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# Competitive Supragovernmental Regulation: How Could It Be Democratic?\*

Errol Meidinger \*\*

## I. INTRODUCTION

This Article explores the possibility that an emerging mode of transnational governance may also be generating a novel form of democracy, one in which competing regulatory programs aim to anticipate emergent public values and institute regulatory mechanisms to implement them, thereby advancing their own authority.<sup>1</sup> “Competitive supragovernmental regulation” is largely driven and implemented by nonstate actors, and is therefore commonly viewed as suffering a democracy deficit. However, it institutionalizes broad participation, rigorous deliberative procedures, responsiveness to state law, incorporation of widely accepted norms, and competition among regulatory programs to achieve effective implementation and widespread public acceptance.

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<sup>1</sup> Alvin Toffler appears to have coined the term “anticipatory democracy” three decades ago. Toffler was advocating the injection of enhanced “future consciousness” and public participation into traditional state-based processes. Alvin Toffler, *What is Anticipatory Democracy?*, 9 *Futurist* 224 (1975). As visionary as he may have been, there is little inkling in his work of the kinds of self-organizing supragovernmental regulatory systems described in this Article.

The purpose of this Article is to work through an initial assessment of the democratic potential of competitive supragovernmental regulatory systems. Section II lays out the main institutional elements of competitive supragovernmental regulation and gives some examples of its operation. Key features include implementation through market chains, increasingly participatory and transparent deliberative procedures, and competition among programs. Section III then focuses on the democratic dimensions of competitive supragovernmental regulatory systems. In partial contrast to other work important in the field,<sup>2</sup> it takes a systemic view, examining the composite democratic potential of regulatory systems composed of multiple programs,<sup>3</sup> rather than focusing on individual programs. It argues that competing programs significantly shape each other's policies, creating an overall tendency toward increased democratization. For example, leading programs that practice increasingly sophisticated forms of deliberative and representative democracy are slowly pushing lagging programs in the same directions, thus creating system-wide democratic tendencies. Section III also argues that competition among programs places them under steady incentives to develop standards and implementation mechanisms that will both operate effectively and achieve widespread acceptance, thereby instituting a form of democratic experimentalism.<sup>4</sup> Section IV concludes by first summarizing the democratic case for competitive supragovernmental regulation and then discussing some of its primary weaknesses. One of its key conclusions is that we presently do not know enough about the dynamics of competition among programs to be confident that they indeed result in regulatory standards that reflect and

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<sup>2</sup> See, for example, Steven Bernstein and Benjamin Cashore, *Can Non-state Global Governance Be Legitimate? An Analytical Framework*, 1 Reg & Governance 347 (2007); Chris Tollefson, Fred Gale, and David Haley, *Setting the Standard: Certification, Governance and the Forest Stewardship Council* (British Columbia forthcoming 2008).

<sup>3</sup> The term "program" is used in this Article to refer to alliances of organizations engaged in developing and implementing regulatory policies through coordinated institutional arrangements. Although use of the term may seem repetitive in places, this is necessary for precision. Supragovernmental regulatory programs are larger than organizations and smaller and more directed than networks. Competing programs often engage in building, extending, and strengthening networks in which they are mutually involved. Although programs are sometimes called "schemes" (see, for example, Ruth Nussbaum and Markku Simula, *The Forest Certification Handbook* 15 (Earthscan 2005)), the term is not a good descriptor because programs are more adaptive and generative than it suggests. Programs are also distinct from agencies because they are not arms of states and from bureaucracies because power in them is relatively distributed and non-hierarchical.

<sup>4</sup> See Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum L Rev 267, 314 (1998). See generally Charles F. Sabel and Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the European Union*, *European Governance*, Paper No C-07-02 (May 10, 2007), available online at <<http://www.connex-network.org/eurogov/pdf/egp-connex-C-07-02.pdf>> (visited Nov 17, 2007).

anticipate broader public values. Therefore we need to learn much more about what factors determine the outcomes of supragovernmental regulatory competitions. It may then be possible to revise the rules governing that competition to more fully realize its democratic potential.

## II. COMPETITIVE SUPRAGOVERNMENTAL REGULATION

Regulatory programs that are developed and implemented primarily by nonstate organizations have grown rapidly over the past decade. Considerable scholarship has examined the Forest Stewardship Council,<sup>5</sup> Fairtrade Labelling Organizations International,<sup>6</sup> International Federation of Organic Agriculture Movements,<sup>7</sup> Marine Stewardship Council,<sup>8</sup> and others.<sup>9</sup> While they vary in many particulars, these programs share the following general characteristics:

*Supragovernmentality.* These regulatory programs are established primarily by nonstate actors organized in transnational networks. While they often have

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- <sup>5</sup> See, for example, Benjamin Cashore, Graeme Auld, and Deanna Newsom, *Governing Through Markets: Forest Certification and the Emergence of Non-state Authority* 5 (Yale 2004); Chris Elliott, *Forest Certification: A Policy Network Perspective* (Ctr Intl Forestry Research 2000); Fred Gale, *The Tropical Timber Trade Regime* (St Martins 1998); David Humphreys, *Logjam: Deforestation and the Crisis of Global Governance* (Earthscan 2006); Errol Meidinger, *Human Rights, 'Private' Environmental Regulation, and Community*, 6 Buff Env L J 123 (1999); Errol Meidinger, Chris Elliott, and Gerhard Oesten, eds, *Social and Political Dimensions of Forest Certification* (Forstbuch 2003).
- <sup>6</sup> See, for example, Sasha Courville, *Social Accountability Audits: Challenging or Defending Democratic Governance?*, 25 L & Poly 269 (2003); Margaret Levi and April Linton, *Fair Trade: A Cup at a Time?* 31 Pol & Socy 407 (2003); Daniel Jaffee, *Brewing Justice: Fair Trade Coffee, Sustainability, and Survival* (California 2007).
- <sup>7</sup> See, for example, William D. Coleman and Austina J. Reed, *Legalisation, Transnationalism and the Global Organic Movement*, in Christian Brüttsch and Dirk Lehmkuhl, eds, *Law and Legalization in Transnational Relations* 101, 113–17 (Routledge 2007); Johannes Michelsen, *Organic Farming in Regulatory Perspective: The Danish Case*, 41 Sociologia Ruralis 62 (2001).
- <sup>8</sup> See, for example, Lars H. Gulbrandsen, *Mark of Sustainability? Challenges for Fishery and Forestry Eco-labeling*, 47 Envir 8 (2005); Alexia Cummins, *The Marine Stewardship Council: A Multi-Stakeholder Approach to Sustainable Fishing*, 11 Corp Soc Resp & Envir Mgmt 85 (2004).
- <sup>9</sup> Additional sectors with significant supragovernmental regulatory programs include apparel, ecotourism, mining, and green building construction. See, for example, Tim Bartley, *Certifying Forests and Factories: States, Social Movements, and the Rise of Private Regulation in the Apparel and Forest Products Fields*, 31 Pol & Socy 433 (2003); Hevina S. Dashwood, *Canadian Mining Companies and Corporate Social Responsibility: Weighing the Impact of Global Norms*, 40 Can J Pol Sci 129 (2007); Cynthia A. Williams, *Civil Society Initiatives and "Soft Law" in the Oil and Gas Industry*, 36 NYU J Intl L & Pol 457, 461 (2004); J.F. McLennan and P. Rumsey, *Is LEED the Holy Grail of Sustainable Design?*, 6 Envir Design & Constr 34 (2003); Martha Honey, *Ecotourism & Certification: Setting Standards in Practice* 39 (Island 2002). More generally, see Kenneth W. Abbott and Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State* (Oct 2006) (draft on file with author); Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* 19 (Cornell 1998); Ann Florini, ed, *The Third Force: The Rise of Transnational Civil Society* 24 (Carnegie Endow 2000).

origins in both activist groups and businesses or trade associations,<sup>10</sup> the activist groups typically provide the primary motivating force by both challenging the acceptability of existing institutional arrangements and offering alternatives. Governments are present in the regulatory fields, but tend to play minor roles in the primary negotiation and institutionalization processes, as is discussed in more detail in the section on “interactions with states” below.

*Supply Chain Leveraging.* Most supragovernmental regulatory programs are leveraged into place and maintained by pressuring sensitive and powerful points in transnational supply chains. Usually these are major branded retailers (for example, Home Depot), but they may also be important wholesalers or producers (for example, DeBeers).<sup>11</sup> The fact that the supply chains are transnational networks generates complex regulatory dynamics, including a compounded form of legal pluralism—both state/state and state/supragovernmental; hence applicable regulatory standards are particularly subject to debate and rapid change.

*Use of Conventional Institutional Modalities.* Supragovernmental regulatory programs generally draw upon and mimic institutional practices already tested and legitimated in less controversial regulatory processes,<sup>12</sup> such as setting standards to achieve interoperability or reliability of products.<sup>13</sup> These usually involve four institutional elements:

- (1) *Setting standards* for appropriate practices. This is typically done by committees that are both expert- and stakeholder-based.

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<sup>10</sup> Dashwood, 40 Can J Pol Sci at 152 (cited in note 9).

<sup>11</sup> See Erika Sasser, *Gaining Leverage: NGO Influence on Certification Institutions in the Forest Products Sector*, in Lawrence W. Teeter, Benjamin Cashore, and Dao Zhang, eds, *Forest Policy for Private Forestry* 222, 236–37 (CABI 2003); Virginia Haufler, *The Kimberly Process, Club Goods, and Public Enforcement of a Private Regime*, Paper prepared for the Voluntary Regulation Conference, University of Washington at Seattle (June 29, 2007), available online at <[http://www.polisci.washington.edu/direct/faculty\\_bio/vrc/Haufler--Kimberly\\_nc.doc](http://www.polisci.washington.edu/direct/faculty_bio/vrc/Haufler--Kimberly_nc.doc)> (visited Nov 17, 2007); Tim Bartley, *Standards for Sweatshops: The Power and Limits of Club Theory for Explaining Voluntary Labor Standards Programs*, 2, Paper prepared for the Voluntary Regulation Conference, University of Washington at Seattle (June 29, 2007), available online at <[http://www.polisci.washington.edu/direct/faculty\\_bio/vrc/club%20theory\\_Bartley.doc](http://www.polisci.washington.edu/direct/faculty_bio/vrc/club%20theory_Bartley.doc)> (visited Nov 17, 2007).

<sup>12</sup> David Szablowski, *Of Models and Mimics: Legitimation Strategies and the Constitution of Transnational Legal Authority*, Paper presented at the International Studies Association Conference, San Diego (Mar 22–25, 2006) (draft on file with author).

<sup>13</sup> See, for example, Ross E. Cheit, *Setting Safety Standards: Regulation in the Public and Private Sectors* (California 1990); Samuel Krislov, *How Nations Choose Product Standards and Standards Change Nations* (Pittsburgh 1997); Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* 4–6 (Hart 2005). But see Stepan Wood, *Environmental Management Systems and Public Authority in Canada: Rethinking Environmental Governance*, 10 Buff Envir L J 129 (2002) (arguing generally that defining standard setting as technical often obscures politically important questions).

- (2) *Certifying* that standards are met. This role is usually performed by professionals who are organizationally independent of both the standard setting organization and the company being evaluated.
- (3) *Accrediting* certifiers. Accreditation is generally carried out by specialized experts who are also organizationally distinct from the standard setting organization.
- (4) *Labeling* complying products or organizations. This involves rules for labeling and systems for monitoring the “chain of custody” of certified products.

*Increasingly Participatory and Transparent Decisional Procedures.* One of the most striking developments in supragovernmental regulation has been the broad and continuous expansion of participation and transparency, although both remain subject to improvement.<sup>14</sup> Most programs now provide for multi-stakeholder participation, notice and comment processes for rulemaking and adjudication, public responses to comments and explanations of decisions, formalized dispute resolution and appeals processes, publication of rules, procedures and decisions, and similar practices characterizing modern administrative regulation.<sup>15</sup> Norms for participation continue to intensify, so that, for example, the best practices standards of the International Social and Environmental Accreditation and Labelling Alliance require that “participation reflects a balance of interests among interested parties”<sup>16</sup> and that “the standard-setting process shall strive for consensus.”<sup>17</sup>

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<sup>14</sup> Archon Fung, *Deliberative Democracy and International Labor Standards*, 16 *Governance* 51 (2003) (noting serious problems with transparency in the field of international labor standards).

<sup>15</sup> See generally Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 *Eur J Int L* 47 (2006); Errol Meidinger, *Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems*, in Christian Brütch and Dirk Lehmkuhl, eds, *Law and Legalization in Transnational Relations* 121 (Routledge 2007).

<sup>16</sup> International Social and Environmental Accreditation and Labelling Alliance, *Code of Good Practice*, ¶ 7.1, available online at <<http://www.isealalliance.org/document/docWindow.cfm?fuseaction=document.viewDocument&documentid=212&documentFormatId=898>> (visited Nov 17, 2007) (“ISEAL Code”). ISEAL is only one effort—albeit a particularly important one—to create standards for supragovernmental regulatory organizations. See also Mary Kay Gugerty, *Self-regulation and Voluntary Programs among Nonprofit Organizations*, Draft Chapter prepared for the Voluntary Regulation Conference, University of Washington at Seattle (June 29, 2007), available online at <[http://www.polisci.washington.edu/direct/faculty\\_bio/vrc/Gugerty\\_VolProgramsNonprofits.pdf](http://www.polisci.washington.edu/direct/faculty_bio/vrc/Gugerty_VolProgramsNonprofits.pdf)> (visited Nov 17, 2007) (providing a preliminary overview of this relatively unstudied field).

<sup>17</sup> ISEAL Code at ¶ 5.6 (cited in note 16). “Consensus” is defined as “[g]eneral agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process seeking to take into account the views of interested parties, particularly those directly affected, and to reconcile any conflicting arguments. NOTE - Consensus need not imply unanimity.” Id at ¶ 3.1.

*Regulatory Competition.* Although research on supragovernmental regulation tends to focus on individual organizations and their programs, most regulatory domains are populated by more than one program.<sup>18</sup> A common scenario is that the establishment of an NGO-sponsored program is countered by the establishment of an industry-sponsored program (or several). Although the main reason for founding the industry program may be to undermine the NGO program, perhaps by creating confusion in the marketplace, the programs tend to mutually survive. Not only do they compete, but in doing so they also become somewhat dependent on each other. Section III argues that a reliable assessment of the democratic implications of competitive supragovernmental regulation requires a better understanding of the dynamics of this competition and interdependence, but at present they are not well understood. There is informal acknowledgement that competition plays a role in preserving respective programs.<sup>19</sup> There is also some evidence for a “ratcheting up” of standards, at least for the industry programs.<sup>20</sup> Conversely, the NGO programs sometimes find it advisable to loosen or modify standards to be more competitive and feasible in the marketplace.<sup>21</sup>

Thus, supragovernmental regulatory standards and practices are formed not only by the official participants in the programs, but also by processes of interprogram observation, competition, and mutual adjustment. Supragovernmental regulation, then, should be understood as a dynamic, competitive system, in which multiple regulators compete for business and legitimacy. Although such processes of competition are commonly thought of as subpolitical, Section III explores the possibility that they may actually be vehicles of an emergent form of democratic politics.

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<sup>18</sup> See, for example, Abbott and Snidal, *Governance Triangle* at 5 (cited in note 9) (the authors provide a highly suggestive overview in Figure 1 of their article).

<sup>19</sup> One informant associated with an industry program explained the situation as follows: “There’s an old saying among lawyers that a town that isn’t big enough to support one lawyer can support two just fine.” Interview 21016 (on file with author). Author’s Note: some of the information supporting the analysis in this Article is derived primarily from interviews or discussions with the author in which the speakers had assurances of anonymity. These communications are preserved in detailed contemporaneous notes on file with the author. [Editorial note: In order to accommodate this anonymity, the Chicago Journal of International Law has made an exception to its policy of independently reviewing all cited sources, instead relying on the author to ensure the proper use of confidential interviews.]

<sup>20</sup> See generally Archon Fung, Dara O’Rourke, and Charles Sabel, *Can We Put an End to Sweatshops? A New Democracy Forum on Raising Global Labor Standards* 87 (Beacon 2001); Christine Overdeest, *Codes of Conduct and Standard Setting in the Forest Sector: Constructing Markets for Democracy?*, 59 *Indust Rel* 172 (2004).

<sup>21</sup> See, for example, Benjamin Cashore, Graeme Auld, and Deanna Newsom, *The United States’ Race to Certify Sustainable Forestry: Non-State Environmental Governance and the Competition for Policy-Making Authority*, 5 *Bus & Pol* 219, 231–32 (2003).

*Interactions with States.* While states usually are not prime movers, they play significant roles in supragovernmental regulatory systems. Individual certification programs generally define their policies in terms of existing state regulatory frameworks and often consciously serve the purposes of states by requiring, at a minimum, compliance with state law.<sup>22</sup> Thus, certification by a supragovernmental regulatory program often provides state regulators with a useful proxy for state law compliance. Perhaps more interestingly, it is not uncommon for states to seek supragovernmental certification of their own management practices, as is increasingly the case with the forestry and fishery programs.<sup>23</sup> In addition, many states operate procurement programs that establish preferences or requirements for products certified by supragovernmental programs.<sup>24</sup>

Important interactions also occur between state and supragovernmental regulatory programs. State regulatory agencies sometimes find themselves in tacit competition with supragovernmental programs. This may not be a problem in regulatory domains where states are not active and can implicitly or explicitly cede regulatory authority to the supragovernmental programs. Where state agencies are active in the same domains, however, they will often feel some pressure to adjust their policies in response to those of the supragovernmental programs. Given the long interactions of many state regulatory programs with industry, they may incline toward industry-based standards over NGO-based ones. However, such choices are vulnerable to contestation and can easily subject state agencies to fresh criticisms that they more easily avoided when they were perceived as the only regulators in the domain.

Through this complex interaction, state standards are often drawn into closer alignment with supragovernmental ones, although they often remain different in significant ways. Sometimes convergence happens through formal deliberative processes, particularly when governmental and supragovernmental rulemaking occur in close proximity to each other. In such cases the same ideas, and often the same actors, are involved in both processes; thus, much

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<sup>22</sup> There are some cases in which supragovernmental standards are inconsistent with state standards. In Russia, for example, Forest Stewardship Council standards that require leaving some dead and dying trees in the forest to provide wildlife habitats are inconsistent with state regulations requiring complete removal. But such cases seem quite rare.

<sup>23</sup> Errol Meidinger, *Multi-Interest Self-Governance through Global Product Certification Programs*, in Olaf Dilling, Martin Herberg, and Gerd Winter, eds, *Responsible Business? Self-Governance in Transnational Economic Transactions* (Hart forthcoming 2008).

<sup>24</sup> Peter Sprang, et al, *Public Procurement and Forest Certification: Assessment of the Implications for Policy, Law and International Trade*, available online at <[http://www.ecologic.de/download/briefe/2006/933\\_brief\\_procurement\\_forest.pdf](http://www.ecologic.de/download/briefe/2006/933_brief_procurement_forest.pdf)> (visited Nov 17, 2007).



convergence can happen quite quickly.<sup>25</sup> More often, the interchange is slower and barely visible. Thus, regulatory officials gradually and almost imperceptibly redefine their informal standards as professional and on-the-ground definitions of “best practices” evolve. They may also adapt their enforcement and other policies to privilege firms meeting supragovernmental standards. Revisions to state standards may gradually come to appear quite natural as regulated organizations adjust their practices to meet supragovernmental standards.

Supragovernmental standards may also be incorporated through other state legal processes, as for example, when tort standards for due care assimilate private standards.<sup>26</sup> Among the potentially most powerful state-based legal mechanisms for incorporation is international trade law, which directs World Trade Organization members engaging in “technical regulation” to adopt supragovernmental international standards when they are available and would not be inappropriate.<sup>27</sup> This provision creates a sort of Holy Grail for supragovernmental regulatory programs, which suddenly enjoy the possibility that their standards could be leveraged into state requirements by WTO-mandated incorporation. Although there is scant information on whether this has happened on a widespread basis to date, many supragovernmental programs seem to be motivated in part by the possibility of widespread state adoption.

Despite the tendencies toward convergence, however, there are also incentives for continued differentiation. Regulatory programs and organizations maintain themselves in part by claiming unique roles and special competencies. To date, this has been the experience in the fields of forestry, organic agriculture,

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<sup>25</sup> Proximity of rulemaking processes leading to convergence in forest certification standards occurred in Bolivia and Estonia. For Bolivia, see Johannes Ebeling, *Market-Based Conservation and Global Governance: Can Forest Certification Compensate for Poor Environmental Law Enforcement? Insights from Ecuador and Bolivia* (June 2005) (unpublished master’s thesis presented to the University of Freiburg in partial fulfillment of the requirements for the degree of Magister Artium in Political Science) (on file with author). For Estonia, see Rein Ahas, Hando Hain, and Peep Mardiste, *Forest Certification in Estonia*, in Benjamin Cashore, et al, eds, *Confronting Sustainability: Forest Certification in Developing and Transitioning Countries* (Yale School of Forestry and Environmental Studies 2006).

<sup>26</sup> Schepel, *Constitution of Private Governance* at 339 (cited in note 13). See also Errol Meidinger, *Private Environmental Certification Systems and US Environmental Law: Closer than You May Think*, 31 *Envir L Rep* 10162 (2000).

<sup>27</sup> GATT Annex 1A, Agreement on Technical Barriers to Trade (1994), § 2.4, 33 ILM 154, available online at <[http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm](http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm)> (visited Nov 17, 2007).

Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when [they] . . . would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

These international standards are typically developed in supragovernmental regulatory processes.

and fair trade, each of which manifests the continued presence of plural regulatory programs.<sup>28</sup> How long this will continue is impossible to say. But from a utilitarian standpoint, it is not a problem so long as the costs of regulatory divergence and uncertainty are outweighed by the benefits of regulatory competition and innovation. Moreover, continued competition may also facilitate a more democratically responsive regulatory system.

In sum, “competitive supragovernmental regulation” characterizes a novel and expanding mode of governance in which supragovernmental regulatory programs develop competing standards and implementation mechanisms. The standards are typically deployed through sensitive transnational commodity chains using conventional institutional modalities and increasingly participatory and transparent procedures. States and businesses participate in these processes to varying degrees, but the prime movers are typically organizations set up for the express purpose of developing standards for industries, often in the first instance by nongovernmental organizations.

“Supragovernmental” denotes the hybrid and dynamically expansionary nature of this governance mode. A given regulatory field is often centered on the competition between supragovernmental programs. Figure 1 depicts the emerging regulatory structure in the forestry sector as I see it. The Forest Stewardship Council (“FSC”)<sup>29</sup> is the NGO-sponsored program, and the Programme for Endorsement of Forest Certification (“PEFC”)<sup>30</sup> is the industry-sponsored one. Although the arena centers on them, the participation and engagement of businesses and states are necessary to make the regulatory process work. While necessary, however, the mere presence of these actors in the regulatory field is not sufficient to explain why this loose and complex regulatory system seems to be effectuating changed standards. That remains in important part a mystery. The FSC and PEFC have strikingly little coercive power (although they do have some), and the diverse interests of states and businesses would seem to pull in all kinds of directions. The next Section

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<sup>28</sup> Periodically, there are also new entrants to regulatory fields as organizations seek to extend their reach. Recently, for example, the International Organization for Standardization (“ISO”) has undertaken an effort to set standards for corporate social responsibility programs as a whole. Its Committee on Consumer Policy has developed draft standard ISO 26000, which is expected to be published in 2010. *Guidance on Social Responsibility*, ISO/TMB/WG SR N55, OSO/WD 26000, (March 28, 2006), available online at <[http://inni.pacinst.org/inni/corporate\\_social\\_responsibility/N055WD1\\_26000.pdf](http://inni.pacinst.org/inni/corporate_social_responsibility/N055WD1_26000.pdf)> (visited Nov 17, 2007). Such developments often create challenges for the other standard-setting organizations. To protect themselves, they also form various kinds of alliances, such as ISEAL (as discussed in note 16).

<sup>29</sup> Forest Stewardship Council, available online at <<http://www.fsc.org/en/>> (visited Nov 17, 2007).

<sup>30</sup> Programme for Endorsement of Forest Certification, available online at <<http://www.pefc.org/internet/html/>> (visited Nov 17, 2007).

explores the proposition that the system works in part because it lays claim to a kind of democratic legitimacy.

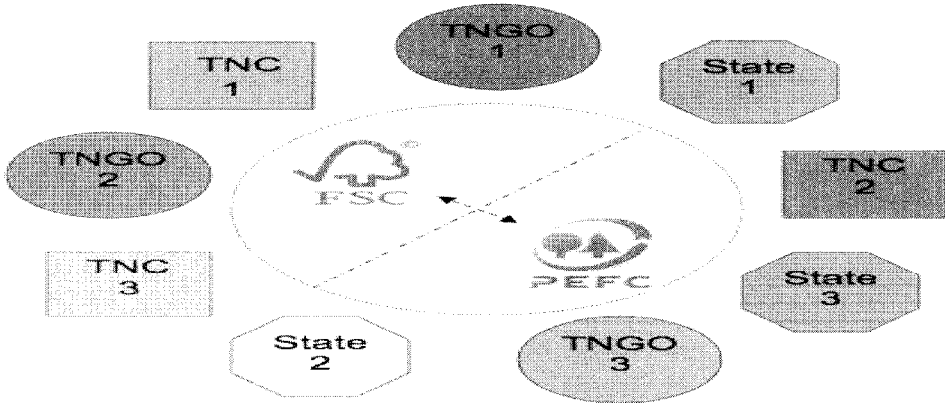


Figure 1. Emerging Structure of Transnational Forestry Governance (TNGO = transnational NGO, TNC = transnational corporation)<sup>31</sup>

### III. DEMOCRATIC GOVERNANCE AND COMPETITIVE SUPRAGOVERNMENTAL REGULATION

Assuming the above depiction of competitive supragovernmental regulatory systems is reasonably accurate, how can it be that they actually govern? They have little coercive power, and most of the coercive power that they do hold could be deployed in opposing directions by different participants. If, therefore, they govern more through authority than through power, what might be the source of that authority? Not custom, religion, or tradition, since these are diverse, inconsistently distributed, and often under pressure. That leaves expertise, collective survival, and democracy as likely candidates. Expertise explains little, as it is present in all of the programs. If each program has it, why would we need several? Collective survival may help answer that question, since competing groups of experts may increase the likelihood of generating effective societal policies. However, many of the regulatory domains with competitive supragovernmental regulatory systems are hard to describe as closely connected to collective survival. But their respective domains do involve issues that many people think are important and require regulation. Thus, democratic responsiveness and legitimacy may indeed be an important part of the puzzle. The problem is that if these competitive supragovernmental

<sup>31</sup> Meidinger, *Multi-Interest Self-Governance* at 263 (cited in note 23).

regulatory systems further democracy, they do so in ways that do not fit very comfortably with received models of democracy.

Since the argument in this Article is based on extrapolations from empirical research, it is not necessary to offer an extended treatment of democratic theory. However, it is helpful to frame the discussion in relation to conventional concepts of democracy that are broadly held. Built out of “demos” (the people) and “kratia” (power, rule), the term is often literally rendered as “rule by the people.”<sup>32</sup> This immediately raises the questions, who are “the people” in competitive supragovernmental regulatory systems, and how do they “rule”? For several centuries, conventional answers have tended to assume that states and their subunits appropriately delimit “the people” and have focused debate on methods of rule, largely dividing between “aggregative” and “deliberative” visions on the one hand, and “direct” and “representative” models on the other, and then combining them in various ways.<sup>33</sup> Typically, the main mode of democratic rule is law. Thus, in aggregative models, the people either simply vote on their laws or vote for representatives who then vote on laws. In deliberative models, the people either reason together to develop the best laws, or their representatives do so. Thus, a representative system can have both aggregative and deliberative elements, as can a direct system.

As noted in Section II, all of the procedural devices and institutional practices of aggregative and deliberative democracy exist within individual supragovernmental regulatory programs. The FSC is one of the most elaborate examples, with a global “general assembly” made up of economic, environmental, and social chambers, each with equal voting power, and each subdivided into “northern” and “southern” subchambers, also with equal voting power (regardless of membership numbers).<sup>34</sup> New statutes and policies require a two-thirds vote<sup>35</sup> and, thus, substantial agreement across the chambers and subchambers. Most rules and standards are developed through extensive deliberative proceedings involving consultation, formal public notice and comment processes, and public explanations of decisions.<sup>36</sup> Certifications of companies are also publicized along with written summaries of the facts found and decisions made.

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<sup>32</sup> See, for example, Robert Dahl, *Democracy and Its Critics* 3 (Yale 1989).

<sup>33</sup> Joshua Cohen and Charles Sabel, *Directly-Deliberative Polyarchy*, 3 Eur L J 313 (1997).

<sup>34</sup> FSC, *Forest Stewardship Council AC By-Laws*, bylaws 12 & 13, available online at <[http://www.fsc.org/keepout/en/content\\_areas/77/84/files/1\\_1\\_FSC\\_By\\_Laws\\_2006.pdf](http://www.fsc.org/keepout/en/content_areas/77/84/files/1_1_FSC_By_Laws_2006.pdf)> (visited Nov 17, 2007).

<sup>35</sup> Id at bylaw 15.

<sup>36</sup> Meidinger, 17 Eur J Intl L at 67 (cited in note 15).

The FSC thus implements both representative and deliberative democratic structures and procedures. Other supragovernmental regulatory programs are moving in similar directions, although few are as elaborate in both their representational and deliberative aspects.<sup>37</sup> But does that make them “democratic” governance mechanisms?

This question returns us to that of who “the people” are. The supragovernmental regulatory programs under discussion are nominally voluntary; their standards apply only to those who choose to conform to them. Thus, in one sense they appear to be clearly democratic. The people who are ruled choose to subject themselves to the rules. It is as if they purposely locate themselves in a polity whose laws are to their liking. And if they become disenchanted with the laws they can leave that polity simply by leaving the program.

There are two preliminary problems with this depiction, the first involving formal citizenship and the second practical power. Regarding citizenship, the “subjects” of the rules do not always have the capacity to help choose the rules. In some programs, firms that are certified are not allowed to be members of the standard setting organization, although they generally have the opportunity to comment on proposed rules.<sup>38</sup> In other programs, many choose not to be members even though they could be. Thus, it would seem that some people are making rules for others. Yet this does not appear to be a major problem on first consideration because the subjects have the right to exit the polity if they so choose, allowing them an effective veto over the rules that could apply to them.<sup>39</sup>

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<sup>37</sup> Id at 68.

<sup>38</sup> A prominent example is the industry sponsored Sustainable Forestry Initiative (“SFI”) in the US. Membership in the parent organization, the American Forest & Paper Association (“AF&PA”), is limited to approximately two-hundred of the largest companies in the country. SFI has no members at all and is constituted entirely by an eighteen-member Board of Directors (with a current actual membership of fifteen) originally established by the AF&PA predecessor organization. See Sustainable Forestry Initiative, *Bylaws of the Sustainable Forestry Initiative, Inc.*, available online at <<http://www.sfiprogram.org/miscPDFs/SFIIncBylaws.pdf>> (visited Nov 17, 2007).

<sup>39</sup> For a somewhat parallel argument about regulating the global garment industry, see Terry Macdonald and Kate Macdonald, *Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry*, 17 Eur J Intl L 119 (2006). My more individualistic analysis echoes Albert Hirschman, who held that too-easy exit could be bad for an organization because those dissatisfied with organizational practices would choose simply to exit rather than to voice their concerns and seek change, leaving the organization effectively unable to adapt. See Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* 37 (Harvard 1970). The focus on information gathering and attentiveness fostered by supragovernmental regulatory competition, of course, may provide a partial remedy for this problem.

Easy exit, however, is often seriously constrained by practical power. Many firms choose to subject themselves to supragovernmental regulatory standards not so much because they wish to live under them as because they feel that they must in order to avoid significant economic losses. They believe this because activist groups threaten to associate their brands with such bad practices as destroying rainforests, abusing workers, annihilating fisheries, and supporting civil conflict.<sup>40</sup> The FSC, for example, enjoyed major uptake as a result of hundreds of protest actions over several years by the Rainforest Action Network at Home Depot stores in North America. Once Home Depot agreed to favor FSC products in its purchasing policies, its enormous market power leveraged the FSC system into place among large numbers of producers in (or wanting to be in) Home Depot's market chain.<sup>41</sup> Other big retailers (Lowe's, B&Q, Obi) did the same thing in both North America and Europe, thus cumulatively leveraging the FSC regulatory system into place in a substantial portion of the forestry sector.<sup>42</sup>

What does the role of economic coercion in driving supragovernmental regulation mean for its claim to democratic legitimacy? The first critique is easy to see: a few "green" or "socially progressive" activist groups are imposing regulatory standards that suit their values—"blackmailing" businesses, as is sometimes said.<sup>43</sup> But what is the basis of the blackmail? What is the nature of the threat? The "weapon" that activists are exercising is the threat to publicize their claim that challenged practices fall below socially acceptable standards. In the cases considered in this Article, the standards at issue have been articulated and publicized through the formal rulemaking processes of supragovernmental regulatory programs.<sup>44</sup> The implicit claim is that the standards reflect public values (implicitly values of "the people") to which businesses should be held accountable and thus constitute public duties. Hence, any punishment suffered by firms results from their failure to meet their social obligations, rather than violation of their rights.

The question of exactly what public values (or whose) are at issue is sharpened by a second version of the unequal power critique. This is the

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<sup>40</sup> See generally, for example, Michael Conroy, *Branded* (New Society 2007).

<sup>41</sup> Sasser, *Gaining Leverage* at 231 (cited in note 11).

<sup>42</sup> Cashore, Auld, and Newsom, 5 *Bus & Pol* at 241 (cited in note 21); Meidinger, *Multi-Interest Self-Governance* at 263 (cited in note 23).

<sup>43</sup> See ForestNewsWatch, *Leadership Interview with Patrick Moore, Part 1*, (Aug 8, 2004), available online at <<http://www.forestnewswatch.com/content/view/543/79/>> (visited Nov 17, 2007).

<sup>44</sup> This contrasts to the largely one-off nature of the local negotiations of the "social license" as discussed in Neil Gunningham, Robert Kagan, and Dorothy Thornton, *Shades of Green: Business, Regulation, and the Environment* (Stanford 2003).

argument that supragovernmental regulatory programs are essentially a system of developed country imperialism: activists from wealthy countries threaten to get their consumers to boycott commodities produced in ways that do not meet their standards, thus forcing producers in developing countries to conform to developed country standards.<sup>45</sup> Indeed, producers in developing countries often say that they are complying with supragovernmental regulatory standards because European or American activists and consumers demand that they do so,<sup>46</sup> suggesting that they are subjects and not citizens of the regulatory programs.

The imperialism critique is probably the most probing test of the democratic claims of competitive supragovernmental regulatory programs. The strongest response that can be made on their behalf includes the following elements:

*Broad Representation.* As already noted, most supragovernmental regulatory programs embrace the norm of broad participation. Moreover, the emerging international standard is quite inclusive; an “interested party” with a legitimate right to participate is anyone “concerned with or directly affected by” a given standard.<sup>47</sup> While some programs—typically industry-based—carefully control which stakeholders participate, and at what stages, they generally feel a need to incorporate at least the major kinds of interests involved in their regulatory fields.<sup>48</sup> It remains to be seen how well these “house environmentalists and social justice representatives” can be managed over time. Moreover, competition among programs includes public criticism of exclusionary and manipulated participation structures.<sup>49</sup> Beyond simply allowing interested parties to

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<sup>45</sup> These concerns are well-summarized in Arthur E. Appleton, *Environmental Labelling Schemes Revisited: WTO Law and Developing Country Implications*, in Gary P. Sampson and W. Bradnee Chambers, eds, *Trade, Environment and the Millennium* 236, 240–43 (2002) (noting that developing countries often see the eco-labeling standards as difficult to meet, difficult to influence, hard to learn about, and inappropriate to developing country conditions).

<sup>46</sup> For example, see the following articles, all in Benjamin Cashore, Fred Gale, Errol Meidinger, and Deanna Newsom, eds, *Confronting Sustainability: Forest Certification in Developing and Transitioning Countries* (Yale School of Forestry & Envir Stud 2006): Dwi Rahmad Muhtaman and Ferdinandus Agung Prasetyo, *Forest Certification in Indonesia* 33, 35; Maria Tysiachniouk, *Forest Certification in Russia* 261, 288; Lincoln Quevedo, *Forest Certification in Bolivia* 303, 313–14, 326; Peter May, *Forest Certification in Brazil* 337, 339; Felix Njovu, *Forest Certification in Zambia* 535, 546–47.

<sup>47</sup> ISEAL Code at ¶ 3.2 (cited in note 16). Perhaps reflecting the broadening definition of the concept, ISEAL uses the term “interested party” rather than stakeholder. This is also the practice in ISO environmental standard setting. International Organization for Standardization, *International Standard ISO 14001*, § 3.11 (1996).

<sup>48</sup> As evidenced in the SFI’s decision to include economic, environmental and social/community interests on their Board of Directors. Sustainable Forestry Initiative, *Bylaws* at 2 (cited in note 38).

<sup>49</sup> See, for example, Simon Counsell and Kim Terje Loraas, *Trading in Credibility: The Myth and Reality of the Forest Stewardship Council* 30–34 (Rainforest Found UK), available online at

participate, leading programs such as the FSC make efforts to provide resources and venues enabling poor and underrepresented interests to participate in their deliberative processes. Even in the best circumstances, however, this is still a notional concept of participation. Representatives are not chosen by constituents. Rather, people with given types of interests are assumed to be able to represent them for others. While there are deep ontological issues with this concept of representation, as a practical matter it often does not seem unreasonable to those involved in regulatory arenas.

Nonetheless, every supragovernmental regulatory program appears somewhat partial in its representation. Each one can be characterized as attracting certain types of businesses, activists, professionals, and so on, and not others. Thus, the industry-sponsored programs are easily (and usually accurately) characterized as leaning toward industry viewpoints.<sup>50</sup> Conversely, programs sponsored by activist groups can be characterized as leaning toward their viewpoints.<sup>51</sup> No program can be said to represent “the public” fully, no matter how broad-based or open it might be. A fundamental reason is that it is not clear which public is to be represented. The focus of most supragovernmental regulatory programs is increasingly transnational, often global. Their operative assumption is that standards and implementation mechanisms should be appropriate across local, national, and regional borders, and ideally around the globe. Yet the communities involved are both plural and partial. They are plural in the sense that local, state, and transnational peoples, including geographic communities, tribes, activist groups, consumer associations, interest networks, trading groups, and industrial sectors are all implicated. A few are organized as polities, but most are not. Moreover, the development of transnational communities is partial and incomplete. Many of them grow up around trade and

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<<http://www.rainforestfoundationuk.org/files/Trading%20in%20Credibility%20full%20report.pdf>> (visited Nov 17, 2007); Saskia Ozinga, *Behind the Logo: An Environmental and Social Assessment of Forest Certification Schemes* (FERN 2001), available online at <<http://www.fern.org/pubs/reports/behind/btdpage.html>> (visited Nov 17, 2007); Jim Motavalli and Brian C. Howard, Commentary, *Sustainable Forestry . . . With a Chainsaw?*, *emagazine.com* (May/June 2005), available online at <<http://www.emagazine.com/view/?2530>> (visited Nov 17, 2007); Dara O'Rourke, *Multi-Stakeholder Regulation: Privatizing or Socializing Global Labor Standards?*, 34 *World Dev* 899, 902 (2006); Jeremy Weber, *Fair Trade Coffee Enthusiasts Should Confront Reality*, 27 *Cato J* 109 (2007).

<sup>50</sup> See, for example, O'Rourke, *Multi-Stakeholder Regulation* at 903 (cited in note 49); Lars H. Gulbrandsen, *Accountability Arrangements in Transnational Standards Organizations: Instrumental Design and Imitation*, Paper prepared for the Amsterdam Conference on the Human Dimensions of Global Environmental Changes 19 (May 24–26, 2007), available online at <[http://www.2007amsterdamconference.org/Downloads/AC2007\\_Gulbrandsen.pdf](http://www.2007amsterdamconference.org/Downloads/AC2007_Gulbrandsen.pdf)> (visited Nov 17, 2007).

<sup>51</sup> See, for example, Matt Bennett, *FSC Not 'Top Choice,' Wrong Choice for Love's*, *Envir News* (Sept 1, 2001), available online at <<http://www.heartland.org/Article.cfm?artId=956>> (visited Nov 17, 2007).



are linked and organized through economic sectors; a few (for example, indigenous peoples and social justice activists) are linked through common interests and rapidly improving communications networks.<sup>52</sup> But these are all communities under construction. Most transnational peoples are at best emergent and highly changeable. Obviously, then, there is no unifying global polity to define the appropriate scope of representation. Nor are there organized public choice mechanisms capable of marshalling the will of transnational communities and translating it into policy.

*Accountability to Governments.* An important, although recently muted, response to the paradox of transnational representation is that supragovernmental regulatory programs are accountable to states in multiple ways. Indeed, as noted above and discussed in more detail elsewhere,<sup>53</sup> most supragovernmental programs have been careful to accommodate existing state laws and policies and to anticipate future ones where possible. Moreover, states stand in the wings with the capacity to regulate both the supragovernmental programs themselves and the activities within state territories that are the object of the supragovernmental programs. Again, however, this capacity is limited by economic coercion to the degree that transnational trade may be threatened by a state's refusal to accommodate supragovernmental regulatory policies, as well as by the simple costs and difficulties of mounting or modifying a regulatory program. Thus, although state policies stand as constraints on supragovernmental ones, they work more as influences than as controls.

There is also an equally powerful obverse reason why state constraints are not an adequate answer to the imperialism critique: states have few institutional incentives to consider the effects of their policies on noncitizens outside their boundaries. Thus, even where state policies can be seen as democratically legitimate vis-à-vis domestic constituencies, they may be imperialistic as to noncitizens when state regulatory policies are powerful enough to influence extraterritorial behavior or have other extraterritorial effects.<sup>54</sup> In this sense, supragovernmental rulemaking processes that are open to whoever wishes to participate may have some democratic advantages over state-based ones.

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<sup>52</sup> Thus, fragmented decision structures of the kind that Professor Aman worries about are as widespread in the supragovernmental regulatory system as in state-centered ones. See Alfred C. Aman, *The Democracy Deficit: Taming Globalization through Law Reform* 177 (NYU 2004).

<sup>53</sup> Meidinger, *Multi-Interest Self-Governance* at 272–283 (cited in note 23).

<sup>54</sup> The US Department of Agriculture's requirements for organic certification, for example, have powerful effects on Mexican farmers who depend on access to the US organic market. See, for example, Brady, *Tighter Organic Standards May Squeeze Out Small Farmers*, (Apr 4, 2007), available online at <<http://twohandsworldshop.com/blog/2007/04/04/tighter-organic-standards-may-squeeze-out-small-farmers/>> (visited Nov 17, 2007).

*Robust Deliberative Processes.* Deliberative democracy is sometimes seen as a way of circumventing the problems of representation and aggregation.<sup>55</sup> Deliberative processes have received a great deal of attention in virtually all supragovernmental regulatory programs. While some are considerably more serious and advanced than others, they have shown a broad movement toward the hallmarks of modern deliberative regulation, including structured, deliberative procedures, public rights to comment on proposed rules, emphasis on empirical accuracy, and acceptance of transparency. Although there are many strains of deliberative democratic theory, some far more stringent than others, their shared criteria include:

- fair and open decisional procedures;
- arguments based on reasons;
- policy and law based on the best combination of facts and analysis, including consideration for the concerns of all; and
- policy monitoring and learning.<sup>56</sup>

The last criterion deserves elaboration. Supragovernmental regulatory programs have the possibility of testing and revising the results of their deliberations, since they involve on-the-ground practices that in principle are to be evaluated for results. As with most, if not all, regulatory programs, the actual amount of monitoring often falls short of expectations, in part because it involves continuing costs and in part because resources are regularly drawn to fresh battles. Nonetheless, much monitoring does occur. More importantly, the competition between programs creates continual pressures for auditing. In many cases, programs track their competitors with the intention of publicizing their shortcomings.<sup>57</sup> The resulting contention sometimes generates new measures and methods, such as the use of GPS data to measure actual environmental effects, demands for improved recordkeeping, and independent testing of environmental and social conditions. In sum, competitive supragovernmental regulatory systems have built-in incentives both to deliberate carefully and to measure results and revise standards and methods accordingly.

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<sup>55</sup> Cohen and Sabel, 3 Eur L J at 320 (cited in note 33). See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 290–328 (MIT 1996).

<sup>56</sup> See, for example, Habermas, *Between Facts and Norms* at 296 (cited in note 55). These propositions are accepted in principle by all supragovernmental regulatory programs of which I am aware.

<sup>57</sup> See, for example, the PEFC-supported tract (PEFC was the Pan-European Forest Certification Council before it went global in 2003) by Hannes Mäntyranta, *Forest Certification: An Ideal that Became an Absolute* (Meetsälehti Kustannus 2002).

*Adoption of Widely Accepted Norms.* The account of democratic practices thus far could be construed as entirely procedural, and therefore lacking substantive rationality.<sup>58</sup> But in fact supragovernmental regulatory practices share substantive patterns as well, and much can be learned from how supragovernmental regulators choose substantive policies. Since programs are deeply imitative institutionally, it is not surprising that they are also prone to be deeply assimilative substantively. Virtually all supragovernmental regulatory standard setting processes absorb principles, standards, criteria, and indicators (indeed, these have become standard terms of art in the field) that have already been developed in other forums and then refine them for practical application. Most supragovernmental regulatory standards and rules brim with principles and standards borrowed from other processes and organizations. Often they are forms of soft law previously developed by national or international processes. In the environmental domain, for example, they typically include sustainability, human rights, labor, biodiversity, and pollution standards borrowed from many sources, including international treaties, conventions, protocols, agreements in principle, United Nations organizations, national laws, and academic and professional associations.<sup>59</sup>

Why do supragovernmental regulatory programs do so much substantive borrowing, and what are the implications of this practice? The primary answer to the first question is relatively clear: they want their programs to be accepted and

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<sup>58</sup> Wolf Heydebrand, *Process Rationality as Legal Governance: A Comparative Perspective*, 18 *Intl Sociology* 325, 331 (2003).

<sup>59</sup> There are a great many examples of this pattern, including forest certification as discussed thus far. Most of the FSC's Principles and Criteria, for example, are built out of international standards and discussions of various kinds, although those connections are often not explicit and have not been pursued in any detailed research of which I am aware. When it was founded, the PEFC explicitly claimed to have built its standards on a series of intergovernmental processes extending back the "Helsinki process" which involved a series of ministerial and high level staff conferences on the protection of forests in Europe. See *Pan-European Criteria and Indicators for Sustainable Forest Management*, Resolution L2, Annex 1, available online at <[http://www.pefc.org/internet/resources/4\\_1334\\_702\\_file.614.pdf](http://www.pefc.org/internet/resources/4_1334_702_file.614.pdf)> (visited Nov 17, 2007) (developed for the Third Ministerial Conference on the Protection of Forests in Europe (June 2-4, 1998)). Since going global the PEFC has downplayed these origins, but they are still visible in the structure and content of its program. In cases of labor standards the connections are even closer, as is exemplified by the prominence of International Labor Organization ("ILO") standards in Social Accountability International, *SA 8000 Standard*, available online at <<http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageID=710>> (visited Nov 17, 2007). One arguable exception to this pattern is the current International Federation of Organic Agriculture Movements ("IFOAM") standard-setting process, which seems to be trying to articulate meta-principles. But even this effort is framed in terms of capturing the essence of the organic foods movement to date and stating it at a higher level of insight and generality. IFOAM, *The Principles of Organic Agriculture*, available online at <[http://www.ifoam.org/about\\_ifoam/principles/index.html](http://www.ifoam.org/about_ifoam/principles/index.html)> (visited Nov 17, 2007).

to be viewed as legitimate. As one interviewee succinctly put it, “[o]ur effort is to constantly create greater resonance with a greater raft of stakeholders. To be successful, we must produce a standard that resonates with what people want and hopefully what other people will want in the future.”<sup>60</sup> Of course, choices must be made regarding which standards to adopt, where to modify them, how to implement them, and so on. And on these issues, programs usually differ significantly at the outset, mainly regarding the industry versus NGO orientations noted above and then commence the competitive adjustments and partial convergences also discussed above.

*Competition for Public Acceptance.* This competitive element points to what may be the hidden democratic genius of competitive supragovernmental regulation. In competing for acceptance in the complex arena of industry, NGO, state, and public observation, supragovernmental regulatory programs are under continual pressure to develop programs that will both work on the ground and prove acceptable to the various “publics” that they seek to win over. This may foster more democratic responsiveness than is traditionally the case with state regulatory agencies, which enjoy greater levels of regulatory monopoly and therefore can occasionally be much less responsive.

*Anticipatory Orientation.* Moreover, there are interesting analogies to the literature on prediction markets, which some economists and psychologists argue can be much more effective at pooling and analyzing information than traditional deliberative processes.<sup>61</sup> This is in part because prediction markets involve devoting valuable resources to deliberations and carry the possibility of rewards or losses depending on the quality of the predictions. Supragovernmental regulatory programs seem to face similar incentives. They must obtain resources to establish themselves and must continue to generate resources to survive. Thus, they develop standards and regulatory programs with a keen eye to public acceptability, implementability, and so on, because their economic viability depends on it. They must persuade potential customers and constituents that they “add value” to survive.

The challenges facing supragovernmental regulatory programs seem greater than those facing traditional prediction markets, which generally focus on factual issues such as outcomes of presidential elections, demand for gasoline, and the like. Supragovernmental regulatory programs are engaged in predicting clearly

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<sup>60</sup> Interview 50703 (on file with author).

<sup>61</sup> See, for example, Justin Wolfers and Eric Zitzewitz, *Prediction Markets*, 18 J Econ Perspectives 107 (2004). For an added argument about the inherent shortcomings of deliberative groups, see Cass R. Sunstein, *Deliberating Groups versus Prediction Markets (or Hayek's Challenge to Habermas)*, — Episteme — (forthcoming), available online at <[http://ssrn.com/abstract\\_id=956189](http://ssrn.com/abstract_id=956189)> (visited Nov 17, 2007).

normative issues, such as what levels of environmental protection or worker protection will be socially desirable. Moreover, it must be acknowledged that they often may hope to influence those standards, both by participating in the debate about what the standards should require and by demonstrating how effectively they can be implemented.

It is also plausible that in trying to articulate workable and publicly acceptable regulatory standards, supragovernmental regulatory programs provide valuable predictability regarding the requirements of the “social license” to which many businesses believe they must conform, but about whose content they are often unsure.<sup>62</sup> By seeking to set broadly acceptable standards, programs can remove some of the process of defining social licenses from individual negotiations between companies and local communities to a more general and predictable footing.

On a theoretical level, then, it is possible to see competitive supragovernmental regulatory systems as quite promising. Their competitive, future-oriented dynamics offer one approach to constructing a functional kind of “anticipatory democracy” well beyond the mix of future oriented expertise and participation that Toffler envisioned.<sup>63</sup> Indeed, they do not even wither before the Rawlsian standard of defining rules that people would accept if they did not know their station in life or when they might live.<sup>64</sup> They also address Steffek’s related but somewhat less stringent requirement that generating rules to which everyone in principle can agree is a necessary condition of achieving legitimacy.<sup>65</sup> These systems have the additional benefit of responding to the prospect that concepts of just behavior are likely to be a moving standard. If anticipatory competition indeed characterizes supragovernmental regulatory systems, it increases the likelihood that they may offer a tenable answer to the imperialism problem discussed. This is mainly because programs have long term incentives to develop regulatory arrangements that are acceptable to the widest available audiences, thus spanning extended transnational market chains. Moreover, these incentives include the need to anticipate changes in market power, which may occur as developing countries organize more effectively to maximize the value of their resources. Overall, then, it could turn out that

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<sup>62</sup> Neil Gunningham, Robert A. Kagan, and Dorothy Thornton, *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 L & Soc Inquiry 307 (2004).

<sup>63</sup> Toffler, 9 *Futurist* at 225 (cited in note 1); Clement Bezold, ed, *Anticipatory Democracy: People in the Politics of the Future* (Random House 1978).

<sup>64</sup> John Rawls, *A Theory of Justice* 136 (Harvard 1971).

<sup>65</sup> Jens Steffek, *The Legitimation of International Governance: A Discourse Approach*, 9 *Eur J Intl Rel* 249, 265 (2003).

competitive supragovernmental regulatory systems are valuable vehicles for democratizing regulation across national boundaries and over time.

#### IV. CONCLUSION

##### A. RECAPPING THE BRIGHT SIDE

Looked at cumulatively and relatively optimistically, competitive supragovernmental regulation holds considerable democratic promise. First, as discussed above, the leading NGO programs are quite participatory and inclusive, and seem to be growing more so. To compete, many industry programs have also begun to stress the importance of multi-stakeholder groups. Second, the leading programs tend to be quite elaborate procedurally and do well when measured against practical criteria of deliberative democracy. Their policymaking processes follow extensive procedures for discussion and debate, and results are generally supported with detailed arguments and analyses. In each of these regards, supragovernmental programs compare reasonably well to state programs. Third, the applied and competitive nature of the regulatory field means that these programs are likely to engage in a kind of democratic experimentalism, in which regulatory policies are developed, implemented, criticized, competed with, and revised through the processes described above. Fourth, their heavy use of already developed norms, principles, and standards suggests that they are firmly connected to broader norm development processes, both governmental and supragovernmental, and actively seek areas of overlapping consensus which can be developed and implemented. Fifth, their incentives are such that these programs may be the best mechanisms we have of trying to define regulatory standards that will receive wide acceptance by a broad diversity of actors in very different social circumstances over time. All in all, this could turn out to be a promising path toward greater transnational democracy.

##### B. PONDERING THE DARK SIDE

This Article extrapolates from existing empirical research to construct an account of how regulatory governance processes that are typically seen as suffering significant democratic shortcomings could in fact be sketching out a new form of transnational democracy. But there are many possible problems with this portrayal and hence potentially with the processes described above.

At the empirical level, we still have very limited information on how participation actually works in supragovernmental regulatory programs. While the FSC has been fairly well studied, most other programs have not. And even the FSC has knowledgeable critics who challenge the legitimacy and

effectiveness of its programs.<sup>66</sup> Similarly, we have little evidence that democratic experimentalism is actually being practiced on a widespread basis. It is possible that what we often have is a form of managed tokenism designed to cloak status quo practices in a mantle of procedural and technocratic propriety. The same questions apply to whether we have abundant information flows, truly competitive monitoring, and accountable decisionmaking.<sup>67</sup> Third, while this Article has assumed that the systems described are actually effectuating governance, the evidence to support this assumption is actually rather thin. Where social and environmental problems steadily outpace solutions, as they do in most supragovernmental regulatory arenas, it is quite possible to see the governance situation as one of great fragmentation combined with diffuse and obscure effects. While this may be because we have few good empirical methods for actually measuring the effectiveness of governance institutions, the problem needs to be addressed.

Perhaps most importantly, although this Article describes the competitive processes driving supragovernmental regulatory programs, we know very little about how the outcomes of these competitions are being determined. It would be encouraging if regulatory programs gravitate toward policies that are acceptable to the broadest possible range of people moving into the future, and, thereby, consistently promote democratization. But we really do not know if that is happening, or if other less admirable interests are determining outcomes. It is clear, however, that we need to begin discussing what the rules of the competition should be, and in particular what rules would have to be put into place to foster the kinds of democratic outcomes that seem possible for this emerging mode of regulatory governance. This will require better empirical research on the determinants regulatory competitions. That in hand, we may be able to revise the relevant rules to help push competitive supragovernmental regulatory systems toward their full democratic potential.

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<sup>66</sup> See Counsell and Loraas, *Trading in Credibility* at 30–34 (cited in note 49).

<sup>67</sup> See Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* 245–91 (Cambridge 2002) (analyzing this problem in corporate self-regulation).