248} \url{http://www.un.org/depts/ptd/global.htm}. As this policy suggests, imposing procurement conditions based on production processes poses fewer problems for IGOs than for states.


\textsuperscript{250} See IFC Policy on Social and Environmental Sustainability (2006), available at \url{http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_SocEnvSustainability2006/SFILE/SustainabilityPolicy.pdf}. For discussions of international financial institution (IFI) standards, see David B. Hunter, Civil Society Networks and the Development of Environmental Standards at International Financial Institutions, 8 Chi. J. Int'l L. 437 (2008); Elisa Morgera, Significant Trends in Corporate Environmental Accountability: The New Performance Standards of the International Finance Corporation, 18 COLO. J. INT'L ENVTL. L. & POL'Y 151. Hunter observes that IFI standards can in theory be more effectively enforced than most inter-state treaties, although in practice IFIs often rely on persuasion rather than enforcement. Id. at 471-73.
representativeness and legitimacy. But directive orchestration can operate more subtly. IGOs can initiate RSS programs, with appropriate requirements, and grant their imprimatur to participating firms. The EU “flower” ecolabel is a clear example; so too is ISO 14001. The UN Global Compact could pursue this strategy, but has chosen to eschew directive actions.\textsuperscript{251} IGOs can require participation in approved RSS schemes as a condition for firms’ access to advisory committees, meeting sessions and the like. Tiered access offering varying levels of participation would provide a “seal of approval” to firms with superior levels of RSS participation, grant them a voice in the regime and draw on their expertise. However, this strategy must be used with caution, as discrimination in access affects IGO representativeness and legitimacy.

IGOs can encourage states to support and steer RSS schemes using their stronger directive techniques. Where international agreements restrict state actions, IGOs can work with states to clarify existing rules or develop appropriate exceptions. The most important arena for such action is the WTO, whose rules are widely understood as limiting states’ ability to use trade policy to address transnational issues such as labor rights and environmental performance. Powerful member states have strongly and successfully resisted express modification of WTO rules, but some accommodations have been made through the dispute settlement system, and the deep interconnections between trade and regulatory governance will keep the issue on the WTO agenda. Less controversially, IGOs can provide forums for states to coordinate orchestration, and can coordinate their own activities with those of states.\textsuperscript{252} IGOs can encourage states to learn from successful RSS schemes, collaborate with them, ratify them and where appropriate enact them into law. IGOs and states may be able to incorporate successful RSS standards and procedures into international treaties, recommendations and programs.

Since directive orchestration retains a significant top-down character, issues of power necessarily arise. Although many regulatory goals are widely (although not universally) shared, there remain significant differences on many key aspects of regulation – e.g., how to trade off regulatory goals against other values such as economic growth. Orchestration by developed states may therefore raise opposition from developing countries concerned that their domestic

\textsuperscript{251} Sahlin-Andersson, supra, at 132, 134.

\textsuperscript{252} Fung, O’Rourke & Sabel, supra, suggests that IGOs such as the World Bank and ILO should develop model laws and otherwise urge states to develop appropriate domestic regulation.
policies are being dictated from outside, and from NGOs concerned that states are imposing inappropriate tradeoffs. The same is true of orchestration by IGOs controlled by developed countries: strong IGOs such as the World Bank are already criticized on these grounds. IGO structures and procedures may attenuate these problems but can never fully remove them: RSS is inherently political and will always be contested.

Facilitative orchestration

Facilitation is the most important form of transnational orchestration because of the limitations on state action and the weakness of IGOs. Conversely, facilitation offers significant low-cost opportunities to enhance international regulation, especially for IGOs.253 By supporting and collaborating with RSS schemes, IGOs and states can advance their regulatory goals through the full “web of relationships” of NG – “convening, facilitating, legitimating, negotiating, publicizing, ratifying, supervising, partnering and otherwise interacting.”254 Because it relies less on top-down authority, moreover, facilitation lessens, but does not eliminate, concern about the exercise of power.

i. States

States have substantial resources, and already provide material support for certain RSS schemes. In addition to the State Department’s support for transnational labor schemes, the Netherlands and the city of Bonn provide offices for GRI and FSC respectively, and “at least five European governments … subsidize NGO efforts to promote Fair Trade coffee.”255 Such forms of assistance constitute cheap investments for most states. States can convene, participate in and collaborate with RSS schemes, influencing their norms, structure and procedures through their terms for collaboration and ongoing negotiations. States can also provide legitimacy and moral support for RSS schemes based or operating in their jurisdiction.256 In doing so, states should distinguish among alternative RSS schemes, so as to strengthen those whose policies best fulfill

253 Emphasizing facilitation of RSS schemes would require a deep rethinking of IGO missions and techniques, like that the UN carried out before engaging in public-private partnerships.
254 See supra p.
255 Levi & Linton, supra, at 419. For other examples of state support, see Bartley, supra, at [17-18].
256 Cashore, Auld & Newsom, supra, at 243-44.
public goals and thereby encourage others to adapt. Finally, states have good information on many regulatory issues and can disseminate that knowledge to other participants in RSS.\(^{257}\) States can also use their knowledge to scale up of successful approaches. Finally, states can promote RSS norms by adhering to them in their own operations.

However, states have significant limitations as facilitators. Here too, individual states lack independence and representativeness – a problem that is heightened when developed countries, the key transnational facilitators, are largely promoting regulation of their own firms. Furthermore, because regulatory standards are never neutral, other actors will rightly worry that powerful states are using RSS to impose their preferred standards on the global community.

ii. IGOs

IGOs are well-situated to facilitate TNG, albeit with different comparative advantage than states. While they lack the material resources of states, many IGOs are seen as relatively independent of states and even more so of firms. This allows them to act as “honest brokers” acceptable to multiple stakeholders.

Because IGOs provide neutral forums with strong legitimacy and expert support, they have significant authority to convene multi-stakeholder groups like those in Zone 6 on the Governance Triangle. This is a low-cost way to facilitate initiation of desirable collaborative schemes. Convening, like other facilitative activities, helps private actors overcome the transactions costs and bargaining problems of collaboration. IGO convening can also include states, encouraging participation in public-private schemes and support for private RSS. Other important uses of IGO convening authority include: (1) engaging firms with RSS schemes to facilitate promotion, negotiation, feedback and other interactions; (2) engaging non-traditional actors, such as investors and insurers, with RSS schemes and firms;\(^{258}\) (3) engaging RSS schemes in an area to work toward optimal multiplicity; (4) engaging schemes with other concerned actors in learning forums linked with IGO knowledge production; (5) coordinating orchestration among states; and (6) promoting closer relationships between state regulation and private RSS.

\(^{257}\) The U.S. Labor Department during the Clinton administration published a “Trendsetters List” of firms that had agreed to monitor suppliers’ labor practices; Bartley, supra, at [25] suggests, however, that the program failed because of “irrational” criteria for inclusion.

\(^{258}\) Graham & Woods, supra, at 871-72.
Some IGOs can provide modest material support, especially for local “experiments,” and can run demonstration projects that provide broader lessons for transnational regulation. IGOs often have a legitimacy advantage over states, in that their support is less tied to particularistic interests, such as representing national firms. States might take advantage of this strength by funneling their support for RSS schemes through IGOs, which can “launder” the support, freeing it of perceptions of national bias – although only to the extent IGOs are perceived as independent of individual states. IGOs can participate directly in RSS schemes, negotiating appropriate structures, norms and procedures as part of their terms for collaboration.

IGOs can provide legitimacy and moral support to approved RSS schemes. IGOs could develop coordinated criteria for acceptable principles, structures and procedures – what Murphy calls a “code for codes” – or by adopting criteria developed by others, such as the ISEAL Code of Good Practice or the pending ISO social responsibility standard – and then grant their imprimatur to qualifying schemes. Public approval from respected IGOs assists well-designed schemes compete for resources and participation from consumers and other public audiences, promoting a race to the top. In addition, this approach would increase the experimental benefits of TNG by recognizing successful experiments. IGOs can further develop programs to encourage and persuade firms to adhere to approved schemes, whose reputational value would be increased by the IGO imprimatur. Last but not least, IGOs can themselves adhere to appropriate RSS schemes, applying RSS standards in their own operations.

IGOs already play an important facilitative role by promulgating rules on which private RSS schemes draw. But IGOs can enhance the force multiplier function of TNG by incorporating RSS schemes as core elements of their implementation strategies. The narrowest approach

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259 The World Bank and UNEP contribute to the GRI budget.

260 Pursuant to a 1999 trade agreement between the U.S. and Cambodia, which required the Cambodian textile industry to adhere to internationally recognized labor standards, the ILO agreed to monitor the industry’s compliance and provide technical assistance; the ILO continued the program, under the name Better Factories Cambodia, after the agreement expired. Although the ILO lacks resources to operate many such projects, IFIs and national development agencies see the Cambodia initiative as an example of a fruitful development strategy. See Kolben, supra, at 235-42; Sandra Polaski, Combining Global and Local Forces: The Case of Labor Rights in Cambodia, 34 WORLD DEV. 919, 924-27 (2006). See Bull & McNeill, supra, at 92-114, on other ILO “experiments.”

261 On “laundering,” see Abbott & Snidal, Formal Organizations, supra.

262 Murphy, supra, at 425-26.
would be to continue adopting rules for states using traditional procedures, but to frame those rules with an explicit view to their adaptation and application to firms by RSS schemes. More proactively, IGOs could encourage RSS schemes to adapt international rules for application to firms, involve schemes in international planning and rule-making processes to facilitate and accelerate that process, and provide for feedback from schemes based on their experience. IGOs could also look to RSS rules and procedures as they design their own norms and programs, especially those aimed at influencing private actors. These strategies are especially significant where state power and resources – and thus implementation of traditional rules – are weak.

IGOs can engage in “knowledge production,”\textsuperscript{263} drawing on their expertise and independence; IGOs with complementary expertise might collaborate in this effort. IGOs can gather and publicize information about successful RSS schemes and best practices. By better informing public audiences, this approach would increase the reputational “carrots” for firms to participate in well-designed schemes.\textsuperscript{264} IGOs can also promote replication of transnational best practices by other schemes, and urge states to promote their use. Expert IGOs like the ILO can provide technical assistance to firms or industries that wish to engage in appropriate self-regulation, and to developing countries seeking to implement (T)NG.\textsuperscript{265} This knowledge-based approach is similar to Fung, O’Rourke and Sabel’s influential proposal for a mechanism to “ratchet up” transnational labor standards.\textsuperscript{266} It would have several beneficial effects: promoting comparative study and dialogue on RSS approaches; encouraging race-to-the-top competition among schemes; encouraging standardization; and scaling up effective approaches.

\textsuperscript{263} Id.; Wood, supra.

\textsuperscript{264} Cf. Fung, O’Rourke & Sabel, supra.

\textsuperscript{265} Bull & McNeill, supra, at 99 notes that the ILO has been largely unable to perform this function, or to engage with RSS schemes involving NGOs, because of its formal tripartite structure.

\textsuperscript{266} Fung, O’Rourke & Sabel, supra.
Conclusion

TNG has arisen spontaneously, largely to fill the vacuum left by the persistent failures of international OG to regulate adequately through treaties and IGOs. Often TNG is billed as a purely private affair, and private TNG has had some modest success. But the full potential of TNG can only be achieved by bringing the state back in to international regulation.

The state operates in very different ways in TNG than in OG. Eschewing centralized mandatory regulation, TNG engages a softer and more subtle state role as orchestrator of diverse RSS schemes.

Orchestration has many advantages over traditional regulation at the international level. It demands fewer state resources and engages the wider range of expertise essential for addressing complex and far-flung regulatory problems. It does not require the top-down authority that has been elusive at the international level. Most importantly, orchestration is compatible with the incentives of the relevant actors. Orchestration allows states to participate in international regulation and delegate limited authority without incurring significant sovereignty costs; it allows IGOs to pursue their regulatory goals with less resistance from states and greater collaboration with private actors; it allows NGOs to pursue their normative goals and harness their capacities more directly and effectively; and it allows firms to have a direct voice and operating role in the regulatory system, a preferred substitute to mandatory regulation.

Because TNG is largely incentive-compatible, we expect that it will continue to expand as states and IGOs progressively increase their participation in this new style of regulation. Such progress requires a realization of the importance of orchestration and an understanding of how best to orchestrate; a major purpose of this article is to deepen our understanding of the value of orchestration and the techniques through which states and IGOs can enhance the impact of TNG.

TNG is no panacea. Its techniques are effective only to the extent that the power of civil society can substitute for that of the state. Undoubtedly, some firms and states will evade or undermine its impact. And even where it can be effective, its development will be politically contested, in part because actors have real differences over the content of standards: firms and NGOs differ over the desired stringency of labor standards, developed and developing states over that of environmental standards. The international system lacks well-developed legal and
political institutions where such differences can be reconciled, so the specter of power looms large, as always in international politics. IGOs are the best forums available for making these difficult collective decisions, but their efficacy varies according to perceptions of their independence from powerful states.

Nevertheless, we conclude on an optimistic note: for all its shortcomings, TNG provides both a viable way to strengthen the international regulatory system and new opportunities for states and IGOs to address urgent regulatory problems.
Figure 1: The Governance Triangle
<p>| Zone 1 | IECA | The Employment of Children Act (India) 1938 |
| Zone 1 | OECD | OECD Guidelines for Multinational Enterprises 1976 |
| Zone 1 | ECO | German Blue Angel eco-label 1978 |
| Zone 1 | BM | WHO Code of Marketing for Breast-milk Substitutes 1981 |
| Zone 1 | EMAS | UK Eco-Management and Audit Scheme 1992 |
| Zone 1 | IFC | World Bank International Finance Corp. Safeguard Policies 1998 |
| Zone 2 | GAP | individual labor rights scheme of Gap, Inc. 1992 |
| Zone 2 | BS | The Body Shop's &quot;Trade Not Aid&quot; initiative 1991 |
| Zone 2 | ICC | Int'l Chamber of Commerce Charter for Sustainable Development 1991 |
| Zone 2 | RC | Responsible Care, chemical industry environmental scheme 1987 |
| Zone 2 | WDC | World Diamond Council warranty system for conflict diamonds 2004 |
| Zone 2 | WRAP | Worldwide Responsible Apparel Production, industry labor code 2000 |
| Zone 2 | SFI | Sustainable Forestry Initiative 1994 |
| Zone 2 | PEFC | Programme for the Endorsement of Forest Certification 1999 |
| Zone 2 | WBCSD | World Business Council for Sustainable Development 1992 |
| Zone 3 | SULL | Sullivan Principles 1977 |
| Zone 3 | AI | Amnesty International Human Rights Guidelines for Companies 1997 |
| Zone 3 | CERES | CERES Principles on environmental practices and reporting 1989 |
| Zone 3 | RUG | Rugmark labeling scheme to control child labor in carpets 1994 |
| Zone 3 | GSULL | Global Sullivan Principles on economic and social justice 1999 |
| Zone 3 | WRC | Worker Rights Consortium 2000 |
| Zone 4 | ISO14 | International Organization for Standardization 14001 environmental management standard 1996 |
| Zone 4 | UNGC | United Nations Global Compact 2000 |
| Zone 4 | TOI | Tour Operators Initiative 2000 |
| Zone 4 | EQP | Equator Principles 2003 |
| Zone 5 | TCO | TCO Development environmental and energy standards for computers |</p>
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<tr>
<th>Zone 6</th>
<th>IFOAM</th>
<th>International Federation of Organic Agriculture Movements 1972</th>
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<tr>
<td></td>
<td>FLA</td>
<td>Fair Labor Association; apparel industry scheme 1999</td>
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<td></td>
<td>FLO</td>
<td>Fairtrade Labeling Organization “fair trade” umbrella scheme 1997</td>
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<td></td>
<td>FSC</td>
<td>Forest Stewardship Council certification, labeling scheme 1993</td>
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<td></td>
<td>GRI</td>
<td>Global Reporting Initiative; standards for social, environ. reports 1997</td>
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<td></td>
<td>SAI</td>
<td>Social Accountability Int’l standard for supplier labor practices 1997</td>
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<td></td>
<td>MH</td>
<td>Max Havelaar Fair Trade certification, labeling for coffee 1988</td>
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<td></td>
<td>MSC</td>
<td>Marine Stewardship Council 1997</td>
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<tr>
<th>Zone 7</th>
<th>AIP</th>
<th>Apparel Industry Partnership; Clinton Administration initiative convening firms, unions, NGOs, other industry stakeholders 1996-7</th>
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<td></td>
<td>EITI</td>
<td>Extractive Industries Transparency Initiative; UK disclosure scheme for payments by firms, host government expenditures 2002-03</td>
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<td>ILO</td>
<td>International Labor Org. Declaration on Multinational Enterprises 1977</td>
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<td>KIMB</td>
<td>Kimberley Process on conflict diamond trade 2003</td>
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<td></td>
<td>VPSHR</td>
<td>Voluntary Principles on Security and Human Rights (private security forces) 2000</td>
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Table 1. RSS Schemes on the Governance Triangle