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Chapter 12

Private Import Safety Regulation and Transnational New Governance

Errol Meidinger

The world is awash in complex systems of private regulation, many of which are highly innovative and dynamic. This chapter discusses the current and potential role of private regulatory systems in ensuring import safety. Using recent developments in food safety regulation as a primary example, it argues that private regulatory institutions can provide valuable control and learning capacities for an effective import safety regulatory system. However, significant institutional developments are needed to adequately take into account the full range of interests that must be accommodated in global production systems. Safety regulation is currently spread out among a large number of public and private organizations, often with overlapping or competing roles, which can be thought of as constituting “regulatory ecosystems.” Regulatory actors will have to develop new strategies for maximizing the effects of these polycentric authority structures. Moreover, most private safety regulation currently faces northward. It protects developed country (“northern,” hereafter) interests, and has only haltingly and partially incorporated the voices and interests of developing country (“southern,” hereafter) producers and publics. To achieve effective and sustainable transnational governance, private import safety regulation will have to pioneer significant new ways of incorporating the interests of southern countries and coordinating them with the interests of northern ones.

Private Safety Regulation

“Regulation” is simply formalized social control that aims to establish a desired level of order in a given field of human activity. It typically defines the duties of different kinds of actors through rules or

standards and uses credentialed experts to enforce them (Black 2008: 139; Meidinger 2007: 121). “Private” regulation refers to regulatory programs that are not created or managed primarily by governments. Non-governmental actors engage in every facet of safety regulation, from standard-setting and adoption through inspection, monitoring, and enforcement. As we will see, most private regulatory programs are nonetheless deeply intertwined with governmental and intergovernmental regulatory structures. Moreover, many have developed increasingly “public” dimensions in that they seek to incorporate the concerns of all interested parties, operate with a high degree of transparency, and implement standards that claim to be in the public interest. Thus, the term “private” must be understood critically.

Safety is a long-standing focus of regulation, and safety regulation has long involved major elements of private regulation. In the United States, for example, private safety regulation became important in the 1890s as one of the first companies to make a business out of product safety testing and standard-setting, Underwriters Laboratories (UL), started to conduct thousands of laboratory tests of products such as arc lamps, circuit breakers, fuses, heaters, lamp adjusters, and rheostats (UL 2009). Testing necessarily implied standards, and within a decade UL had gotten into the business of writing and publishing standards. UL was not alone in the product-testing and standard-setting business. Many such organizations, some for-profit and others not-for-profit, emerged during the same period, multiplying, merging, and redefining themselves in a dizzying spiral of development (Cheit 1990; Krislov 1997; Schepel 2005).

The drivers of private safety regulation have been partly public and partly private. One main public influence has been tort liability. Simply put, manufacturers have a powerful and abiding interest in showing that their designs and production processes entail due care; widely accepted production standards and testing programs have been highly valuable in that effort. Another important public driver has been government procurement, particularly defense procurement, which led to the creation and implementation of many safety standards beginning at about the time of World War II. A final important public driver that endures today is the desire to forestall government regulation by demonstrating adequate self-regulation.

On the private side, the most important force has been the insurance industry, which has had a powerful and sustained interest in controlling the risks that it was insuring against. UL’s rise was largely propelled by the insurance industry, which funded UL’s early development and often required insured parties to use UL certified products. Other important

private incentives included businesses' reliance on available product standards to reduce transaction costs and the competitive value of having a reputation for safe products.

Today the universe of safety standard-setting and implementation bodies includes thousands of businesses, trade associations, and scientific and technical associations, as well as government agencies (Krislov 1997). Many are involved in a global federation of standard-setting bodies, the International Organization for Standardization (ISO). It is impossible to know exactly how many product safety standards exist, yet we do know they number in the many thousands. Any complex product capable of causing injury is likely to involve dozens of safety standards, some for the product as a whole and some for individual components.

Moreover, for many products there are multiple, often competing regulatory programs. Some may be private, others public. This regulatory complexity is sharply amplified by international trade. Both producing and importing countries are likely to have their own safety programs, sometimes also competing, and products that flow from one to the other may be subject to all of them. No government regulatory body has jurisdiction over the entire supply chain. For many technically complex or risky modern products, standards and assessment procedures are constantly changing as new technologies and unanticipated problems steadily emerge.

In sum, international product safety regulation consists of a profusion of standards made and implemented by a multitude of private and public bodies, none of which necessarily has the final say. The products and problems involved are highly complex and changeable, requiring a great deal of adaptation and innovation.

The most dynamic field of international product safety regulation at present is food. Although it may seem technologically simple, food production is often highly complex and involves many biological and chemical components that can change and interact quickly. Food is also a sensitive issue, since it is both essential and ingested. The enormous growth of transnational food supply chains in recent years has combined with multiple food scares (Knowles et al. 2007) to make food a major focus of innovative and sometimes controversial import safety regulation.

The major recent developments in food regulation have occurred in nongovernmental organizations (NGOs). At the same time, the roles of private and public regulators across national boundaries are highly interconnected and fluid. This chapter thus examines food safety regulation as a major field of transnational "new governance," and uses

research on new governance generally to analyze the promise and peril of this major example of private safety regulation.

Transnational New Governance

New governance scholarship focuses on several broad ongoing changes in policy making and regulation. These include decentralization of authority, networked governance structures, public-private partnerships, transparency, stakeholder participation, increased reliance on “soft law,” stress on policy experimentation and learning, and implementation through a wide array of mechanisms that include general standards and rules, contracts, independent monitoring, benchmarking, and institutionalization (Lobel 2004).

Decentralized (or perhaps better, polycentric) authority structures and efforts to institute experimentation and learning are the key features of new governance for purposes of analyzing import safety regulation. Decentralization involves the increasingly broad distribution of governance functions among a wide array of social actors, including government bodies, business firms, trade associations, professional organizations, and activist NGOs. Decentralization also involves various types of cooperation and competition among all of these types of actors. The ideas of networked governance and private-public partnerships follow more or less directly. The concept of network is important because many emerging governance systems manifest complex mechanisms of coordination (or sometimes, a worrying lack of coordination). Decentralization is driven by many factors, including shrinking state capacity, the increasing complexity of governance problems, and the expanding regulatory capacity of nonstate institutions, as well as broad changes in contemporary thinking about regulatory institutions (Lobel 2004).

Experimentation and learning are critical to new governance because of the high degree of complexity, uncertainty, and rapid change that characterizes most regulatory arenas and the consequent need to constantly assess progress, adjust policies, and learn from other arenas of governance. The use of soft law methods, such as recommendations, principles, voluntary standards, benchmarking practices, and the like, follows from the difficulty of imposing mandatory requirements and the value of retaining experimentation and learning. The same is true for expanded stakeholder participation and transparency (Dorf and Sabel 1998).

New governance offers several important practical lessons for import safety regulation. First, different regulatory organizations are likely to have different comparative advantages, and should be utilized accord-

ing to those advantages. Some may be better positioned to set standards, while others may be better at monitoring, inspection, or enforcement functions. Second, each organization observes and learns from other organizations, since there is experience and knowledge to be gained. Third, information sharing is consequently critical to new governance arrangements. Fourth, in thinking about how to maximize its effectiveness with the available resources, each regulatory agency must necessarily consider how best to coordinate with others.

Transnational new governance is distinctive mainly because the difficulties of achieving intelligent and legitimate regulation are much greater across national borders than within them, and because the variability of regulatory problems and practices is compounded. Thus, the difficulty of orchestrating transnational governance institutions is enormous (Abbott and Snidal 2009). At the same time, as elaborated below, the growth of transnational trade and communication increases the need for transnational governance, with the consequence that a great number of innovative governance institutions are constantly being established, tested, and revamped (Abbott and Snidal 2009; Meidinger 2008a).

Recent Growth in Private Safety Regulation

Private safety regulation is booming for many reasons, among them the limitations of government regulators and the distinctive capacities and interests of private regulators. Private regulators also appear to have been particularly nimble in developing transnational regulatory programs, both in safety regulation and in other areas such as environment and labor (Abbott and Snidal 2009; Meidinger 2008a, b). Private regulators can have a variety of motives, but one of them is almost always to facilitate transactions, since it is that capacity that induces the participation of firms. Like much public regulation, expansions in private regulation are often driven by public scares, such as food safety, or other perceived risks, such as destruction of the world's rainforests. In recent years, private regulatory programs have also become central to corporate branding.

Regulatory programs can be broken down into several basic functions, including standard-setting and rule-making, adoption, implementation, inspection and monitoring, and sanctioning (Henson and Humphrey 2008). Over the years certain institutional patterns have become common in private regulation for each of these functions, and they bear many similarities to government regulation.

Private standard-setting processes have gradually moved from relying primarily on technical expertise to combining such expertise with

expanded participation, transparency, and multistakeholder decision making. Ideally, standard-setting bodies include representatives of all relevant interests and seek to operate by consensus (ISO/IEC 1994; WTO/TBT 2000).

In private regulation the adoption of standards is usually distinct from their development. Adoption can be done either by an authoritative legislature or agency, or by a firm or group of firms.

Implementation is carried out primarily by firms, and hence is sometimes overlooked in conceptions focusing primarily on external regulators. This is a serious oversight because firms' capacity to implement regulatory standards is essential to regulatory success and because those capacities are rapidly expanding in some cases, due to advances in supply chain management, discussed below.

External inspection and monitoring have also become a standard part of private regulation. The general assumption is that inspections will be conducted by third-party experts accredited in a separate process and organizationally independent of the firm. In most cases producers receive formal certification of compliance with the standard, and often their products can be so labeled. Inspectors are generally chosen and paid by the firms seeking certification, so they face complex pressures to please the client while also retaining their reputation for integrity (Havinga 2006: 526). The only formal sanction in most private regulatory systems is the loss of the certifying organization's approval, or the threat of that loss. This is important to the degree that it entails a loss of business or revenue, which will occur because important buyers value the certification. NGO activists can also leverage sanctions by pointing to lack of certification as an indicator of poor corporate citizenship.

While substantive product quality or performance standards were long the *sine qua non* of private regulatory programs, they are increasingly being displaced or absorbed by management or system standards. Whereas performance standards focus on assessing measurable qualities of the product, system standards seek to assess the quality of the production and distribution system. They recognize the complexity and variability of risks by institutionalizing processes of searching for and reducing them.

Supply Chain Regulation

As noted earlier, supply chain control has become a major factor in the effectiveness of private regulation. The rapid development of supply chain management over the past two decades, and its integration into operations management, has meant that powerful actors along the

supply chain—often but not always retailers—can assert enormous control over the quality of products received by consumers (Bozarth and Handfield 2006; Vandenberg 2007). New production, transportation, communications, and information technologies have allowed vast consolidation of control over production, processing, transportation, and retailing. This can be achieved regardless of whether the firms carrying out these functions are part of the same organization.

Global supply chains bring both the possibility of greatly increased value and new sources of risks in the form of different producers, production practices, physical conditions, and institutional structures (Roth et al. 2008). The brunt of these risks most often falls on retail firms, which may be legally liable for product defects and which risk reputational damage well beyond legal liability. Thus, actors at different stages of the supply chain become increasingly dependent on each other as it becomes increasingly possible to trace problems to their sources and as the economic viability of the producers depends on the success of the retailers.

In some cases this interdependence extends across different supply chains in the same sectors. A case of peanut butter food poisoning, for example, may affect all manufacturers and distributors of peanut butter, not just the culpable producers. These interdependent actors thus become “hostages of each other” in highly sensitive industries (Rees 1996). This condition, in which an entire industry is dependent on effective regulation, can give rise to rapid development of private regulation under certain conditions, or calls for public regulation if effective industry-wide private regulation is too difficult to achieve, as has recently been the case in the food industry.

Private Food Safety Regulation

The main engine of private food safety regulation over the past two decades has been the European retail sector, and British retailers in particular. The food scares that began in the late 1980s severely undermined public trust in the reliability of the European food supply, which in turn threatened the profitability of the large retailers. The UK seems to have been the driving force of regulatory innovation for two primary reasons. First, the UK retail sector is large and highly concentrated. Four supermarkets control 70 percent of the market, and ten control 85 percent. Moreover, the UK food retail sector has a high propensity for private labels, making retailers highly vulnerable to safety failures (Gow 2008). Second, the British Food Safety Act of 1990 imposed a form of strict liability on providers of food injurious to health (as defined under European Union, or EU, law) (FSA 1990), but also allowed a defense for

those who “took all reasonable precautions and exercised all due diligence to avoid the commission of the offense by himself or by a person under his control” (FEPA 1985: sec. 22).

Consequently, to minimize both legal liability and brand risk, British retailers embarked on intensive efforts to establish quality control systems that could identify their products’ sources and conditions of production. Given that much of the British food supply is imported, these systems were inherently transnational. It soon became apparent that there was great duplication of effort, since many producers sold to multiple retailers and each retailer was visiting and monitoring virtually every producer. Treading carefully around the edges of antitrust laws, some retailers began discussing a harmonized approach and converged on the idea of creating a common standard for good agricultural practices (GAP) for fruits and vegetables. They then established a membership group, the Euro-Retailer Produce Work Group (EUREP), to move the project forward, soon named EUREPGAP (Bell and Shelman 2009).

EUREP successfully recruited other large retailers from a half-dozen European countries, greatly aided by the 1996 discovery of mad cow disease in Britain, and continued work on the fruit and vegetable standard. For the first several years EUREP consisted solely of retailers; producers groups declined to be involved. After the retailers accumulated enough strength to persuade many producers that standards for agriculture were going to change with or without their active participation, a significant number joined and EUREP was restructured to become an equal partnership between retailers and producers.

EUREPGAP followed best practices for standard setting by convening a Technical Standards Committee with wider stakeholder representation, including retailers, consumer groups, agro-science, agro-industry, environmental groups, other related NGOs, government agencies, and producer organizations (Campbell 2005). The GAP standard for produce was completed in 2001, and incorporated a variety of best management practices techniques such as integrated pest management and hazard analysis and critical control point (HACCP) management systems. HACCP systems involve proactively searching for and analyzing safety hazards, identifying critical control points where the hazards can be managed or eliminated, establishing preventive measures with critical limits for each control point, monitoring the control points, taking corrective actions where critical limits are exceeded, keeping good records, and regularly verifying that the system is working properly. The EUREPGAP standard centered on the HACCP strategy, and created a number of predefined critical control points. These were divided into “major musts” for which 100 percent compliance was required,

“minor musts,” for which 95 percent compliance was required, and recommended control points, leaving significant but constrained discretion to producers (Campbell 2005).

Soon thereafter, at the request of retailers, EUREP produced standards for coffee, tea, ornamental plants, livestock, and aquaculture. EUREP also began using ISO accredited third-party certifiers to conduct inspections, issue certificates, and conduct annual audits. Members committed to pushing their suppliers to become certified and by 2004 the number of certified producers had reached the tens of thousands (Bell and Shelman 2009).

Reflecting global trading patterns, EUREPGAP steadily went global and changed its name in 2007 to GLOBALGAP. Its standards now include not only requirements directly related to food quality, but also environmental protection and worker health and safety, thus encompassing both consumption and production externalities. GLOBALGAP has also sought to address the disadvantages faced by small producers (a producer certification can cost anywhere from several hundred to several thousand dollars) by creating a group certification program, whereby small producers can combine under a unified management regime and certification can be achieved by sampling some of the producers (Bell and Shelman 2009).

While GLOBALGAP has been the leading edge of private food safety regulation, the field is full of other players and contenders for leadership. Small and large producers, retailers, and governments are all part of the mix. The UK Assured Food Standard, for example, was developed by a coalition of producer organizations and grants rights to use the “Red Tractor” symbol. Red Tractor standards are distinguishable from, but also evidently partially derivative of, the GLOBALGAP ones (Assured Food Standards 2009).

There are also other major global players. As the EUREPGAP effort began to take off in 2000, the Food Business Forum, the world’s most powerful association of major food retailers, established the Global Food Safety Initiative (GFSI) to “promote convergence among food safety standards through maintaining a benchmarking process for food safety management schemes” (Food Business Forum 2008). Unlike GLOBALGAP, GFSI concentrates solely on food safety and excludes quality, environmental, and social concerns. GFSI is governed by an appointed board of nine retailers, three manufacturers, and one food service. The board currently includes officers of Coca-Cola, Hormel, Walmart, and the China Resources Vanguard Company, among others (Food Business Forum 2008).

ISO also recently entered the fray with its 22000 standard, intended to provide an “internationally recognized standard for a food safety

management system that can be applied to any organization in the food chain” (ISO 2009). Relying primarily on the ISO’s management system approach and using an HACCP framework, the 22000 standard leaves great policy discretion in the company developing the system. Serious companies are therefore likely to have strong systems, less serious ones less strong systems.

In sum, the world of private food safety regulation is currently made up of a multitude of large and small regulatory systems. Some focus solely and narrowly on safety issues; others include safety in a larger set of food quality, environmental, and social concerns. All rely to a great extent on the HACCP strategy of proactively searching for potential problem areas and trying to control the risks in advance. For the most part they are competing to achieve market acceptance, but governments will also play an important role in determining the fates of these regulatory programs.

Government/Private Relations

Private safety regulation has long been deeply intertwined with government safety regulation, both through the legal liability system and through more complex relationships between government and private regulatory agencies. In recent years private safety regulatory programs seem to have grown in importance in both Europe and the United States. Moreover, the relationship between public and private regulation may be shifting. Rather than government agencies either “delegating” or “dominating,” they are more often coexisting in complex fields of highly dynamic private regulatory initiatives.

Today, governments regularly find themselves competing with private safety regulatory programs for authority. In food safety, for example, the rise of private regulatory programs was partly driven by a loss of public faith in government due to its failure to avert major food problems such as those that arose with the mad cow debacle (Ansell 2006: 332). While governments have regained some of that authority, they cannot take it for granted—nor should they. Governments do not have the capacity to protect public safety all on their own, and they should not expend resources to carry out functions that private regulatory actors can perform within the cost structures of their products. The question is: What regulatory roles do and should governments play?

There are two helpful ways of envisioning modern fields of safety regulation: the ecosystem model and the orchestra model. In the ecosystem model, different regulatory programs occupy “niches” they have found in production systems and compete with each other for the nutri-

ents of resources and public acceptance. For example, Iizuka and Borbon-Galvez (2008) describe the variety of regulatory functions—from standard-setting to sanctioning—carried out by various public and private actors in the Chilean salmon fishing and Mexican fresh agricultural produce industries. These actors range from industry associations, private purchasers, and independent standard-setting bodies to regional and national government regulators and foreign governments, and they often perform similar or overlapping functions. Most of the varied regulators in an ecosystem seek to expand their ranges to increase their likelihood of survival. They also develop many kinds of exchanges that are stable to the degree that the environment is stable and none of the competitors obtains a major infusion of resources or a new technology. This seems to describe much transnational safety regulation today, where government and private actors carry out many similar activities and overlap, cooperate, compete, feed off, and sometimes mimic each other.

The orchestration model acknowledges similar complexity, but envisions a “conductor” to get the various regulatory actors to perform reasonably efficiently and in concert (Abbott and Snidal 2009). But which actor can serve as the conductor? The advantages of the coercive capacity of government are considerable, but not always decisive. The transnational nature of the regulatory field means that there will always be at least two governments involved, together with multiple agencies.

Still, the governments of wealthy, northern countries have considerable capacity to regulate the entire supply chain, subject mainly to important constraints imposed by the World Trade Organization (WTO). While these constraints are detailed more fully in chapter 4, it is important here to understand that the Sanitary and Phytosanitary Measures Agreement (SPS) puts special burdens on governments to justify mandatory food safety standards stricter than those of the Codex Alimentarius Commission (Codex) (SPS 1994: arts. 3.1, 5, Annex A, para. 3[a]) and that the Technical Barriers to Trade (TBT) Agreement requires governments adopting nonfood safety standards to give special consideration to existing international standards (TBT 1994: art. 2.4). Thus, governments will have to be particularly sophisticated to effectively orchestrate the standards they are encouraged to follow.

To date, few government agencies seem to be acting as conductors—or if they are, they are doing so only in a relatively weak sense. Both the United States and the European Union (EU) are increasing their promotion of private regulatory programs. The United States has required use of HACCP systems in meat and poultry plants since 1996 (USDA 1996), and has repeatedly called for greater use of voluntary third-party

food safety programs in recent years (USDA/ERS 2007). Congress is also in the process of mandating much greater use of private regulatory systems in food import safety bills. But it will be a considerable challenge for legislation to give a government agency the kind of flexible, adaptive mandate necessary to orchestrate complex, competitive, and highly dynamic regulatory domains of the kind described above. Moreover, to meet the challenges of fairness and legitimacy, such an agency would have to develop an uncommonly high level of consideration for the legitimate expectations and needs of other countries, particularly southern ones.

Private Safety Regulation and International Trade

It is increasingly common for northern retailers to require southern producers to meet private certification standards in order to access northern markets (Maertens and Swinnen 2007, 2009). The attendant costs are often seen as trade barriers by southern countries.

However, the evidence on trade barriers is complex. Although it seems clear that it would be cheaper for any given producer to meet only home country standards and not pay for certification, often the only way for southern producers to sell into northern markets is to meet standards accepted by northern consumers. There is some research that private certification facilitates that access, effectively serving as a market maker rather than a market breaker (Henson and Jaffee 2008; Maertens and Swinnen 2007, 2009). By clarifying requirements and offering standardized conformity assessment mechanisms, private regulatory programs can reduce transactions costs and serve as bridges between northern consumers and southern suppliers. They may also improve northern consumer confidence, thereby increasing demand. There is also some evidence that private regulatory programs may improve efficiency in southern enterprises, thus increasing their market competitiveness (Henson and Jaffee 2008; Maertens and Swinnen 2007, 2009). Evidence is limited, however, and further research is needed.

Regardless of the effects of individual private regulatory programs, there is a significant debate regarding how many there should be. One view holds that standards should be widely harmonized: "certified once, accepted everywhere," as a recent SPS document puts it (WTO/SPS 2008: 5). A more stringent version of that view is that private food regulatory standards are suspect whenever they are stricter than Codex standards. An alternative view is that the SPS Agreement was never meant to reach so deeply into private market relations. Rather, there must be allowance for different private standards because consumers in differ-

ent parts of the world inevitably have different values (Epps 2009) and because the food safety regime should be given equal stature to the international trade regime (Wouters et al. 2008).

What effect the WTO will have on the degree of consistency among private regulatory programs is quite unclear at present. While SPS Article 13 directs governments to “take such reasonable measures as may be available to them to ensure that nongovernmental entities within their territories . . . comply with the relevant provisions” of the SPS Agreement, the meaning of compliance is still to be worked out (Epps 2009). Currently the SPS Committee is undertaking a general study to compare private standards with international and official requirements (WTO/SPS 2008). Regarding nonfood safety standards, the TBT Agreement is even less directive, although the TBT Committee interprets it as encouraging good governance practices in the setting of standards (WTO/TBT 2000).

Assessing Private Import Safety Regulation

Successful regulatory regimes must meet minimum standards of effectiveness, fairness, accountability, and legitimacy, among others. The following discussion offers some preliminary assessments of private safety regulation programs and indicates key questions yet to be answered.

Effectiveness

Although it is impossible to draw conclusions about the effectiveness of private safety regulatory programs in general, it is clear that they can be remarkably effective. As suggested earlier, a major reason is the growing ability of powerful firms to manage information and control the operations of extended and complex supply chains. When these capacities are harnessed to appropriate incentives, private regulatory programs can be enormously effective. There is reason to believe that the British Food Safety Act of 1990 established good incentives for effectiveness. The combination of strict liability with a demanding due diligence defense prompted British retailers to implement highly effective private regulatory systems to deal with highly variable production conditions. Moreover, the practices thus established seem to have had network effects, as other European food certification systems operating under less rigorous liability systems developed similarly stringent requirements. Over time, moreover, it is likely that practices adopted to control risks will become institutionalized in taken-for-granted routines of regulated organizations.

Private food safety regulation also embodies a considerable capacity to learn and adapt because it is centered on HACCP management systems that require constant searching for hazards and control points. While this capacity can be constrained by the incentives of firms to take advantage of it, even in cases with relatively weak incentives HACCP systems can lead to reductions in risks (Coglianese and Lazer 2003: 724). Where there is both legal and market accountability, HACCP systems can be expected to yield considerable risk reduction benefits. Effectiveness can be enhanced through appropriate legal liability mechanisms, as well as the use of information to focus risks upon firms capable of controlling them.

Because private regulatory programs compete with each other for consumer trust and commercial acceptance, they also have systematic interests in learning. There is considerable evidence of competing regulatory programs adopting standards and practices from each other where they work, and also differentiating themselves from one another in hopes of achieving improved results or acceptance. In general, private regulatory systems can adapt to changed circumstances much more quickly than government ones.

Government regulatory programs can maximize their own effectiveness by maximizing the effectiveness of private regulatory programs. They will thus be most successful when they seek to align the incentives of organizations capable of imposing significant supply chain control with the public interest. They can facilitate coordination across regulatory ecosystem niches by strengthening rules and incentives for information production and sharing. They should also focus on finding possible weaknesses of private regulatory systems and either recommending or requiring changes as appropriate. In the case of the United States, this will require significant change. Government agencies will need greater authority with greater discretion, upgraded expertise capable of monitoring and assessing complex safety management systems, and changed attitudes in which private safety regulation is seen as a valuable but shifting and difficult-to-monitor asset (Coglianese and Lazer 2003; May 2007).

Fairness

Private import safety regulation typically relies on the market power of northern retailers. By imposing management and product standards on foreign producers, northern retailers presumably increase the value of the supply chain, but it also seems likely that northern retailers or consumers will retain most of that value. Still, there is little rea-

son to think that producers are worse off than they otherwise would have been, since they retain or obtain access to desired northern markets, and avoid the same risks of catastrophic market loss that retailers avoid. Thus, private import regulation is likely to satisfy the criterion of Pareto improvement in most cases. Nonetheless, fairness, or distributive justice, may pose significant challenges over time. If northern interests are retaining most of the surplus generated by private safety regulatory systems, southern interests—especially in large economies such as China, India, and Brazil—will have an incentive to create competing programs and brand identities to take some of that surplus back (Henson and Humphrey 2008: 16). Thus, private import safety regulators will have to attend carefully to questions of distributive justice if they hope to persist.

There is also an important question of the fairness of private regulatory systems to small producers. Management system and record-keeping requirements, like most regulatory requirements, are generally more difficult for small enterprises to implement, and certification fees are relatively more burdensome. Some ameliorative steps have been taken through programs such as the GLOBALGAP's group certification program. Moreover, some research indicates that agricultural programs do not necessarily disadvantage small operators (Maertens and Swinnen 2007, 2009). But these effects are highly context dependent, and private safety regulation must be closely scrutinized for its ability to treat small operators fairly.

“Rent seeking”—that is, the construction of rules to favor some interests over others (Tullock 1967)—is a problem in all regulatory programs, public and private. Competition among regulatory programs may reduce this problem, as different interests commit to programs that do not unfairly disadvantage them, and programs thus have incentives to adapt in order to attract a wider array of interests.

Equally important is the political distribution of regulatory authority. Reliance on standards generated largely by northern interests can remove considerable regulatory power from southern countries, and they often express concern about that fact. While some of this problem may be alleviated by the legitimacy strategies discussed later in this chapter, it is also important to note that researchers have recently found that southern countries experience benefits in using regulatory standards developed in the north. In their studies of the Chilean salmon and Mexican fresh produce industries, Iizuka and Borbon-Galvez (2008) find that the availability of working packages of private standards and implementation institutions benefits resource-strapped southern countries because they can avoid expending resources on

those functions and instead devote them to communicating policies, adapting agency practices, and supporting local businesses. While the benefits and costs of using such packages will undoubtedly be weighed differently in different contexts, trade-offs do exist.

Accountability and Legitimacy

Accountability arrangements are far more complex and multidimensional than is commonly understood (Scott 2000). Accountability takes multiple forms and runs in multiple directions in private safety regulation. Nonetheless, the dominant accountability in current import safety regulation is to northern interests. Northern retailers are accountable largely to northern consumers, and northern governments to northern citizens.

The widespread emergence of transnational supply chains puts this accountability structure in question. To whom should private regulators be accountable? There is of course no straightforward answer. Northerners interested in import regulation are primarily concerned with ensuring that participants in foreign supply chains keep risks to consumers down to an acceptable level. However, private safety regulatory regimes also have very significant effects on southern producers, as well as their employees, and on southern consumers because the quality and prices of products may be affected. Moreover, private regulatory programs have incentives to consider southern interests, since failure to do so might undermine the programs' long-term viability.

The food safety programs have begun to incorporate representatives of producer and southern interests, thus expanding their accountability. But it is not clear how far this expansion of stakeholders will go; at present decision making appears likely to remain dominated by retailers and producers, usually relatively large ones. The interests of many other constituencies (e.g., southern consumers, laborers, northern workers) are not well represented, and that could turn out to be a major problem. On the other hand, it is possible that the regulatory programs' need to achieve broad legitimacy will make up for this limited accountability structure.

To survive and thrive, private import safety programs must achieve a significant level of legitimacy—that is, acceptance that they are the appropriate agencies to carry out their functions and that the requirements they stand for deserve adherence. Legitimacy is essential to effective regulation; without it the costs of monitoring and enforcement are too high. The ecosystem structure of modern safety regulation suggests that there are multiple publics with multiple legitimacy standards. It

may indicate that a new kind of system legitimacy is under construction. Most constituencies are satisfied by one regulatory program or another, but there is no single legitimacy structure (Black 2008). It may also be that continuities from one program to the other create a kind of mutually reinforcing legitimacy dynamic. If this arrangement holds, it may signal a significant new development in legitimacy structures.

Just as there is no single accountability framework for the regime as a whole, so also is there no single legitimacy structure. Instead, there is a patchwork of legitimacy that will add up to system legitimacy if enough of the individual pieces maintain sufficient acceptance with their relevant constituencies. This is a very rough, inelegant conception of legitimacy, but it may be emblematic of the present era in new transnational governance. Assessing it will require looking not only at the individual regulatory programs, but also at how they interact with each other and how they add up. Analyzing it may be aided by Scharpf's (1970) equally rough concepts of "input" and "output" legitimacy. Input legitimacy refers to the procedural pedigree of a policy, including the degree of participation by affected interests and the quality of openness and deliberation that goes into forming it. Output legitimacy refers to a policy's substantive acceptability, and includes its success in addressing the social problem to which it is addressed.

On the input side, we see that most private safety regulatory programs involve limited but expanding stakeholder participation, still dominated by northern interests but with growing southern representation. Overall, they also seem to show a growing amount of transparency and public deliberation. Private import safety programs thus seem to be developing considerable input legitimacy, sometimes comparable to that of public agencies.

On the output side, well-managed private safety regulation programs have the capacity to significantly improve the control of risks to safety. They may also improve the positions of affected stakeholders if properly constructed. Effectiveness and fairness can thus be seen as augmenting output legitimacy. Moreover, by competing to attract ever larger constituencies, private regulatory programs may potentially be adumbrating a new kind of anticipatory democracy, one in which they attempt to predict and implement the kinds of standards and regulatory institutions that emerging constituencies will eventually desire (Meidinger 2008b).

However, these prospective legitimacy gains remain deeply contingent. Significant failure in one portion of the regulatory ecosystem has the capacity to undermine the legitimacy of programs in other portions. Thus, each program has an interest in preventing catastrophic

failures in other nearby ones while still competing with them. Whether they will manage to so coordinate themselves remains to be seen.

Regulatory Legitimacy in a New Era

Today's transnational safety regulatory system is made up of a multitude of competing, yet partially interdependent, public and private regulatory programs in which most regulatory functions are carried out by both government and private entities. While this regulatory pluralism has considerable advantages, individual actors in the system also face major challenges in determining how to relate to other actors and the regulatory ecosystem as a whole. Doing so will probably require much more improvisational, adaptive, and cooperative strategies than many regulators—particularly government agencies accustomed to relative monopolies—are accustomed to. In trying to protect the public interest, government agencies will have to find ways to take advantage of useful private regulatory practices and curb problematic ones. They will also have to foster accountability structures wherein the interests of powerful private regulators are aligned with larger public interests and the full range of interests along the supply chain is accounted for satisfactorily.

Ultimately, the existence of multiple public and private regulators means that there is an ongoing contest for regulatory legitimacy, and governments will have to both foster effective private regulation and partially “ride” the legitimacy of private regulatory organizations if they are to have a chance of effectively orchestrating the relevant actors.

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