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Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit

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Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit

Kenneth W. Abbott*
Duncan Snidal†

ABSTRACT

A new kind of international regulatory system is spontaneously arising out of the failure of international "Old Governance" (i.e., treaties and intergovernmental organizations) to adequately regulate international business. Nongovernmental organizations, business firms, and other actors, singly and in novel combinations, are creating innovative institutions to apply transnational norms to business. These institutions are predominantly private and operate through voluntary standards. The Authors depict the diversity of these new regulatory institutions on the "Governance Triangle," according to the roles of different actors in their operations. To analyze this complex system, we adapt the domestic "New Governance" model of regulation to the international setting. "Transnational New Governance" potentially provides many benefits of New Governance and is particularly suitable for international regulation because it demands less of states and intergovernmental organizations (IGOs). However, Transnational New Governance does require states and IGOs to act as orchestrators of the international regulatory system, and that system currently suffers from a significant orchestration deficit. If states and IGOs expanded "directive" and especially "facilitative" orchestration of the Transnational New Governance system, they could strengthen high-quality private regulatory standards, improve the

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international regulatory system, and better achieve their own regulatory goals.

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I. INTRODUCTION

Regulation of transnational business has become a dynamic area of international governance.¹ Nongovernmental organizations (NGOs) have demanded stricter regulation of international firms and their suppliers,² especially with regard to worker rights, human rights, and the environment—the areas addressed 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

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 concern over the power of multinational enterprises.

2. The tactics by which NGOs influence international decision makers are the subject of a substantial body of literature. See, e.g., MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998) (discussing the influence of transnational NGO networks on issues such as human rights, the environment, and violence against women); Ann Florini & P.J. Simmons, *What the World Needs Now?*, in *THE THIRD FORCE: THE RISE OF TRANSNATIONAL CIVIL SOCIETY* (Ann Florini ed., 2000) (stating that NGOs are involved in a “wide range of decision-making processes” including international security, human rights, and the environment); Richard Price, *Transnational Civil Society and Advocacy in World Politics*, 55 *WORLD POL.* 579, 580–81 (2003) (describing the role of privately-organized public interest activist groups in political advocacy); Thomas Risse, *Transnational Actors and World Politics*, in *HANDBOOK OF INTERNATIONAL RELATIONS* 255, 255, 268–69 (Walter Carlsnaes et al. eds., 2002); see also Ronnie Lipschutz, *Reconstructing World Politics: The Emergence of Global Civil Society*, 21 *MILLENNIUM J. OF INT’L STUD.* 389, 415 (1992). In the areas discussed here, NGOs mounted “social movement campaigns” to create public and stakeholder pressure, often around corporate scandals. Erika N. Sasser et al., *Direct Targeting as an NGO Political Strategy: Examining Private Authority Regimes in the Forest Sector*, *BUS. & POL.*, Dec. 2006, at 1, available at <http://www.bepress.com/bap/vol8/iss3/art1>. Social movement campaigns used market- and media-based strategies to pressure specific firms, industries (e.g., chemicals, tropical timber), and “downstream” firms (e.g., retailers that could impose standards on suppliers). *Id.* at 3–4; see 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, 300, 319 (2007) (analyzing successful campaigns, including efforts against Nike’s labor conditions and efforts to increase environmental friendliness of timber products); cf. Orly Lobel, *Big Box Benefits: The Targeting of Giants in a National Campaign to Raise Work Conditions*, 39 *CONN. L. REV.* 1685 (2007) (analyzing domestic campaigns to target major symbolic firms such as Wal-Mart).

3. These areas reflect a broad consensus on the need for regulation. See Wesley Cragg, *Multinational Corporations, Globalisation, and the Challenge of Self-Regulation*, in *HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE* 213, 215–17 (John J. Kirton & Michael J. Trebilcock eds., 2004).

4. For discussion of such “demonstration effects” in stimulating demand for regulation, see Walter Mattli & Ngaire Woods, *In Whose Benefit?: Explaining*

these demands. Yet business has, for the most part, vigorously resisted mandatory (and even less than mandatory⁵) regulation in these areas, even as an increasing number of large firms⁶ have responded to public demand, reputational concerns, and the possibility of “win-win” innovations⁷ to embrace corporate social responsibility,⁸ self-regulation,⁹ and stronger requirements for suppliers.¹⁰ In addition, the evolving structures of global

Regulatory Change in Global Politics, in *THE POLITICS OF GLOBAL REGULATION* (Walter Mattli & Ngaire Woods eds., forthcoming 2009).

5. See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion & Prot. of Human Rights, *Economic, Social and Cultural Rights: Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12 (May 30, 2003) [hereinafter *Draft Norms*]. Business opposed the Draft Norms approved by the UN Sub-Commission on the Promotion and Protection of Human Rights—a subsidiary body of the then-Human Rights Commission. See John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819, 821 (2007); David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT’L L. 901, 903 (2003). Supporters in the Sub-Commission argued that the Norms were “non-voluntary,” drawing legal authority from human rights treaties. That position appears to go beyond settled international law, see Ruggie, *supra*, at 827, 832, and the principal drafter of the Norms, David Weissbrodt, now describes them as “consistent with the progressive development of international law.” David Weissbrodt, *International Standard-Setting on the Human Rights Responsibilities of Businesses*, 26 BERKELEY J. INT’L L. 373, 382 (2008).

6. 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* note 5, at 836.

7. In “win-win” situations, a firm’s responses to social or environmental problems also increase its profits. See ASEEM PRAKASH & MATTHEW POTOSKI, *THE VOLUNTARY ENVIRONMENTALISTS: GREEN CLUBS, ISO 14001, AND VOLUNTARY REGULATIONS* 48 (2006).

8. David Vogel distinguishes “new” corporate social responsibility, in which firms address social and environmental externalities of their business practices with an eye to increasing profits, from “old” corporate social responsibility, 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).

9. Some firms have tried to avert mandatory regulation by instituting largely symbolic codes of conduct, some of which have been exposed as shams. See Bartley, *supra* note 2, at 327–28 (stating that “shoddy” symbolic responses by the garment industry have been challenged and exposed). Business does support regulation that facilitates its activities—e.g., the trade-liberalizing rules of the WTO—and individual firms support regulations that benefit them economically. *Id.* at 333–34.

10. In a potentially significant recent example, Wal-Mart announced new social and environmental requirements for foreign suppliers at a “sustainability summit” in Beijing on October 22, 2008. See Press Release, Wal-Mart Stores, Inc., Wal-Mart Announces Global Responsible Sourcing Initiative at China Summit (Oct. 22, 2008), available at <http://walmartstores.com/FactsNews/NewsRoom/8696.aspx>.

production—multinational enterprises and global supply chains¹¹—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 production¹⁴ through transnational norms¹⁵ that apply directly to firms and other economic operators.¹⁶

The new regulatory initiatives have two particularly striking features.¹⁷ 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.”¹⁸ Unlike traditional inter-state treaties and IGOs,¹⁹ and unlike transgovernmental networks of state officials,²⁰ most of these arrangements are governed by (1) firms and industry groups whose own practices or those of supplier firms are the targets of regulation; (2) NGOs and other civil society groups, including labor unions and socially responsible

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* note 5, at 823.

12. Julia Black, *Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World*, 54 CURRENT LEGAL PROBS. 103, 128–40 (2001) (reviewing other definitions of “regulation”).

13. Many institutions were newly created to adopt regulatory standards; where appropriate institutions (e.g., NGOs and industry associations) already existed, only the standards were newly created.

14. Most of the new institutions are primarily concerned with transnational business. Other actors, including universities, landowners, and government agencies, also adhere to certain schemes.

15. Stepan Wood notes that the new institutions and rules are “normative” in two senses: they both prescribe and standardize behavior. Stepan Wood, *Voluntary Environmental Codes and Sustainability*, in ENVIRONMENTAL LAW FOR SUSTAINABILITY 229, 230 (Benjamin J. Richardson & Stepan Wood eds., 2006).

16. See Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROB. 15, 23–24 (2005).

17. Referring to sustainable forestry schemes, BENJAMIN CASHORE ET AL., GOVERNING THROUGH MARKETS: FOREST CERTIFICATION AND THE EMERGENCE OF NON-STATE AUTHORITY 4 (2004), describes these arrangements as “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.

19. The regulatory powers of IGOs have also evolved, often dramatically. See Benedict Kingsbury et al., *Foreword: Global Governance as Administration—National and Transnational Approaches to Global Administrative Law*, 68 L. & CONTEMP. PROB. 1, 2 (2005).

20. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 10 (2004).

investors;²¹ and (3) combinations of actors from these two categories.²² States and IGOs support and even participate in some largely private schemes, yet the state is not central to their governance or operations.²³ 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—including 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 (as opposed to indirectly, through rules governing states).²⁴ Many of these initiatives also 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.²⁵ It is natural for private institutions formed by firms 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” approaches rather than the traditional “hard law” of treaties.

We refer to these novel private, public-private, and IGO initiatives as forms of “regulatory standard-setting” (RSS),²⁶ defined

21. In connection with the Governance Triangle, we use “NGOs” very broadly to refer to all non-state actors except IGOs (Zone 1) and firms and industry groups that are targets of regulation (Zone 2).

22. Private schemes thus reflect a “cosmopolitan” view of global governance, not limited to inter-state arrangements. See Kingsbury et al., *supra* note 16, at 43.

23. Meidinger calls such arrangements “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) [hereinafter Meidinger, *Competitive Supragovernmental Regulation*].

24. The *Draft Norms*, *supra* note 5, were intended to apply directly to firms; the failed UN Draft Code of Conduct for Transnational Corporations would also have done so.

25. These norms are “voluntary” in the sense that they are not legally required; however, firms often adhere because of 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* note 2, at 297 (“transnational private regulation”); CASHORE ET AL., *supra* note 17, at 4 (“private governance systems” and “non-state market driven governance systems”); PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS, at ix (A. Claire Cutler et al. eds., 1999) (emphasizing private authority as “governance without government”); Rodney Bruce Hall & Thomas J. Biersteker, *The Emergence of Private Authority in the International System*, in THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE 3, 4 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002) (discussing the “legitimate authority” of private organizations). We also address private institutions but argue that there is (and should

as the promulgation and implementation of nonbinding, voluntary standards of business conduct in situations that reflect “prisoner’s dilemma” externality incentives (the normal realm of regulation), rather than coordination network externality incentives²⁷ (the realm of voluntary technical “standards” such as those set by the International Organization for Standardization).²⁸ RSS potentially involves all of the functions of administrative regulation in domestic legal systems: rule making, rule promotion and implementation, monitoring, adjudication of compliance, and the imposition of sanctions.²⁹ The rapid multiplication of RSS 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.³⁰

To gain analytical leverage on this complex emerging system, we look to the New Governance model of regulation, which was

be) a role for the state in the emerging system. We therefore use the broader term RSS, which encompasses more than purely “private” activity.

27. Kenneth W. Abbott & Duncan Snidal, *International “Standards” and International Governance*, 8 J. EUR. PUB. POL’Y 345, § 1 (2001) [hereinafter Abbott & Snidal, *International Standards*] (distinguishing the broad categories of prisoner’s dilemma versus coordination externalities, and stating that a key difference between the two is that incentives to participate in a regulatory scheme increase with the number of other participants for coordination but not for prisoner’s dilemma problems); Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT’L L. 389, 392–94 (2005) (referring to these categories as “public welfare” and “private transactional”).

28. Margaret M. Blair et al., *The Roles of Standardization, Certification, and Assurance Services in Global Commerce* 15–17 (Aug. 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1120503> (arguing that regulatory standards, like technical standards, reduce the transactions costs of market interactions). ISO is currently considering guidelines for social responsibility standards, tentatively designated ISO 26000.

29. Cf. Kingsbury et al., *supra* note 16, at 17 (noting that functions of many global institutions resemble domestic “administration”). On monitoring and related activities, see Dara O’Rourke, *Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring*, 31 POL’Y STUD. J. 1 (2003).

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* 121, 121 (Christian Brutsch & Dirk Lehmkuhl eds., 2007) [hereinafter Meidinger, *Beyond Westphalia*], defines “regulation” as “a purposive, organized and sustained effort to establish a general and consistent order in a field of human activity.” It “typically centres on rules defined in terms of rights and duties, with differentiated official roles and normative justifications . . . characterized by a reliance on credentialed experts.” *Id.* Similarly, Julia Black, *Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation*, PUB. L., Spring 2003, at 63, 65, defines “regulation” as “the sustained and focused attempt to alter the behaviour 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 behaviour-modification.” Even more broadly, Stepan Wood defines “regulation” as “all calculated efforts at social control, whether undertaken by state agents or not.” Wood, *supra* note 15, at 229.

developed to characterize a diverse range of innovative domestic regulatory practices.³¹ The diversity of practices encompassed within New Governance makes it difficult to define precisely—indeed, it is often defined merely by contrast to traditional forms of regulation.³² To focus the discussion, we identify four central elements of New

31. For discussions of New Governance from a public administration perspective, see *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* (Lester M. Salamon ed., 2001). New Governance is related to other recent developments in regulation. One is the growing use of nontraditional 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) [hereinafter *NEW INSTRUMENTS*]. 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 New Governance are instruments such as ecolabels and ecoaudits. Jonathan Golub, *New Instruments for Environmental Policy in the EU: Introduction and Overview*, in *NEW INSTRUMENTS*, *supra*, at 1, 5 [hereinafter Golub, *Introduction*]. 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* 293, 304 (Errol Meidinger et al. eds., 2002) [hereinafter Meidinger, *Environmental Law-Making*]. Market instruments can also lead to inefficiencies, e.g., if property rights are inadequate. PRAKASH & POTOSKI, *supra* note 7, at 12–14.

A second related development is New Public Management theory. See Mayra Besosa, *New Public Management*, *ACADEME ONLINE*, May–June 2007, <http://www.aaup.org/AAUP/pubsres/academe/2007/MJ/Feat/ieso1.htm> (defining “new public management” theory as advocating the application of private-sector management strategies to governance); see also DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 22–24 (1992) (arguing for government to be more “entrepreneurial” and less bureaucratic in how it spends its resources); Scott Burris et al., *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 *AKRON L. REV.* 1, 46–47 (2008) (explaining the demand to “reinvent government” partially by making it more efficient and responsive to constituents). New Public Management analogizes regulators to businesses that must satisfy their “customers.” Burris et al., *supra*, at 47. Elements shared with New Governance include support for community “ownership” of public programs; competition among service mechanisms including private contractors and public-private partnerships; and a preference for participation over hierarchy. OSBORNE & GAEBLER, *supra*, at 49–107, 250–79.

Many practices seen as part of New Governance, such as government-business negotiations over rules, have in fact been used for years; New Governance represents an intensification of traditional approaches. See Wood, *supra* note 15, at 236.

32. Black, *supra* note 12, at 105; Gráinne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 1, 2–3 (Gráinne de Búrca & Joanne Scott eds., 2006); David M. Trubek & Louise G. Trubek, *New Governance and Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 *COLUM. J. EUR. L.* 539, 542–43 (2007) [hereinafter Trubek & Trubek, *New Governance*].

Governance, each reflecting a modification of the state's traditional role.³³ In New Governance, the state:

- (1) incorporates a *decentralized* range of actors and institutions, both public and private, into the regulatory system, as by negotiating standards with firms, encouraging and supervising self-regulation, or sponsoring voluntary management systems;
- (2) relies on this range of actors for regulatory *expertise*;
- (3) modifies its regulatory responsibilities to emphasize *orchestration*³⁴ of 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 New Governance model is still predominantly applied in domestic contexts. New Governance approaches such as government–industry pollution control agreements have been widely adopted in industrialized countries. John Braithwaite argues that New Governance 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 New Governance for the international system—what we label “Transnational New Governance.” New Governance cannot be uncritically transferred to the very different circumstances involved in the international system, where the role of the state is even more attenuated, but it does provide key insights for improving international regulation.

In this Article, we develop a model of Transnational New Governance to analyze the emerging patterns of RSS and its potential for improving international regulation. The Article advances both positive and normative arguments. Positively, the Article argues that the expanding array of RSS schemes is developing into a system of Transnational New Governance for business. As in the New Governance model, these schemes form a decentralized but increasingly dense and interlinked³⁶ constellation of private and

33. For an alternative organization of the principles of New Governance, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004) (synthesizing the literature on New Governance and related approaches to regulation, identifying eight “organizing principles”).

34. The authors draw the term “orchestration” from Lobel. *Id.* at 345.

35. John Braithwaite, *Responsive Regulation and Developing Economies*, 34 WORLD DEV. 884, 884–85 (2006). New Governance is undermined in developing countries by weak markets and civil society, but Braithwaite still finds it more workable than Old Governance. *Id.* at 886.

36. On emerging linkages among schemes, see Meidinger, *Beyond Westphalia*, *supra* note 30, at 126–30.

public-private rule-making arrangements, drawing on many sources of expertise and relying on soft law, which surrounds and complements traditional state-based regulatory structures. This Article also argues positively that states, and especially IGOs, have incentives to promote Transnational New Governance as the best means of achieving their regulatory objectives. Normatively, this Article argues that states and IGOs should promote Transnational New Governance because it has significant potential to ameliorate the persistent regulatory inadequacies of international "Old Governance," which created the space for RSS to develop.³⁷

Whether Transnational New Governance 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, New Governance is a tool deployed and orchestrated by governments.³⁸ Orchestration includes a wide range of directive and facilitative measures designed to convene, empower, support, and steer public and private actors engaged in regulatory activities. Most transnational RSS schemes, in contrast, have been created from the bottom up by societal actors,³⁹ often in response to perceived failures of state action.⁴⁰ Most are private institutions operating largely free of state orchestration and support.⁴¹ Absent a global "state" or more effective orchestration by states and IGOs, RSS schemes must compete for authority⁴² from target firms⁴³ and from

37. The weakness of the state is frequently seen as a major reason for the rise of domestic New Governance. Gráinne de Búrca & Joanne Scott, *Narrowing the Gap? Law and New Approaches to Governance in the European Union: Introduction*, 13 COLUM. J. EUR. L. 513, 513-14 (2007).

38. See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 4 (1992) (holding public regulators should "promote private market governance through enlightened delegations of regulatory functions"); CASHORE ET AL., *supra* note 17, at 29 (discussing how private regulation literature focuses on institutions selected and empowered by state); Gunningham & Sinclair, *supra* note 31, at 49-50 (viewing regulatory instruments as tools for policy makers).

39. Black, *supra* note 30, at 63-66 (analyzing modern regulation as a process of "enrolling" those actors best able to contribute to the regulatory project, yet recognizing that the state cannot control the enrolling process in a decentralized regulatory system).

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).

41. No scheme is entirely private, as its participants and the institution itself are legal entities operating under state-generated legal constraints.

42. On the importance of obtaining authority from audiences connected to relevant supply chains, see Steven Bernstein & Benjamin Cashore, *Non-State Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest*

audiences including consumers, NGOs, “downstream” firms, and socially responsible investors,⁴⁴ which can create incentives for firms to comply with RSS norms. These processes are weaker and more uncertain than state action. As a result, existing Transnational New Governance falls short of the New Governance ideal—Transnational New Governance is not and may never be as effective as New Governance is within advanced states.

However, states and IGOs can play substantial, if nontraditional, roles in Transnational New Governance to enhance its effectiveness.⁴⁵ This Article argues 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. States and IGOs can draw on fewer and less powerful techniques of orchestration than are available domestically, but relatively modest actions can significantly enhance the effectiveness, legitimacy, and global public interest orientation of RSS. Nonetheless, our expectations must remain modest. The political weaknesses that undercut international Old Governance also constrain Transnational New Governance, and their extent is massive: in many areas Transnational New Governance can do no more than ameliorate the shortcomings of international regulation.

The Article proceeds as follows. Part 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 Transnational New Governance and is the empirical basis for our analysis. Part III develops basic analytic building blocks, contrasting the “ideal type” of New Governance to that of Old Governance. Unlike Old Governance, New Governance emphasizes state orchestration of decentralized actors,

Convention?, in *HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE*, *supra* note 3, at 33, 36.

43. PRAKASH & POTOSKI, *supra* note 7, at 2–3 (characterizing 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, business and nonbusiness “legitimacy communities” have quite different criteria for granting authority, such that a gain of legitimacy with one may reduce the authority granted by another. Black, *supra* note 30, at 75–76.

45. CASHORE ET AL., *supra* note 17, at 28, tbl.1.7, presents a useful typology of governance modes, placing most private RSS 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; that would move such schemes out of the pure “non-state” category and toward Cashore, Auld and Newsom’s next category, “shared public-private governance.” However, they define this category to include only schemes whose authority is derived from government; we would not move private schemes that far.

engages dispersed expertise, and relies on soft law. Part IV analyzes how these two ideal types have been transferred imperfectly to the international level: Old Governance through IGOs and unilateral state actions, and New Governance through the RSS schemes on the Triangle. Transnational New Governance is even more decentralized and suffers a severe “orchestration deficit” compared to the New Governance ideal type. Part V evaluates the strengths and weaknesses of Transnational New Governance in light of this analysis. Part VI analyzes how the orchestration deficit that weakens Transnational New Governance might be overcome, particularly through facilitative orchestration, a more practical option than the directive orchestration characteristic of domestic New Governance.

II. THE GOVERNANCE TRIANGLE

We begin by introducing the major transnational RSS schemes that constitute the emerging Transnational New Governance 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, with the dates of their first significant regulatory standard-setting activities. 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.⁴⁶ (For clarity, in Zones 2 and 6 brackets indicate sets of schemes that are sufficiently similar to be approximated by a single point.) 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.”⁴⁷ For convenience, that space is divided into

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 its placement criteria, see Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, in *THE POLITICS OF GLOBAL REGULATION*, *supra* note 4 [hereinafter Abbott & Snidal, *Governance Triangle*]. 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 ET AL., *supra* note 17, at 220 (advocating comparison by process rather than placement). 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, *supra* note 15, at 237. We include some OG schemes in Zone 1 for purposes of the ensuing discussion.

47. This resembles the “global administrative space” identified in Kingsbury et al., *supra* note 16, at 25–27.

seven zones representing situations in which one (Zones 1–3), two (Zones 4–6), or three (Zone 7) actor groups dominate governance of RSS schemes.

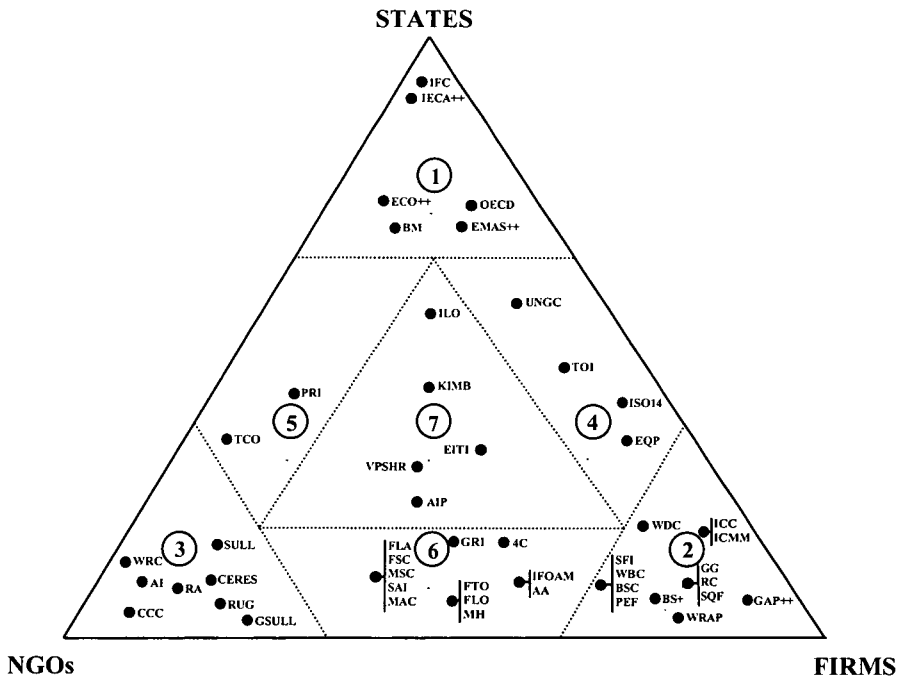


Figure 1: The Governance Triangle

Zone 1	IECA	The Employment of Children Act (India), 1938
	OECD	Guidelines for Multinational Enterprises, 1976
	ECO	German Blue Angel eco-label, 1978
	BM	WHO Code of Marketing for Breast-milk Substitutes, 1981
	EMAS	UK Eco-Management and Audit Scheme, 1992
	IFC	International Finance Corp. Safeguard Policies, 1998
Zone 2	GAP	Labor rights scheme of Gap, Inc., 1992
	BS	The Body Shop, "Trade Not Aid" initiative, 1991
	ICC	Int'l Chamber of Commerce Business Charter for Sustainable Development, 1991
	RC	Responsible Care, 1987
	GG	Global GAP, agricultural products standard on safety, environment, labor, 1997 (as EUREPGAP)
	SQF	SQF 1000, 2000 food safety standards, optional social, environmental standards, 1994
	WDC	World Diamond Council warranty system for conflict diamonds, 2004
	ICMM	Int'l Council on Mining and Metals sustainable development principles, 2003
	WRAP	Worldwide Responsible Apparel Production, industry labor code, 2000
	SFI	Sustainable Forestry Initiative, 1994
	PEFC	Programme for the Endorsement of Forest Certification, 1999 (as Pan-European Forest Certification)
	WBC	World Business Council for Sustainable Development, 1992
BSC	Business Social Compliance Initiative; European supplier labor standard, 2004	
Zone 3	SULL	Sullivan Principles, 1977
	AI	Amnesty International Human Rights Guidelines for Companies, 1997

	CCC	Clean Clothes Campaign Code of Labor Practices for apparel, 1998
	CERES	CERES Principles on environmental practices, 1989
	RUG	Rugmark labeling scheme to control child labor in carpets, 1994
	GSULL	Global Sullivan Principles on economic and social justice, 1999
	WRC	Worker Rights Consortium, 2000
	RA	Rainforest Alliance/Sustainable Agriculture Network standard, 1993
Zone 4	ISO14	International Organization for Standardization 14001 environmental management standard, 1996
	UNGC	United Nations Global Compact, 2000
	TOI	Tour Operators Initiative, 2000
	EQP	Equator Principles, 2003
Zone 5	TCO	TCO Development environmental and energy standards for computers, 1992
	PRI	Principles for Responsible Investment, UN institutional investor scheme, 2006
Zone 6	IFOAM	International Federation of Organic Agriculture Movements, 1972
	FLA	Fair Labor Association; apparel industry scheme, 1999
	FLO	Fairtrade Labeling Organization, "fair trade" umbrella scheme, 1997
	FTO	World Fair Trade Organization; standard for fair trade organizations, 2004
	FSC	Forest Stewardship Council certification, labeling scheme, 1993
	GRI	Global Reporting Initiative standards for social, environmental reports, 1997
	SAI	Social Accountability Int'l standard for supplier labor practices, 1997
	ETI	Ethical Trading Initiative, worker rights scheme, 1998
	MAC	Marine Aquarium Council standards for ornamental fish suppliers, 2001

	MH	Max Havelaar, Netherlands, Fair Trade coffee certification, labeling scheme, 1988
	MSC	Marine Stewardship Council, 1997
	AA	AccountAbility AA1000 framework for ethical business practices, 1999
	4C	Common Code for the Coffee Community, social, environmental standard, 2006
Zone 7	AIP	Apparel Industry Partnership; Clinton Administration stakeholders scheme, 1996–97
	EITI	Extractive Industries Transparency Initiative; UK financial disclosure scheme, 2002–03
	ILO	International Labor Org. Declaration on Multinational Enterprises, 1977
	KIMB	Kimberley Process on conflict diamonds, 2003
	VPSHR	Voluntary Principles on Security and Human Rights (private security), 2000

Table 1. RSS Schemes on the Governance Triangle

The three actor groups should be understood as general, abstract categories. In particular, 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, 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. The “Firms” category includes multinationals selling branded consumer products, small firms selling intermediate goods, agricultural enterprises and small-scale farmers, and many other variants. “States” includes both developing and developed countries, as well as governmental agencies. 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 are crucial in addressing particular issues, but setting them aside provides a clearer depiction of the emerging Transnational New Governance system as a whole.

A tour around the Governance Triangle reveals both the multiplicity and range of RSS schemes. 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 Old Governance,

although their enforcement varies widely. We represent them by one early example from a developing country, the Indian Employment of Children Act of 1938 (IECA++),⁴⁸ with ‘++’ indicating the many other national enactments that could be included. Zone 1 also includes many voluntary state programs reflecting New Governance. We represent these by the pioneering German “Blue Angel” eco-label (ECO++) (1978) and the British Eco-Management and Audit Scheme (EMAS++) (1992), with ‘++’ again indicating the many other domestic New Governance initiatives that have been adopted.⁴⁹ Note the absence in Zone 1 of treaties and other traditional forms of international regulation; these address firm behavior only indirectly, by mandating or coordinating national regulation, whereas 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 hundreds if not thousands of firm schemes.⁵⁰ 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.⁵¹ Other Zone 2 schemes, such as Global Gap (GG), are efforts by retailers and other resellers to regulate the practices of transnational suppliers.⁵² Zone 3 contains a smaller number of NGO schemes, including the pioneering Sullivan Principles (1977), the CERES Principles (1989), and Rugmark (1994).

The remaining zones include RSS schemes governed jointly by two or more types of actors. The most intriguing of these is Zone 6, which includes schemes that are joint efforts between NGOs and firms. Examples include the Forest Stewardship Council (FSC),

48. Summary information on national labor legislation is available in the ILO NATLEX database. International Labour Organization, NATLEX, http://www.ilo.org/dyn/natlex/natlex_browse.home (last visited Feb. 16, 2009). For information on the IECA (which was superseded by other legislation in 1986), see International Labour Organizations, NATLEX: Browse By Country Results, http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=IND&p_classification=04&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY (last visited Feb. 16, 2009).

49. Wood, *supra* note 15, at 236–48, documents the large number of such arrangements.

50. 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 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, 466–68 (2008).

51. Responsible Care, Who We Are, <http://www.responsiblecare.org/page.asp?p=6406&l=1> (last visited Feb. 13, 2009).

52. Global Gap, <http://www.globalgap.org> (last visited Feb. 16, 2009); see also Tetty Havinga, *Private Regulation of Food Safety by Supermarkets*, 28 LAW & POL’Y 515 (2006) (suggesting that grocery retailers responding to consumer preferences for food safety and quality may set more stringent standards than public regulators).

which promotes sustainable forestry; the Fairtrade Labeling Organization (FLO), an umbrella for national fair trade programs; Social Accountability International (SAI), which promotes worker rights principles and management systems; and the Fair Labor Association (FLA), which promotes worker rights in transnational apparel production. While many of these schemes entail some *indirect* state role (e.g., the use of 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 its relationship with the United Nations Environment Programme (UNEP), which originally partnered with CERES to develop GRI; GRI is now a UNEP “collaborating center.”⁵³ 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;⁵⁴ and the ISO 14001 environmental management standard. Zone 5 is virtually empty; our only examples are the specialized TCO Development and the recent UN-sponsored Principles for Responsible Investment, in which pension funds and other fiduciary investors act as NGOs. Finally, Zone 7 schemes share governance among all three groups of actors. Examples include the International Labour Organization’s 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.

The Governance Triangle in Figure 1 does not show every transnational RSS scheme. Moreover, even if the Triangle were a complete mapping, it would require frequent revision; new schemes—addressing issues such as fresh water stewardship,⁵⁵ sustainable biofuels production,⁵⁶ and sustainable tourism⁵⁷—are regularly being

53. See Global Reporting Initiative, *Our History*, <http://www.globalreporting.org/AboutGRI/WhatWeDo/OurHistory> (last visited Feb. 16, 2009); United Nations Environment Programme, UNEP Offices, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=296> (last visited Feb. 16, 2009).

54. See Andrew Hardenbrook, *The Equator Principles: The Private Financial Sector’s Attempt at Environmental Responsibility*, 40 VAND. J. TRANSNAT’L L. 197, 200–01 (2007).

55. The Alliance for Water Stewardship is developing global standards for socially beneficial and sustainable management of freshwater resources. See Alliance for Water Stewardship, <http://www.allianceforwaterstewardship.org/index.html> (last visited Feb. 16, 2009).

56. The Roundtable on Sustainable Biofuels is developing global standards for sustainable biofuels production and processing. See CEN—Energy Center, Roundtable on Sustainable Biofuels, <http://cgse.epfl.ch/page65660-en.html> (last visited Feb. 16,

created. Yet Figure 1 clearly reveals the multiplicity and diversity of RSS schemes.⁵⁸ Some issues, such as child labor in apparel production, are addressed by schemes in multiple zones: OECD and IECA++ in Zone 1; GAP++, WRAP, and BSC 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; Zones 3 and 6 are moderately dense; and Zones 4, 5, and 7 are relatively sparse.

RSS is evolving toward a system of Transnational New Governance. Prior to 1985, labor, environmental, and human rights regulation was almost exclusively the province of states and IGOs in Zone 1; mandatory law predominated, along with a growing number of domestic New Governance initiatives and a few IGO programs with New Governance elements, such as the 1976 OECD Guidelines.⁵⁹ NGO efforts to address domestic and international regulatory gaps led to the proliferation of Zone 3 schemes beginning in the mid-1980s, about the same time as the firm and industry codes in Zone 2.⁶⁰ The latter rapidly accelerated until, by the late 1990s, it had become de rigeur for large, multinational firms to adopt codes of conduct on social and environmental issues.⁶¹ 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, one can observe a progression, first among different types of single-actor schemes, then into increasingly complex multi-actor schemes. This evolving pattern constitutes the emerging Transnational New Governance system represented by the Triangle as a whole.⁶²

2009). Similar Roundtables already address specific crops. See, e.g., Roundtable on Sustainable Palm Oil, <http://www.rspo.org/> (last visited Feb. 16, 2009).

57. The Rainforest Alliance is developing the Sustainable Tourism Stewardship Council as a “global accreditation body for sustainable tourism and ecotourism certification programs.” See Rainforest Alliance Sustainable Tourism, Sustainable Tourism Stewardship Council, <http://www.rainforest-alliance.org/tourism.cfm?id=council> (last visited Feb. 16, 2009). The Alliance (RA in Zone 3) also certifies tropical agricultural products including coffee, cocoa and flowers against standards set by the Sustainable Agriculture Network. See Rainforest Alliance Sustainable Agriculture, Standards, <http://www.rainforest-alliance.org/agriculture.cfm?id=standards> (last visited Feb. 16, 2009).

58. For a related discussion of our Governance Triangle, see Abbott & Snidal, *Governance Triangle*, *supra* note 46, at 7–9.

59. See *id.* at 10–11 (describing the lack of RSS before 1985).

60. *Id.* at 8–9, 11 (describing emergence of NGO and Firm schemes).

61. *Id.*; see also Lance Compa, Trade Unions, NGOs, and Corporate Codes of Conduct, <http://www.gdrc.org/ngo/codesofconduct/compa.html> (last visited Feb. 16, 2009) (describing the proliferation of corporate codes of conduct in the 1990s).

62. See generally Abbott & Snidal, *Governance Triangle*, *supra* note 46 (tracing the evolution of RSS in more detail and analyzing the strengths and weaknesses of single- and multi-actor schemes based on the “competencies” of participating actors).

III. OLD GOVERNANCE AND NEW GOVERNANCE

This Part begins by systematizing New Governance and its analytical opposite, traditional regulation (Old Governance), as ideal types. This Part also presents the major arguments in favor of New Governance and highlights the limitations of both ideal types.

A. *Old Governance and New Governance as Ideal Types*

Table 2 compares the four principal features of the two ideal types. These depictions are analytic caricatures 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 useful guides to the key differences between the two approaches.⁶³ We discuss each feature in turn in this Part.

<u>Old Governance</u>	<u>New Governance</u>
State-centric	State orchestration
Centralized	Decentralized
Bureaucratic expertise	Dispersed expertise
Mandatory rules	Soft law

Table 2: Old Governance and New Governance as ideal types

B. *Role of the State*

Old Governance and New Governance are fundamentally distinguished by the differing roles of the state in regulation; other features largely flow from this distinction. In Old Governance, the state is central. While actual regulatory systems are more complex, in ideal Old Governance the state regulates from the top down, often exercises “command and control” over regulated activities, and coercively enforces its rules when necessary.⁶⁴ The central role of the state and state coercion are justified by the incentives firms and other targets of regulation face in prisoner’s dilemma externality situations.⁶⁵ Standard examples in U.S. law include environmental

63. Black, *supra* note 12, at 105, correctly calls the ideal type of traditional command and control regulation a “caricature”—but that’s the point!

64. David M. Trubek & Louise B. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination*, 11 EUR. L.J. 343, 344 (2005) [hereinafter Trubek & Trubek, *Open Method of Coordination*]; Trubek & Trubek, *New Governance*, *supra* note 32, at 543.

65. PRAKASH & POTOSKI, *supra* note 7, at 1.

regulations that limit certain forms of pollution or prescribe certain pollution control technologies, and laws mandating specific labor relations procedures.⁶⁶ EU regulation of member-state activities through the “Community Method” of rule making—based on Commission initiative, legislative action by the Council and European Parliament, and uniform interpretation by the Court of Justice—is also a variety of Old Governance.⁶⁷ Through the Community Method, the EU aspires to the Old Governance ideal for IGOs to operate as central “governments,” perhaps in federal style vis-à-vis participating states. However, in this the EU is an exception among IGOs, most of which have had little success with centralized Old Governance.

In New Governance, 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 directive and facilitative techniques for supporting and steering this network, such as initiating voluntary and cooperative programs; convening and facilitating private collaborations; persuading and providing incentives for 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.⁶⁸

A domestic U.S. example is the Environmental Protection Agency’s (EPA) National Environmental Performance Track, launched in 2000, which offers public recognition, fewer inspections,

66. Golub, *Introduction*, *supra* note 31, at 2, presents early European environmental regulation as another paradigm case of Old Governance: “The command and control approach is characterised 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.”

67. [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.

Stijn Smismans, *New Modes of Governance and the Participatory Myth* 4 (European Governance Papers, Working Paper No. N-06-01, 2006).

68. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 31–33 (1997–98) [hereinafter Freeman, *Collaborative Governance*]; Lobel, *supra* note 33, at 320–24. For a valuable typology of interactions between the state and private rule making bodies, see Stepan Wood, *Environmental Management Systems and Public Authority in Canada: Rethinking Environmental Governance*, 10 BUFF. ENVTL. L.J. 129, 131 (2002–03).

less frequent reporting, accelerated permit review, and less stringent substantive rules⁶⁹ for firms that voluntarily commit to enhanced environmental performance and continuous improvement, adopt internal environmental management systems (EMS) subject to external auditing, and engage with the public.⁷⁰ A parallel EU procedure is the Environmental Management and Audit System (EMAS),⁷¹ under which the EU certifies companies and other organizations that voluntarily make environmental commitments, adopt qualified EMS, carry out environmental reviews and audits, and publicly report their environmental performance.⁷² To promote global harmonization, EMAS recognizes EMS standards established by ISO 14001 as appropriate intermediate steps.⁷³ Similarly, the EU has created a procedure for coordinating social regulation among its member states, the Open Method of Coordination (OMC), which relies on common objectives, national implementation plans, common indicators, national reporting, exchange of good practices, and joint

69. See Environmental Protection Agency, National Environmental Performance Track, Basic Information, <http://www.epa.gov/perfrac/about.htm> (last visited Feb. 16, 2009); ENVTL. PROT. AGENCY, NATIONAL ENVIRONMENTAL PERFORMANCE TRACK, PERFORMANCE TRACK REGULATORY, ADMINISTRATIVE, AND OTHER MEMBER BENEFITS 1–3 (2008), <http://www.epa.gov/perfrac/downloads/PTRegulAdminIncentives.pdf>.

70. See Environmental Protection Agency, National Environmental Performance Track, Criteria, <http://www.epa.gov/perfrac/program/index.htm> (last visited Feb. 16, 2009). For other examples of domestic New Governance techniques, see Cary Coglianese et al., *Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection*, 55 ADMIN. L. REV. 705, 707 (2003) (Exec. Order No. 12,866, U.S. EPA, Federal Highway Admin., Nuclear Regulatory Commission programs); Freeman, *Collaborative Governance*, *supra* note 68, at 41–47 (EPA and OSHA negotiated rule-makings); Katharina Holzinger et al., *Rhetoric or Reality? “New Governance” in EU Environmental Policy*, 12 EUR. L.J. 403, 409, 420 (2006) (EU environmental policy); Miriam Seifter, *Rent-a-Regulator: Design and Innovation in Privatized Governmental Decisionmaking*, 33 ECOLOGY L.Q. 1091, 1093 n.7 (2006) (EU environmental policy); Trubek & Trubek, *New Governance*, *supra* note 32, at 543, 558 (Wisconsin Green Tier program).

71. The EU adopted EMAS to reduce confusion caused by multiple member state EMS programs, such as the UK EMAS in Zone 1.

72. Europa, Environment, European Eco-Management Audit Scheme, Summary, http://ec.europa.eu/environment/emas/about/summary_en.htm (last visited Feb. 16, 2009); see also FRANCESCO PERRINI ET AL., DEVELOPING CORPORATE SOCIAL RESPONSIBILITY: A EUROPEAN PERSPECTIVE 106–08 (2006); Karola Taschner, *Environmental Management Systems: The European Regulation*, in NEW INSTRUMENTS, *supra* note 31, at 215, 216–17.

73. See EMAS and ISO/EN ISO 14001: Differences and Complementarities, EMAS—Factsheet (Eco-Mgmt. & Audit Scheme, European Commission), May 2008, available at http://ec.europa.eu/environment/emas/pdf/factsheet/fs_iso_en_low.pdf. For a comparison of 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).

analysis and assessment of progress and priorities.⁷⁴ As these examples suggest, the state often initiates New Governance programs. While firms and other private actors may create their own schemes or approach the state with proposals for collaborative regulation, ideally the state treats New Governance as an important regulatory tool and uses it proactively.

Even though the state eschews most mandatory actions in a New Governance system, it retains its regulatory authority and can use it in significant ways. It can establish accountability mechanisms for private actors and institutions, such as the Performance Track requirement for independent external assessment,⁷⁵ 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. Additionally, state power often lurks in the background. If necessary, the state can step in with mandatory regulation, and the threat of such intervention reinforces softer New Governance measures.⁷⁶

74. European Commission, Employment, Social Affairs, & Equal Opportunities, Social Protection Social Inclusion, The Process: The Open Method of Coordination, http://ec.europa.eu/employment_social/spsi/the_process_en.htm (last visited Feb. 16, 2009); *Communication from the Commission, Working Together, Working Better: A New Framework for the Open Coordination of Social Protection and Inclusion Policies in the European Union*, COM (2005) 706 final (Dec. 22, 2005) (reviewing progress under OMC and proposing changes to strengthen and streamline process). On the OMC, see generally Kerstin Jacobsson, *Between Deliberation and Discipline: Soft Governance in EU Employment Policy*, in *SOFT LAW IN GOVERNANCE AND REGULATION: AN INTERDISCIPLINARY ANALYSIS* 81 (Ulrika Mörth ed., 2004); Trubek & Trubek, *Open Method of Coordination*, *supra* note 64, at 343. The OMC grew out of earlier procedures to coordinate member state economic and employment policies, 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* note 67, at 18, casts doubt on the extent of civil society involvement. Armstrong & Kilpatrick, *supra*, criticize the association of the Community Method and OMC with Old Governance and New Governance, and with hard and soft law, respectively. For other examples of EU New Governance in relations with member states, see Trubek & Trubek, *New Governance*, *supra* note 32, at 550–57 (discussing the Water Framework Directive, Stability and Growth Pact).

75. Such measures must adapt public law mechanisms to the private context. Jody Freeman, *Extending Public Law Norms through Privatization*, 116 *HARV. L. REV.* 1285, 1325–26 (2003) [hereinafter Freeman, *Privatization*], recommends measures such as private accreditation, auditing, ombudsmen, disclosure, and management systems.

76. AYRES & BRAITHWAITE, *supra* note 38, at 158 (arguing that delegations of regulatory authority are “reinforced by traditional forms of regulatory fiat—if delegation fails”); Freeman, *Collaborative Governance*, *supra* note 68, at 32; Lobel, *supra* note 33, at 372. Many scholars favor hybrids of Old Governance and New Governance, in which the state maintains a baseline of mandatory rights and procedures, adopts default rules for actors that do not engage in New Governance standard-setting, or uses New Governance techniques to implement mandatory law. de

C. Centralization vs. Decentralization

Old Governance is hierarchical, with regulatory authority centralized in state organs, typically executive departments and administrative agencies. Old Governance views societal actors as self-interested and unaccountable, and thus incapable of self-regulation or any direct role in state regulation.⁷⁷ To further the public interest, the state must restrict authority to public regulators presumed to be independent, disinterested, and public-spirited.⁷⁸ To preserve regulators' independence, regulatory procedures largely insulate them from the influence of private actors.⁷⁹ Private groups may compete to influence regulatory decisions, but only at arm's length through carefully designed procedures.⁸⁰ 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 New Governance, regulatory authority is decentralized, with regulatory responsibilities shared among private actors as well as state agencies.⁸¹ Firms are encouraged to regulate themselves,⁸² and civil society actors are encouraged to participate in regulating others through varied forms of private ordering and relationships with state

Búrca & Scott, *supra* note 32, at 514–15; Trubek & Trubek, *New Governance*, *supra* note 32, at 541–42.

77. See Braithwaite, *supra* note 35, at 886–87, for an explanation of the Old Governance view on societal actors.

78. Freeman, *Privatization*, *supra* note 75, at 1303; Freeman, *Collaborative Governance*, *supra* note 68, at 13.

79. This is not typically true of legislatures, but U.S. scholars in particular view it as characteristic of independent administrative agencies. See, e.g., Guy L.F. Holburn & Richard G. Vanden Bergh, *Consumer Capture of Regulatory Institutions: The Creation of Public Utility Consumer Advocates in the United States*, 126 PUBLIC CHOICE 45, 45–47 (2006), available at <http://www.springerlink.com/content/m1451nr726024041/fulltext.pdf>.

80. Freeman, *Collaborative Governance*, *supra* note 68, at 10–12, 18–19. The 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.

81. See AYRES & BRAITHWAITE, *supra* note 38, at 4 (“[P]ublic policy can effectively delegate government regulation . . . to public interest groups . . . , to unregulated competitors . . . , and even to the regulated firms themselves.”); cf. Archon Fung & Erik Olin Wright, *Thinking About Empowered Participatory Governance*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 3, 3–4 (Archon Fung & Erik Olin Wright eds., 2003) (proposing expanded forms of participatory governance).

82. See Black, *supra* note 12, at 113–21 (reviewing multiple definitions of “self-regulation”).

agencies.⁸³ 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 or NGOs than by public inspectors.⁸⁴ Decentralization thus reduces demands on the state, a significant advantage in an era when many states and agencies face both shrinking resources and growing demands for action.⁸⁵ 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.⁸⁶ In particular, state orchestration can extend public law principles, such as due process, into the regulatory activities of private institutions.⁸⁷

With authority decentralized, New Governance becomes collaborative or “networked,” with the state coordinating and engaging with business and civil society groups throughout the regulatory process.⁸⁸ The state helps create and acts within a web of relationships⁸⁹—convening, facilitating, legitimating, negotiating, publicizing, ratifying, supervising, partnering, and otherwise interacting with private actors for regulatory purposes.⁹⁰ The state thus views firms and NGOs as partners in governance, not mere

83. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 292–314 (1998) (arguing that Old Governance in the twentieth century was shaped by the centralized, hierarchical nature of target firms). Now that firms are more open, networked and collaborative, New Governance approaches are more appropriate. *Id.* In the approach Dorf and Sabel 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.

84. AYRES & BRAITHWAITE, *supra* note 38, at 104–06.

85. CASHORE, ET AL., *supra* note 17, at 10; O’Rourke, *supra* note 29, at 4.

86. See AYRES & BRAITHWAITE, *supra* note 38, at 103 (suggesting that government subcontract regulatory functions to private actors for greater efficiency).

87. Freeman, *Privatization*, *supra* note 75, at 1285, 1290, 1314–15, 1327–28.

88. Adelle Blackett, *Codes of Corporate Conduct and the Labour Regulatory State*, in HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE, *supra* note 3, at 121, 129 (noting that labor law has long involved tripartite collaboration, and arguing that New Governance approaches to worker rights must preserve democratic participation); Lobel, *supra* note 33, at 344; see Black, *supra* note 12, at 111 (describing characteristics of the “new regulatory state”); Braithwaite, *supra* note 35, at 889–90 (discussing the era of networked governance); de Búrca & Scott, *supra* note 32, at 3 (discussing key aspects of new governance).

89. In two significant forms of collaboration, 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. BENEDICTE BULL & DESMOND MCNEILL, DEVELOPMENT ISSUES IN GLOBAL GOVERNANCE: PUBLIC-PRIVATE PARTNERSHIPS AND MARKET MULTILATERALISM 33 (2007); O’Rourke, *supra* note 29, at 4. Second, many schemes require compliance with national law as a basic element of their standards. Meidinger, *Beyond Westphalia*, *supra* note 30, at 130. Background property rights, contract, and tort rules are also critically important to RSS. CASHORE, ET AL., *supra* note 17, at 20–21.

90. Freeman, *Collaborative Governance*, *supra* note 68, at 31–32.

interest groups or objects of regulation.⁹¹ This softens the adversarial nature of regulation, reducing its social costs.⁹²

Collaboration is more conducive than Old Governance procedures to information sharing and learning, an important benefit given the bounded rationality of state regulators.⁹³ New Governance 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. This creates incentives for firms to exceed mandated standards, and reduces the state's own costs of monitoring and enforcement.⁹⁴ More broadly, state regulators, state-sponsored New Governance programs, and private schemes observe one another, borrow techniques, compete, and otherwise co-evolve over time.⁹⁵

Importantly, collaboration in New Governance is not just about the state. Private actors and institutions also collaborate with one another in multi-stakeholder arrangements. Collaboration allows actors to pursue complementary goals and combine complementary competencies.⁹⁶ For example, collaboration between NGOs that favor high labor standards and firms that are willing to accept higher standards but prefer self-regulation may result in 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 actor combinations in New Governance produces multiple regulatory approaches. The synergy provided by multiple actors pursuing similar goals through varied means may be more effective than the actions of a single

91. Lobel, *supra* note 33, at 377; see Freeman, *Collaborative Governance*, *supra* note 68, at 13, 22 (arguing that Old Governance regulatory procedures are based on interest group representation, whereas New Governance 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* note 35, at 889–90.

92. PRAKASH & POTOSKI, *supra* note 7, at 8–9.

93. Freeman, *Collaborative Governance*, *supra* note 68, at 22–23, 28–29.

94. PRAKASH & POTOSKI, *supra* note 7, at 73–74; see also Golub, *supra* note 31, at 3–6 (contrasting the drawbacks of the old with the benefits of the new method).

95. Meidinger, *Competitive Supragovernmental Regulation*, *supra* note 23, at 519–20.

96. Abbott & Snidal, *Governance Triangle*, *supra* note 46; Black, *supra* note 30, at 85. For similar reasons, New Public Management 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, *Collaborative Governance*, *supra* note 68, at 22; Freeman, *Privatization*, *supra* note 75, at 1289.

centralized regulator. 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.”⁹⁷ Ideally, competitive pressures and public support will lead to the replication or scaling up of successful approaches.⁹⁸ Like collaboration, multiplicity also facilitates the fine-tuning of regulation to local circumstances.⁹⁹ Of course, multiplicity entails transactions costs, but New Governance advocates see the benefits as outweighing them in most cases.¹⁰⁰

Finally, New Governance views broad participation not only as a means to more effective regulation, but also as an end in itself.¹⁰¹ By breaching the Old Governance divide between officials and interest groups,¹⁰² decentralization promotes stakeholder engagement,¹⁰³

97. Dorf & Sabel, *supra* note 83, at 287–88, 315–16, 322–23 (arguing that to be effective national regulation must adapt to local conditions); Freeman, *Collaborative Governance*, *supra* note 68, at 22–23, 26, 28–29 (describing aspects of effective collaborative governance); Lobel, *supra* note 33, at 380, 316–20 (arguing that the most effective means of regulating is through competition and diversity); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1243–46 (2003) (discussing the potential of competition and diversity to create incentives for increased innovation and efficiency).

98. Dorf & Sabel, *supra* note 83, at 335 (discussing the benefits of the parallel development approach, in which parts of a system are developed simultaneously); Lobel, *supra* note 33, at 452–53 (advocating the benefits of collaborative approaches between government and private actors to encourage private actors to self-regulate); Charles Sabel, Dara O'Rourke & Archon Fung, *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace* 15–16 (World Bank Social Protection, Discussion Paper No. 0011, 2000) (advocating a use of competition between private parties to encourage improvement in labor practices).

99. See AYRES & BRAITHWAITE, *supra* note 38, at 101 (discussing a model that would create negotiated regulations “particularized to each firm”); Dorf & Sabel, *supra* note 83, at 315 (“[E]ffective government . . . regulations must be continuously adapted . . . to respond to diverse and changing local conditions.”); Lobel, *supra* note 33, at 400 (arguing that decentralized regulation requires coordination of local efforts).

100. Meidinger, *Competitive Supragovernmental Regulation*, *supra* note 23, at 521.

101. AYRES & BRAITHWAITE, *supra* note 38, 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.”); see also Fung & Wright, *supra* note 81, at 27–29. In fact, some New Governance schemes lack strong public participation. Smismans, *supra* note 67, at 5 (“[M]ore heterarchical, horizontal and flexible modes of governance do not necessarily imply more participation and inclusion . . . as too quickly taken for granted by some normative claims.”).

102. Freeman, *Collaborative Governance*, *supra* note 68, at 18, 27; see AYRES & BRAITHWAITE, *supra* note 38, at 57–58 (suggesting a policy of tripartism in which public interest groups are granted access to all information available to regulators and to all regulator–firm negotiations).

103. Stakeholder engagement is a longtime goal of labor regulation, but participation is generally limited to employers and unions. Blackett, *supra* note 88, at

thereby providing new avenues for participation and voice, enriching democracy, and enhancing the legitimacy of regulation.¹⁰⁴ In this, New Governance implicitly 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.¹⁰⁵ New Governance sees decentralization and collaboration as empowering societal actors;¹⁰⁶ promoting dialogue and deliberation; and fostering tolerance, interdependence, and mutual accountability.¹⁰⁷

D. *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.¹⁰⁸ Because of the complexity of regulatory problems, multiple areas of expertise are relevant: *technical*, regarding social or environmental problems and regulatory solutions; *normative*, regarding social values and the normative context; *economic*, regarding the operations of target firms; and *social*, regarding the effects of regulation on intended beneficiaries and the public. Old Governance assumes that professional regulators possess or can develop all the expertise necessary to implement appropriate policies.¹⁰⁹ New Governance, in contrast, recognizes that expertise is often dispersed, and seeks to harness a wide range of stakeholders who may have "local" expertise

125–26, 129. As a result, RSS could enhance engagement even in this relatively participatory regime.

104. See CASHORE ET AL., *supra* note 17, at 5 (arguing that private RSS schemes could come to be seen as more legitimate than public regulation).

105. Drawing on Habermas, Frykman and Mörth elaborate three conceptions of democracy: the liberal or aggregative; the republican or communitarian; and the cosmopolitan or deliberative. Henrik Frykman & Ulrike Mörth, *Soft Law and Three Notions of Democracy: The Case of the EU*, in *SOFT LAW IN GOVERNANCE AND REGULATION: AN INTERDISCIPLINARY ANALYSIS*, *supra* note 74, at 155, 157. The republican tradition also emphasizes participation, but requires a relatively strong, self-conscious community based on shared ethnicity or values. *Id.* at 157–58.

106. See Golub, *Introduction*, *supra* note 31, at 6 ("Another important advantage . . . is . . . direct public involvement . . .").

107. AYRES & BRAITHWAITE, *supra* note 38, at 82–86; Freeman, *Collaborative Governance*, *supra* note 68, at 23–24; Lobel, *supra* note 33, at 374, 378, 421; see Minow, *supra* note 97, at 1244–45 (suggesting that these effects are especially valuable in large countries, where deep engagement through traditional processes is problematic).

108. BULL & MCNEILL, *supra* note 89, at 33–34; Claire Cutler et al., *Private Authority and International Affairs*, in *PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS*, *supra* note 26, at 3, 18; Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 *INT'L ORG.* 1, 8, 17 (1992).

109. Lobel, *supra* note 33, at 371–73.

otherwise unavailable to the state.¹¹⁰ This range of stakeholders includes firms, which have unique information about their industries and their own internal operations where regulations must be implemented.¹¹¹ It also includes NGOs, which may have superior knowledge about societal conditions and needs, as well as the actual (rather than claimed) performance of firms. Mobilizing the expertise of societal actors makes regulation better informed, better adapted to local circumstances, more open to new knowledge, and more innovative.¹¹²

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 Old Governance and New Governance derive in part from different assumptions about what the state “knows” in these areas. Old Governance is predicated on the assumption that the state knows the “public interest” and hence the appropriate regulatory goals, perhaps based on prior legislative action. By contrast, New Governance does not assume that the state possesses complete *a priori* knowledge of regulatory goals. Rather, the collaborative procedures of New Governance act as a public interest revelation mechanism: in New Governance the state engages stakeholders on all sides of a regulatory issue and collaboratively determines what actions are desirable. In this respect, New Governance represents a “third way,” responding not only to market failures but also to government failures—here, the “bounded rationality” of the state.¹¹³

E. *Hard vs. Soft Law*

Old Governance is rooted in “hard law”;¹¹⁴ its regulations are legally binding and mandatory. Hard law rules are generally uniform across regions and categories of actors and are enforced by legal

110. *Id.* at 373–74; see Trubek & Trubek, *New Governance*, *supra* note 32, at 557 (noting that similar arguments may support EU New Governance efforts that draw on the expertise of member states).

111. David Graham & Ngaire Woods, *Making Corporate Self-Regulation Effective in Developing Countries*, 34 *WORLD DEV.* 868, 869 (2006).

112. Freeman, *Collaborative Governance*, *supra* note 68, at 22–23, 27–29.

113. PRAKASH & POTOSKI, *supra* note 7, at 2, 9.

114. See Kenneth W. Abbott et al., *The Concept of Legalization*, 54 *INT'L ORG.* 401, 402 (2000) [hereinafter Abbott et al., *Legalization*]; Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *INT'L ORG.* 421, 424–34 (2000). Kirton and Trebilcock define hard law as “a regime relying primarily on the authority or power of the state—ultimately its legitimate monopoly on the means of coercion—in the construction, operation, and implementation, including enforcement, of arrangements at international, national, or subnational level.” John J. Kirton & Michael J. Trebilcock, *Introduction: Hard Choices and Soft Law in Sustainable Global Governance*, in *HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE*, *supra* note 3, at 3, 9.

procedures backed by civil, administrative, or criminal sanctions.¹¹⁵ 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).¹¹⁶ In the Old Governance model, compliance is monitored by state-operated “police patrols,” but in practice, “fire alarm” citizen complaint mechanisms are also widely used.¹¹⁷ The latter have a New Governance flavor insofar as they mobilize the informational advantages of local actors.

New Governance relies on more flexible norms and procedures throughout the regulatory process.¹¹⁸ Private schemes in Zones 2, 3, and 6 of the Triangle necessarily promulgate legally nonbinding standards,¹¹⁹ and public-private schemes in Zones 4, 5, and 7 typically do so as well. From a legal pluralist perspective, however, all of these norms may be seen as “law” for participating firms.¹²⁰ State regulatory actions under New Governance are also relatively soft. Regulations may be phrased in general terms¹²¹ or may 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,¹²² or call for disclosure or dialogue.¹²³ Examples include “performance-

115. Trubek & Trubek, *Open Method of Coordination*, *supra* note 64, at 344.

116. Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC'Y REV. 691, 691 (2003); Gunningham & Sinclair, *supra* note 31, at 53.

117. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, in CONGRESS: STRUCTURE AND POLICY 426, 427 (Mathew D. McCubbins & Terry Sullivan eds., 1987).

118. Lobel, *supra* note 33, at 380. Referring to these normative forms as “soft law,” as in Table 2, elides complex questions regarding the nature of “law” that arise in both rationalist and constructivist approaches. See, e.g., Abbott et al., *Legalization*, *supra* note 114; de Búrca & Scott, *supra* note 37. We do not address those conceptual questions here.

119. See Kirton & Trebilcock, *supra* note 114, at 9 (defining 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”).

120. See Meidinger, *Environmental Law-Making*, *supra* note 31, at 299–300; Wood, *supra* note 15, at 229.

121. Such regulations resemble “standards” rather than “rules.” See Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 26 (1992) (explaining that regulations affording participants more discretion are generally considered “standards,” as opposed to more rigid “rules”).

122. See Wood, *supra* note 68, for a valuable analysis of EMS. Recent studies conclude that ISO 14001 implementation leads to improved environmental performance and legal compliance. Prakash & Potoski, *supra* note 40, at 351.

123. Kerstin Sahlin-Andersson, *Emergent Cross-Sectional Soft Regulations: Dynamics at Play in the Global Compact Initiative*, in SOFT LAW IN GOVERNANCE AND REGULATION: AN INTERDISCIPLINARY ANALYSIS, *supra* note 74, at 129, 134.

based"¹²⁴ and "management-based" regulation.¹²⁵ Often (as in the EPA Performance Track), state agencies grant relief from substantive mandates, inspections, or sanctions (e.g., waiving enterprise liability) or grant a benefit (e.g., use of an "ecolabel")¹²⁶ for firms that accept voluntary obligations or otherwise cooperate in achieving public goals.¹²⁷ In all its forms, reliance on flexible standards supports the central tenets of New Governance: multiplicity, experimentation, and learning;¹²⁸ particularization to local circumstances; broad expertise; and stakeholder engagement.

Even soft norms are nested in a formal legal system.¹²⁹ Binding legal rules and procedures coexist with softer New Governance approaches, complementing or competing with one another.¹³⁰ In addition, law and New Governance 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.¹³¹ The state can also step in with mandatory regulation should firms fail to comply with soft measures.¹³² Firms can incur legal obligations by accepting New Governance undertakings. In some forms of "regulatory negotiation" (Reg-Neg), for example, the state asks a multi-stakeholder group to propose a regulatory approach.¹³³ The resulting agreements are legally binding, even if they are flexible as to means and timetables.¹³⁴ Finally, soft private commitments can feed back into hard law: they play an important role in the discourse affecting the adoption and

124. See Coglianesi et al., *supra* note 70, at 707.

125. Coglianesi & Lazer, *supra* note 116, at 691.

126. See generally Eva Eiderstrom, *Ecolabels in EU Environmental Policy*, in *NEW INSTRUMENTS*, *supra* note 31, at 190.

127. 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, *Introduction*, *supra* note 31, at 15.

128. New Governance views rules as provisional and more easily revised to reflect new information than hard regulations which require complex procedures to modify. de Búrca & Scott, *supra* note 32, at 3; Freeman, *Collaborative Governance*, *supra* note 68, at 28–29; Smismans, *supra* note 67, at 5.

129. Lobel, *supra* note 33, at 389.

130. See Trubek & Trubek, *New Governance*, *supra* note 32, at 544–48.

131. *Id.* at 548–49.

132. AYRES & BRAITHWAITE, *supra* note 38, at 103 (arguing that to be effective self-regulation must include a system of public detection and punishment); Freeman, *Collaborative Governance*, *supra* note 68, at 32.

133. Meidinger, *Environmental Law-Making*, *supra* note 31, at 306. The results of these processes are highly controversial. *Id.*

134. 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, *Privatization*, *supra* note 75, at 1303 n.67.

application of mandatory law and can be incorporated directly into state law.¹³⁵

F. *Limits of Ideal Types*

Both the Old Governance and New Governance 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 Old Governance, where state commands and enforcement are central. Although the state plays more subtle roles in New Governance, 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 essential to effective, legitimate regulation.¹³⁶ 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: Old Governance assumes effective representative democracy, while New Governance assumes effective stakeholder representation, participation, and deliberation. But again, many states and private institutions lack such procedures, as does the international system. Third, and more fundamentally, both ideal types assume an independent state that furthers the public interest (albeit in different ways).¹³⁷ This assumption is vulnerable to the economic or public choice critique that there is no “public interest,” only private interests with varying degrees of influence.¹³⁸ Interest groups lobby, contribute to campaigns, pay bribes, and otherwise seek to persuade regulators to advance their interests; they may even “capture” regulators outright.¹³⁹ 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. In evaluating the Old

135. Private standards can also take on hard law authority through additional channels, such as references by courts interpreting broad tort standards and expectations of best practices by inspectors and regulators. Meidinger, *Beyond Westphalia*, *supra* note 30, at 122–30. Courts and legislatures sometimes mandate the observance of voluntary standards. Wood, *supra* note 15, at 248.

136. 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* note 38, at 35–38.

137. See Mattli & Woods, *supra* note 4, for critiques of this presumption.

138. See, e.g., Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

139. See Peltzman, *supra* note 138, at 228; Stigler, *supra* note 138, at 5.

Governance and New Governance models, it is important to consider how each deals with these political forces.

IV. OLD GOVERNANCE AND NEW GOVERNANCE AT THE INTERNATIONAL LEVEL

In this section, we address how the Old Governance and New Governance ideal types have been translated to the international level. For most of the twentieth century, efforts by activists and states to regulate the social and environmental impacts of transnational production focused on Old Governance. Over the past two decades, international regulatory activity has moved increasingly toward something resembling New Governance. Because of the very different characteristics of the international system, however, neither effort to transpose an essentially domestic model has been wholly successful.

A. *International Old Governance*

1. IGOs

Twentieth century efforts to build international governance were part of a long-standing project to move the international system closer to the Old Governance ideal type, exemplified by calls for world federalism¹⁴⁰ and world peace through law.¹⁴¹ 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.¹⁴² Such efforts have continued with recent attempts to incorporate a binding “social clause” into the rules of the WTO.¹⁴³ Yet these idealistic

140. The world federalist movement was created in 1947 through the amalgamation of independent 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.” World Federalist Movement, *Our Vision and History*, <http://www.wfm.org/site/index.php/pages/1> (last visited Feb. 16, 2009).

141. See GRENVILLE CLARK & LOUIS B. SOHN, *WORLD PEACE THROUGH WORLD LAW* (2d ed. 1960).

142. See Alexander Thompson & Duncan Snidal, *International Organization*, in 5 *ENCYCLOPEDIA L. & ECON.* 692, 692–722 (Boudewijn Bouckaert & Gerrit de Gees eds., 2000); Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 *J. SMALL & EMERGING BUS. L.* 93, 104 (1999) (arguing that “global optimists” believe the institutions and protections of national labor relations systems can be replicated on the international level).

143. Van Wezel Stone, *supra* note 142, at 105–06.

aspirations have not been fulfilled, at least outside the EU, and seem as remote as ever.

The difficulty of replicating domestic Old Governance 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 international agreements costly to negotiate, while the divergence between individual and collective state 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 Old Governance has been the creation of an array of issue-specific IGOs, including the UN’s specialized agencies, the Bretton Woods institutions, and the WTO. Although IGOs might seem analogous to national regulatory agencies, all are far weaker than the ideal Old Governance agency because of the systemic features just noted. Table 3 summarizes the analytic differences between IGOs and the Old Governance ideal type defined in Table 2.

<u>Old Governance</u>	<u>IGOs</u>
State-centric	Member-centric
Centralized	Limited Centralization
Bureaucratic Expertise	Bureaucratic Expertise
Mandatory Rules	Recommendations

Table 3: International Old Governance through IGOs

First, although IGOs are created and governed by their member states,¹⁴⁴ they are not *state-centric*, as in the Old Governance ideal type. To conform to the Old Governance model, IGOs themselves would have to possess state-like authority for mandatory regulation and enforcement. Thus far, states have been 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, some of the most normatively attractive features of Old Governance.

144. Increasing civil society participation in many IGOs does not change this basic principle.

IGO *centralization* is also limited. While member states often centralize administrative and operational functions within IGOs,¹⁴⁵ they rarely centralize the adoption and implementation of rules. Moreover, even when formal decision procedures are available, many IGOs operate by consensus among member states, often constraining their already limited authority. Important issues frequently remain within the political and financial control of member states, which exercise such control 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 Old Governance. Treaties and other legally binding rules require state ratification to take effect, even after adoption by IGOs. Some IGOs are authorized to adopt regulations (e.g., the Standards and Recommended Practices of the International Civil Aviation Organization),¹⁴⁶ 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,”¹⁴⁷ not coercive. Finally, whereas the Old Governance ideal type assumes that the state can directly regulate private actors, international Old Governance is typically indirect, requiring or urging states to implement regulations that govern private actors in their jurisdictions.¹⁴⁸

145. Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3, 9 (1998) [hereinafter Abbott & Snidal, *Organizations*].

146. United Nations Convention on International Civil Aviation arts. 37–38, Dec. 7, 1944, 15 U.N.T.S. 295, ICAO Doc. 7300/9 (2006), available at <http://treaties.un.org/doc/Publication/UNTS/Volume%2015/volume-15-II-102-English.pdf>.

147. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 229–49 (1995).

148. The point is not that IGOs can never address private actors—although they do so only infrequently—but that in doing so they deviate from international Old Governance. 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. See ORG. FOR ECON. COOPERATION & DEV., *THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>; United Nations Global Compact, <http://www.unglobalcompact.org/index.html> (last visited Feb. 16, 2009). On this point, the EU more closely resembles the Old Governance model, in that it can adopt rules with direct effect in national legal

The ILO, the central international agency on labor rights, illustrates how IGOs fall short of the Old Governance 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 Old Governance in the issue areas addressed in this Article.¹⁴⁹ The ILO is member-centric: under its Constitution (a treaty), only states can be members¹⁵⁰ (states nominate worker and employer delegates by agreement with representative organizations).¹⁵¹ 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.¹⁵² Its main labor standards take the form of treaties that require state ratification, supplemented by recommendations; its implementation procedures rely on peer and expert review and other managerial techniques.¹⁵³ 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),¹⁵⁴ their ratification power, and their financial control.¹⁵⁵ The International Labor Office has greater authority than many secretariats, but still less than domestic regulatory agencies.

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

systems. European Judicial Network in Civil and Commercial Matters, http://ec.europa.eu/civiljustice/legal_order/legal_order_ec_en.htm (last visited Feb. 16, 2009).

149. In some respects, the ILO operates like a state-based organization in spite of its tripartite character, e.g., states must ratify approved conventions before they take effect. ILO Constitution art. 19, June 28, 1919, 49 Stat. 2712 [hereinafter ILO Constitution]. 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.

150. *Id.* art. 1(2).

151. *Id.* art. 3.

152. 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 then urged governments to grant the ILO greater authority, but state and employer delegates rejected these proposals. The ILO reasserted its leadership by adopting the Declaration on Fundamental Principles and Rights at Work in 1998. Van Wezel Stone, *supra* note 142, at 105–08. See Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649 (2006), for a valuable analysis of these and other institutional developments over the history of the ILO.

153. Van Wezel Stone, *supra* note 142, at 106–08.

154. State delegates constitute 50% of those organs, worker and employer delegates 25% each. ILO Constitution, *supra* note 149, art. 3.

155. The expenses of the ILO are borne by its members under its Constitution and agreement with the UN. *Id.* art. 13

technical assistance; its expertise is highly regarded.¹⁵⁶ It also collaborates with private actors, particularly worker and employer organizations, more than many other 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.¹⁵⁷ Nonbinding recommendations guide convention implementation. 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.¹⁵⁸

2. Unilateral State Action

While IGOs were created in large part as responses to failures of domestic Old Governance with respect to transborder issues, their inadequacies have led to continuing calls to extend domestic Old Governance transnationally. Advocates of this form of regulation argue that states having authority or leverage over firms responsible for transnational production externalities should unilaterally regulate their conduct.¹⁵⁹ 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 multinational enterprises (MNEs), the source of most foreign investment, and the largest global markets.

156. See ILO, How the ILO Works, http://www.ilo.org/global/About_the_ILO/Structure/lang-en/index.htm (last visited Feb. 16, 2009).

157. The ILO had adopted 188 conventions as of June 2007. ILO, International Labour Standards, <http://www.ilo.org/public/english/region/afpro/daressalaam/standards/index.htm> (last visited Feb. 16, 2009). Its Constitution requires member governments to present approved conventions for consideration by the appropriate national authorities. ILO Constitution, *supra* note 149, art. 19. 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. ILO, Conventions and Recommendations, http://www.ilo.org/global/What_we_do/International_LabourStandards/Introduction/ConventionsandRecommendations/lang-en/index.htm (last visited Mar. 7, 2009). The ILO regards its 1998 Declaration on Fundamental Principles and Rights at Work as morally binding even on members that have not ratified those conventions, but its implementation procedures are merely promotional. ROGER BLANPAIN & MICHELE COLUCCI, THE GLOBALIZATION OF LABOUR STANDARDS: THE SOFT LAW TRACK 41 (2004).

158. ILO Constitution, *supra* note 149, arts. 26–29.

159. A prominent recent example is the Corporate Responsibility Coalition (CORE) campaign for UK and EU legislation to regulate foreign social and environmental impacts of national corporate groups. See JENNIFER A. ZERK, CORP. RESP. COALITION, CORPORATE ABUSE IN 2007: A DISCUSSION PAPER ON WHAT CHANGES IN THE LAW NEED TO HAPPEN (2007), available at http://www.corporatejustice.org/IMG/pdf/corporateabuse_discussionpaper.pdf, for a summary of legislative alternatives currently considered by CORE.

Developing countries are often inadequate regulators due to insufficient capability or willingness.¹⁶⁰ If developing countries could effectively regulate their own economies (including transnational firms operating there), domestic Old Governance could satisfactorily control many production externalities.¹⁶¹ Unfortunately, in many developing countries, this is not the case.¹⁶² Even though most 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 monitoring and enforcement capacities undermines the effectiveness of these laws.

Critics argue that international competition creates a “race to the bottom” that limits how strictly developing countries are willing to regulate.¹⁶³ Scholars have found little empirical evidence of such a race.¹⁶⁴ However, even without a downward race, international competition limits 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.¹⁶⁵ This shifts the issue from capacity and will to the difficult normative question of what standards are appropriate in different circumstances. 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,¹⁶⁶ the questionable level of

160. Rawls uses the terms “burdened societies” and “outlaw states” to refer to these categories. JOHN RAWLS, *THE LAW OF PEOPLES* 90 (1999).

161. Natalie L. Bridgeman & David B. Hunter, *Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism*, 20 *GEO. INT’L ENVTL. L. REV.* 187, 195 (2008).

162. *Id.* at 195–99; see also Braithwaite, *supra* note 35, at 888–89; Graham & Woods, *supra* note 111, at 868–69.

163. See, e.g., Van Wezel Stone, *supra* note 142, at 95 (highlighting the “fear that globalization will marginalize or supplant national politics by virtue of its tendency to undermine the capacity of nation-states to regulate their own domestic economies” and the prediction “that globalization will lead to the demise of the Western welfare state, the decline of Western labor movements, and the deterioration of labor standards everywhere”); Lori Wallach, *Introduction: It’s Not About Trade, in WHOSE TRADE ORGANIZATION? A COMPREHENSIVE GUIDE TO THE WTO* 1, 8–16 (Lori Wallach & Patrick Woodall eds., 2004) (discussing the adverse effects of WTO compliance around the world).

164. See Prakash & Potoski, *supra* note 40, at 352–53 (citing sources). See generally Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 *J. LEGAL STUD.* 141 (2002) [hereinafter Abbott & Snidal, *Values*] (summarizing empirical and theoretical debate over “race to the bottom”).

165. Graham & Woods, *supra* note 111, at 869.

166. Subsidiarity is a principle of European Union (EU) law, embodied in Article 5 of the Treaty Establishing the European Community. See Treaty Establishing the European Community art. 5, Nov. 10, 1997, 1997 O.J. (C 340) 5 [hereinafter EC

democracy in many of those states, coupled with problems of corruption and capture, undermine their legitimacy for making these decisions.¹⁶⁷

Alternatively, developed countries might regulate the foreign conduct of domestic MNEs and investors; forbid imports of goods produced abroad under poor social or environmental conditions; and require domestic importers, retailers, and firms with transnational supply chains to impose high standards on foreign suppliers. But this strategy also faces problems of capability, willingness, and legitimacy.¹⁶⁸ Transnational regulation strains the regulatory capacities of even developed country governments, given the difficulty of collecting information about firms' foreign operations. Indeed, some firms "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, developing-country 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.¹⁶⁹

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 if they might undermine national growth or competitiveness—may even be viewed negatively by certain domestic groups.¹⁷⁰ Domestic firms resist regulation and seek to

Treaty] (providing that EU institutions should not take legal or regulatory action, except in areas in which they have exclusive competence, unless action at EU level would be more effective than action at the national, regional or local level). The principle, like its analogues in other areas of law, is designed to ensure that decisions are taken as close as possible to the citizen. See Lobel, *supra* note 33, at 381–86 (discussing decentralization and subsidiarity).

167. 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.")

168. Daniel Drezner argues that powerful developed countries have the capacity to regulate internationally and unilaterally set many rules that bind developing countries. DANIEL W. DREZNER, *ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES* 5 (2007). However, the financial and other areas Drezner examines differ substantially from transnational production. Whereas developed countries feel the effects of foreign financial externalities, production externalities generally flow in the opposite direction, reducing developed country incentives to regulate. Moreover, Drezner's positive argument focuses on power politics and does not address normative issues.

169. Bridgeman & Hunter, *supra* note 161, at 200–05; Van Wezel Stone, *supra* note 142, at 115–16.

170. Not only are [governments] not well placed to define the common interests of populations that fall outside their national boundaries, but

avoid or weaken it through capture.¹⁷¹ 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 Old Governance raises significant legal and normative issues, both domestic and international. For examples, to avoid interference in foreign affairs, U.S. courts generally presume (absent clear expressions of Congressional intent) that statutes do not apply extraterritorially.¹⁷² 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.¹⁷³ Decisions under the General Agreement on Tariffs and Trade (GATT) exacerbated the difficulties by suggesting that states cannot lawfully impose import restrictions based on foreign production processes;¹⁷⁴ more recent WTO cases provide greater regulatory leeway, however.¹⁷⁵

Even if developed countries were willing and had legal capacity and authority to regulate transnationally, 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.¹⁷⁶

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* note 3, at 220.

171. See, e.g., Levi & Linton, *supra* note 167, at 414 ("[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.")

172. E.g., *Foley Bros. v. Filardo*, 336 U.S. 281, 284–85 (1949) (refusing to apply wage and hour law to laborers working abroad). Only a few U.S. labor statutes extend to the foreign conduct of national firms. Van Wezel Stone, *supra* note 142, at 114–15.

173. Van Wezel Stone, *supra* note 142, at 117; see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. §§ 401–403 (1987) (proposing principles to resolve conflicts of national prescriptive jurisdiction).

174. See generally Panel Report, *United States—Restrictions on Imports of Tuna*, WT/DS29/R (June 16, 1994); Panel Report, *United States—Restrictions on Imports of Tuna*, WT/DS21/R (Sept. 3, 1991).

175. See, e.g., Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 8, 1998) (exemplifying greater leeway on the part of the WTO). See generally JASON POTTS, INT'L INST. FOR SUSTAINABLE DEV., *THE LEGALITY OF PPMS UNDER THE GATT: CHALLENGES AND OPPORTUNITIES FOR SUSTAINABLE TRADE POLICY* (2008), available at http://www.iisd.org/pdf/2008/ppms_gatt.pdf (summarizing current WTO law that suggests the expanded scope for "process and production method" regulation).

176. "Democratic governments can speak for . . . only the common interests of those who elect them." Cragg, *supra* note 3, at 219. "The problem with democratic

Moreover, because developed country regulation would most often influence business activity in developing countries, it might impose inappropriate standards or cultural values.¹⁷⁷ Such concerns feed back into states' 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."¹⁷⁸

B. *Transnational New Governance*

The shortcomings of international Old Governance have led concerned actors to develop the alternative of transnational RSS. The increasingly dense constellation of RSS schemes on the Governance Triangle is developing into a system of Transnational New Governance that complements, competes with, and sometimes serves as a substitute for national and international Old Governance. This emerging system closely resembles the New Governance 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.

<u>New Governance</u>	<u>Emerging Transnational New Governance</u>
State orchestration	Limited state orchestration
Decentralized	Highly decentralized
Dispersed expertise	Dispersed expertise
Soft law	Voluntary codes

Table 4: Transnational New Governance

We begin by analyzing the areas of similarity—the three final dimensions in Table 4—and then turn to the relative lack of state orchestration, the greatest current weakness of Transnational New Governance.

regimes is that 'the publics' whose interests the regimes are justified in protecting and advancing are national publics." *Id.*

177. See Meidinger, *Competitive Supragovernmental Regulation*, *supra* note 23, at 526–31 (assessing possible responses to Northern regulatory "imperialism").

178. PARLIAMENTARY JOINT STATUTORY COMM. ON CORP. & SEC., REPORT ON THE CORPORATE CODE OF CONDUCT BILL 2000, at 16 (2001), available at http://www.aph.gov.au/senate/committee/corporations_ctte/completed_inquiries/1999-02/corp_code/report/index.htm.

1. Decentralization

The most striking feature of the system depicted on the Governance Triangle is the decentralization of regulatory authority from the state to private and public-private schemes. The degree of decentralization is greatest across the lowest tier of the Triangle (Zones 2, 3, and 6). Schemes in that tier primarily entail actions by and collaboration among private actors; the direct role of public actors—states or IGOs—is very limited. However, as the numerous schemes near the Firm and NGO vertices of the Triangle suggest, the current system is far more decentralized than the New Governance model contemplates; many of those schemes are not deeply enmeshed in a regulatory network, let alone one orchestrated by the state. 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 New Governance 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 Old Governance national laws, domestic New Governance schemes such as national eco-labels, or voluntary IGO schemes with New Governance features.

Even more important is the decentralized character of Transnational New Governance 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 other.¹⁷⁹ 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 shared objectives, albeit with significant variations in norms and procedures. These schemes often compete but sometimes collaborate, most formally in alliances such as the International Social and Environmental Accreditation and Labeling Alliance (ISEAL).¹⁸⁰

179. See O'Rourke, *supra* note 29, at 18–20 (discussing the diversity of RSS schemes).

180. ISEAL is an alliance of major multi-stakeholder standards schemes that defines and codifies best practices in the adoption and implementation of voluntary standards, most notably in its Code of Good Practice for Setting Social and Environmental Standards, serves as a forum for high-quality standards schemes and provides technical assistance to new schemes. As of 2007, seven member schemes (six

2. Dispersed Expertise

Effective RSS requires all the forms of expertise identified earlier: normative, technical, economic, and social. Transnational New Governance is similar to the New Governance model in not relying solely on state or IGO regulators for needed expertise, except within some Zone 1 schemes.¹⁸¹ Instead, private RSS schemes draw primarily on the expertise of the societal actors that create and govern them. As a result, however, the range of expertise found within any one scheme depends on the actors it engages. Single-actor schemes near the vertices of the Triangle have a limited range of expertise, whereas collaborative schemes closer to the center engage wider ranges of expertise. A major rationale of multi-stakeholder schemes like those in Zone 6 is to combine complementary sources of expertise.

3. Soft Law

The emerging Transnational New Governance system relies heavily on voluntary principles, codes, procedures, and (to the extent states and IGOs are involved) soft law. Private schemes lack authority to promulgate hard law; they also lack the capacity for coercive enforcement, relying on economic and social pressure from consumers and other constituencies, potential commercial benefits, and the implicit threat of state regulation to induce firms to adopt and comply with their norms. Even when the state is involved, Transnational New Governance relies on New Governance techniques rather than Old Governance coercive regulation. IGOs, including the OECD, ILO, and UN, increasingly use soft law to address firms directly and to increase the flexibility and attractiveness of the norms they promote. As in the New Governance model, however, some Transnational New Governance norms have been embodied in legally binding instruments.¹⁸² Complementarily, private RSS schemes rely heavily on state-generated rules and norms, including treaty rules, as the principal benchmarks for their own voluntary norms. This has the interesting consequence that state-generated norms that fail to

in Zone 6 of the Triangle and one in Zone 3) were in full compliance with the Code of Good Practice. See ISEAL Alliance, <http://www.isealalliance.org/index.cfm?fuseaction=Feature.showFeature&CategoryID=25&FeatureID=131> (last visited Mar. 7, 2009).

181. Some Zone 1 schemes, especially those near the vertex, are essentially Old Governance. New Governance-influenced schemes lower in Zone 1 typically involve consultation with business and civil society groups and collaboration with target firms.

182. 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* note 5, at 835.

become effective through hard law may find a second life in the voluntary codes of private RSS schemes.

4. State Orchestration

The role of the state is the major distinction between the emerging Transnational New Governance system and the New Governance ideal type. In the New Governance 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, and this background role shapes the interactions of other actors. 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.¹⁸³ Furthermore, as with international Old Governance, states have limited means to correct bottom-up regulation in the transnational context.¹⁸⁴

Two types of orchestration can be observed in Transnational New Governance, although in most cases their extent is modest. First, several schemes in the upper tier of the Governance Triangle involve “directive orchestration,” in which states and IGOs use mandatory rules, binding conditions on public benefits, and similar measures to steer RSS in desired directions. For example, the EU enforces mandatory conditions for firms that participate in EMAS, while the IFC Safeguard Policies are enforceable requirements for clients in its financing programs.¹⁸⁵ Second, even though states and

183. See Abbott & Snidal, *Governance Triangle*, *supra* note 46, at 2, 14–19 (discussing the emergence of non-state and public-private governance arrangements).

184. Kingsbury et al., *supra* note 16, at 54–56.

185. 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 weak. See United Nations Governance Centre, <http://www.ungc.org> (last visited Feb. 16, 2009); UN Procurement Division, <http://www.un.org/depts/ptd/conditions.htm> (last visited Feb. 16, 2009) (listing UN General Terms and Conditions of Contract); Organisation for Economic Co-operation and Development, http://www.oecd.org/department/0,3355,en_2649_34889_1_1_1_1,00.html (last visited Feb. 16, 2009) (covering guidelines for multinational enterprises).

IGOs are not centrally involved in the predominantly private schemes in the lowest tier of the Triangle, they sometimes engage in “facilitative orchestration,” or supportive actions that encourage and enhance the development of desired forms of RSS. For example, the U.S. Department of Labor convened a broad range of apparel industry stakeholders as the Apparel Industry Partnership (AIP), thereby setting the initial framework for RSS in that sector.¹⁸⁶ Material and moral support for schemes that meet public standards is another form of facilitation: for example, the Department of State has financially assisted several transnational labor rights schemes.¹⁸⁷ Even indirect contributions, such as ILO promulgation of labor standards on which private schemes can subsequently build, can facilitate RSS. In the public–private partnerships across the middle tier of the Triangle, states and IGOs engage in variants of both approaches.

Transnational New Governance is clearly evolving with a different balance among these forms of orchestration than in domestic New Governance theory: directive orchestration is less prominent, facilitative orchestration more so. Overall, however, there is little doubt that states and IGOs do not currently provide the level of orchestration called for by the New Governance ideal type. Part V explores the implications of this deficiency, while Part VI suggests how states and IGOs could orchestrate more effectively.

V. EVALUATING TRANSNATIONAL NEW GOVERNANCE

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

186. See Alexis M. Herman, Sec’y of Labor, Remarks at the Marymount University Academic Search for Sweatshop Solutions (May 30, 1997), available at <http://www.dol.gov/oasam/programs/history/herman/speeches/sp970603.htm> (discussing the development of the AIP from a DOL perspective).

187. See U.S. Department of State Bureau of Democracy, Human Rights, and Labor, Fact Sheet FY 2004–2005 Human Rights and Democracy Fund Projects (July 28, 2005), <http://2001-2009.state.gov/g/drl/rls/50318.htm> (listing expenditures of the Human Rights and Democracy Fund for fiscal year 2004–2005).

New Governance, yet it also suggests that the potential of Transnational New Governance can be more fully realized if states and IGOs provide more effective orchestration and support.

The most significant strengths and weaknesses of Transnational New Governance relate to the first two elements of the New Governance ideal type: decentralization and orchestration. This Part is organized around those categories; it briefly addresses the other two elements, dispersed expertise and soft law, within that analysis.

A. Decentralization

Decentralization is a hallmark of the New Governance model, but decentralization in that model is to some degree centrally orchestrated by the state. Decentralization in Transnational New Governance, in contrast, is the result of independent decisions by private and some public actors to initiate individual RSS schemes; as a result, viewed as a system of governance, RSS has been largely spontaneous and unplanned.¹⁸⁸

Transnational New Governance in its current form thus shares the strengths and weaknesses of spontaneous social orders. Consider the closely related but generally simpler issue of technical product standards.¹⁸⁹ 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 standard-setting process can produce a cacophony of incompatible standards. This outcome is costly for an industry even though it results from the actions of individual firms within that industry, each advancing standards that serve its individual, sometimes 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 collaborates with and orchestrates private standard-setting bodies through institutions such as the American National Standards Institute (ANSI) and ISO.¹⁹⁰ Coordination is desirable in this setting

188. Significant exceptions include the UNGC, ILO Tripartite Declaration, AIP, PRI, and ISO 14000. See UNGC, About UNGC, <http://www.ungc.org> (last visited Feb. 16, 2009); ILO, About the ILO, http://www.ilo.org/global/about_the_ilo/lang-en/index.htm (last visited Feb. 16, 2009); Herman, *supra* note 186; PRI, About PRI, <http://www.unpri.org/about> (last visited Feb. 16, 2009); ISO, About ISO, <http://www.iso.org/iso/about.htm> (last visited Feb. 16, 2009). To varying extents, such efforts demonstrate the advantages of IGO and state roles in RSS.

189. See generally Abbott & Snidal, *International Standards*, *supra* note 27 (analyzing technical product standards in comparison to regulatory standards).

190. Directive orchestration of ISO is limited, largely because of the technical issues it addresses. But states were instrumental in its formation, authorize

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.

Here we address the advantages and disadvantages of the strong decentralization that currently characterizes Transnational New Governance. We first consider the distribution of regulatory authority that results from strong decentralization, and then analyze certain specific effects of the multiplicity of RSS schemes and the opportunities for participation they create.

1. Distribution of Regulatory Authority

In the emerging Transnational New Governance system, regulatory authority is distributed across a wide variety of RSS schemes, themselves governed by a broad range of actors. States and IGOs are directly involved in institutions in the upper and middle tiers of the Governance Triangle. Far more striking, however, is the extensive private ordering across the lower tier of the Triangle, the locus of much recent Transnational New Governance activity. This distribution of authority engages two major goals of New Governance: 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 led to significant gaps and overlaps in regulatory coverage, particularly across products and industries. While self-regulation by firms is extensive, its emergence, content, and strength depend heavily on idiosyncratic factors such as normative commitments of top executives, strategic decisions to emphasize corporate social responsibility, organizational cultures, and, especially, characteristics of specific markets.¹⁹¹ 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.¹⁹² The former also are likely to be less tightly constrained by bottom-line concerns due to

participation by private standards bodies, collaborate in its operations, and present a background threat of intervention if it acts improperly. *Id.* at 15.

191. Sasser et al., *supra* note 2, at 11–12; see Jennifer Howard-Grenville, Jennifer Nash & Cary Coglianese, *Constructing the License to Operate: Internal Factors and Their Influence on Corporate Environmental Decisions*, 30 L. & POLY 73, 74 (2008) (finding that individual firms subject to similar external pressures respond differently due to internal cultures and management incentives).

192. Howard-Grenville et al., *supra* note 191, at 83.

differentiated markets. For parallel reasons, NGO and collaborative schemes focus on vulnerable targets, such as consumer goods firms that rely on brand reputation (e.g., Nike), “branded” retailers (e.g., Home Depot and Wal-Mart), and other 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 Transnational New Governance.¹⁹³

In addition, Transnational New Governance is currently characterized by a disproportionate concentration of single-actor RSS schemes, especially in Zone 2 of the Triangle. Even if their participants are normatively motivated, Firm schemes reflect individual 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, therefore, oppose regulation that threatens it.¹⁹⁴ 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 breadth¹⁹⁵ and relatively opaque to outsiders. Opacity leaves many openings for opportunism,¹⁹⁶ in turn creating credibility problems for sincere firms.

Similar problems arise with the single-actor NGO schemes in Zone 3. 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.¹⁹⁷ They may choose policies that please vocal activists or attract donors rather than serving all concerned

193. See O'Rourke, *supra* note 29, at 22 (discussing regulatory implementation challenges).

194. 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. See Lawrence W. Reed, *Child Labor and the British Industrial Revolution* (1976), available at <http://www.mackinac.org/article.aspx?id=3879> (discussing the intended and unintended consequences of child labor laws). 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.”

195. On the limited effectiveness of business codes, especially for the environment, see Wood, *supra* note 15, at 254–65. CASHORE ET AL., *supra* note 17, at 15 argue that firms see business codes as opportunities to communicate the virtues of existing practices.

196. See Kimberley D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 526 (2003) (discussing opportunism).

197. See generally Abbott & Snidal, *Values*, *supra* note 164 (discussing the pursuit of goals by value activists and the political tactics reflecting motivating beliefs).

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.

Single-actor schemes, moreover, do not possess all of the competencies necessary for effective regulation: expertise of several kinds, concrete operational capacities (including resources), independence from the targets of regulation, and representativeness.¹⁹⁸ Firm schemes have unparalleled business expertise and managerial capacity, but lack independence and represent only narrow economic interests. NGO schemes have normative expertise, significant operational capacities (e.g., for influencing and mobilizing public opinion), and substantial independence. Yet they have little business expertise, managerial capacity, or resources, and their representativeness varies widely and is frequently challenged. Even State schemes lack important competencies for regulation in transnational settings:¹⁹⁹ 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 these problems by including multiple actors who together possess a more representative range of motivations and a fuller range of complementary competencies.²⁰⁰ Zone 6 schemes, such as FSC, SAI, GRI, and FLO, bring together private sector and civil society groups with diverse interests, values, expertise, and operational capacities.²⁰¹ Participation by NGOs makes these schemes more representative than pure Firm schemes; business participation strengthens their operational capacities for implementing standards over pure NGO schemes; and their multi-

198. See Abbott & Snidal, *Governance Triangle*, *supra* note 46, at 19–29 (discussing competencies essential to effective regulatory action); see Black, *supra* note 30, at 63 (identifying actors' regulatory capacities).

199. Developed states possess most competencies for domestic regulation.

200. Meidinger, *Beyond Westphalia*, *supra* note 30, at 128–29, characterizes schemes like FSC as networks, bringing together firms, activists, professionals, government officials, indigenous groups, and other actors. See O'Rourke, *supra* note 29, at 4–6 (suggesting that the network form of such arrangements is designed to match the new structures of global production).

201. In some of these schemes, states or IGOs have acted as facilitator, as UNEP has in GRI. Press Release, United Nations Environment Programme (UNEP), Corporate Sustainability Reporting Guidelines Set New Standard for Transparency (July 11, 2000), available at <http://www.grida.no/news/press/2094.aspx>. We place such schemes higher in Zone 6.

stakeholder structure reinforces their independence from any single actor group. A few Zone 4 schemes involve modest IGO efforts to promote socially responsible firm behavior, thus partially resembling the New Governance ideal type.²⁰² The UNGC promotes normative learning, disclosure, and business–NGO interactions. The IFC provided “extensive advice and guidance” to banks drafting the Equator Principles, which follow IFC rules.²⁰³ 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.²⁰⁴ In Zone 5, UNEP and the UNGC similarly promote socially responsible behavior by institutional investors through the PRI, but beyond this Zone 5 is sparse, as firms strongly resist exclusive state-NGO regulatory arrangements; most such schemes would in any case lack business expertise and managerial capacity, although the PRI is an exception.

Two-actor schemes have further shortcomings. Bringing together disparate, often adversarial actors necessarily entails a degree of mutual suspicion, increasing the costs of bargaining and compromising. An even greater cost from the New Governance 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 motives approximating the public interest.²⁰⁵ Yet in a context of weak orchestration, bargaining costs and suspicion make this area quite sparse, especially since some Zone 7 schemes are either temporary (e.g., AIP) or relatively weak (e.g., EITI and VPSHR).

202. These schemes involve a range of orchestration approaches. As an IGO initiative, UNGC would 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 strong links to governments through member state agencies and works closely with IGOs such as the WTO; its standards are sometimes reinforced by incorporation in treaties and national statutes.

203. Press Release, The Equator Principles, Leading Banks Announce Adoption of Equator Principles (June 4, 2003), available at <http://www.equator-principles.com/pr030604.shtml>.

204. 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. See generally Kenneth W. Abbott, *Public Private Partnership*, in MAX PLANCK ENCYCLOPEDIA PUB. INT’L L., <http://www.mpopil.com/>.

205. Even successful RSS initiatives suggest the importance of involving all three actor groups. Cragg, *supra* note 3, at 224–25.

2. Multiplicity

The large number of RSS schemes within the Transnational New Governance system engages another key strength of New Governance—the ability to address regulatory issues in multiple and diverse ways, including through complementary interactions with Old Governance. Again, consider worker rights in Southern apparel industries, which are only imperfectly protected by the ILO and by states. Transnational New Governance offers an additional array of RSS schemes to address the issue: IGO initiatives, firm and industry codes regulating foreign suppliers, and NGO and multi-stakeholder institutions. Private schemes have also introduced varied and innovative techniques, including certifying plants, products, and firms; external monitoring; product labels and logos; and social and environmental reporting.

Because RSS supplements rather than displaces treaties, IGO rules, and state regulation, the cumulative effect of Transnational New Governance and international Old Governance exceeds that of Old Governance alone. RSS schemes act as force multipliers for international regulation: they apply mechanisms such as private certification and labeling in support of international norms, amplifying the impact of the state-centric mechanisms of Old Governance. Furthermore, many RSS schemes fill gaps in international regulation: their implementation and technical assistance programs address actors, issues, sectors, and regions where Old Governance has limited impact, and their norms are sometimes more extensive or demanding than Old Governance rules, as by requiring payment of a living wage.

However, multiplicity can also undermine Transnational New Governance, 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 transaction, implementation, and organizational costs. Suppliers in highly visible sectors, for example, may face downstream firms demanding compliance with their own unique standards, as well as one or more industry, multi-stakeholder, or NGO schemes. For small-scale businesses and farmers in developing countries, these costs are especially intense, posing significant barriers to participation.²⁰⁶ Of equal significance, 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.

206. See generally Making Sustainability Standards Work for Small-Scale Farmers: A Pre-UNCTAD XII Event, Apr. 7–9, 2008, http://www.unctad.org/trade_env/meeting.asp?MeetingID=249 (offering conclusions and recommendations for overcoming such costs).

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 transaction 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, at least in the absence of meaningful orchestration.

We now highlight three more specific benefits of multiplicity.

a. Facilitating Adaptation

Multiplicity allows RSS standards and procedures to be fine-tuned to individual circumstances, in contrast to the relative uniformity of international Old Governance; this is all the more important in today's diverse global economy. Self-regulatory and supplier codes are tailored to the circumstances of specific firms or industries; so too are many NGO and collaborative schemes, such as FSC, MSC, RUG, RA, WRC, MAC, and IFOAM. Some external schemes provide even finer variations for specific sectors (e.g., GRI sector supplements), actors (e.g., FLA requirements for large, small firms), or regions (e.g., FSC national and 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.²⁰⁷ The advantages of adaptability are tempered, however, by the possibility that firms may use fine-tuning to weaken RSS standards.

b. Promoting Experimentation

Transnational New Governance offers a powerful laboratory for regulatory experimentation, although strong decentralization makes it a somewhat different laboratory than domestic New Governance. Indeed, because low costs of entry and the flexibility of soft law allow private actors to create RSS schemes with relative ease, Transnational New Governance may produce even greater experimentation than domestic New Governance.²⁰⁸

Decentralization offers opportunities for learning across schemes. Business groups and consultants disseminate lessons of successful self-regulation among firms. "Norm entrepreneurs" learn

207. See *supra* note 166.

208. Low entry costs may facilitate the appearance of relatively extreme schemes, both pro- and anti-business.

from other schemes, even borrowing entire templates, such as the “fair trade” and “stewardship council” models, for new industries. ISEAL and other alliances promote learning and harmonization among like-minded schemes and provide technical assistance to new ones. Mutual learning occurs through formal collaborations and other interactions: for example, NGOs consult with firms in formulating standards (e.g., GSULL and TCO); firms contract with NGOs for external monitoring; firms study and participate in NGO schemes (e.g., CERES); and UNGC sponsors learning forums and encourages firms to engage with NGOs.²⁰⁹ Even institutions that vigorously compete for public and industry support observe, learn from, and borrow from one another.²¹⁰ In effect, competing schemes co-evolve through continuous interaction. In forestry, for example, NGO and industry schemes are converging on common procedures in areas such as stakeholder input and external monitoring.²¹¹ Governments also learn from RSS experiments, improving public regulation.²¹²

However, these benefits are diminished by the absence of any centralized agency in Transnational New Governance to promote learning and consolidate the lessons of experimentation, a significant failing given the sheer range of experimentation in Transnational New Governance. A central agent such as the state is better positioned to assess regulatory experiments systematically and to publicize and scale up the most successful. As it stands, the diffusion of successful approaches in Transnational New Governance depends largely on demonstration effects—the willingness and ability of schemes to learn from one another—and on competition, discussed further below.

c. Avoiding Capture

Multiplicity in Transnational New Governance helps protect the international regulatory system against capture, which would otherwise be a significant danger of granting enhanced authority to the targets of regulation.²¹³ The multiplicity of regulatory institutions diminishes the risk of capture: if one institution is captured, the activities of other schemes can compensate for it. Even

209. Sahlin-Andersson, *supra* note 123, at 140–41.

210. Such interactions facilitate accountability in a non-hierarchical regulatory system. Kingsbury et al., *supra* note 16, at 58–59.

211. Meidinger, *Beyond Westphalia*, *supra* note 30, at 129.

212. Meidinger, *Environmental Law-Making*, *supra* note 31, at 315; Meidinger, *Competitive Supragovernmental Regulation*, *supra* note 23, at 519–20.

213. Because of this access, NGOs wary of capture are often suspicious of New Governance programs. Kollman & Prakash, *supra* note 73, at 417. NGOs can also capture regulation.

if an IGO or state agency is captured, private RSS schemes retain substantial regulatory independence. Moreover, Transnational New Governance 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 Old Governance, nor allows the captured institution to trump other schemes. These protections are reinforced by the intense competition for legitimacy and public support among RSS schemes; if one institution were captured, its competitors would quickly reveal and criticize that fact.²¹⁴

Countervailing interests within 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.²¹⁵ Public actors can play similar roles in Zone 4, 5, and 7 schemes. Multi-stakeholder composition also makes collaborative schemes relatively transparent, allowing interested outsiders to monitor their internal politics.²¹⁶

3. Participation and Engagement

Transnational New Governance has created new avenues of participation for many diverse groups and actors: NGOs, firms and their employees; unions (WRC); universities (FLA, WRC); socially responsible investors (CERES, PRI); organic and small farmers (IFOAM, FLO, FTO); indigenous groups and forest owners (FSC); and scientists, advocates, and concerned individuals. Participation allows these individuals and groups to engage directly with regulatory issues and exercise greater influence on their own futures and the futures of those they seek to help. Such engagement is both an

214. This effect can be seen in the mutual criticism between NGO and Firm schemes, both of which are "captured" by design.

215. *E.g.*, Kingsbury et al., *supra* note 16, 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.

216. RSS schemes are not subject to legal transparency requirements found in advanced democratic states, such as open meeting and freedom of information laws, but a number of private multi-stakeholder schemes have begun to develop analogous procedures. The ISEAL Code of Good Practice details extensive transparency requirements, including procedures for notice to and comment by interested parties during standard-setting. See ISEAL CODE OF GOOD PRACTICE FOR SETTING SOCIAL AND ENVIRONMENTAL STANDARDS art. 5 (Public Version 4, Jan. 2006), available at <http://www.isealalliance.org/document/docWindow.cfm?fuseaction=document.viewDocument&documentid=212&documentFormatId=1289> [hereinafter ISEAL CODE OF GOOD PRACTICE].

independent good and more empowering than the typical Old Governance roles as lobbyists and objects of regulation.²¹⁷

Evaluating the social or collective benefits of Transnational New Governance engagement is more difficult. Broad participation arguably renders Transnational New Governance more democratic, enhancing its legitimacy as a regulatory system. However, this claim has been called “the most vexing normative implication” of New Governance,²¹⁸ in part because participation is rarely representative in the ways liberal democratic theory calls for.²¹⁹ Deliberative theory provides an alternative rationale, although there is no consensus on what constitutes adequate participation and deliberation. Even with “convincing democratic theories for the global sphere . . . lacking,”²²⁰ many collaborative RSS schemes have developed structures and procedures that pragmatically further 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 through deliberations within and among distinct environmental, social, and economic “chambers,” each with Northern and Southern components.²²¹ Other schemes have adopted stakeholder advisory councils, public comment procedures, and other means to promote transparency, participation, and deliberation. Even in labor rights, where direct roles in governance have long been extended—and confined—to workers and employers, these arrangements render the global regime more participatory. Pragmatic steps like these constitute sensible approaches to developing democracy in an arena where the very

217. See AYRES & BRAITHWAITE, *supra* note 38, at 158–62 (discussing delegation and participation in a responsive regulatory order). Blackett, *supra* note 88, 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.

218. Meidinger, *Beyond Westphalia*, *supra* note 30, at 140, argues that theoretical examination of the democratic implications of New Governance is “a conceptual hodgepodge.”

219. 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* note 3, at 214.

220. Kingsbury et al., *supra* note 16, at 49.

221. Klaus Dingwerth, *North-South Parity in Global Governance: The Affirmative Procedures of the Forest Stewardship Council*, 14 GLOBAL GOVERNANCE 53, 56–58 (2008); Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 EUR. J. INT’L L. 47, 53 (2006); Meidinger, *Competitive Supragovernmental Regulation*, *supra* note 23, at 523. At the time of this Article’s publication, FSC is considering changes to its internal governance. See FOREST STEWARDSHIP COUNCIL, FSC GOVERNANCE REVIEW PROCESS: FINAL PROPOSALS (2008), available at http://www.fsc.org/fileadmin/web-data/public/document_center/institutional_documents/FSC_Governance_Paper_2008.pdf (presenting proposals for changes to FSC governance system).

meaning of the concept is in doubt;²²² over time, they could have significant consequences for global democracy.²²³ Finally, Transnational New Governance as a whole is implicitly deliberative in a different sense, as RSS schemes learn from one another, compete, bargain, and collaborate.²²⁴

Yet Transnational New Governance still falls short of liberal and deliberative democratic ideals. Liberal critics argue that democratic states are the sole legitimate regulators;²²⁵ 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.²²⁶ Even from a less purist perspective, the quality of participation and deliberation in Transnational New Governance remains uneven. Firm schemes are limited to economic stakeholders and are not highly deliberative, although a few schemes do 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 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 workers in monitoring. In general, even though many RSS schemes make an effort to include Southern voices, most are dominated by Northern elites.²²⁷

Disparities in participation reflect a deeper collective action problem: social groups possess highly uneven capacities for organization and collective action, systematically skewing

222. For example, these developments are consistent with de Búrca'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. Gráinne de Búrca, *Developing Democracy Beyond the State*, 46 COLUM. J. TRANSNAT'L L. 221, 227 (2008).

223. See Joshua Cohen & Charles F. Sabel, *Global Democracy?*, 37 N.Y.U. J. INT'L L. & POL. 763, 766 (2005) (speculating that the development of new accountability mechanisms for institutions of "global politics," including IGO and other public regulation as well as Transnational New Governance, could over time democratize global governance by developing the necessary global "demos" and public sphere).

224. Meidinger, *Competitive Supragovernmental Regulation*, *supra* note 23, at 531 (describing competition for public acceptance as the "hidden democratic genius" of RSS).

225. *E.g.*, John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 221 (2000) (arguing that many forms of global governance, including expanded civil society participation, undercut national democratic procedures).

226. *Id.* at 212–13. These critics level the same objections at IGOs that allow civil society participation.

227. Klaus Dingwerth, *Private Transnational Governance and the Developing World: A Comparative Perspective*, 52 INT'L STUD. Q. 607, 622–25 (2008).

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.²²⁸ By contrast, social and environmental activists face problems of organization, although some can piggyback on preexisting NGOs.²²⁹ Once formed, activist groups benefit from intense member support and often attract significant resources, even if they are rarely equal to those of business. However, because norm entrepreneurs initiate most NGO schemes, and because those schemes depend on support from public audiences, the concerns of affluent, well-organized, and vocal advocates and constituencies strongly influence the priorities of Transnational New Governance, perhaps at the expense of less influential groups and issues of equal social value.²³⁰ Groups such as consumers and agricultural workers in developing countries, for example, have diffuse interests and few organizational resources; their voices are less likely to be reflected in RSS.

Although deficient compared to the New Governance ideal, Transnational New Governance nevertheless represents a substantial overall improvement in the quality of transnational participation. In evaluating Transnational New Governance, the appropriate counterfactual is not hypothetical representative democracy or "ideal speech" deliberation,²³¹ but the prevailing regulatory setting. Many states involved in worker rights, environmental, and human rights issues are not democratic, but authoritarian and corrupt. Even in democracies, elite groups and leaders, not ordinary individuals, dominate politics; collective action problems pervasively influence interest group competition, even in Old Governance.

The comparative participatory advantages of Transnational New Governance are magnified by the nature of transnational issues. Decisions by a single state, even if democratic, cannot take account of

228. 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* note 2, at 9.

229. 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.

230. A possible example is organic food, which is less important to poor Southern consumers than to affluent Northern advocates. Graham & Woods, *supra* note 111, at 873.

231. In an ideal speech situation, a concept introduced by Habermas, participants come together on equal terms in pursuit of a rational consensus based on free deliberation and offering reasons, without being confounded by asymmetries of power, information, rhetoric, or strategic action. See Richard Harvey Brown & Douglas Goodman, *Jürgen Habermas' Theory of Communicative Action: An Incomplete Project*, in *HANDBOOK OF SOCIAL THEORY* 201, 206 (George Ritzer & Barry Smart eds., 2001) (discussing ideal speech situations).

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.²³² Even with its many problems, then, Transnational New Governance enhances transnational civic engagement, participation, and voice.

B. *Orchestration*

1. The International Orchestration Deficit

In principle, Transnational New Governance is well suited to international regulation, but it faces a fundamental dilemma. As Braithwaite argues with respect to developing countries, the agents of international Old Governance—states and IGOs—lack essential competencies for regulation; successful New Governance could produce superior outcomes at lower cost.²³³ Yet New Governance 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.²³⁴ The resulting orchestration deficit is Transnational New Governance’s greatest divergence from the New Governance ideal type and its most serious limitation.

Greater orchestration could enhance the impact, legitimacy, and public interest orientation of RSS schemes. It could prescribe substantive principles and procedures derived from public law to reinforce transparency and accountability, enhancing the legitimacy of private schemes. It could add the imprimatur of the state to schemes that meet such requirements. Orchestration could modulate the composition, structure, and procedures of private schemes to maximize their participatory and deliberative character and public interest orientation. It could empower weaker and more diffuse groups in internal decision making, assist them in participating, and

232. Many IGOs have broadened societal participation in response to democratic deficit concerns and other rationales of New Governance. *See, e.g.*, One World Trust, IGO Initiatives, http://www.oneworldtrust.org/index.php?option=com_content&view=article&id=88&Itemid=86 (last visited Feb. 16, 2009) (discussing IGOs in terms of accountability and civil society participation).

233. Braithwaite, *supra* note 35, at 891–94.

234. IGOs and states provide limited directive and facilitative orchestration, but currently at modest levels.

act on their behalf where necessary.²³⁵ Promoting broad participation and a rough balance of power among countervailing interests, along with transparency, would also reduce the risk of capture.²³⁶

Greater orchestration could also strengthen Transnational New Governance as a system. Orchestration could help to rectify the uneven and suboptimal distribution of RSS schemes, including the disproportionate number of single-actor schemes and the absence of potentially valuable alternatives. It could reduce the bargaining problems that hamper collaboration by initiating desirable regulatory arrangements, convening public and private actors, and facilitating the formation and operation of private institutions.²³⁷ Orchestration could also ameliorate excessive multiplicity by endorsing, and thereby increasing, the legitimacy of, effective RSS schemes, as well as by encouraging uniformity of standards across competing schemes; this would reduce forum-shopping and adverse competition, as well as the costs of adherence for firms and other private actors.²³⁸ It could more systematically encourage learning across the system and disseminate, replicate, and scale up the most successful innovations.

Many RSS schemes already recognize the value of connections to state institutions. Many incorporate international law rules as the heart of their standards. Virtually all labor rights schemes, for

235. AYRES & BRAITHWAITE, *supra* note 38, at 59 (state can give weaker parties decision-making power and resources to use it effectively).

236. 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. *Id.* at 81–84; cf. Archon Fung & Erik Olin Wright, *Countervailing Power in Empowered Participatory Governance*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE, *supra* note 81, at 259, 259 (arguing it is not enough to merely promote broad participation; "problems of powerlessness and domination" must also be considered).

237. Cases in which states and NGOs have played such roles include AIP and EITI. See Herman, *supra* note 186 (discussing development of AAIP); Extractive Industries Transparency Initiative (EITI), EITI Summary, <http://eitransparency.org/eiti/summary> (last visited Feb. 16, 2009) (discussing EITI goals).

238. One way to reduce the costs of multiplicity is to encourage mutual recognition and equivalency determinations by public and private schemes. In 2003, UNCTAD, FAO, and IFOAM formed the International Task Force on Harmonization and Equivalence in Organic Agriculture (ITF) to pursue this approach in that area. International Task Force for Harmonization and Equivalence in Organic Agriculture, <http://www.itf-organic.org/brief.html> (last visited Feb. 16, 2009). In 2008, the Task Force introduced tools for recognizing organic certification bodies and the equivalency of organic production and processing standards. See UNEP-UNCTAD CAPACITY BUILDING TASK FORCE ON TRADE, ENVIRONMENT AND DEVELOPMENT, BEST PRACTICES FOR ORGANIC POLICY: WHAT DEVELOPING COUNTRY GOVERNMENTS CAN DO TO PROMOTE THE ORGANIC AGRICULTURE SECTOR 17–21, UNCTAD/DITC/TED/2007/3 (2008), available at http://www.unep.ch/etb/publications/UNCTAD_DITC_TED_2007_3.pdf.

example, echo core ILO principles.²³⁹ Many collaborative schemes also follow governance procedures consistent with due process, public participation, and other public law principles.²⁴⁰ Yet these moves are voluntary, decentralized, and uneven. The New Governance model suggests that a modest strengthening of orchestration could significantly improve the performance of Transnational New Governance. Orchestration would also provide opportunities for IGOs and states to enhance the transnational impact of their operations. Part VI discusses these possibilities.

2. Reliance on Voluntary Action by Firms and Public Audiences

In the absence of state authority and orchestration, Transnational New Governance must currently rely on voluntary actions by firms, which decide whether to adhere to and comply with RSS standards, and by consumers and other commercial and public audiences, which provide the incentives, both “carrots” and “sticks,” for firms to act.²⁴¹ In the transnational context, these are unsatisfactory bases for regulatory action.

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, most profit-oriented firms make their decisions by comparing anticipated costs and benefits.²⁴² Some perceive significant commercial advantages from participation: premium prices, access to “ethical markets” and high-standards customers, improved brand loyalty, employee recruitment and morale, and a continuing “social license to operate.”²⁴³ Conversely, reliance on brand reputation makes firms vulnerable to

239. See, e.g., SAI, Overview of SA8000, <http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=473> (last visited Mar. 7, 2009).

240. The ISEAL Code of Good Practice has accelerated this process. See ISEAL CODE OF GOOD PRACTICE, *supra* note 216. The ISEAL Code itself follows public norms in the WTO Agreement on Technical Barriers to Trade, as well as ISO standards. ISEAL CODE OF GOOD PRACTICE, *supra* note 216, intro.

241. For this reason, Cashore, Auld, and Newsom call such regulation “non-state market-driven.” CASHORE, ET AL., *supra* note 17, at 4.

242. *Id.* at 237; see also Wood, *supra* note 15, at 249–52 (analyzing anticipated benefits and costs for businesses). Gunningham and Sinclair observe that local culture shapes the effectiveness of approaches such as self-regulation; firms in an adversarial society like the U.S. may be more cost–benefit oriented than in Europe. Gunningham & Sinclair, *supra* note 31, at 52. However, firms in competitive markets face competitive constraints regardless of local culture.

243. See Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307, 308–10 (2004); see CASHORE ET AL., *supra* note 17, at 23 (providing additional commercial advantage from participation: favorable evaluations from non-state governance systems).

pressure from consumers, employees, investors,²⁴⁴ and the public, and sometimes to boycotts or legal proceedings.²⁴⁵ Downstream firms can provide strong incentives by conditioning purchases on suppliers' adherence to their own or external standards; such requirements are increasingly common among large firms in many industries.²⁴⁶ Indeed, much of the transnational impact of RSS, especially in business-to-business sectors,²⁴⁷ has resulted from pressure on vulnerable downstream firms (e.g., branded retailers) to induce them to require foreign suppliers to accept external standards.²⁴⁸

Ayres and Braithwaite observe that commercial and public audiences could replace the state in "responsive regulation" if they could reliably respond to firm misfeasance.²⁴⁹ However, reliance on such audiences poses major challenges for Transnational New Governance, even as compared to domestic New Governance. Consumers and other audiences may favor or oppose certain behaviors once recognized, but they are often poorly informed about transnational business (whose productive activities and effects occur in far-off locations) and confused by multiple opaque schemes and standards. Moreover, consumer values are frequently latent, especially for issues that are geographically, culturally, and psychologically remote. Audiences must be informed and "activated"

244. Pressure comes from both socially responsible investors and economic investors seeking to avoid catastrophic risks like Bhopal. See Blair et al., *supra* note 28, at 9–10. Even the UN-sponsored Principles for Responsible Investment (PRI) are based on the assumption that environmental, social, and corporate governance issues can affect the performance of investment portfolios. Principles for Responsible Investment, About, <http://www.unpri.org/about/> (last visited Feb. 16, 2009).

245. Graham & Woods, *supra* note 111, at 872–73, 877 (discussing consumer boycotts and legal proceedings).

246. Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913, 922–25 (2007). Vandenbergh examined publicly disclosed policies and supply contracts for the largest firms in eight sectors; over half of the firms, typically the largest, impose some environmental standards on suppliers. *Id.* at 917. Other interfirm contracts, such as acquisition, credit, and insurance agreements, can also contain such standards. *Id.* at 925. Wal-Mart has recently announced such higher standards for suppliers. See *supra* note 10.

247. CASHORE ET AL., *supra* note 17, at 238–39 (noting that in business-to-business markets, where individual consumers cannot express their preferences directly, advocates must focus pressure on downstream firms). For example, consumers rarely have opportunities to select FSC-certified wood over competing lumber. *Id.* at 239.

248. Erika N. Sasser, *Gaining Leverage: NGO Influence on Certification Institutions in the Forest Products Sector*, in FOREST POLICY FOR PRIVATE FORESTRY: GLOBAL AND REGIONAL CHALLENGES 229, 236–37 (Lawrence W. Teeter, Benjamin Cashore & Dao Zhang eds., 2003); cf. Misty L. Archambault, Note, *Making the Brand: Using Brand Management to Encourage Market Acceptance of Forestry Certification*, 81 N.Y.U. L. REV. 1400, 1400 (2006) (arguing that this approach has had limited effect in the U.S. and suggesting marketing strategies to stimulate consumer demand for certified products).

249. AYRES & BRAITHWAITE, *supra* note 38, at 158–61.

to serve as demandeurs and sanctioners for RSS;²⁵⁰ to do so, advocates and schemes must establish legitimacy in the eyes of these audiences.²⁵¹ In addition, many consumers cannot or will not pay premiums for high-standards products.²⁵² Public audiences often have short attention spans and quickly redirect their interest to new issues. Organized actions, such as boycotts, depend on sustained collective action by highly diffuse groups.

As a result, firms' reliance on cost-benefit calculations significantly limits the regulatory potential of Transnational New Governance; for most firms, the costs of participation outweigh the perceived benefits. For a RSS scheme to promote strict standards, it must modify firms' calculations by providing economic carrots—market or reputational benefits for adherents—or sticks—costs for non-adherents.²⁵³ However, because both carrots and sticks depend on the actions of consumers and other audiences, they are uncertain and variable. Business groups such as Business for Social Responsibility, RSS schemes such as UNGC, and other advocates promote corporate social responsibility 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.²⁵⁴

Sticks, such as consumer boycotts or terminations of supplier contracts, are also costly to use and can have perverse consequences.²⁵⁵ Applied by a labor rights scheme, for example, they 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.²⁵⁶ In turn, these options create pressure on external schemes to relax their standards. While Transnational New Governance advocates

250. Abbott & Snidal, *Values*, *supra* note 164, at 146–50.

251. Bernstein & Cashore, *supra* note 42, at 33–35. Competencies such as independence, normative expertise, and representativeness are central to the quest for legitimacy. Black, *supra* note 30, at 76.

252. *Accord Levi & Linton*, *supra* note 167, at 415 (“Approximately 80 percent of U.S. coffee consumers drink canned coffee. They are indifferent to quality and sensitive to price.”) (footnote omitted).

253. CASHORE ET AL., *supra* note 17, at 4, 237.

254. *See, e.g.*, VOGEL, *supra* note 8, at 10–13 (assessing likely impact of corporate social responsibility and the “market for virtue”).

255. Similar issues arise with enforcement actions. PRAKASH & POTOSKI, *supra* note 7, at 22–23.

256. Some scholars argue 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. Sasser et al., *supra* note 2, at 3. This strategy depends on the inability of audiences to distinguish more or less stringent regulation.

hope that RSS standards will be “ratcheted up”²⁵⁷ over time through competition for legitimacy and public support, as has occurred in certain sectors,²⁵⁸ these schemes also face strong incentives to “ratchet down” their standards.²⁵⁹

Similarly, it is difficult for external schemes to appeal simultaneously to public audiences and to target firms. A scheme that sets strict standards to match the moral commitments of its core supporters may draw few business adherents;²⁶⁰ in turn, the scheme’s small size will limit the reputational benefits it can offer to attract additional firms.²⁶¹ 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 dues, certification fees, and the like. Relying on business support, however, may damage credibility with committed audiences. Public contributions, on the other hand, are uncertain and difficult to acquire. Most RSS schemes survive, albeit modestly, through varying combinations of business and public sources, as well as similarly unreliable foundation²⁶² and government grants.

Thus, in some cases, competition for legitimacy and audience support leads regulatory standard-setting schemes to strengthen their standards; in other cases, competition for adherents leads schemes to 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.²⁶³ The outcomes of such cross-cutting competition are extremely difficult to predict.²⁶⁴

257. Sabel, O’Rourke & Fung, *supra* note 98, at 4, propose a structured ratcheting-up process based on disclosure and ratings by independent monitors, fueling competition for responsible reputations.

258. Examples include competing forestry and worker rights/apparel schemes.

259. CASHORE ET AL., *supra* note 17, at 8 (stating that “efforts to gain forest company and landowner support may result in the FSC certification program *reducing* the stringency of its rules”) (emphasis added); Meidinger, *Beyond Westphalia*, *supra* note 30, at 127 (stating that the FSC has made concessions “to make its programme more workable in the face of market challenges”).

260. CASHORE ET AL., *supra* note 17, at 240–43 (explaining how the moral legitimacy of core supporters affects support from other institutional groups).

261. PRAKASH & POTOSKI, *supra* note 7, at 56–57.

262. Foundations have supported some RSS schemes, notably FSC. Tim Bartley, *How Foundations Shape Social Movements: The Construction of an Organizational Field and the Rise of Forest Certification*, 43 SOC. PROBS. 229 (2007).

263. CASHORE ET AL., *supra* note 17, at 8.

264. *Id.* at 8–9 (“[W]e cannot predict”); Meidinger, *Beyond Westphalia*, *supra* note 30, at 140–41 (describing this issue as “the thorny problem of democracy”).

VI. REALIZING THE POTENTIAL OF TRANSNATIONAL NEW GOVERNANCE

A. *Overcoming the Orchestration Deficit*

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

Transnational New Governance 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 Old Governance. For states, orchestration requires less extensive involvement than does international Old Governance, demands fewer capacities and resources, and avoids the legal and political snares of extraterritorial regulation. Support for and engagement with RSS schemes allow individual government agencies (e.g., environment ministries or economic development agencies) and subnational units (e.g., federal states or regions) to enhance their transnational impact without the need for time-consuming, high-level political approval. Orchestration also entails more limited delegations of authority than does effective Old Governance. For IGOs, orchestration offers ways to achieve their regulatory aims that are within their capacities and that generate less state opposition than does international OG. In sum, Transnational New Governance provides the most viable route to improving the international regulatory system.

To be sure, not all states and IGOs will wish to strengthen Transnational New Governance. 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 implicit resistance from consumers seeking cheaper goods, that will overwhelm other societal pressures that favor regulation.²⁶⁵ To the extent Transnational New Governance is promoted by Northern states and NGOs, developing

265. That is, state support for Transnational New Governance is constrained by the limits to the New Governance and Old Governance models as previously discussed. See discussion *supra* Part III.

country actors may oppose it as a form of cultural imperialism imposing inappropriate First World standards or as disguised protectionism.²⁶⁶ IGOs may be constrained by influential member states, and some may fear that Transnational New Governance will displace them from their rightful roles. Nevertheless, many states, state agencies, and IGOs already support RSS schemes. Given the benefits of Transnational New Governance just described, this support should grow over time.

This Part identifies potential methods of orchestration for states and IGOs.²⁶⁷ We organize our discussion around the categories of orchestration introduced above: *directive*, the closest to the New Governance ideal, especially in domestic settings, where the state has substantial capacity for mandatory action; and *facilitative*, which is far more feasible in the international system, where state capacity is limited. Of course, these categories are not distinct, but blend into one another, especially in the collaborative relationships in the middle tier of the Governance Triangle. We draw on existing examples but extrapolate from them based on New Governance 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 Transnational New Governance.

B. Directive Orchestration

1. States

States have the authority and capacity for directive orchestration and exercise them on occasion.²⁶⁸ To further support Transnational New Governance, states can extend a major domestic New Governance approach to the international plane by relaxing legal and administrative requirements for firms that adhere to approved transnational RSS schemes and require adherence by their suppliers. (This benefits the state as well, allowing it to focus limited enforcement resources on nonparticipating firms.) Developed states can also sponsor RSS schemes, such as EMS and eco-label schemes, that apply to national firms' foreign operations and suppliers. States can scale up successful approaches by mandating other schemes to adopt equivalent techniques or by incorporating them into

266. For example, U.S. Secretary of Labor Robert Reich's proposal for an ILO social label died because of charges of protectionism. Bartley, *supra* note 2, at 331.

267. This discussion overlaps, but does not exactly follow, the typology of public-private interactions defined in Wood, *supra* note 68, at 131.

268. See CASHORE ET AL., *supra* note 17, at 243-44; Meidinger, *Environmental Law-Making*, *supra* note 31, at 315-16; Meidinger, *Beyond Westphalia*, *supra* note 30, at 130-32.

government programs. Some forms of directive involvement may, however, risk subjecting private standards to the constraints of WTO law, e.g., as a “law, regulation or requirement” under GATT Article III.²⁶⁹

To further steer RSS, states can mandate baseline substantive principles, operational procedures, and other institutional parameters for schemes subject to their jurisdiction, particularly for single-actor schemes whose independence and representativeness are limited. States can similarly regulate the auditing firms and other actors that monitor firm compliance with RSS schemes.²⁷⁰ A background threat of mandatory regulation creates an incentive for firms, schemes, and monitors to adopt appropriate principles and procedures.

Credible threats of regulation are more difficult in the transnational context because of the significant legal and practical limits on extraterritorial exercises of jurisdiction.²⁷¹ States can avoid many of these constraints by adopting domestic requirements that “exert subtler regulatory pressures . . . in relation to . . . foreign social and environmental performance, short of actually prescribing and enforcing standards.”²⁷² For example, rather than directly regulating

269. General Agreement on Tariffs and Trade art. III, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, available at http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm. This is not to say that such requirements necessarily violate WTO law or qualify as exceptions under GATT Article XX. See POTTS, *supra* note 175, at 18. Developing countries have raised questions under the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) about the trade-restrictive nature of private RSS standards related to food safety and quality, such as SQF and Global GAP, apart from any governmental involvement. STDF Information Session on Private Standards, http://www.wto.org/english/tratop_e/sps_e/private_standards_june08_e/private_standards_june08_e.htm (last visited Feb. 16, 2009); see Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreements on Trade in Goods, Agreement on the Application of Sanitary and Phytosanitary Measures pmb., Apr. 15, 1994, 1867 U.N.T.S. 3, available at http://www.wto.org/english/docs_e/legal_e/15-sps.pdf. In October 2008 the SPS Committee authorized a study of the trade effects of such standards. Press Release, World Trade Organization, Think Development? Think Fruit-Fly, Committee Hears (Oct. 8–9, 2008), available at http://www.wto.org/english/news_e/news08_e/sps_10oct08_e.htm. For further background on this decision, see World Trade Organization, *Private Standards—Identifying Practical Actions for the SPS Committee—Summary of Responses: Note by the Secretariat*, G/SPS/W/230 (Sept. 25, 2008); World Trade Organization, *Private Standards and the SPS Agreement: Note by the Secretariat*, G/SPS/GEN/746 (Jan. 24, 2007).

270. Murphy, *supra* note 27, 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. Blair et al., *supra* note 28, at 4. For a critique of external monitoring by auditing firms, see Dara O'Rourke, *Monitoring the Monitors: A Critique of Corporate Third-Party Labor Monitoring*, in CORPORATE RESPONSIBILITY AND LABOR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY 196 (R. Jenkins et al. eds., 2002).

271. JENNIFER A. ZERK, MULTATIONALS AND CORPORATE SOCIAL RESPONSIBILITY 104–42 (2006).

272. *Id.* at 134.

the foreign conduct of national firms, a state can influence such conduct by imposing reasonable duties on home-based parent companies, directors, and executives, monitoring such requirements through regular supervision procedures or newly mandated corporate reports.

To be sure, directive orchestration by individual states runs the risk of fostering confusion, increasing costs, and creating outright conflicts for transnational firms and RSS schemes. Transparency requirements minimize these risks while still influencing transnational behavior. States can, for example, require disclosures by national firms regarding social and environmental aspects of their global operations, including their major suppliers.²⁷³ More extreme techniques might also be feasible: the state could require national firms to disclose the conditions under which the products they sell were made, perhaps with certification by approved RSS schemes. Transparency requirements empower NGOs and public audiences to monitor firms and hold them accountable for their reports and actions. They also enable the state to punish misleading disclosures, even when the underlying conduct is only discouraged and not itself unlawful. In a prominent recent example, the California Supreme Court allowed a civil suit for unfair and deceptive practices to proceed against Nike, based on Nike's public statements about the working conditions under which its products were manufactured abroad.²⁷⁴

Another potentially powerful directive approach is to condition public benefits for firms, particularly government procurement opportunities, on satisfying the standards of approved RSS schemes.²⁷⁵ There is currently wide international support for

273. A modest example is the UK Companies Act 2006, § 417, the subject of the CORE coalition campaign. See discussion *supra* note 159. 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. Companies Act, 2006, c. 46, § 417 (Eng.).

274. *Kasky v. Nike, Inc.*, 45 P.3d 243, 262 (Cal. 2002), *cert. dismissed as improvidently granted* 539 U.S. 654 (2003). Nike and Kasky settled the case in 2003, with Nike agreeing to donate \$1.5 million to the FLA. Press Release, Nike, Inc., Nike, Inc. and Kasky Announce Settlement of *Kasky v. Nike First Amendment Case* (Sept. 12, 2003), available at http://www.nike.com/nikebiz/news/pressrelease_print.jhtml?year=2003&month=09&letter=f.

275. The power of the strategy derives from the size of the public procurement sector in many countries. In Europe, for example, public authorities spend some 16% of the GDP of the EU. EUROPEAN COMMISSION, BUYING GREEN: A HANDBOOK ON ENVIRONMENTAL PUBLIC PROCUREMENT 5 (2004), available at http://ec.europa.eu/environment/gpp/pdf/buying_green_handbook_en.pdf [hereinafter BUYING GREEN]. In developing countries the percentage is often even higher. See, e.g., Rod Falvey et al., *Competition Policy and Public Procurement in Developing Countries* 15 (Centre for Research in Econ. Dev. & Int'l Trade, Research Paper 08/07, 2008), available at <http://www.nottingham.ac.uk/economics/credit/research/papers/CP0807.pdf> (stating

strategies of this kind, especially for “green public procurement” (GPP). The EU has supported GPP since at least 2001.²⁷⁶ Its procurement directives enable the approach,²⁷⁷ and in July 2008 the Commission proposed a substantial expansion of GPP.²⁷⁸ Similarly, the Plan of Implementation of the 2002 Johannesburg World Summit on Sustainable Development encourages public authorities at all levels to consider sustainable development in decision making, specifically by promoting GPP.²⁷⁹ As part of the Marrakech Process to implement the results of the Summit,²⁸⁰ the Marrakech Task Force on Sustainable Public Procurement has developed a plan to promote sustainable public procurement around the globe.²⁸¹

Procurement strategies raise complex legal issues, however, and must be pursued with care. First, most states require public authorities to maximize value in their purchases, yet they also allow authorities to define the parameters of procurements.²⁸² As a result, authorities may, for example, require bidders to supply environmentally sustainable products and then select the best value among those offered, rather than accepting the lowest bid regardless of sustainability.²⁸³ Second, public authorities must treat potential bidders fairly, prescribing conditions that are widely accessible and transparent.²⁸⁴ In practice, this is usually taken to mean that

that Malaysia spends 20.6% of GDP); *but see id.* (stating that Kenya spends merely 8%).

276. See *Commission Interpretative Communication on the Community Law Applicable to Public Procurement and the Possibilities for Integrating Environmental Considerations into Public Procurement*, at 6, COM (2002) 274 final (July 4, 2001) (noting that the Commission intends to produce a handbook on green public procurement and referencing a 2001 Commission Communication in Integrated Product Policy).

277. See Council Directive 2004/18, 2004 O.J. (L 134) 114 (EC) (detailing the “coordination of procedures for the award of public works contracts, public supply contracts and public service contracts”); Council Directive 2004/17, 2004 O.J. (L 134) 1 (EC) (“coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors”).

278. *Communication from the Commission: Public Procurement for a Better Environment*, § 2, COM (2008) 400 final (July 16, 2008).

279. World Summit on Sustainable Development, Aug. 26–Sept. 4, 2002, *Plan of Implementation of the World Summit on Sustainable Development*, ¶ 19, U.N. Doc. A/CONF.199/20 (Sept. 4, 2002), available at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf [hereinafter World Summit on Sustainable Development].

280. For more about this process, see The Marrakech Process, <http://esa.un.org/marrakechprocess/> (last visited Feb. 16, 2009).

281. See United Nations Environment Programme, Marrakech Task Forces, <http://www.unep.fr/scp/marrakech/taskforces/procurement.htm> (last visited Feb. 16, 2009) (detailing plan to promote sustainable procurement).

282. BUYING GREEN, *supra* note 275, at 12.

283. See *id.*

284. See *id.*

authorities may not require certification by a particular RSS scheme; they may, however, base their specifications on private standards and accept certification by private schemes as one means of demonstrating compliance.²⁸⁵ Third, in the EU, public authorities must ensure that procurement conditions do not discriminate against bidders from other member countries.²⁸⁶ The WTO Agreement on Government Procurement applies similar rules to participating states: procurement specifications and practices may not discriminate against foreign suppliers or suppliers from particular states, specifications may not create unnecessary obstacles to international trade, and contracts must be awarded to the lowest bidder or to the bidder that “in terms of the specific evaluation criteria set forth . . . is determined to be the most advantageous.”²⁸⁷ It also requires authorities to base their specifications on international standards where they exist.²⁸⁸

As noted earlier, many developing countries lack the capacities for directive action. Even developed states lack the regulatory reach to direct transnational activities, and individual states are globally unrepresentative, reducing their legitimacy. To address these limitations, developed states might promote RSS through international agreements, for example, by linking bilateral trade or investment agreements and related technical assistance to developing country support for private standards and monitoring.²⁸⁹ However, this approach again raises issues of power and the imposition of

285. See *id.* at 19.

286. See *id.* at 14.

287. Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), Plurilateral Trade Agreement on Government Procurement arts. III, VI, XIII, Apr. 15, 1994, 1867 U.N.T.S. 3, available at http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm [hereinafter GPA]. It should be noted that the quoted language in Article XIII § 4 does not say “economically advantageous,” *id.*, suggesting that social and environmental advantages may be considered so long as they are an explicit part of the specifications. Additionally, Article VI § 1 refers not only to specifications laying down characteristics of products, but also to those prescribing “processes and methods for their production.” *Id.* Government procurement is excluded from the basic national treatment rule of GATT. General Agreement on Tariffs and Trade, *supra* note 269, art. III, § 8. Government procurement is also excluded from the Agreement on Technical Barriers to Trade. Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Agreement on Technical Barriers to Trade art. 1(4), Apr. 15, 1994, 1867 U.N.T.S. 3, available at http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm. The Agreement on Government Procurement is accepted only by a limited number of states. See WTO, Parties and Observers to the GPA, http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties (last visited Feb. 16, 2009) (listing the parties and observers of the GPA).

288. GPA, *supra* note 287, art. VI, § 2(b). Since the Agreement defines a “standard” as a “document approved by a recognized body,” even private RSS schemes may qualify if the sponsoring organizations are “recognized.” *Id.* art. VI, § 2(b) n.4.

289. For a related proposal inspired by New Governance theory, see Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT’L L.J. 203, 242–56 (2007).

inappropriate standards. It can also create problems of divergent state action. In this as in other forms of orchestration, it is essential for states to coordinate their approaches with one another and with IGOs. Coordination reduces the costs, confusion, and conflicts of divergent actions, while leveraging complementary capacities and jurisdictions. In state-IGO coordination, 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 legitimacy because of their global representativeness and their relative independence from particular national interests. Thus, directive orchestration by states and IGOs is highly complementary.

2. IGOs

Strong directive orchestration by IGOs is rarely feasible for the same reason that international Old Governance has often failed: IGOs generally lack authority for mandatory action without state consent and also for mandatory action addressed to private actors. But Transnational New Governance opens other avenues of influence. For example, IGOs can set conditions on benefits they offer, inducing desired actions rather than compelling them. Here too, the most feasible and powerful technique is to require satisfaction of approved RSS standards to qualify as a vendor for IGO procurement, consistent with global support for GPP. UN agencies alone procure over \$10 billion in goods and services annually, a substantial incentive.²⁹⁰ According to the Internet procurement portal of the UN system, “[s]uppliers to the UN are strongly encouraged to subscribe to the principles of the UN Global Compact.”²⁹¹ This action is a good beginning, but it is both hortatory and limited to a single scheme. Transnational New Governance would be strengthened if IGOs did not limit procurement conditions to schemes they themselves sponsor, but instead integrated additional, equivalent standards in order to encourage and even orchestrate beneficial “race-to-the-top” competition among RSS schemes. IGOs have considerable freedom in this regard, as they are not subject to legal constraints such as the EU procurement directives or the WTO Agreement on Government Procurement. Of course, IGOs should still observe basic procurement principles, such as obtaining value, acting fairly, and avoiding discrimination.

290. United Nations Global Marketplace, About, <http://www.ungm.org/Info/About.aspx> (last visited Feb. 16, 2009).

291. United Nations Global Marketplace, Guidelines to Supplying the UN, <http://www.ungm.org/Info/Guidelines.aspx> (last visited Feb. 16, 2009).

Financial IGOs have special opportunities for directive orchestration, as they can require support for or participation in approved schemes as a condition of financing. Two examples reflect partial adoption of this strategy and suggest how it can be strengthened. First, in 2002, the World Bank adopted a new strategy to promote sustainable forest management (SFM).²⁹² Due to governance and capacity problems, the strategy encourages developing country governments “to take advantage of growing opportunities to engage independent third-party certification bodies in performance-based monitoring of forest . . . operations.”²⁹³ The Bank also agreed with leading conservation organizations to “encourage the widespread use of internationally agreed criteria and indicators for SFM,” including those of the FSC.²⁹⁴ Yet while the Bank has worked with the World Wildlife Fund (WWF) to develop new principles and criteria for certification systems,²⁹⁵ it has refused to endorse any specific RSS schemes.²⁹⁶ This increases the complexity of Transnational New Governance and misses a prime opportunity to strengthen high-quality RSS schemes.

Second, IFC, the private sector arm of the World Bank, requires clients and funded projects to meet demanding social and environmental conditions.²⁹⁷ But IFC carries out its own social and environmental reviews of proposed projects and its own monitoring of project compliance; it does not prescribe or encourage participation in approved RSS schemes as a way to satisfy its conditions.²⁹⁸ IFC says

292. See generally WORLD BANK, SUSTAINING FORESTS: A DEVELOPMENT STRATEGY (2004), available at <http://siteresources.worldbank.org/INTFORESTS/Resources/SustainingForests.pdf>.

293. *Id.* at 31–32. This is consistent with the Bank’s intention to implement the strategy through partnerships. *Id.* at 25.

294. *Id.* at 32.

295. *Id.* For more on the partnership between the Bank and the WWF, see World Wildlife Fund, WWF/World Bank Global Forest Alliance, <http://www.worldwildlife.org/what/globalmarkets/forests/worldbankalliance.html> (last visited Feb. 16, 2009).

296. WORLD BANK, *supra* note 292, at 33; see Bartley, *supra* note 2, at 302–03 (providing an example where the World Bank merely utilized certification as a quasi-policy instrument rather than a specific regulatory scheme).

297. INT’L FIN. CORP., INTERNATIONAL FINANCE CORPORATION’S POLICY ON SOCIAL AND ENVIRONMENTAL SUSTAINABILITY 1 (2006), available at [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_SocEnvSustainability2006/\\$FILE/SustainabilityPolicy.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_SocEnvSustainability2006/$FILE/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), and 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 (2007). Hunter observes that IFI standards can in theory be more effectively enforced than most interstate treaties, although in practice IFIs often rely on persuasion rather than enforcement. Hunter, *supra*, at 471–73.

298. See INT’L FIN. CORP., *supra* note 297, at 2–6.

it “liaise[s]” with external initiatives to enhance the social and environmental sustainability of its private sector projects, but mentions only the Global Compact and Equator Principles.²⁹⁹ Here too, integrating additional schemes would enhance the impact of IFC standards, strengthen Transnational New Governance, and encourage beneficial competition.

Few IGOs provide sufficient financial benefits to employ these powerful forms of directive orchestration, and some of those that do—including the World Bank—face complaints over their 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 pursues a similar strategy, but focuses on learning and eschews strong directive action.³⁰⁰ IGOs could potentially require participation in approved RSS schemes as a condition for firms’ access to advisory committees, meeting sessions, and the like. Offering multiple tiers 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 approached with caution, as discrimination might adversely affect IGO representativeness and legitimacy.

IGOs can encourage states to support and steer RSS schemes using their stronger directive techniques. IGOs that have sufficient authority and leverage can “orchestrate orchestration,” pressing states to reach consensus on principles of RSS and appropriate orchestration techniques. Short of that, IGOs can encourage states to learn from successful RSS schemes, collaborate with them, and, where appropriate, ratify and scale up their standards and procedures. Where international agreements like GATT may restrict orchestration, IGOs can work with states and with one another to clarify existing rules or develop appropriate exceptions. Less controversially, IGOs can provide forums for states to coordinate their orchestration activities, and can coordinate their own activities with those of states.³⁰¹ In some cases, IGOs and states may be able to scale up successful RSS standards and procedures on a global scale by incorporating them into international programs, recommendations, or even treaties.

Directive orchestration by states and IGOs retains a significant top-down character, and issues of power necessarily arise. Although

299. *Id.* at 8.

300. Sahlin-Andersson, *supra* note 123, at 132–33.

301. Sabel, O’Rourke & Fung, *supra* note 98, at 33, suggest that IGOs such as the World Bank and ILO should develop model laws and otherwise urge states to develop appropriate domestic regulation.

many regulatory goals are widely shared, there remain significant differences on many key issues—for example, 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 domestic 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. IGOs whose structures and procedures provide them substantial independence are best positioned to orchestrate without generating excessive resistance, but even they can never fully overcome issues of power: RSS is inherently political and will always be contested.

C. *Facilitative orchestration*

Facilitation is the more important form of transnational orchestration because of the limitations on directive state action and the weakness of IGOs in the international system. Conversely, facilitation offers significant low-cost opportunities to enhance international regulation, especially for IGOs.³⁰² By supporting and collaborating with RSS schemes, IGOs and states can advance their regulatory goals through the full “web of relationships” characteristic of New Governance—“convening, facilitating, legitimating, negotiating, publicizing, ratifying, supervising, partnering and otherwise interacting.”³⁰³ Moreover, because facilitation entails less top-down authority, it lessens, but does not eliminate, concern about the exercise of power.

1. States

States have substantial resources and already provide material support for certain RSS schemes. For example, 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;³⁰⁴ the UK Department for International Development

302. 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.

303. See discussion *supra* notes 89–90 and accompanying text.

304. Global Reporting Initiative, Funding, <http://www.globalreporting.org/AboutGRI/Funding/> (last visited Feb. 16, 2009) (stating that the Netherlands Ministries of Foreign Affairs and Housing, Spatial Planning, and the Environment provide “institutional support” to GRI); *FSC International Headquarters Moves to Bonn*, FOREST STEWARDSHIP COUNCIL U.S. NEWS & VIEWS (Forest Stewardship Council, Bonn, Ger.), Feb. 2003, at 1, available at <http://www.fscus.org/images/>

(DFID) has supported the Ethical Trading Initiative (ETI) since its creation;³⁰⁵ the Swiss State Secretariat for Economic Affairs (SECO) provided start-up financing to the Max Havelaar Foundation in Switzerland and helps developing country farmers qualify for organic and Fair Trade certification;³⁰⁶ the German development agencies BMZ and GTZ, along with SECO, supported the 4C Association;³⁰⁷ and “at least five European governments . . . subsidize NGO efforts to promote Fair Trade coffee.”³⁰⁸ Such forms of assistance constitute cheap investments for most states. Development agencies like DFID, SECO, and GTZ are especially valuable facilitators: in addition to their material resources, they typically maintain some independence from government agencies that are tied to national economic interests and are seen externally as committed to development, enhancing their legitimacy and effectiveness.

In addition to material support, states can convene private actors to encourage the creation of multi-stakeholder schemes, and can participate in and collaborate with RSS schemes, influencing their norms, structure, and procedures through their terms for collaboration. States can also provide legitimacy and moral support for RSS schemes based or operating in their jurisdictions.³⁰⁹ In doing so, states must distinguish among competing schemes based on the quality of their standards and governance, the effectiveness of their procedures, and their public interest orientation, so as to strengthen those whose policies best fulfill public goals and to encourage others to adapt. States have good information on many regulatory issues and can disseminate it to participants in RSS.³¹⁰ States can also disseminate information on high-quality schemes and successful RSS practices. Finally, states can promote RSS norms by adhering to them in their own operations.

newsletters/FSCNews_early_february_2003.pdf (announcing move of FSC's office to Bonn pursuant to support agreement with city, state, and national governments).

305. Ethical Trading Initiative, About, <http://www.ethicaltrade.org/Z/abteti/index.shtml> (last visited Feb. 16, 2009).

306. FED. DEPT OF ECON. AFF. (SWITZ.) (SECO), ECONOMIC DEVELOPMENT COOPERATION: BRIEF PORTRAIT 12–13 (2005), available at http://www.oecd.org/secure/pdfDocument/0,2834,en_21571361_34047972_34579960_1_1_1_1,00.pdf.

307. Common Code for the Coffee Community, Sustainability and Services for the Mainstream Green Coffee Value Chain, <http://www.nescafe.com/NR/rdonlyres/CA26CACB-CE8A-4F5A-BCFF-8C908DF55B77/67166/4Cinanutshell1.pdf>.

308. Levi & Linton, *supra* note 167, at 419. For other examples of state support, see Bartley, *supra* note 2, at 321–22.

309. See CASHORE ET AL., *supra* note 17, at 243–44 (providing examples of states that have directly or indirectly enhanced legitimacy).

310. The U.S. Labor Department during the Clinton administration published a “Trendsetters List” of firms that had agreed to monitor suppliers’ labor practices; Bartley suggests, however, that the program failed because of “irrational” inclusion criteria. Bartley, *supra* note 2, at 330.

2. IGOs

IGOs are well situated to facilitate Transnational New Governance, albeit with different comparative advantages than states. IGOs already play an important facilitative role by promulgating standards and rules on which private RSS schemes draw. But IGOs can enhance the “force multiplier” role of private schemes by incorporating them as core elements of international rule implementation strategies. The narrowest approach would be for IGOs to adopt rules applicable to 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 private schemes to adapt international rules for application to firms, involve private schemes in international rule making to facilitate and accelerate that process, and provide for feedback from them. IGOs can also look to RSS rules and procedures as they design their own norms and programs, especially those aimed at private actors. These strategies are especially significant where state power and resources—and thus implementation of traditional rules—are weak.

Many IGOs are seen as relatively independent of individual states and even more so of firms. This allows them to act as “honest brokers” acceptable to multiple stakeholders.³¹¹ 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. IGO authority can help persuade disparate actors to work together and help ensure weaker participants that the more powerful will not take advantage of them. Convening also helps private actors overcome the transactions costs and bargaining problems of collaboration, thereby facilitating initiation of desirable collaborative schemes. IGO convening can also include states, encouraging their participation in public–private schemes and their support for private RSS. IGO convening might also: (1) engage firms with RSS schemes to facilitate promotion, negotiation, feedback, and other interactions; (2) engage nontraditional actors, such as investors and insurers, with RSS schemes and firms, as in the PRI;³¹² (3) engage RSS schemes in an area to work toward optimal multiplicity; (4) engage schemes with other concerned actors in learning forums linked with IGO knowledge production; (5) coordinate orchestration among states; and (6) promote closer relationships between state regulation and private RSS.

311. IGOs made up of particular groups of states, such as UNCTAD and OECD, may not be seen as honest brokers, but have special influence with those groups.

312. Graham & Woods, *supra* note 111, at 871–72.

Some IGOs can provide material support, as UNEP has for GRI.³¹³ With their modest resources, IGOs may most effectively support and participate in local “experiments” and demonstration projects that provide broader lessons for transnational regulation, as the ILO has done on a modest scale.³¹⁴ IGOs can provide valuable technical assistance to participants in these projects.³¹⁵ IGOs often have a legitimacy advantage over states, as their support is less tied to national interests. 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 that the IGOs are perceived as independent.³¹⁶ IGOs can in some cases participate 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 in their areas of concern—what Murphy calls a “code for codes”³¹⁷—or adopt 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. IGOs can further apply RSS standards in their own operations, sending a strong signal of approval. Public approval from respected IGOs would help high-quality schemes compete for resources and support from consumers and public audiences, promoting a race to the top. It would also enhance reputational benefits for firms, encouraging them to adhere. In addition, this approach would increase the experimental benefits of Transnational New Governance by recognizing successful experiments.

Finally, IGOs can engage in “knowledge production,” drawing on their expertise and independence; IGOs with complementary

313. Global Reporting Initiative, *Our History*, *supra* note 53.

314. For example, pursuant to a 1999 U.S.–Cambodia trade agreement, which required the Cambodian textile industry to observe internationally recognized labor standards, the ILO agreed to monitor the industry’s compliance and provide technical assistance; it continued the program, under the name Better Factories Cambodia, after the agreement expired. International financial institutions and national development agencies have seen the Cambodia initiative as a fruitful development strategy. Kolben, *supra* note 289, 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* note 89, at 92–114 (discussing other ILO “experiments”).

315. In partnership with IFC, ILO has built on its Cambodia experience, see *supra* note 314, with its Better Work initiative, designed to help developing country enterprises improve their labor practices and gain better access to global supply chains. Better Work, Global Portal, <http://www.betterwork.org/public/global> (last visited Feb. 16, 2009).

316. On “laundering,” see Abbott & Snidal, *Organizations*, *supra* note 145.

317. Murphy, *supra* note 27, at 425–26.

expertise might collaborate in this effort.³¹⁸ IGOs can produce and publicize information about the impacts of particular RSS approaches; equivalencies and differences in RSS standards and procedures; best practices in RSS; and successful RSS schemes. By better informing public audiences, this approach would increase the reputational “carrots” for firms to participate in high-quality schemes.³¹⁹ IGOs can also promote replication of best practices 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 that wish to implement (Transnational) New Governance.³²⁰ These knowledge-based approaches are similar to Sabel, O’Rourke, and Fung’s influential proposal for a mechanism to “ratchet” up labor standards.³²¹ They would have multiple beneficial effects: promoting comparative study and dialogue on RSS approaches, encouraging race-to-the-top competition among RSS schemes, encouraging standardization, and scaling up effective approaches.

VII. CONCLUSION

Transnational New Governance has arisen spontaneously in the vacuum left by the regulatory failures of international Old Governance. Often, Transnational New Governance is billed as a purely private affair, and private Transnational New Governance has had some success on a modest scale. But its success has been limited by its extreme decentralization and the small scale of its constituent schemes, and more broadly by a pervasive orchestration deficit. The full potential of Transnational New Governance can only be achieved by bringing the state back into transnational regulation.

The state operates in very different ways in Transnational New Governance than in international Old Governance. Eschewing centralized mandatory regulation, Transnational New Governance engages a softer and subtler state role as orchestrator of diverse RSS schemes. Orchestration has many advantages at the international

318. See *id.* (citing the benefit of IGO expertise in rule-making); Wood, *supra* note 15, at 244–45 (describing “integrated rule-making” involving government bodies, private actors, and interested third parties such as IGOs).

319. Cf. Sabel, O’Rourke & Fung, *supra* note 98, at 3 (“The appeal of this [ratcheting labor standards] approach is that it creates incentives for prominent firms to increase their social performance and, as they do so, generates *de facto* standards with which to criticize firms with poor labor practices.”).

320. BULL & MCNEILL, *supra* note 89, at 99, argue that the ILO has been largely unable to perform this function, or to engage with RSS schemes involving NGOs, because of its tripartite structure. However, the Better Work initiative, *supra* note 315, moves in this direction.

321. Sabel, O’Rourke & Fung, *supra* note 98, at 4.

level. It demands fewer state resources and engages the wider range of expertise essential for addressing complex, 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 Transnational New Governance is largely incentive-compatible, we expect it to continue to expand as states and IGOs increase their participation in this new style of regulation. However, 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 understanding of the value of orchestration and the techniques through which states and IGOs can enhance the impact of Transnational New Governance.

To be sure, Transnational New Governance is no panacea. Its techniques are effective only to the extent that the power of civil society, consumers, and other public audiences 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 and environmental standards, as do developed and developing states. The international system lacks well-developed legal and political institutions in which to reconcile such differences, 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, Transnational New Governance provides both the most viable way to strengthen the international regulatory system and valuable new opportunities for states and IGOs to address urgent regulatory problems.