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**Multi-Interest Self-Governance  
Through Global Product Certification Programs**

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# MULTI-INTEREST SELF-GOVERNANCE THROUGH GLOBAL PRODUCT CERTIFICATION PROGRAMS\*

Errol Meidinger\*\*

## ABSTRACT

This paper describes emerging new governance systems centered on programs that 'certify' products as having been produced in environmentally or socially appropriate ways. These programs typically promulgate their own standards, which are often considerably stricter than state standards, and implement them through distinctive adjudication, inspection and monitoring institutions. Conventionally labeled as 'self-governance' because they are organized around global product chains, the programs also incorporate a growing variety of non-economic interests from around the world in policy making and implementation and often compete with each other within economic sectors. The paper focuses on forestry, but also discusses organic agriculture, apparel, and fisheries certification, describing the structure and dynamics of these programs as well as their relationships to state legal regimes. It suggests, among other things, that the programs should be understood as a kind of law making that interacts in intricate ways with state based legal systems, that they have had surprisingly large effects on operational practices, that they may be evolving distinctive new accountability systems, and that they rely particularly heavily on 'logics of appropriateness' in seeking to establish their legitimacy.

**KEYWORDS:** accountability, administrative law, certification, conformity assurance, eco-labeling, environmental management, globalization, governance, international trade, labor standards, legal pluralism, self-regulation, self-governance, standard setting.

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## INTRODUCTION

Emerging governance systems are overrunning several classical divisions of regulation, and indeed of law – between states, firms, and the public, and between national and international domains. Because these changes are effectuated through market-centered networks, it is sometimes said that modern transnational regulation is essentially a form ‘self-regulation’ by economic actors. While there is truth in this depiction, it needs significant revision in order to comprehend the structure, dynamics and implications of many emerging systems. First, the concept of ‘self’ must be expanded beyond a relatively narrow group of profit maximizing market participants to include a variety of other actors such as non-governmental environmental and social justice organizations and states. This has been done to some extent by adopting the term ‘self-governance’ in place of self-regulation, but again, the expanding and increasingly public nature of the regulatory communities involved merits notice and analysis. At the same time, the governance process is still implemented in large part with the traditional regulatory techniques of normatively based rules organised in terms of rights, duties and carefully defined formal responsibilities. Second, the concept of regulation must be expanded beyond traditional

'public law' concerns to include the 'private law' ones such as facilitating transactional predictability and efficiency. The new regulatory systems reach from negotiations about whether and how to control social and environmental externalities of economic activities down through firms' routine organizational and management practices. Thus they are simultaneously broad and deep. Finally, the regulatory process appears to be growing increasingly dynamic, as negotiations among authorised actors transmute into competitions among contingently empowered regulators and their contested constituencies.

This paper examines these developments by reviewing transnational, supragovernmental regulatory systems that are taking shape in several sectors through the development of product certification programs. These programs set standards for proper management, assess compliance, and publicize results, typically by awarding rights to label products with their logos. The primary case is forestry, which has seen the most extensive and sharply defined institutional development over the past decade; examples from fisheries, agriculture, apparel and other sectors are also noted. The next section begins by describing the evolution of certification institutions generally and their recent application to transnational social and environmental regulation. It also compares and contrasts some of the institutional arrangements that have emerged in different sectors. The third section examines the relationships and compatibility between the emergent certification institutions and state based legal systems, with primary reference to the US legal system and the international trading regime. It preliminarily describes a complex set of relationships between certification programs and active and passive state legal processes, which currently manifest both a high level of interpenetration and continuing partial autonomy among the different centers of legal activity. The final section considers some possible grounds for assessment of the emerging self-governance systems. It suggests, among other things, that the multi-sector certification systems have led to operational improvements in each area studied, and that they may be in the process of constituting a new non-principal-agent accountability system whose most important capacity is to learn. It also describes distinctive legitimation strategies centered on the development of master metaphors while also relying on traditional standard setting technologies and competitive testing.

## **CERTIFICATION**

### **Forestry**

Certification institutions enjoyed a major spike following the 1992 United Nations Conference on Environment and Development (UNCED) in Rio. Among the multiple reasons were both 'failures' and 'successes' of the Rio conference. On the negative side, UNCED failed to produce a binding

forest convention to guide and harmonise forestry regulation across the various forested countries, leaving great disparities in forestry practices around the world and little hope of curbing accelerating forest destruction in many developing countries. On the positive side, UNCED consolidated the language and concepts of sustainable development and sustainable forest management, and ratified calls for a greater role of civil society organizations in setting and monitoring public policy (United Nations, 1992).

An consequential reaction to these developments was the 1993 establishment of the Forest Stewardship Council (FSC), a global non-governmental program for certifying proper forest management. Founded by a coalition of environmental and social justice NGOs, progressive wood buyers, and forestry experts, the FSC quickly promulgated a set of globally applicable standards for forest management together with an institutional system for certifying complying forests and labeling products made of wood from them. Building on the sustainable development movement, the FSC standards combine environmental, social and economic requirements in 10 'principles' and 56 'criteria' that further define the principles (FSC, 2006). These are given additional detail in standards developed for specific countries and regions, as well as in assessment protocols used by certifiers. Certifiers are organizationally independent of both the FSC and the firms seeking certification, although they are chosen and paid by the firms and accredited by an FSC spin-off organization.

The FSC has an elaborate stakeholder governance system organised in three chambers – environmental, economic, and social, each with equal voting power – and following increasingly participatory and transparent processes (Meidinger, 2006). Membership in the FSC is open to any person or organization subscribing to its principles and endorsed by two existing members. Of the more than 600 current international members approximately 90 percent are organizations and ten percent individuals. Membership is skewed toward developed countries, but voting principles give members from the developing world equal decisional power to those from the developed world.

The FSC, while organizationally sophisticated, interesting and important, is only one part of the larger transnational, supragovernmental regulatory system that has emerged in the forestry sector over the past decade. The founding and early success of the FSC triggered the establishment of competing forest certification programs by coalitions of traditional forestry authorities including landowners, forest products companies, and governmental forestry agencies. The histories, details, similarities, and differences of the various programs are discussed at length in many other publications (e.g., Meidinger, 1999; Cashore et al, 2004; Meidinger et al 2003; Humphreys, 2006). Here it suffices to make several fundamental

observations. First, the programs have coalesced into two competing alliances, one centered on the FSC and the other on traditional land owner and industry interests through the Programme for the Endorsement of Forest Certification (PEFC), which currently consists of 32 nationally based programs (PEFC 2006). While some of the PEFC programs were arguably established with the purpose of undermining the FSC and possibly forest certification as a whole, that has not been the result. Instead, a broader system has taken shape in which the programs observe, mimic, compete, communicate, and negotiate with each other.

Second, the programs do so within a larger social field that increasingly includes government agencies. Indeed, the founding of the PEFC inherently brought governments into closer involvement with forest certification, since traditional forestry interests had long enjoyed close relationships with government agencies. In most countries where land was largely privately owned, the professionalization of forestry in the nineteenth and twentieth centuries also created close relationships between government forestry agencies, forest landowners and forestry companies, catalyzing a new forest governance systems (e.g., J Scott, 1998). Where forests were publicly owned (often developing countries with natural resources constitutionally assigned to the state but also with conflicting indigenous customary rights) (Goodman, 2002) the relationships were even tighter because government officials were directly in charge of forest management.

Third, the rapid globalization of timber markets in the twentieth century, and the concurrent organization of much of the world into exporting and importing countries, often reflecting their levels of economic development, also made forestry into an international policy arena. Forestry companies in countries with relatively demanding standards felt disadvantaged relative to those in countries with lenient or poorly enforced standards, while those from developing countries felt inherently disadvantaged in developed country markets. Moreover, new understandings of the importance of forests in controlling global climate change and protecting biodiversity made local forest management practices into international environmental policy concerns. While international negotiations failed to resolve these conflicts, they helped define forestry as a transnational policy domain. Thus, the expanding global market effectively created a larger legal space in which legal pluralism was both compounded and seen as a problem. At the same time, however, international negotiations and discussions among forestry and environmental professionals, academics, and activists began to articulate broad possible principles of harmonization, largely collected under the rubrics of sustainable development and sustainable forest management.

Finally, and perhaps most importantly, the adoption of forest certification was leveraged through existing international trading relationships. Transnational environmental and social justice organizations used the organizational and marketing interests of large transnational corporations, mostly brand-dependent retailers, to force the issue of global forestry standards (eg, Sasser 2002). A decisive instance was the campaign by the Rainforest Action Network (RAN) to persuade Home Depot, the world's largest wood products retailer, to commit to buying FSC certified products. Although Home Depot originally refused, RAN conducted an intense campaign against the corporation designed to threaten the value of its brand. RAN activists staged many dramatic actions in Home Depot parking lots, such as setting up huge blimp-like inflated chain saws painted with the Home Depot colors and logo and referencing a 'homedepotsucks.com' website. When customers were attracted to the spectacle RAN members enthusiastically thanked them for helping Home Depot destroy the world's rain forests and endangered species, but of course quickly verged into explanations of how Home Depot had the capacity to aid significantly in solving those problems but was in fact making them worse.

After dealing with hundreds of such actions, Home Depot came to see certification as desirable and agreed to buy as much FSC certified fiber as it could. When RAN turned its attention to the second largest wood products retailer, Lowe's, agreement to the same terms came swiftly. Contemporaneous negotiations by other activist organizations also succeeded with European retailers such as British B&Q and German OBI. These decisions turned the considerable resources of several large wood products retailers and their supply chains to the favor of forest certification, helping to leverage certification programs into the center of the global forest policy arena and restructuring the regulatory community. It also gave transnational corporations as well as timber products importing and exporting states enduring interests in participating in and monitoring forest certification policy. As a result, the policy making center of the present forest governance system can be very roughly and abstractly portrayed as in Figure 1.

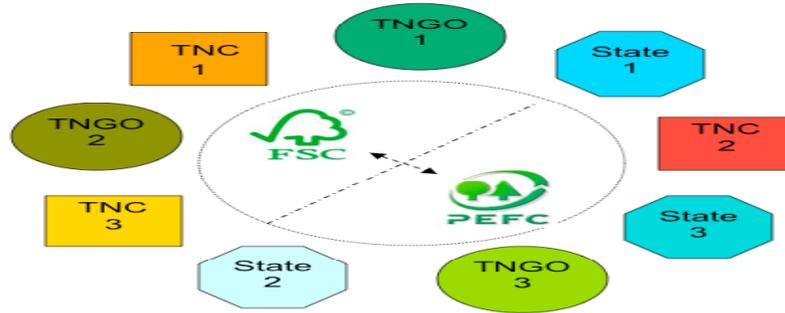


Figure 1. Emerging Structure of Transnational Forestry Policy Making (TNC = transnational corporation; TNGO = transnational nongovernmental organization)

The reality is of course much more complicated than Figure 1 can indicate. Several significant types of actors, such as local landowner organizations, influential researchers, and local environmental organizations are not represented. Moreover, lawyers, who often perform key roles in regulatory governance, are relatively rare in this arena, although the institutional arrangements take legal forms and national and international legal frameworks are quite important. Relationships among the various types of actors in the diagram are highly complex and changeable. Relationships within all types of actors, particularly states, are complex and sometimes conflictual. Finally, the power of the system is directly tied to global trading relationships outside the diagram. Still, the diagram suggests the main contours of the policy making system that appears to be emerging in the global forestry arena.

Such a system is potentially disorganised and ineffectual. The obvious question therefore is what phenomena might operate to structure both the governance system and the larger domain of forest management it seeks to organise. There seem to be several basic types of ordering mechanisms at work in the global forest self-governance system: (1) the increasingly detailed and elaborate discourse of sustainable forest management, (2) the increasingly formal and legalised institutional arrangements of forest certification, and (3) the growing competition among certification programs. In addition, all of these mechanisms operate in the framework of (4) elaborate state-based legal systems and global trade law. This paper concentrates on the second and fourth

mechanisms, as discussed in the next two sections, but also outlines the first and third.

## **Institutional Components**

When founded in 1993 the FSC was able to draw on a substantial fund of certification experience, some in forestry, but more in organic agriculture and the broader field of international standard setting that had taken form through the International Organization for Standardization (ISO). The ISO became very important with the rapid growth in international trade after World War II. Its primary work focused on 'technical' standard setting, defining the characteristics of such things as metal bolts and magnetic credit card strips so that they would function reliably around the world. Although such work had long gone on in subject-specific national standard-setting bodies (Cheit, 1990; Krislov, 1997; Schepel, 2005), the ISO federated and unified them, thus constituting an extensive and important transnational governance system.

Along the way the ISO developed standardised methods and approaches to carrying out the main functions involved in certification programs:

- 1) setting standards,
- 2) certifying compliance ('conformity assurance'),
- 3) accrediting certifiers, and
- 4) labeling products.

### *Standard Setting*

The FSC was able to draw on both these ISO modalities and the more recent experience of the International Federation of Organic Agriculture Movements (IFOAM) of which several FSC founders were veterans. It established the multi-stakeholder mechanism for setting standards outlined above, together with protocols for accrediting and auditing certifiers. Although these were somewhat different from the standard ISO approaches, carefully building in multi-stakeholder structures and non-economic criteria such as environmental and community protection, they were still clearly recognizable adaptations of the ISO models.

In the 1980s the ISO also began setting standards for organizational management. The premise was that globalization created demand for a mechanism whereby firms considering transactions with new partners could ascertain that they were well managed and therefore good business prospects. Positing that good management could be systematised and certified like any other commodity, ISO developed its 9000 series of standards, the hallmark requirements of which were that (1) a well

managed organization must continuously seek ways to improve its performance and (2) that specific officials in the organization must be made responsible for planning, monitoring, evaluating, and improving performance. It was thus a form of organizational governance that sought to institute organizational dynamism alongside predictability.

In response to UNCED, ISO committed to developing an environmental management standard as well, issuing the ISO 14000 series in 1996. The importance of this series was that it offered an alternative model of forest certification to that promoted by the FSC. While the FSC model relied on general performance standards in much the same way as many of the traditional ISO technical standards, the new ISO standards focused on internal management systems that would themselves define environmental goals and then monitor their success in meeting them and developing new ones. The ISO approach thus vested much policy-making discretion in firms, whereas the FSC vested it primarily in external multi-stakeholder groups.

The industry based certification programs generally favored the management standard approach, although some also contained substantive requirements. Over time most appear to have incorporated a growing number of substantive standards, although this is difficult to gauge accurately and there are uncertainties about how binding they are in many cases. A sense of the variation can be gained by comparing the FSC and the American Forest & Paper Association Sustainable Forestry Initiative (SFI) standards regarding biodiversity.

FSC Principle 6 provides (FSC 2006):

Forest management shall conserve biological diversity and its associated values, water resources, soils, and unique and fragile ecosystems and landscapes, and, by so doing, maintain the ecological functions and the integrity of the forest.

Criteria: . . .

6.2 Safeguards shall exist which protect rare, threatened and endangered species and their habitats (e.g., nesting and feeding areas). Conservation zones and protection areas shall be established, appropriate to the scale and intensity of forest management and the uniqueness of the affected resources. Inappropriate hunting, fishing, trapping and collecting shall be controlled.

6.3 Ecological functions and values shall be maintained intact, enhanced, or restored, including: a) Forest

regeneration and succession. b) Genetic, species, and ecosystem diversity. c) Natural cycles that affect the productivity of the forest ecosystem.

6.4 Representative samples of existing ecosystems within the landscape shall be protected in their natural state and recorded on maps, appropriate to the scale and intensity of operations and the uniqueness of the affected resources. . . .

The analogous portion of the SFI standard provides (SFI 2005-9):

Objective 4. To manage the quality and distribution of wildlife habitats and contribute to the conservation of biological diversity by developing and implementing stand- and landscape-level measures that promote habitat diversity and the conservation of forest plants and animals, including aquatic fauna.

Performance Measure 4.1. Program Participants shall have programs to promote biological diversity at stand and landscape levels.

Indicators:

1. Program to promote the conservation of native biological diversity, including species, wildlife habitats, and ecological or natural community types, at stand and landscape levels.
2. Program to protect threatened and endangered species.
3. Plans to locate and protect known sites associated with viable occurrences of critically imperiled and imperiled species and communities. . . .
4. Development and implementation of criteria, as guided by regionally appropriate science, for retention of stand-level wildlife habitat elements (e.g., snags, mast trees, down woody debris, den trees, nest trees). . . .

While both standards contain prescriptive language, the FSC one contains a great deal more, and the SFI standard requires simply that a firm have programs to promote a goal, rather than necessarily achieve it or any other outcome. What constitutes an adequate program in the SFI framework is therefore likely to depend to a greater degree on the certifier, and it may be difficult for any certifier to find that a company does not have a program just because the program is not very effective.

### *Implementation*

As with law generally, the real meaning of any standard depends on its implementation. Much attention accordingly has gone into defining the appropriate protocols for certification, the qualifications of certifiers, and the use of labels. It is neither possible nor important to discuss these in detail in this short paper, but several basic institutional patterns deserve note.

The first falls slightly outside the traditional categories of legal analysis. It is that the new governance systems reach well into the internal organization of certified firms and seek to turn them into affirmative legal actors. This is most obvious in the ISO standards, which rely on installation of detailed internal management systems to ascertain current performance, set goals, monitor achievement, and make corrections and improvements. If implemented well, this method has the potential to significantly enhance firm performance. The continuous improvement mandate creates a standard beyond simple 'compliance'. It implies a dynamic learning and adaptation process. And the whole approach seeks to enroll the firm in the process of policy formulation and improvement. It is not clear how far this potential will actually be realised. Neither the PEFC nor the FSC has placed heavy stress on continuous improvement. Still, empirical research on environmental management systems suggests that they can catalyze significantly improved environmental performance (eg, Coglianesse and Nash, 2001; Potoski and Prakash 2005; Parker, 2000).

A central actor in implementing multi-interest self-governance is the certifier, who is conceived as a trustworthy expert who can verify for outsiders that a firm is performing up to standard. The certifier is thus directly analogous to a government inspector or hearing-officer in a traditional regulatory scheme, except that the firm, rather than the state, chooses and pays the certifier. Although this compensation scheme seems to pose significant corruption risks, it apparently has worked well in traditional certification schemes. There may be various reasons for this, but a key one is likely that the certifier typically works to ascertain quality in a product that, if absent, will affect its performance. Therefore poor certification work is likely to be discovered by a product user. This is not the case with certification directed to production processes, such as environmental or worker protection, that do not have a direct effect on the functionality of the product. Certification programs do not seem to have focused very carefully on this risk thus far. They have dealt with it primarily by relying on professionalism in accreditation standards and, in some cases, random external auditing. Since programs compete with each other, however, and since outside critics of various kinds have considerable capacity to uncover substandard certifications, it is possible that quality controls are adequate. As discussed in section three, there is

even some possibility that risks of legal liability for substandard certifications will create incentives for quality work.

Because certification programs rely heavily on governance through economic transactions, product labeling is an important implementation mechanism in most certification programs (although not all). Labels serve as signals of economic reliability and social probity, in principle allowing customers to distinguish properly from improperly produced products. To function well, labels must be perceived as meaningful and accurate. The proliferation of certification programs in some sectors has made this problematic, in turn leading the programs to concentrate more heavily on 'brand' management through use of intellectual property laws. The forest certification programs have also engaged in an intensive and interesting dialogue on how much certified fiber a given product must contain to be certified. The FSC originally required every piece of wood in a certified product to be directly traceable to a certified forest. The necessary tracking and wood flow management can be very expensive, particularly in complex product chains with many small producers, and the PEFC challenged this practice frontally by instituting a 'percent-in, percent out' policy making it much easier to use their label. FSC has responded by revising its policy several times to make use of its label more feasible in complex product chains. Thus labeling requirements, rather than being mere technical matters, also are forums for policy debate and competition.

Enforcement systems in certification programs differ somewhat from traditional government regulatory systems in that the sanctions involved tend to be more diffuse and their administration less procedurally rigorous. While one form of sanction is revocation of certification, which is relatively formalised, this sanction is not very important in its own right. Its significance, as suggested in the section one, has to do with potential loss of access to markets and the value of brands. These can be imposed by a variety of actors, including important customers and NGOs. For the system to work reliably, more regularity and reliability will probably have to be achieved in the processes by which NGOs laud and shame firms.

### *Public Law*

As suggested above, certification institutions can be understood as supra-governmental legal systems. They perform the legislative function of setting standards, the adjudicatory function of certifying compliance, and the administrative functions of monitoring performance and sanctioning non-compliance. They are organised in terms of rules, rights, and duties. They rely on normative justifications for their decisions and have enjoyed considerable uptake in practice. Moreover, their needs to make good policies and implement them reliably are quite similar to those of governments. It is therefore not surprising that certification programs have

been using and elaborating a kind of administrative law to organise their activities. While there is much variation among programs, several broad tendencies are evident in the competing forest certification programs (Meidinger 2006).

First, driven by the FSC example, forest certification programs have gradually expanded and improved their provisions for public participation, both structural and procedural. On the procedural side, most certification programs now provide for open notice and comment processes in rule-makings and sometimes in adjudications. They also appear to be moving toward explaining their responses to the comments. Structurally, again driven by the FSC model, even the industry-based programs have sought to include participation by representatives of diverse interests. This participation is often controlled to a significant extent, for example by choosing who can represent which outside interests, but there nevertheless seems to be a widely felt imperative to be able to demonstrate multi-interest participation in policy making. The definition of who should be allowed to participate increasingly extends beyond directly affected interests.

Second, the certification programs have also been moving toward greater transparency, even in individual certifications. While one of the attractions of certification for firms could be that the certifier can stand between the firm and outsiders to assure them that all is well in the firm, thereby preserving the private and confidential nature of management operations, there is strong pressure to provide as much public information as possible regarding the quality and content of the certification decision. Even the industry based programs are moving in this direction, albeit sometimes slowly.

In sum, although it would be easy to overstate the participatory and transparent nature of the forest certification programs, they do seem to be moving slowly but broadly in the direction of more openness and deliberative regularity, which also seems to be a trend throughout the world of private standard setting (Schepel, 2005:6). This improves at least their potential for responsiveness and adaptability over time, and seems to put them in a favorable position vis-à-vis governments to produce high quality and effective governance. Of course, it is not an either-or situation, and certification institutions must be understood as acting in tandem with governments. Section three discusses some of the actual and possible relationships between certification programs and state based law. But first it is helpful to note some of the variations evident in the supra-state governance systems sectors other than forestry.

## Other Sectors

As noted above, the basic methods of extra-governmental standard setting and certification have been applied in a number of sectors and to a number of problems over the years. They seem to have originated in cases where their primary function was to facilitate the predictability and efficiency of economic transactions. Although they undoubtedly produced winners and losers, they were thought to have relatively little overtly political import, at least in the sense of making important choices about fairness and justice. Of course in some cases this was and remains a kind of subterfuge. Defining questions as largely technical and managerial makes them seem apolitical and therefore more controllable by interests with access to expertise (Wood, 2003). Even in the technocratic types of cases, however, recent years have brought an expanding commitment to increased public participation and transparency. The more interesting and harder cases are those in which the interests involved are not directly included in production chains. Forest certification provides a key example in which the standard setting and certification mechanisms are used to pursue environmental protection and social justice. This subsection briefly notes some potentially significant similarities and differences in other sectors that also involve overtly political concerns, although a more careful analysis will have to await future work.

### *Organic Agriculture*

Organic agriculture appears to be a transitional case. While organic agriculture is an ethical and political movement, it also is premised on the assumption that organic food products are in fact healthier and safer than non-organic ones and that consumers should be able to make accurate distinctions between organic and non-organic foods. Thus, it must have seemed quite logical, if a bit forward looking, to develop organic agriculture certification programs, the first of which was established in Germany in 1928, but the rest of which began after the late 1960s (Coleman and Reed, forthcoming). In 1972 the International Federation of Organic Agriculture Movements (IFOAM) was founded to develop global standards. IFOAM's membership is open, and it generally subjects draft standards to broad public criticism, but voting rights are restricted to organizations that qualify as 'predominantly organic.'

In 1980 IFOAM published a set of 'Basic Standards' seeking to harmonise criteria among then-existing nationally based organic certification programs. Perhaps even more than forest certification, organic agriculture certification has sought to define and revise standards by reasoning in terms of basic principles. The principles have gradually broadened from relatively focused goals (e.g., 'to maintain the long term fertility of soils' in 1980) to broad precepts (e.g., 'Organic Agriculture should sustain and

enhance the health of soil, plant, animal, human and planet as one and indivisible' in 2006) (IFOAM, 2006). The discussion of principles in turn appears to be closely tied to a more fundamental discussion of basic concepts. IFOAM's operational standards have been revised several times, and are currently undergoing a major revision that has lasted for several years.

Broadly speaking, IFOAM standards have sometimes been used as the basis for government-enforced organic food standards. But perhaps more importantly, as many as sixty governments have promulgated their own, often less stringent standards. Moreover, the US, Japan, and to a lesser extent Europe, appear to have developed their organic agriculture regulations with relatively little deference either to the IFOAM standards or to each other (Courville and Crucefix, 2003; Bolster 2006). The US, for example, conducted its own legislative and rulemaking processes starting in about 1990, which ultimately defined 'organic' in a way considerably narrower than its meaning in the IFOAM system. The IFOAM standards certainly had an influence on that process, but were not determinative. While the US relies mainly on private certifiers to enforce the system, it requires that they be accredited through a division of the US Department of Agriculture (USDA),<sup>1</sup> thus spurning the IFOAM affiliated International Organic Accreditation Service. Moreover, approximately two dozen of the accredited certifiers are state agencies, usually departments of agriculture, and approximate one-third are located in foreign countries. Thus, the US is using the size of its domestic market to extend standards into foreign countries.<sup>2</sup> Finally, although the USDA does not preclude the use of other standards in the field, it does preclude their using the label 'organic' for products that do not meet the federal standards. It thus remains possible in principle to develop other, more stringent labeling systems that serve as add-ons to the USDA system, although difficult in practice. Overall, then, the case of organic agriculture suggests caution in assessing the potential of supra-governmental regulatory systems to foster consistent transnational governance frameworks.

### *Apparel*

The transnational apparel industry poses difficult problems of worker protection and parity. Since the early 1980s activists have sought to use developed country market power to force improved labor conditions in developing country factories that supply those markets. The first major flurry of initiatives involved promulgation of corporate codes of conduct. These were typically prepared by individual corporations seeking to protect their brands from activist attacks, but soon began to show broad common patterns (eg, Webb, 2005). In the late 1990s three separate apparel certification programs were founded, all with the express goal of improving the consistency and implementation of codes of conduct. Two

of them, Social Accountability International (SAI) and the Fair Labor Association (FLA), were primarily the offspring of NGOs and governments, while the third, Worldwide Responsible Apparel Production (WRAP), was a creature of industry (see generally Bartley 2003). SAI and WRAP certify individual factories, whereas FLA certifies entire supply chains.

Competition among the programs has been intense and contentious at times. Efforts to put brand integrity at issue have occasionally brought backlashes that have challenged the legitimacy of the certification programs. Perhaps more than in forest certification and organic agriculture, apparel certification programs have been able to draw on labor standards developed by intergovernmental organizations, mainly the ILO. Yet labor standards remain contested, both in principle and in practice. Governments have been quite engaged in apparel certification debates, but in highly varying ways. The biggest challenge of the programs has been to achieve effective and credible control of labor conditions in far-flung and rapidly rotating factories (O'Rourke, 2000). With many exporting and importing governments holding inconsistent views about appropriate labor standards, the problem of achieving transnational consistency seems even more difficult than in forestry and organic agriculture, and the overall governance arena more disorganised and contentious. Still, despite the structural difficulty of the situation, one school of thought strongly argues that the presence of certification programs has helped to 'ratchet up' worldwide labor standards (Fung, O'Rourke and Sabel, 2001).

### *Fisheries*

As in the forestry and apparel sectors, a fisheries certification program has been created to curb stresses created by the expansion of global markets. Modeled on the FSC, the Marine Stewardship Council (MSC) is an independent, nonprofit organization seeking to promote sustainable fisheries and fishing practices worldwide. It was founded in 1997 as a joint initiative between the World-Wide Fund for Nature (WWF) and Unilever (owner of the Birdseye brand among others, and one of the world's largest buyers of fish). As in the other sectors, the MSC has a broad set of principles and criteria. These are largely biological and operational, however, and do not extend to social issues (MSC 2006a). The MSC has also focused on stakeholder processes, although they seem to have been somewhat narrower and more targeted to date than those of the other sectors discussed above.

Certification under the MSC principles and criteria is carried out by a small group of independent, MSC accredited certification bodies. Eighteen fisheries have received MSC certification to date, with an equal number undergoing assessment (MSC, 2006b). Government cooperation is

essential to fisheries certification, since governments are primarily responsible for controlling access and take in most fisheries.

Governments, thus, are among the main actors being certified. To date the uptake of MSC certified products seems to be limited to Europe and North America. There are grounds for believing that the MSC has contributed to improved fisheries management in many locales, but the challenges of over-fishing and of achieving effective control over open waters remain severe (eg, Gulbrandsen, 2005).

## **CERTIFICATION AND THE STATE**

With the partial exception of organic agriculture, all of the certification programs described above build upon and often require compliance with state promulgated statutes and regulations. Even organic agriculture certification must contend with state regulation of organic labeling. Moreover, certification programs often set stricter or different requirements than do state programs, thereby adding a layer of regulatory and normative complexity to the legal environment. This legal imbrication of certification programs with state policy and law raises important questions about how state legal systems relate to certification programs. In principle, the possibilities are nearly infinite, since states can choose to react or not to react, to incorporate, repudiate, or regulate certification standards, and to do so either immediately through direct action or from a distance through general legal standards. The sections below describe both active modes of state engagement and more passive ones, where certification institutions come into play with general bodies of established law. The discussion is somewhat preliminary, however, and must be treated as a first approximation because the questions posed are quite open-ended and subject to multiple possible resolutions.

### **Direct Engagement**

As the prior subsections indicate, governments interact with certification programs in a bewildering and sometimes contradictory variety of ways. In forest certification, while seemingly somewhat distant from developments at first, governments produced much of the information and management criteria that were drawn upon from the beginning. Moreover, several European governments provided crucial initial early funding to help get FSC off the ground. Over time governments became more involved, with government land managers and regulators participating in many FSC national and regional standard setting initiatives, as well as in PEFC programs.

### *Proprietary*

Even more strikingly, many government agencies, operating in their proprietary roles at the national, provincial, and local levels, have chosen

to subject forests they manage to certification under one or more programs (eg, Cashore et al 2006). Thus they have acknowledged the presumptive legitimacy and applicability of certification to their activities, which are already carried out under elaborate state laws. This rapidly growing trend by itself may indicate the growing authority of certification programs.

A number of governments have also adopted procurement policies either directly or effectively requiring that wood products purchased by government be certified. The most important have been adopted by European governments<sup>3</sup> and there is an ongoing EU debate about what criteria may legitimately be included (Tarasovsky and Sprang, 2005). Such procurement policies also seem somewhat at odds with the effort of international trade law to discourage regulations of extra-territorial production processes and methods (PPMs) as potential non-tariff barriers to trade, as noted below, but they are generally exempted from the GATT treaties.<sup>4</sup> Government purchasing policies are covered in a supplementary treaty that includes most of industrialised and a few developing countries, but the status under that treaty of procurement policies requiring or promoting certification remains to be adjudicated.<sup>5</sup> A reasonable prediction is that it would follow an analysis parallel to that in the next section on state mandated standards in international trade law, and treat as reasonable such requirements as conform to international standards. In any event, the adoption of government procurement policies has already been a major force both in promoting certification generally and in raising standards for participation and transparency in PEFC policies.

### *Regulatory*

In addition to their proprietary powers, states can exercise their regulatory powers with regard to certification programs. For analytical purposes it is helpful to distinguish regulation of activities within the state's territory (discussed in this section) from activities outside it (discussed under 'Trade and Competition Law' below). Overall, the picture is quite mixed, especially when multiple sectors are taken into account. In forestry, with a few exceptions, governments initially stood aside and observed the rise of certification. A few, however, have adopted requirements that forestry enterprises operating within their jurisdictions obtain certification (e.g., Carrera et al, 2006). This does not seem to have occurred in the US, but if it did it would face several legal questions. The first is the 'non-delegation doctrine', which is generally understood to prohibit legislatures from delegating their legislative powers to private organizations.<sup>6</sup> This has long been an issue with non-governmental standard setting bodies. The orthodox solution has been for legislatures simply to adopt as their own the privately developed standards.<sup>7</sup> Legislatures in the U.S. have often adopted private standards for housing construction, plumbing, electrical wiring, fire safety and many other areas. But such adoption does not

appear to have occurred for the kind of transnational, multi-interest environmental and social standards discussed in this article, although legislatures in some other countries have indeed mandated conformance to standards developed by forest certification programs (e.g., Quevedo, 2006; Derani forthcoming). At this stage, however, a more limited alternative seems possible. Rather than wholesale adoption of certification standards, particular provisions might be adopted to conform state laws more closely to certification standards. This is currently under discussion with regard to forestry in at least one state (Pinchot Institute, 2006), and a number of state fisheries laws probably have needed to be changed to achieve certification under the Marine Stewardship Council standard as discussed in above.

At the administrative level, U.S. agencies have a long history of incorporating privately generated standards in all kinds of public regulations (Hamilton 1978). Moreover, to help conform US law to WTO requirements discussed below, the National Technology Transfer and Advancement Act of 1995 (NTTAA) mandates federal agencies to 'use technical standards that are developed or adopted by voluntary consensus bodies' if feasible and also to participate in their development when possible.<sup>8</sup> Again, however, to date there seem to be no examples of adoption of multi-interest transnational regulatory standards of the kind discussed in this article. The most relevant example is organic agriculture, where the United States Department of Agriculture adopted regulations that are partly inconsistent with IFOAM criteria. This is readily possible under the NTTAA because it allows agencies to reject voluntary standards when it would be 'inconsistent with law or otherwise impractical' to adopt them.

Certification could also be used as a simple enforcement tool, a way of demonstrating compliance with accepted standards. This kind of delegation of inspection and adjudication responsibilities to certification programs would seem to be less problematic, since the standards to be applied would be authorised by state legislation, and many administrative implementation functions have been privatised over the past decade. However, the constitutional arguments also are less developed. The central question would probably be whether the certifier should be classified as an 'officer of the United States', in which case the delegation would be invalid, or a 'contractor', in which case there would not be an inherent constitutional problem. The certification process would still probably have to meet constitutional due process requirements. There are at least some cases of states using non-governmental certification programs to implement state law. Colorado, for example, requires wildlife sanctuaries to be certified by the American Zoological Association,<sup>9</sup> and there are probably many other such requirements.

Even when governments do not require certification, they may offer certified firms preferential treatment. The EPA 'Performance Track' program, for example, gives special treatment to firms meeting certification-like requirements.<sup>10</sup> In addition to displaying the Performance Track logo, qualified companies enjoy streamlined monitoring, record keeping, and reporting under the Clean Air and Water Acts, and increased flexibility in installing 'best available control technology' under the Clean Air Act. Approximately 17 states have similar programs (USEPA, 2006). Moreover, even without such official policies, it seems likely that governmental regulators will be prone to view certified firms more positively than uncertified ones. Thus, over time, absorption or incorporation of certification standards and routines into state law seems likely to occur informally, through infusion into the general expectations and conventional assumptions of regulatory communities.

### **Indirect Engagement**

The preceding subsection discussed states as affirmative actors in the way that the governance literature typically views them – as policy makers, regulators, conveners, facilitators, resource managers, subjects of regulation, etc. However, states also act on certification programs in more passive ways, through general legal systems with which certification programs must be compatible and through which they must work. This section examines some of those more general forms of engagement. It is necessarily incomplete and preliminary. An infinite amount of general law is potentially applicable to certification systems. Moreover, the results of legal interactions in the future are inherently difficult to predict, both because key legal provisions are unsettled and because state legal systems embody conflicting values. Thus, this section is intended to suggest general patterns of interaction, rather than describe the entire set of relationships or convey detailed results.

### ***International Trade Law***

One of the most important legal factors shaping certification programs to date has been the international trade law regime. Most of the certification programs discussed in this article have taken the form they have in significant part as a response to it. They made sense in the short term because governments were retreating from transnational regulation in favor of market liberalism and in the longer term because recognised international voluntary standards enjoy a special status in the international trading regime. Thus the FSC, for example, was purposely designed as a voluntary non-governmental standard.

Yet the status of the certification programs in international trade law remains somewhat ambiguous. This ambiguity depends to some extent on

the particular relationship of certification programs to states, since the international trade regime focuses primarily on the activities of states in promoting and regulating trade. So long as certification programs are seen as completely independent of states, their status under international trade law is relatively unproblematic. They are 'purely voluntary' standards, and traders can conform to them or not as they choose. As seen above, however, certification programs tend to be entangled with states in various ways, and to become more so over time. The question thus naturally arises whether they should be viewed as truly independent of states, or rather as attributable to them and therefore covered by the World Trade Organization (WTO) agreements.

The question is easiest to answer in those few cases where states effectively mandate certification of imported goods. States can do this either by requiring certification under a named program of all goods of a certain type sold in their territories, or by requiring importers to prove that their goods meet standards identical to those of the program. These requirements are subject to scrutiny because they can constitute 'technical barriers to trade' by effectively disadvantaging foreign goods and services in local markets. Such requirements may focus either on characteristics of the product itself or on the processes and methods by which it was produced (PPMs), which is likely to be the case for the kinds of certification programs discussed in this article.

Although some analysts argue that there is still a possibility that the Technical Barriers to Trade (TBT) agreement does not apply to PPMs, this seems implausible in light of the Shrimp-Turtle decision, which, although it did not decide the question, focused at considerable length on a US PPM requiring use of turtle excluder devices or their equivalent in the harvesting of shrimp sold in the US.<sup>11</sup> Thus, where conformance is mandatory, PPM certification standards seem likely to be treated as 'technical regulations' under the TBT Agreement<sup>12</sup> and hence subject to the requirements that they not create 'unnecessary obstacles to trade' or 'be more trade-restrictive than necessary to fulfill a legitimate objective.'<sup>13</sup> Legitimate objectives are indicated, but not clearly defined by the Agreement.<sup>14</sup> While they include the protection of human health and the environment, it seems likely that the goal of protecting environmental or social conditions in another state would be subject to vigorous challenge should it be raised. Nonetheless, the Agreement does grant a rebuttable presumption of acceptability to regulations 'in accordance with relevant international standards'<sup>15</sup> so long as they pursue one of the enumerated objectives.

Where certification standards are not mandatory they might still qualify as 'standards'<sup>16</sup> under the TBT, which are subject to additional, somewhat vague requirements involving coordinating with other relevant standards.<sup>17</sup> Certification standards are only standards for TBT purposes, however, if

they are approved by a 'recognised body', a term not defined in the Treaty. Some commentators argue that organizations such as the ISO, with designated national standards bodies, should be viewed as a recognised bodies, but that those such as the FSC and possibly PEFC bodies should not, since they operate with a much more ambiguous status in the eyes of states (Webb 1999). This argument is bolstered where certification domains are inhabited by competing programs. Yet the practical question still will have to be answered whether there is a sufficient nexus between the certification programs and governments to bring them under the TBT program. The answer could also change over time if the imbrication of state and non-state requirements continues to expand.

Certification programs operate under a complex set of legal incentives here. Internationally recognised standards are valued by the trade law regime as a way of facilitating international trade. States are enjoined to use 'relevant' ones in developing technical regulations, except when they would be ineffective or inappropriate, and these conditions must be 'fundamental' to justify departures.<sup>18</sup> The WTO appellate body, moreover, has defined 'relevant' fairly broadly as 'bearing upon or relating to the matter in hand; pertinent.'<sup>19</sup> This approach does not thus far seem to have brought many of the certification programs discussed in this article into the embrace of states.

Yet the programs are operating as if this may yet happen, and have worked hard to qualify as recognised standardizing bodies. They presumably hope that doing so will allow them not only to survive possible legal attacks, but also ultimately to amplify their effectiveness through state regulatory systems conforming to international trade law. The FSC, for example, has systematically reviewed and revised its structure and procedures so as to meet international criteria for standard setting and certification, and recently succeeded in getting itself added to the World Standards Services Network (WSSN) list of standardizing bodies (WSSN, 2006). Success in this arena will allow it to continue competing in the certification arena and over time possibly to draw states into acceptance and enforcement of its standards, at least those that survive its competition with the PEFC.

In sum then, international trade law has performed two large roles regarding certification systems. First, it has defined some of the key conditions under which they have evolved – particularly their careful distance from nation states in the early stages. Second, it has offered a possible vehicle through which they could greatly extend their reach, by endorsing international standards as the basis for state regulations and standards. Ultimately, of course, the rise of certification programs may also call for some clarification or revision of international trade law, as their full capacities and implications become more apparent.

### *National Competition Law*

National and regional competition laws have also played important roles in the formation and operation of certification programs, but these appear to be both highly variable and poorly researched. At present two limited points can be made with reference to U.S. law.

First, U.S. anti-trust law seems to have shadowed many efforts to develop and extend certification programs, and often to have been used as a tactical device in program competition. The AF&PA, for example, argued vehemently that if a buyer's group explicitly limited its purchasing strategy to FSC products it would violate US antitrust law. This appears to have led many purchasing programs to articulate more generic standards, which SFI could possibly meet (Cashore, Auld and Newson, 2003). Similar events occurred under U.K. anti-trust law. Second, US anti-trust law does potentially constrain self-regulatory programs like those discussed in this article, but only under relatively unusual circumstances where they have clearly anticompetitive effects (e.g., artificially raising prices), reduce choices to consumers, or are rigged so as to unfairly disadvantage products of equal quality (Pitofsky, 1998).

Finally, it is worth noting that the U.S. Constitution creates an added barrier to the uptake of certification requirements by individual states. Although they are free to require certification of activities conducted within their jurisdictions, they would be challenged if they required it of imported products. Under the 'dormant commerce clause' state regulations affecting interstate commerce are sustained only if the burden they place on interstate commerce is justified by the local interest they protect, and simply creating a level playing field for local producers competing with out of state ones is generally not viewed as sufficient justification.

### *Regulatory Law*

As noted above, some of the most important and difficult-to-trace forms of legal change unfold in informal processes. These processes include broad discussions in industrial, professional, and policy circles, as well specific transactions among firms, regulators, and sometimes community organizations. It seems quite likely that certification programs will affect regulatory programs through these almost invisible channels, beyond whatever changes are promulgated as official policy. Some tacit changes will probably occur as inspectors evaluate practices at production facilities and question whether firms are following best practices. Others may come into play when permits go through revision cycles, and regulators or public interest groups push for up-to-date standards reflecting best available technologies and management practices, which will are likely to be

reshaped through the dynamic adaptations of certification programs. Regulatory officials can also promote certification standards in their choices of which firms to inspect and monitor. Thus, as suggested above, they might tend to treat certification as an indicator of strong performance, and to concentrate their enforcement efforts on other firms. As it became apparent in an industry that certified firms were likely to suffer fewer or less intensive inspections, or to find it easier to get necessary regulatory approvals, the standard of practice in the industry would tend to converge with that of certification programs over time.<sup>20</sup> Moreover, American law tends to presume the validity of administrative decisions. The burden is on challengers must show that they are 'arbitrary and capricious' or clearly beyond the legal capacity of the agency, and this becomes steadily more difficult as common assumptions in a field converge with certification standards.

### *Tort Law*

Tort law might also be a channel for the legal expansion of certification standards over time. In general, American tort law requires parties to exercise reasonable care under the circumstances.' Those who fail to do so must compensate those who are foreseeably injured as a result. Standards set by private associations have often been the measure of reasonable care in American tort law. It is hard to predict how important tort law will be in the types of environmental and social justice standards considered here, since it typically requires some sort of direct injury. One can imagine possible examples, such as a worker being injured due to an absence of protective gear that, while not required by state law, is required by a certification standard. And it is conceivable that negligence would be found, whether the particular firm involved is certified or not. Similar results are possible under nuisance law, which generally prohibits uses of land that 'substantially' and 'unreasonably' interfere with the use and enjoyment of land by others. Although what is unreasonable is hard to define, and depends on many factors, certification standards could be used to define some land uses as unreasonable. Thus, stream pollution resulting from a clear-cut larger or nearer a stream than would be allowed by a certification program, and that substantially affects downstream water quality, could potentially be cited as unreasonable and enjoined by a court. Thus, in both types of cases, the state legal system could operate to extend voluntary certification standards to non-participants. But no examples of such liability have turned up in research thus far.

Tort law can also be a source of liability for certification programs and companies. Several cases have held standard setting organizations liable for injuries proximately caused by practices which conformed to their standards but were found by courts not to constitute due care – the most evocative examples being injuries in swimming pools meeting private

standards.<sup>21</sup> It is also possible that a certifying organization could be sued for failing to detect a substandard practice in a firm that it inspects. Certification programs and organizations are aware of these risks, and it is possible that these concerns occasionally lead them to be more careful in their standard setting and certification activities. Interview information indicates that they seek to carry appropriate insurance and to work out the terms of liability contractually, but thus far no evidence has come to light that tort law is a significant factor in shaping social and environmental certification programs.

### *Information Law*

Much American law focuses on what kinds of information are and may be required of market participants. Certification programs exist for the purpose of conveying reliable information to consumers and others that certified organizations operate properly. As suggested in sections one and two, there is often disagreement as to what are appropriate standards. Many environmentalists, for example, argue that the Sustainable Forestry Initiative does not in fact certify sustainable forestry. There is at least some potential for lawsuits about such issues under the US 'Lanham Act,' which creates general liability for commercial misrepresentation of goods or services. This potential seems limited at present, however, because, although the Act's terms create liability to 'any person who believes that he or she is or is likely to be damaged' by a misrepresentation,<sup>22</sup> American courts have thus far limited standing to competitors and rejected suits by consumers (Winders, 2006). There has been some discussion among activists of bringing Lanham Act suits against certified firms with substandard practices, but to date no such suits appear to have been filed, and it would probably take an unusual set of circumstances for a timber company to bring such a suit against another such company.<sup>23</sup>

On the other hand, some major corporations are bringing legal actions to constrain the information published by certification programs. The Monsanto Corporation, for example, recently sued a Maine dairy certified under a voluntary program for milk producers who do not use bovine growth hormone. Wielding the Lanham Act as a sword, Monsanto argued that the product label – 'Our Farmers Pledge: No Artificial Growth Hormones' – was a misleading representation of fact harming its interests, since 'there is no known way to tell the difference between milk from cows supplemented with [bovine growth hormone] and milk from other cows'. The case was settled when the Dairy agreed to add a disclaimer that the Food and Drug Administration saw no difference in certified and uncertified milk (Kysar 2004). While this case may appear as an isolated incident at present, other examples seem likely to occur as certification programs become important. For now, however, while participants in certification programs may be aware of the possibility of suits for

misrepresentation, there is little evidence that this has had a significant influence on certification practices.

Finally, it is also possible that U.S. securities laws, which require disclosure of 'material' information on publicly held corporations, could eventually raise the profile of a corporation's certification status, but any such requirement appears to be well in the future. Present regulations are limited to legal liabilities, and certification status, while connected, is only one, relatively indirect way of getting at the question of potential liability. Thus, while many firms choose to disclose their certification status in securities filings, the securities laws seem to have little to do with those disclosures and it is too early to predict whether a 'common law' pattern is emerging.

### *Summary*

The above analysis is inherently schematic and partial. It leaves out many potentially important areas of law, such as contract, corporate, and intellectual property law among others, and many legal systems. Nonetheless, if accurate, it indicates a significant and growing interpenetration among self-regulatory certification systems and state based legal systems. Clearly some of the initiative in setting and implementing governing rules has shifted to non-state forums, and that trend seems likely to continue. Yet their dynamics are also shaped by, directed toward, and potentially reconstitutive of state legal systems. In evaluating emerging self-governance arrangements, therefore, it will be important to pay attention to both their state and non-state dimensions and to further describe the ways in which they shape and reshape each other.

## **ASSESSMENT**

For many readers the value of this research depends on what it can tell us about the implications of multi-interest self-governance for society and law. Unfortunately, the answer at present is 'not enough'. The institutions are still too preliminary and the research too limited to offer strong conclusions. In one form, the fundamental question is empirical: how well do these institutions work? But answering it is also deeply normative, since it is necessary to define what working well means. The contemporary discussion focuses primarily on three concerns: effectiveness, accountability, and legitimacy. The following sections briefly indicate what can be said about each of them and, perhaps more importantly, what further questions should be asked.

### **Effectiveness: Racing with Problems?**

Most debate about multi-interest self-governance systems has centered on their effectiveness, or presumed lack thereof. Not wielding the formal

coercive power of states, multi-interest self-governance systems have had to rely on other forces – primarily the kind of market leveraging described above – to create pressures for compliance. These pressures seem inherently episodic and transitory, lacking the persistence a state agency. Still, research to date supports the proposition that several of the new regimes have been remarkably effective. Forest certification, for example, clearly has shifted a multitude of practices in many places around the world. These include not only the environmental practices of forestry firms, but also their dealings with local communities, labor, and other stakeholder groups (Cashore et al 2006; Bass et al 2001). The increased consultation and participation spurred by certification also seems to have rippled out into other local institutions in many cases (eg Tysiachniouk and Meidinger, 2004). Although less is known about the other sectors discussed in this paper, there are reasons to expect that emerging multi-interest self-governance systems have also had significant effects on practices and relationships.

At this stage we have relatively little detailed research about the exact channels and mechanisms through which certification institutions have effectuated these changes, but the analysis above suggests some likely ones. These include the leveraging of existing supply chains and economic relationships, establishment of competitive programs that observe and critique each other, institutional modifications that extend far along commodity chains (eg Vandenberg 2006) and deep into organizational management routines (eg Edelman et al, 1999), gradual interweaving of certification systems with state regulatory and legal systems, and ultimately changes in cultural understandings and expectations of appropriate behavior (Haufler 2001).

While evidence that multi-interest self-governance systems are effectuating behavioral change grows steadily stronger, it does not follow that they are ‘solving’ the problems they seek to address. The latter question may be impossible to answer with any confidence (Young 1999), particularly since the problems that regulatory systems seek to address evolve continually and are always understood only partially. Yet it is hard to assess a governance system without some sense of whether it has the capacity to carry out its mission. Here two limited points can be made. First, there do not seem to be any plausible competitor governance systems in the fields examined. The image of states articulating strong, intelligent, adaptive treaties and reliably enforcing them remains a distant dream at present – although ironically, it could turn out that the systems described here lay the groundwork for such treaties. Second, the great strength of these systems is their dynamism – their continual competition and contestation in an effort to gain adherents and legitimacy. Thus, their strongest promise of effectiveness may be their searching adaptability. Accordingly we may be best off viewing and evaluating them in terms of

their ability to ‘race’ with the problems they confront – rather than to ‘solve’ them per se (Sabel 2004). Whether they will be dynamic enough, and whether they will continue to be dynamic over the long term is necessarily speculative. Effective dynamism requires the ability to formulate strategies, implement them, assess them, and change strategies relatively easily. At the same time, strategies must be seriously implemented and widely adopted even though change is expected. This is a demanding standard. The evidence to date is not inconsistent with this possibility, but considerable optimism is required to predict that the emerging systems will realise it. Tropical forests, for example, are still declining rapidly, and will require a very effective governance system to arrest that decline.

### **Accountability: Learning for Cosmopolitan Society?**

Even if multi-interest self-governance through product certification systems proves reasonably effective, that does not necessarily make it good. The question naturally arises, effective for what purposes? And embedded in that question is, for whose purposes? Here the emergent systems present serious conceptual challenges. They are fundamentally transnational, and do not match up with territorial polities. Thus, no claim can be made that they are fully accountable to territorial citizenries. Yet, as noted above, certification systems are at least partly accountable to territorial polities in that they must be compatible with state laws and seem to be growing increasingly intertwined with state legal systems. At the same time, global self-governance systems may seek to foster and respond to an incipient global citizenry. The actual nature of this global citizenry is a mystery at this time, and is likely to be formed more by global market and information flows than by certification programs per se. One of the great challenges of certification systems will be to incorporate the enormous global diversity of local communities and yet respond to and support them (Archibugi and Held, 1995; Santos et al, 2005).

At present, it is impossible to tie the accountability systems of the multi-interest self-governance systems described in this paper to one social entity. There is no single ‘principal’ whose will can serve as the measure of their accountability. Rather, they are best understood as compound accountability systems, resting on a mix of national and international law, familiar institutions for standard setting and certification, increasingly (but far from completely) open and transparent decisional procedures, and dynamic competition among certification programs for business and public acceptance. Commentators with a critical cast of mind may see this either as no accountability system at all, or alternatively as such a confused and potentially gridlocked one as to amount to the same thing. Those with a stronger belief in the functionality of emerging governance systems may see it as a desirable mix of responsiveness and stability in a complicated and highly changeable world (e.g, Sabel, 2004; Cohen and Sabel, 1997).

What can be said to both sides, however, is that at present we are only at the most rudimentary stage of understanding or assessing accountability in these governance systems.

Nonetheless, one fundamental point is becoming clear. Whatever the utility of principal-agent models for understanding and rationalizing state-centered governance systems, they will not suffice for the new ones discussed here. Instead, it will be necessary to carry out serious empirical research on which interests the new systems answer to, and how. It may turn out that they are evolving a new accountability system based on learning and adaptability, and possibly answering to a newly emerging transnational citizenry by fitting regulatory requirements to hard found areas of overlapping consensus (Rawls, 2001) while effectively addressing problems. Or it may turn out that skeptics are correct, and that the new systems effectively answer to no one, or only to already privileged social interests. We will only be able to answer these questions through creative and theoretically sophisticated empirical research. Traditional principal-agent models of accountability are likely to be of limited value in this effort.

### **Legitimacy: Principled Experimental Mimicry?**

Ultimately multi-interest self-governance systems must prove themselves legitimate – ie, socially accepted and expected – if they are to persist. I will not venture to guess whether they will succeed, but it is worth describing the main strategies they seem to be pursuing. First, the certification systems described in this paper manifest a strong commitment to the power of ideas. The fields are all highly conceptual and seem to center on continuing conceptual development over time. This is especially evident in organic certification, the oldest of the fields, but is also strongly present in the others. This focus on conceptual development does not seem to be simply a matter of sloganeering – e.g., ‘fair trade’ or ‘sustainable forestry’ – but rather of finding a powerful idea or charismatic metaphor and giving it meaning through iterative experimental practices and adaptable rules. Arguments about how to define standards and criteria, moreover, frequently rely heavily on central concepts and principles.

While certification systems thus manifest a strong ‘logic of appropriateness’, this is not to the exclusion of a ‘logic of consequences’ (March and Olsen, 2004). As noted above, the competition among certification programs is conditioned to a considerable degree on how well they ‘work’. Rules and routines are under constant pressure to adjust to conditions and experience. Achievements and failures rub elbows with costs and practicality on a daily basis.

Finally, it seems clear that multi-interest self-governance systems rely heavily on mimicking well-established institutions – primarily those of

standard setting and certification discussed above, but also the best practices of government regulatory institutions. While it is quite possible that they do this in part out of a belief that these institutions will function well in performing the tasks assigned to them, it also seems clear that they are chosen in part because of their well-established public acceptability. As David Szablowski (2006) notes, however, while this may work for purposes of fostering public acceptance and confidence, it is very difficult to tell at this time whether such acceptance is well founded in any given case. That will require persuasive showings of persistent effectiveness and broad accountability as well.

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<sup>1</sup> National Organic Program, Final Rule, Agricultural Marketing Service, US Department of Agriculture. 7 CFR Part 205.

<http://www.ams.usda.gov/nop/NOP/standards/FullText.pdf>

<sup>2</sup> The international trade law dimensions of this process are beyond the scope of this article.

<sup>3</sup> The UK timber procurement policy, for example, requires governmental bodies to purchase timber from legal and sustainable sources. <http://www.proforest.net/cpet/uk-government-timber-procurement-policy>. For a definition of legal and sustainable, see <http://www.proforest.net/cpet/pdf/definition-of-legal-and-sustainable-e1-final.doc> This policy was developed through ISO 9001 and 14001 processes undertaken by the government. [http://www.environment-agency.gov.uk/business/444217/444285/317943/514774/?lang=\\_e&theme=&region=&subject=&searchfor=sustainable+procurement](http://www.environment-agency.gov.uk/business/444217/444285/317943/514774/?lang=_e&theme=&region=&subject=&searchfor=sustainable+procurement)

<sup>4</sup> Article 1.4 of the TBT General Provisions [http://www.wto.org/English/docs\\_e/legal\\_e/17-tbt.pdf](http://www.wto.org/English/docs_e/legal_e/17-tbt.pdf) and Article III:8(a) of the General Agreement

<sup>5</sup> The Agreement on Government Procurement precludes signatories (the US, Canada, Aruba, the EU Countries, Iceland, Norway, Liechtenstein, Switzerland, Japan, Korea, Hong Kong, and Singapore) from using technical specifications, including those defining processes or methods of production, so as to 'unnecessary obstacles to international trade'. Technical specifications adopting recognised international standards seem likely to enjoy a presumption of not being unnecessary trade obstacles, as discussed below.

<sup>6</sup> Following *Carter v. Carter Coal Company*, 298 US 238 (1936).

<sup>7</sup> See, e.g., *State v. Crawford*, 177 P 360 (Kansas 1919), in which the Kansas Supreme Court held that state fire inspectors could be authorised to enforce an electrical code promulgated by the National Fire Protection Association, but only if the Kansas Legislature first adopted that code word for word through its standard legislative process.

<sup>8</sup> National Technology Transfer and Advancement Act of 1995, 15 U.S.C. § 3701 (1996).

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<sup>9</sup> Colorado Wildlife Commission Regulations. Chapter 11 - Wildlife Parks and Unregulated Wildlife, Section 1104-C. <http://wildlife.state.co.us/NR/rdonlyres/BDD5AB1C-D572-4458-AA3C-F7CF3BCA00AE/0/Ch11.pdf>

<sup>10</sup> To qualify, companies must: (1) adopt and implement an environmental management system, (2) have a record of sustained compliance, (3) demonstrate continuous improvement, (4) conduct community outreach programs, and (5) complete annual performance reports. US EPA National Environmental Performance Track, <http://www.epa.gov/performancetrack/partners/comptools.htm>

<sup>11</sup> Report of the Appellate Body, United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998)

<sup>12</sup> 'Technical regulation' is defined by the agreement as a 'document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. Annex 1, TBT Agreement.

<sup>13</sup> Article 2.2, TBT Agreement.

<sup>14</sup> 'Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.' *Id.*

<sup>15</sup> 'Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.' Article 2.5, TBT Agreement.

<sup>16</sup> 'Standard' is defined as a 'document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.' Annex 1, Paragraph 2, TBT Agreement.

<sup>17</sup> Article 4.1, TBT Agreement.

<sup>18</sup> '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.' TBT Article 2.4.

<sup>19</sup> EC-Sardines Case European Communities – Trade Description of Sardines, Report of the Appellate Body, WT/DS231/AB/R, September 26, 2002. Para. 110. [http://www.worldtradelaw.net/reports/wtoab/ec-sardines\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/ec-sardines(ab).pdf)

<sup>20</sup> International environmental law could also become an important source of indirect incorporation of certification standards. Discussions about how to implement the Kyoto Protocol for the Reduction of Greenhouse Gasses, for example, include the possibility of using forest certification to verify the maintenance of carbon retention 'sinks,' as well as using ISO 14000 management systems to achieve reductions in greenhouse gas emissions.

<sup>21</sup> E.g., *King v. National Spa and Pool Institute, Inc.*, 70 So. 2d 612 (Alabama 1990), holding that the Institute had a duty to exercise reasonable care in the interests of consumers when setting voluntary standards for swimming pools.

<sup>22</sup> 15 U.S.C. §1125(a)(1) (1994).

<sup>23</sup> The Federal Trade Commission and various state attorneys general also have the authority to bring suits against companies for commercial misrepresentation, and have done so in other cases, but have shown little interest in certification programs to date. The Federal Trade Commission also has authority under other statutes to issue guidelines for certification programs, but again has shown little interest in doing so.