E. GOVERNANCE PERSPECTIVE

LEGAL DESIGN
OF A META-REGULATORY REGIME
FOR RESPONSIBLE CERTIFICATION

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0. LEGAL DESIGN … RESPONSIBLE CERTIFICATION

Objective

Mapping a regulatory governance perspective.

Is responsible certification a regulatory concern?
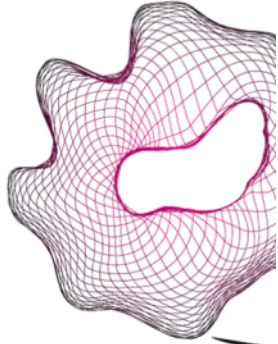
And if so, how so?

Though this be madness, yet there is method in't.

Main subjects

1. Threats & Opportunities of Certification
2. Some Basic Concepts
3. Responsible Certification in Markets
4. Responsible Certification in Public Hierarchies
5. A Closer Look at Competition Law Aspects
6. Some conclusions / statements
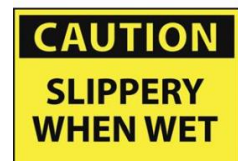
CAUTION SLIPPERY WHEN WET

1a. THREATS TO
RESPONSIBLE CERTIFICATION

A Pakistani police officer guarded a factory in Karachi that was destroyed this month by a fire that killed nearly 300 people, many trapped behind locked exits. (September 2012)

A USA TODAY examination shows that thousands of "green" builders win tax breaks, exceed local restrictions and get expedited permitting under a system that often rewards minor, low-cost steps. (October 2012)

USGBC: U.S. Green Building Council (501(c)(3) IRC NGO)

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1b. OPPORTUNITIES FOR RESPONSIBLE CERTIFICATION

Increase of Global Trade/Welfare interdependencies / Rise in Global Governance

Demise of Welfare state: Privatization

Rise of 'Regulatory Capitalism'…

Nationalization of International Law & 'Governance by Technical Necessity

Governments and NGOs, often push or pull for certification

Esp. standards for social values (environment, labour, health, safety)

Certification is platform for mobilization (force of change)

Answer both to market failure & to government failure!

But with strong markets & strong civil societies (iNGO's)….

also strong (instead of 'hollowed-out') states to match?

2. SOME BASIC CONCEPTS OF RESPONSIBLE CERTIFICATION

Approach to pros & cons of certification

Concern over *responsible* certification..

a. Certification?

b. Legal design

c. of meta-regulation

d. for responsible certification

A brief clarification

2a. SOME BASIC CONCEPTS OF RESPONSIBLE CERTIFICATION

<u>Certification</u> is a declaratory statement upon a conformity assessment* against some (general or specific/ abstract or concrete) standard to the effect that the object** of assessment is in conformity with the standard.

* the process of determining the above conformity, by means of (laboratory) tests, inspections, exams, audits etc., of …

** e.g. persons, organizations, constructions, products, services, processes etc.

Certification: a public or a private law affair (*erga omnes*/*inter partes*)

with authoritative or indicative legal effects (or none?)

about 1st, 2nd or 3rd party conformity assessments,…

UNIVERSITY OF TWENTE.   .. executed by the same or another organization
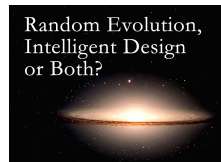
2b. LEGAL DESIGN OF RESPONSIBLE CERTIFICATION

The conceptualization, enabling multiple prescriptive (varied) instantiations, either explanatory, advisory or by authority, of legal rules, regimes or institutions (including legal forms or procedures, or sets thereof).

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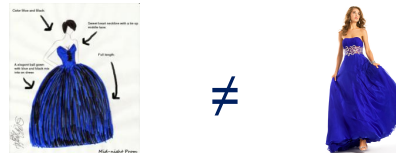
Not legal fact finding (upon legal claims or propositions about legal states of affairs).
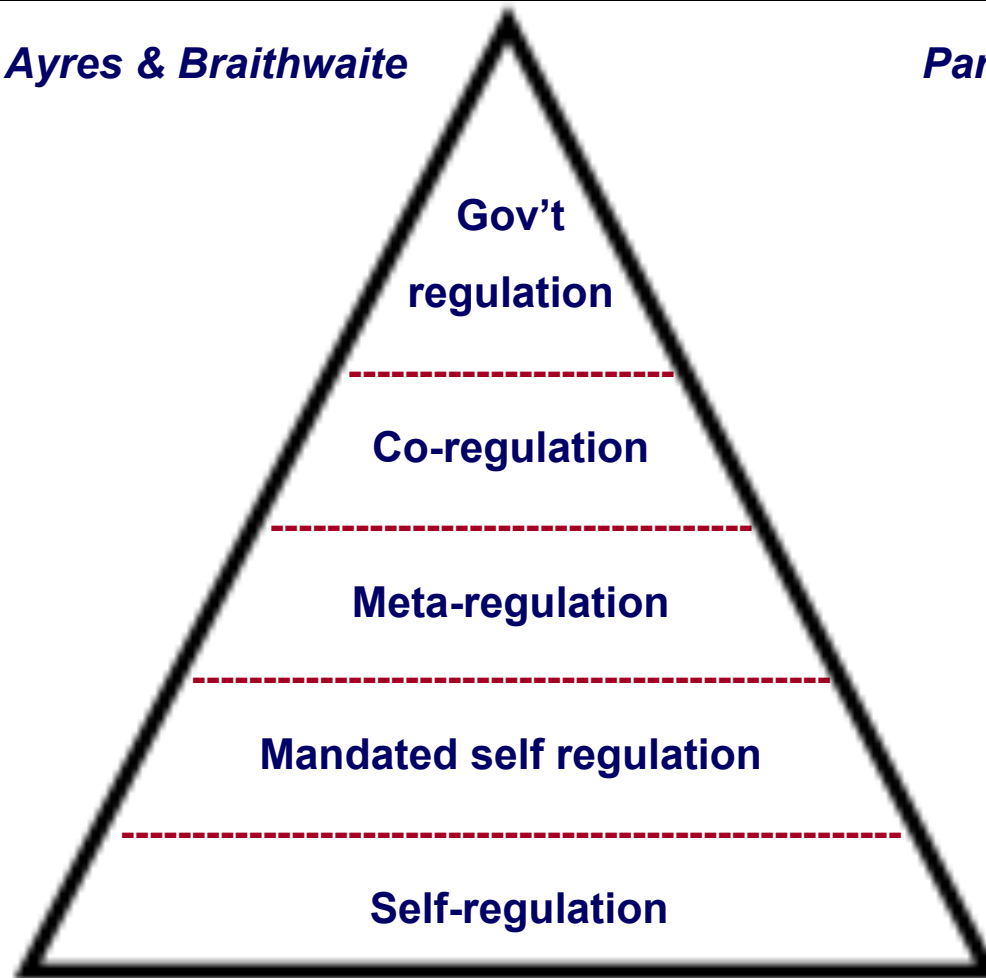

Random Evolution, Intelligent Design or Both?

Prescriptive legal studies, not descriptive

legal studies – how legally secure responsible certification

2c. META-REGULATION IN RESPONSIBLE CERTIFICATION

Insp. by Ayres & Braithwaite

Parker & Scott

Gov't

regulation

Co-regulation

Meta-regulation

Mandated self regulation

Self-regulation

2d. RESPONSIBLE CERTIFICATION?

Backdrop of Regulatory Capitalism & Decentring of States

Various issues of 'constitutionalism' or legitimacy…

- input: when impacts – 'consent'; stakeholder voice/exit/loyalty

- rights: respect for human rights (also externalities) and legal principles

- output: effectiveness on (long-term, key) societal interests (e.g. safety, security, health, environment)

issue of fragmentation on all counts..

'Broad challenge' of limits to (de facto) Public Power & Checks & Balances
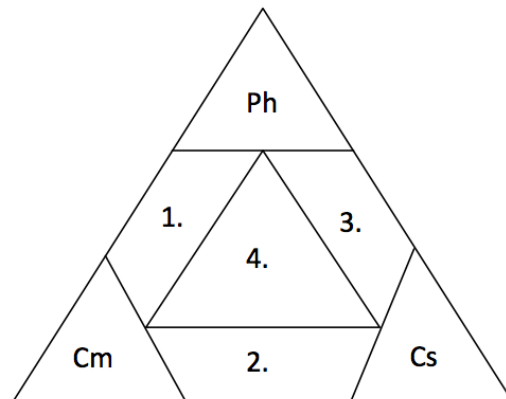
- Global Administrative Law; Re-Instating States; Regulating Markets

- Adopting 'real human rights' (horizontal application)

2d. RESPONSIBLE CERTIFICATION?

Responsible Certification seen as fit with institutional (legal) rules about workings of basic modes of governance…

... representing different views on input & output legitimacy...

in Competitive markets (Cm)

B2B/B2C 'exit' / efficient exchange

Contract, Consumer protection
 & Competition law

in Public hierarchies (Ph)

G2C/G2G 'voice' / servient governmnt

Constitutional & Administrative

law

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3. RESPONSIBLE CERTIFICATION IN COMPETITIVE MARKETS

Fit of Certification with Institutional Rules of Competitive markets

possible **private law** responses – to avoid market failure

1. Issue of fair competition (input: level playing field)

   address by 'inclusive' / 'competitive' certification (& standards)

2. Issue of consumer protection (input: e.g. info.-symmetry)

   address by private accreditation? ISO/IEC audits & certification

3. Issue of externalities (rights: 3rd party)

   address by broad stakeholder involvement (also in underlying

   standards)? Liability for (purposive) 'protective effect'?

4. social welfare (output: societal responsibility)

   address social values through CSR or comp. advantage?

3. RESPONSIBLE CERTIFICATION IN COMPETITIVE MARKETS

Fit of Certification with Institutional Rules of Competitive markets

possible **public law** responses – to remedy market failure

1. Issue of fair competition (level playing field)

   address by public competition law WTO/EU(MS)!

   both regarding public and private 'obligations' of certification

2. Issue of consumer protection (transparency/info-symmetry)

   address by public accreditation (EU-directive)!

   public authority; ISO-IEC standards; standards for certification

3. Issue of externalities (rights legitimacy)

   Legislated protection of third (NGO) parties?

4. Issue of rights & social welfare (output legitimacy)

   public hierarchy measures (see 4. e.g. publicisation)

4. RESPONSIBLE CERTIFICATION IN PUBLIC HIERARCHY

Fit of Certification with Institutional Rules of Public hierarchy

possible <u>public law</u> use of private certification

1. Certification as public permission/admission

   - as binding or interchangeable / challengeable standard

   - as presumed evidence of compliance/conformity

2. Certification as conditional to public permission (subs./procurem.)

3. Certification as indicative of public law compliance

4. Certification as mere market positioning

Variations: monopoly (public?); oligopoly (licensed/notified bodies); regulated competition (accepted standard); open competition (self regulated standards)

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public⇔private / competition law?

4. RESPONSIBLE CERTIFICATION IN PUBLIC HIERARCHY
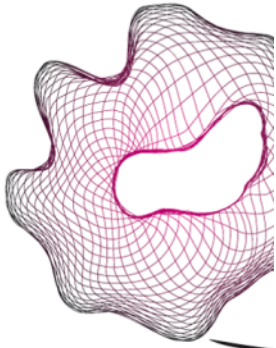
Types 1-3 significant: 4 ways to secure fit with public interest

Starting from private certification at a….

a. Public accreditation / Market surveillance

    non-public interest specific (see 3.)

b. Meta-regulation (Notified bodies/certification bodies)

    – 'new approach model'; Decision 767/2008 criteria conf.

    assessm. (also used by NAA's): est., exp.compet., indept.,

    impart., proper proc. criteria (Outsourcing public regulation)

    MS – (non) EU driven; regulated markets; regulating sectors e.g.

    Bio-fuels; Commodities Act; Construction Law

c. Co-regulation

d. Public regulation or publicisation

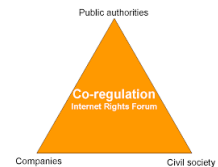# 4. RESPONSIBLE CERTIFICATION IN PUBLIC HIERARCHY

c. Co-regulation

Particularly relevant in private certification type 1-2 – or type 3, when involving key public interests (safety, security, environment, health) Certification & standardisation as co-production

Assuming private certificating body, public involvement by (co-) selecting or acknowledging used standards, or public observers in certification activities.

Liability of government/states?

Public authorities

Co-regulation
Internet Rights Forum

Companies   Civil society

d. Public regulation or publicisation

4. RESPONSIBLE CERTIFICATION IN PUBLIC HIERARCHY

d. Public regulation or publicisation

Particularly in certification type 1- or 2 with serious concern over key public interests (safety, security, environment, health).

Public regulation ... certification by public law legal acts, but execution by private body/bodies and/or conformity assessor(s) as monopolists (Fra.bo Spa) / as licensed competitors.. as free competitors but upon a public (acknowledged) standard.
-- competition law issues? (Also beyond type 1a) State respons'ty?

Publicisation … assumes certification as public law act executed by a public law body.

In both subtypes: public law compliance
Liability of government/states?

4. RESPONSIBLE CERTIFICATION IN PUBLIC HIERARCHY

Possible public law use of private certification

Analyse certifcation-type x regulatory type

Regulatory type ➡ Certification type ⬇	a. Public accreditation	b. Meta-regulation	c. Co-regulation	d. regulation/ publicisation
1. Public permission	-	-	x	x
2. Condition to permission	-	x	x	-
3. Indicative of publ.compliance	x	x	-	-
4. Mere market making	x	-	-	-

'IN CONCLUSION'

Self regulation – making a system that is as weak as possible and then gaming it? Responsible certification?

Public law role to remedy private/market failure…

- when possible through meta-rules (e.g. competition law ++)

- if not then (co-)regulate/publicize

- especially on key human rights issues: safety, security, environment, health, privacy... 'positive obligations' under ECHR

- without neglect of possible horizontal effect of such rights (3rd parties)

ORGANIZING A MARKET FOR STANDARDIZATION AND CERTIFICATION

- What does the optimal standardization/certification landscape look like?

  - Too much competition?

  - Too much choice?

  - Or too much concentration of power; conflicts of interest

- Article 101 TFEU: "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition..."

- Lande and Marvel (2000): "The Three Types of Collusion: Fixing Prices, Rivals, and Rules"

FIXING RULES UNDER ARTICLE 101 TFEU

- Main issues:

    - Exclusion (of competitors, of innovative technologies)

    - Exploitation

    - Collusion

- Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreement

- What is caught by the scope?

    - standardization which qualifies as an economic activity (Case C-113/07 *Selex sistemi*)

- Governance rules for SSOs in order to ensure access of third parties

CERTIFICATION AND ABUSE OF DOMINANT POSITION

- Article 102 TFEU certification cases:
    - *General Motors*
    - *British Leyland*
- Concerns: exploitation of customers, exclusion of rivals, internal market considerations

FRAND FAILURE: PUBLIC LAW SOLUTIONS TO "PRIVATE" QUARRELS

- Disputes involving FRAND terms for SEPs – public and private aspects (*Rambus, Qualcomm, Huawei*)

- Private interest aspects
  - Access to market
  - Consumer access
- Public interest aspects
  - The whole standardization system might fail...
  - Eroding trust

- Contract law and soft governance mechanisms – not enough to allow the parties themselves to achieve their objectives
- Competition law – not enough to shape the standardization system

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ONGOING DISCUSSION
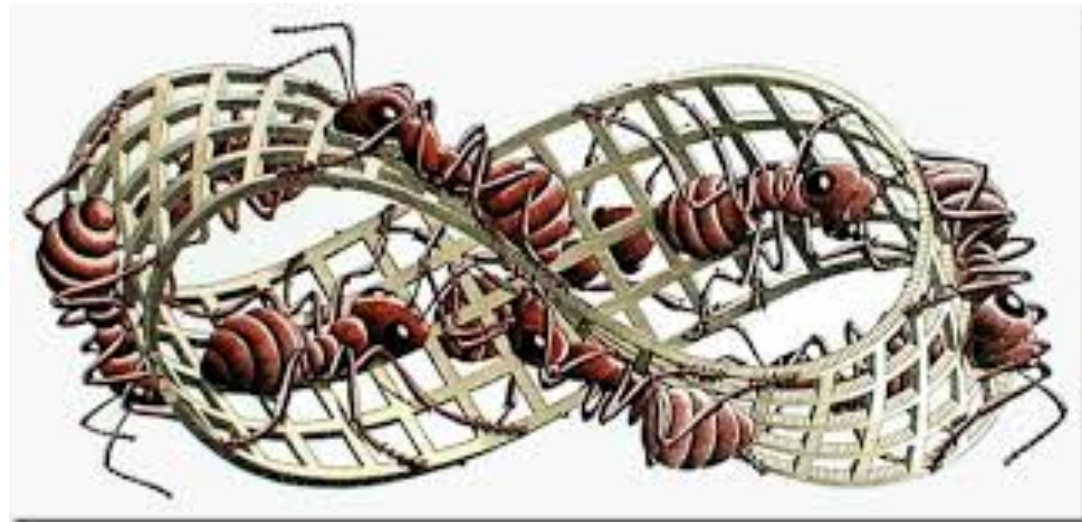
'IN RESERVE SLIDES'

1a. THREATS TO
RESPONSIBLE CERTIFICATION


The New York Times

A Pakistani police officer guarded a factory in Karachi that was destroyed this month by a fire that killed nearly 300 people, many trapped behind locked exits.

By DECLAN WALSH **and** STEVEN GREENHOUSE

Published: September 19, 2012

ISLAMABAD, Pakistan — A prominent factory monitoring group heavily financed by industry gave a clean bill of health to a Pakistani apparel plant last month, just weeks before a fire engulfed the premises and killed nearly 300 workers, many of them trapped behind locked

RESPONSIBLE CERTIFICATION?
THREATS
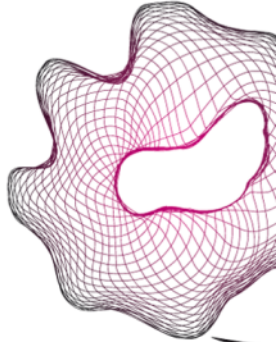
Public (law)

2nd – 3rd party

regulation

Ali Enterprises

Private (law)

1st –2nd – 3rd party

regulation

"*Monitoring ceased in 2003*"

Government Failure?

Market failure?

1a. THREATS TO
RESPONSIBLE CERTIFICATION
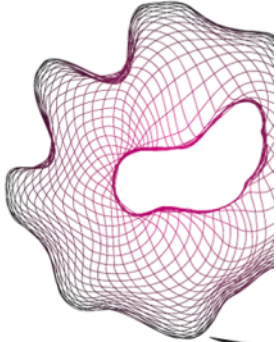
5:46PM EDT October 24. 2012 - LAS VEGAS

A USA TODAY examination shows that thousands of "green" builders win tax breaks, exceed local restrictions and get expedited permitting under a system that often rewards minor, low-cost steps.

USGBC: U.S. Green Building Council (501(c)(3) IRC NGO)

Buildings get points for features that aim to minimize emissions, water use, waste and indoor pollutants.   (Also outside USA......)

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RESPONSIBLE CERTIFICATION?
THREATS

*"Across the United States, the Green Building Council has helped thousands of developers win **tax breaks and grants**, charge higher rents, exceed **local building restrictions** and get **expedited permitting** by certifying them as "green" under a system that often rewards minor, low-cost steps that have little or no proven environmental benefit, a **USA TODAY analysis has found."***

E.g. $27 million tax break over 10 years upon certification by the 'U.S. Green Building Council' (NGO) (Nevada law)… Palazzo hotel Las V.

RESPONSIBLE CERTIFICATION?
OPPORTUNITY & NECESSITY

Increase of Global Trade/Welfare interdependencies / Rise in Global Governance

Demise of Welfare state: Privatization

Rise of 'Regulatory Capitalism'…

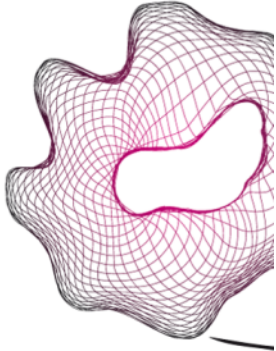**Increase in transnational private ∧/∨ public standards & certification (as law?)***

* Trans Governmental Agencies: 'nationalization of international law'
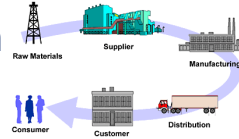
* Trans Administrative Agencies: 'governance by technical necessity'

Strong Markets – Strong iNGO's – Strong States (or a Hollowing-out of States?)

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RESPONSIBLE CERTIFICATION?
OPPORTUNITY & NECESSITY

Certification is more than indication of quality….. E.g. in Supply-Chain

Also standards for social values (environment, labour, health, safety)

Governments ∧/∨ NGOs, often push or pull for certification

Certification is platform for mobilization (force of change)

SOMO   v.

Cause 1: Market failure - self-regulation as fix for information asymmetry and collective action problems. Create trust – esp. 3rd party systems
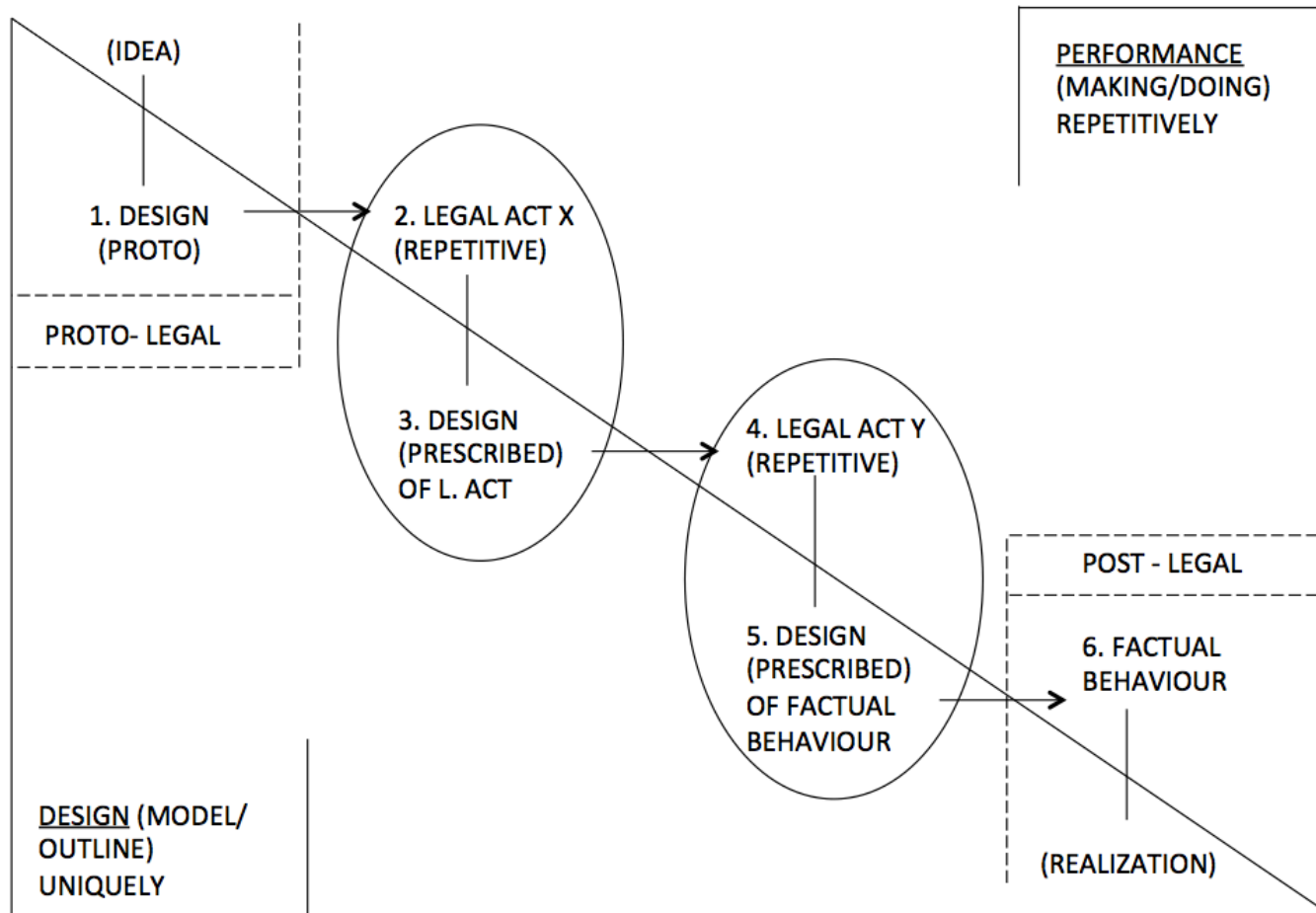
Cause 2: Government failure – fix by social responsibility of companies

fit with neo-liberalism: constrain government regulation; 'post-regulatory state'

outsource regulation: standard setting - certification

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RESPONSIBLE CERTIFICATION?
LEGAL DESIGN

ORCHESTRATING MULTIPLICITY

Abbott & Snidal (2006) Governance Schemes For Int. (..) Standards

	Nesting	**Overlap**	**Parallelism**
General Properties	Hierarchical	Nonhierarchical	Nonhierarchical
	Single Issue Area	Multiple Issue Areas	Single Issue Area
	Rules resolve conflicts	Conflicts addressed through implementation, codification	Competition both creates and resolves conflicts
Forum Shopping and Regime Competition	Hierarchy limits forum shopping and competition among schemes.	Forum shopping and competition among schemes to achieve different ends	Forum shopping and competition among schemes to achieve "same" end

Table 1: Different Forms of Relations among Government Schemes

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