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**NON-GOVERNMENTAL ORGANISATIONS IN
INTERNATIONAL REGULATION: LESSONS FROM
CERTIFICATION SCHEMES**

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I Abstract

The decentralisation and globalisation of regulation has opened up new kinds of regulatory activities to new kinds of actors. Certification schemes as regulatory tools and Non-Governmental Organisations (NGOs) as regulators are two such examples. NGOs have their own set of regulatory capabilities which can be utilised to address some of the difficulties that occur in regulating across nations. At the international level, there is a strong case to be made for collaborative regulation to exploit the regulatory capacities of NGOs and other non-state actors. Certification schemes are often collaborative, and they exploit market mechanisms to further social agendas. NGO regulation is not without its pitfalls, as there are issues with accountability and effectiveness. Certification schemes as a regulatory tool have their own problems, with questions about the effectiveness of the schemes, problems with supply and demand, and the negative impact of fragmentation. This paper illustrates the potential of certification schemes, but it also argues that that potential is not being realised.

Non-governmental organisations, international regulation, collaboration, certification schemes

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III Introduction

In post-cold war international relations, one of the most significant developments was a dramatic rise in the participation of Non-governmental organisations (NGOs) at the international level.¹ Increasingly, scholarship is recognizing the importance of NGOs' role in international regulation.² Elements of the international regulatory environment mean that traditional domestic models of regulation are unable to be duplicated internationally. Instead, international regulatory literature emphasises the usefulness of collaborative regulation, and of utilising the different capabilities of different actors. In this way, different groups act as checks and balances on each other. NGOs have capabilities that can contribute to effective international regulation. These capabilities enable them to set standards via creating or being involved in certification schemes. NGOs can improve regulation via their participation, they can add legitimacy to a scheme, and being driven by values has certain benefits for the overall system. Certification schemes are voluntary regulations that use market forces and consumer pressure to change behaviour. They have increased in number in recent years, yet have the potential for more widespread use.

In Part One of this paper, NGOs will be explained and their regulatory activities introduced; Part Two details the international regulatory environment and argues for collaboration between actors; and Part Three sets out the mechanisms of certification scheme regulation. In Part Four the contribution of NGOs is evaluated and in Part Five some issues with certification scheme regulation are raised and some potential solutions tabled.

¹ Richard Youngs *International Democracy and the West: The Roles of Governments, Civil Society, and Multinational Business* (Oxford University Press, New York 2004) at 3.

² Anne Peters et al *Non-State Actors as Standard Setters* (Cambridge University Press, New York, 2009)

IV About Non-Governmental Organisations

A The emergence of non-governmental organisations

For nearly a quarter of a millennium NGOs have been contributors to international politics.³ In their initial involvement, they engaged with big ideological issues, such as slavery and the peace process, and this set the scene for the kinds of issues they would focus on for the next two centuries.⁴ This participation has fluctuated, however, with different levels of involvement in different eras. The involvement of NGOs was particularly strong in the early years of international society, when there was not a strict delineation between NGOs and international government organisations.⁵ For example, at the first Hague Peace Conference in 1899, many peace societies sent representatives, and "conducted themselves as though they were official members of the conference".⁶ Charnovitz tracked these cycles, and opined that there is currently another period of increased involvement, with numbers of NGOs being particularly high.⁷ In the last century, there has been a sharp incline in the number of international NGOs, which has been much greater than the increase in the number of international governmental organisations.⁸ The number of NGOs at international conferences often exceeds the number of states.⁹ Charnovitz hypothesised that the increases and decreases in involvement relate to increases and decreases in the regulatory abilities of international government organisations.¹⁰ Supporting this theory, the areas in which international NGOs are most active tend to be ones where current institutions have been particularly ineffective. Many international certification schemes, such as the Kimberly Process Certification Scheme

³ Steve Charnovitz "Two Centuries of Participation: NGOs and International Governance" (1997) 18 *Mich J Int'l L* 183 at 185.

⁴ Charnovitz, above n 3, at 191-192.

⁵ Charnovitz, above n 3, at 198.

⁶ Charnovitz, above n 3, at 196.

⁷ Charnovitz, above n 3, at 265.

⁸ Union of International Associations (ed) *Yearbook of International Organizations 2005/2006: Volume 5* (KG Saur, 42 edition, Munich, Germany) at 36 and 236-237.

⁹ Anna-Karin Lindblom *Non-Governmental Organisations in International Law* (Cambridge University Press, New York, 2005) at 519.

¹⁰Charnovitz, above n 3, at 269. This has arguably occurred at the domestic level, with an increase in the regulatory participation of non-state actors being linked to the regulatory withdrawal of the state.

on Conflict Diamonds and the Forest Stewardship Council, were created after parties became disillusioned with attempts by international governmental organisations. Several factors have facilitated the rise in NGO international activities, such as the growth in international corporations, the weakening of national governments and the technological revolution.¹¹ That is, there has been an increase in transnational activities generally, and an improvement in the communicative abilities of NGOs.¹² These developments culminate into what one academic has called an "associational revolution" at the global level that he says is as "significant [a] social and political development...as the rise of the nation state".¹³ It is recognised that NGOs now have influence independent of states and other entities,¹⁴ with Amnesty International, for example, having more resources at its disposal than the United Nations Human Rights Committee.¹⁵

B Defining Non-Governmental Organisations

A significant amount of literature has been written about the NGO phenomena, in many fields of study. A common issue is that the term 'nongovernmental organisation' lacks a precise definition, when used in both the legal and the policy contexts.¹⁶ This problem is twofold: it encompasses a broad range of different groups; and the line around those that are and are not a part of the term is unclear. NGO is, as Archer notes: ¹⁷

¹¹ Dara O'Rourke "Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring" (2003) 31(1) *Policy Studies Journal* 27 and Bronwen Morgan & Karen Yeung *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) at 4.

¹² Grabosky, above n 12, at 116-117.

¹³ Bridget M Hutter & Joan O'Mahony *The Role of Civil Society Organisations in Regulating Business* (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, September 2004 discussion paper) at 4.

¹⁴ Peter J Spiro "Accounting for NGOs" (2003) 3 *Chicago Journal of International Law* 161 at 162.

¹⁵ Richard Youngs *International Democracy and the West: The Roles of Governments, Civil Society, and Multinational Business* (Oxford University Press, New York 2004) at 139.

¹⁶ Lindblom, above n 9, at 45 and Kerstin Martens "Examining the (Non-) Status of NGOs in International Law" (2003) 10 *Ind J Global Legal Stud* 1 at 8.

¹⁷ Kerstin Marens "Mission Impossible? Defining Nongovernmental Organizations" (2002) 13(3) *International Journal of Voluntary and Nonprofit Organisations* 271 at 273

... an awkwardly negative title coined by the United Nations to describe a vast range of international and national citizens organizations, trade unions, voluntary associations, research institutes, public policy centers, private government agencies, business and trade associations, foundations, and charitable endeavors.

This kind of criticism has been repeatedly raised, without resolution.¹⁸ The idea of implementing an international instrument that would set out a precise definition of NGO has been raised before, the first time as early as 1910, without gaining traction.¹⁹ Almost twenty years ago an academic noted that the term was “on the decline” because of the problems with it,²⁰ yet the phrase has persisted.

The main practical implication of the definitional problem is the risk of being over-inclusive, assigning it to organisations that would not be considered "real" NGOs. An example is a Business-friendly International Non-Governmental Organisation or "BINGO". This kind of organisation is characterised as a corporate front group that presents itself to the community as an NGO, such as the Citizens for Sensible Control of Acid Rain, a coal and electricity industry front.²¹ These types of organisations affect the legitimacy and reputation of the "real" NGOs, although ascertaining what constitutes a real NGO is difficult and contentious in itself. Additionally, the vagueness causes problems for the formal inclusion of NGOs as international actors in international legal settings.²²

A further issue is that the split between national NGOs and international NGOs is indistinct, with many international NGOs being in fact national NGOs with international activities.²³ Distinguishing between the two may therefore be contingent on an assessment of their

¹⁸ Marens, above n 17.

¹⁹ Kerstin Martens "Examining the (Non-) Status of NGOs in International Law" (2003) 10 *Ind J Global Legal Stud* 1 at 20.

²⁰ Charnovitz, above n 3, at 188

²¹ John Braithwaite and Peter Drahos *Global Business Regulation* (Cambridge University Press, Cambridge, 2000) at 489.

²² Kerstin Martens "Examining the (Non-) Status of NGOs in International Law" (2003) 10 *Ind J Global Legal Stud* 1 at 8.

²³ Anna-Karin Lindblom *Non-Governmental Organisations in International Law* (Cambridge University Press, New York, 2005) at 428.

activities. However, many NGOs, such as the Fair Trade umbrella organisation and the Forest Stewardship Council, have international bodies responsible for overseeing the schemes, but delegate to various national sub-organisations. Attempts to focus on only international or only national NGOs are likely to have difficulties drawing a bright line.

A clear definition that puts all NGOs in the same category may not be a particularly useful term due to the variations in size, structure and agendas within the broad NGO group.²⁴ Perhaps a single definition is not necessary either: a study found that different areas of international law tended to create their own definitions, ones that related to the particular purpose of the law.²⁵ Thus the term provides flexibility that would not be available if a precise definition was promulgated. In the literature, researchers often adopt a specific definition of "NGO" relevant to their purpose, or they use a different term, such as civil society organisations (CSOs) or international public interest groups (iPIGs).²⁶ Commentators have conducted research into the different ways the phrase has been defined, but delving into this is beyond the scope of this paper.²⁷ Suffice to say, for the purposes of this paper the focus will be on NGOs that participate in standard-setting through certification schemes.

1. As Members of Civil Society

NGOs are regularly discussed with reference to their role as a member of civil society.²⁸ Civil society can be defined by what it is not: anything not within the state or economic

²⁴ Bridget M Hutter and Joan O'Mahony *The Role of Civil Society Organisations in Regulating Business* (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, September 2004 discussion paper) at 3.

²⁵ Anna-Karin Lindblom *Non-Governmental Organisations in International Law* (Cambridge University Press, New York, 2005) at 36.

²⁶ Bridget M Hutter & Joan O'Mahony *The Role of Civil Society Organisations in Regulating Business* (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, September 2004 discussion paper), Charnovitz, above n 3.

²⁷ Marens, above n 17.

²⁸ Bridget M Hutter *The Role of Non-State Actors in Regulation* (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, April 2006, discussion paper 37) at 7, Kerstin Martens "Examining the (Non-) Status of NGOs in International Law" (2003) 10 *Ind J Global Legal Stud* 1 at 24,

sectors.²⁹ It is a broad term and includes NGOs, charities, trusts, foundations, advocacy groups and non-state associations, with NGOs being probably the best known regulatory sources in the sector.³⁰ Thus, the thinking on the role that civil society plays in international regulation is relevant to considering NGOs' role. A well-functioning and critical civil society is cited as a necessary precondition to a democratic state, "if not for the sake of its initial formation then for the sake of its coherence and stability over time".³¹ This concept has been promoted to the international level to some extent, with the recognition that NGOs provide a representative counterbalance to the other two international sectors.³² Braithwaite and Drahos consider that a strong civil society is a practical way to create trust norms in international society, which is important for effective collaboration.³³ The representative and legitimising elements of NGO involvement in international regulation are discussed later in this paper.

C NGOs as regulators

NGOs are capable of a wide variety of international regulatory activities.³⁴ Hood et al define regulation thus:³⁵

There must be some capacity for **standard-setting**, to allow a distinction to be made between more or less preferred states of the system. There must also be some capacity for **information-gathering** or monitoring to produce knowledge about current or changing states of the system. On top of that must be some capacity for **behaviour-modification** to change the state of the system [emphasis added].

Richard Youngs *International Democracy and the West: The Roles of Governments, Civil Society, and Multinational Business* (Oxford University Press, New York 2004) at 140.

²⁹ Anna-Karin Lindblom *Non-Governmental Organisations in International Law* (Cambridge University Press, New York, 2005) at 15.

³⁰ Bridget M Hutter *The Role of Non-State Actors in Regulation* (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, April 2006, discussion paper 37) at 2.

³¹ Anna-Karin Lindblom *Non-Governmental Organisations in International Law* (Cambridge University Press, New York, 2005) at 15.

³² Braithwaite and Drahos, above n 21, at 36.

³³ Braithwaite and Drahos, above n 21, at 36.

³⁴ Steve Charnovitz "Two Centuries of Participation: NGOs and International Governance" (1997) 18 *Mich J Int'l L* 183 at 273.

³⁵ Christopher Hood, Henry Rothstein & Robert Baldwin *The Government of Risk* (Oxford University Press, Oxford, 2001) at 23.

NGO activities can be broken down into these three categories. This paper focuses on standard setting, but as the activities overlap substantially,³⁶ it is useful to outline the other regulatory activities that NGOs engage in. NGOs activities can influence international governmental organisations, private organisations, nation-states and individuals. Note that the variety of organisations classified as NGOs, the different kinds of NGOs involved in certification schemes, and the broad range of regulatory activities they undertake makes it difficult to generalise their activities, or to provide a clear and complete typology of the different regulations. The activities also vary over time.³⁷ Further, some of the available functions are mutually exclusive and so are conducted by separate NGOs.³⁸

1. Information gathering

One academic opined that all information gathering is central to all regulation.³⁹ NGOs are particularly influential gatherers and disseminators of information.⁴⁰ NGOs have conducted highly influential public information campaigns, and have advocated or lobbied international governmental organisations in more formal settings.⁴¹ Some NGOs have a comparative advantage over states or other organisations in terms of their knowledge resources and information networks, being able to "quickly and credibly generate politically usable information and move it to where it will have the most impact".⁴² NGOs also undertake

³⁶ Christopher Hood, Henry Rothstein & Robert Baldwin *The Government of Risk* (Oxford University Press, Oxford, 2001) at 21.

³⁷ See Steve Charnovitz "Two Centuries of Participation: NGOs and International Governance" (1997) 18 *Mich J Int'l L* 183.

³⁸ Steve Charnovitz "Two Centuries of Participation: NGOs and International Governance" (1997) 18 *Mich J Int'l L* 183 at 273.

³⁹ Christopher Hood, Henry Rothstein & Robert Baldwin *The Government of Risk* (Oxford University Press, Oxford, 2001) at 24.

⁴⁰ Bridget M Hutter & Clive J Jones *Business Risk Management Practices: The Influence of State Regulatory Agencies and Non-State Sources* (The Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, Discussion paper) at 12.

⁴¹ Bridget M Hutter & Joan O'Mahony *The Role of Civil Society Organisations in Regulating Business* (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, September 2004 discussion paper), at 5.

⁴² Daniel C Thomas "International NGOs, state sovereignty, and democratic values" (2001) 2 *Chicago Journal of International Law* 389 at 391.

monitoring activities, acting as watchdogs of different schemes or issues. Often, in fact, they have better information about compliance than states and international organisations.⁴³ Moreover, opportunities for NGOs to have influence have increased as the role of experts in international relations has become "increasingly more central" in a world reliant on scientific and technical knowledge.⁴⁴ NGOs can provide expertise in advising international organisations, or as an expert submitting on an international dispute. Governments and international organisations also look to NGOs for advice and draw on their research.⁴⁵ As is discussed later, information gathering and disseminating is a crucial part of several elements of certification scheme regulation.

2. *Behaviour Modification*

NGOs can attempt to modify behaviour with civil action like protests, press conferences and demonstrations.⁴⁶ Generally such undertakings seek to influence business and corporate agendas, often directed at specific corporations.⁴⁷ These actions tie in to information provision by requiring mass communication to stimulate the actions, and by being a form of publicity in themselves. NGOs also contribute to market-driven regulation, such as the creation of codes of conduct or certification schemes, by combining with consumers to apply economic pressure to businesses. In a more formal legal setting, NGOs can participate in private legal action in domestic litigation, albeit often in furtherance of a public not private

⁴³ Bridget M Hutter & Joan O'Mahony *The Role of Civil Society Organisations in Regulating Business* (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, September 2004 discussion paper) at 6.

⁴⁴ Caroline E Foster "New Clothes for the Emperor? Consultation of Experts by the International Court of Justice" (2014) 5 *Journal of International Dispute Settlement* 139 at 172.

⁴⁵ Jennifer A Zerk *Multinationals and Corporate Social Responsibility* (New York, Cambridge University Press, 2006) at 97.

⁴⁶ Bridget M Hutter & Joan O'Mahony *The Role of Civil Society Organisations in Regulating Business* (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, September 2004 discussion paper) at 6.

⁴⁷ Bridget M Hutter & Joan O'Mahony *The Role of Civil Society Organisations in Regulating Business* (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, September 2004 discussion paper), at 7.

interests.⁴⁸ For example, firms who misrepresent their compliance with standards have been sued by NGOs for false advertising.⁴⁹ Occasionally, NGOs are also empowered to represent issues in more formal international legal forums, such as international courts and tribunals. This representation can have behavior-modification impacts.

3. *Standard setting*

A standard is a broad, vague term that can include almost any kind of rule.⁵⁰ Standard-setting regulatory activities, which include communicating, monitoring and enforcing the standards, are particularly important at the international level, as they are often issued when international organisations lack authority to impose sanctions, as an alternative to binding directives.⁵¹ They may also be made by NGOs who perceive a gap in the regulation of states or international organisations, but often they are made by a combination of actors.⁵² The absence of a variety of international regulatory capabilities means that there is more space at the international level for standards than at the domestic level, as the standard-based organisations do not have to compete with domestic agencies and rules.⁵³ Furthermore, the globalisation of markets means that international standards are particularly important and relevant,⁵⁴ for practical reasons, such as technological compatibility across nations, or for normative issues like fair labour conditions. The global adoption of voluntary standards can

⁴⁸ Bridget M Hutter & Joan O'Mahony *The Role of Civil Society Organisations in Regulating Business* (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, September 2004 discussion paper), at 8.

⁴⁹ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) at 86.

⁵⁰ Nils Brunsson, Bengt Jacobsson and Associates *A World of Standards* (Oxford University Press, New York, 2000) at 4.

⁵¹ Nils Brunsson, Bengt Jacobsson and Associates *A World of Standards* (Oxford University Press, New York, 2000) at 3.

⁵² Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) *5 Rev Int Organ* 315 at 316.

⁵³ Nils Brunsson, Bengt Jacobsson and Associates *A World of Standards* (Oxford University Press, New York, 2000) at 38.

⁵⁴ Nils Brunsson, Bengt Jacobsson and Associates *A World of Standards* (Oxford University Press, New York, 2000) at 38.

be a step that leads to more stringent regulation.⁵⁵ Mexico, for example, has forest protection laws that are based on the standards of the Forest Stewardship Council.⁵⁶

These three groups of regulatory activities are in no way comprehensive. There are other ways of conceiving NGOs' regulatory capabilities: they redistribute resources, a prime goal of many regulations,⁵⁷ by collecting donations and using them to provide aid; they correct market failures brought on by information asymmetries; some directly provide public goods like education; others express consumer preferences; and many lobby to get issues onto agendas.⁵⁸ Crucially, many of the issue areas that NGOs participate in areas where international governmental organisations or state actors are seen to be failing.⁵⁹ Further, the activities interrelate, and many of those discussed in the different sections are relevant to the mechanisms around certification schemes.

4. Certification Schemes

Certification schemes are used in this paper as an illustrative example of international regulatory standard-setting. These neoliberal schemes rely on market mechanisms, and are generally based on consumer preferences.⁶⁰ A certification scheme involves voluntary standards that NGOs set for other actors to comply with in return for belonging to a certain group. Such programmes have existed for centuries, but have grown dramatically over the

⁵⁵ Braithwaite and Drahos, above n 21, at 614.

⁵⁶ Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007 at 17.

⁵⁷ Bronwen Morgan & Karen Yeung *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) at 27.

⁵⁸ Steve Charnovitz "The Illegitimacy of Preventing NGO Participation" [2011] 36 *Brook J Int'l L* 891 at 895.

⁵⁹ Bridget M Hutter *The Role of Non-State Actors in Regulation* (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, April 2006, discussion paper 37) at 12.

⁶⁰ Marie-Christine Renard "Quality certification, regulation and power in fair trade" (2005) 21 *Journal of Rural Studies* 419 at 419.

last two decades.⁶¹ Even though international standards are often soft regulation, being just "pieces of general advice"⁶² rather than command-and-control rules, incentives can be built in to the certification schemes that can result in effective compliance with the regulation. Many of the schemes are created by NGOs or an NGO-firm collaboration.⁶³ They involve many actors in different roles and relationships, creating new processes of standard setting, monitoring and enforcement.⁶⁴

Throughout this paper, two schemes will be used as main examples: the Forest Stewardship Council and the Fair Trade group. A common element of these schemes, and one that will be assumed when discussing certification schemes generally in this paper, is that their purpose is to further some kind of social value, as distinct from a scheme which has a solely practical purpose.

The Forest Stewardship Council was founded in 1993 by a general assembly of 126 participants from 26 countries, including representatives from the World Wide Fund for Nature, Greenpeace, Friends of the Earth, retailers, trade unions, and indigenous interest groups.⁶⁵ The scheme was a response to an inability for an inter-governmental negotiation to collaborate on a forestry standards regime.⁶⁶ The FSC involves three different types of standards, made by a policies and standards unit and approved by a board of directors.⁶⁷

⁶¹ Aseem Prakash & Matthew Potoski *The Voluntary Environmentalists* (Cambridge University Press, New York, 2006) at 2.

⁶²Nils Brunsson, Bengt Jacobsson and Associates *A World of Standards* (Oxford University Press, New York, 2000) at 2.

⁶³ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) at 56.

⁶⁴ O'Rourke, above n 11, at 5.

⁶⁵ Philipp Pattberg "What Role for Private Rule-Making in Global Environmental Governance? Analysing the Forest Stewardship Council (FSC)" (2005) 5 *International Environmental Agreements* 175 at 179.

⁶⁶ Donald H Schepers "Challenges to Legitimacy at the Forest Stewardship Council" (2010) 92 *Journal of Business Ethics* 279 at 283.

⁶⁷ Philipp Pattberg "What Role for Private Rule-Making in Global Environmental Governance? Analysing the Forest Stewardship Council (FSC)" (2005) 5 *International Environmental Agreements* 175 at 180.

Often the standards are made or modified as a result of movements passed by the general assembly, which is made up of a variety of different stakeholders.⁶⁸ External independent bodies certify that forestry operations are done in accordance with the FSC Principles and Criteria, and can also certify supply chains.⁶⁹ As of July 2015, the FSC covers 80 countries with a total of more than 182 million hectares⁷⁰

Fair Trade was conceived by Oxfam, the Catholic aid agency for England and Wales, New Consumer, Tradecraft, Christian Aid and The World Development Foundation.⁷¹ The Fair Trade network is "an alternative approach to conventional trade" based on "a partnership between producers and consumers".⁷² Producers that meet the Fair Trade Standards, which include a minimum price for producers, are certified and can then use the Fair Trade trademark.⁷³ Fair Trade also aims to foster long-term relationships between producers and buyers, eliminate the middle man, promote environmental protection and offer more flexible financial terms to producers.⁷⁴ The Fair Labelling Organization is the international coordinating institution which was formed by the various national initiatives. Its role is to make criteria consistent and oversee the inspection and certification processes.⁷⁵

This Part illustrates the regulatory capacity that NGOs can exercise. With the increase in regulation by non-state actors

⁶⁸ Forest Stewardship Council "Setting Standards" <ic.fsc.org>

⁶⁹ Donald H Schepers "Challenges to Legitimacy at the Forest Stewardship Council" (2010) 92 *Journal of Business Ethics* 279, at 283.

⁷⁰ Forest Stewardship Council *Facts and Figures* (3 July 2015)

⁷¹ Len Tiu Wright & Simon Heaton "Fair Trade marketing: an exploration through qualitative research" (2006) 14(4) *Journal of Strategic Marketing* 411 at 414.

⁷² Fair Trade Labelling Organizations International "What is Fair Trade?" <www.fairtrade.net>

⁷³ Fair Trade Labelling Organizations International "What is Fair Trade?" <www.fairtrade.net>

⁷⁴ Will Low & Eileen Davenport "Mainstreaming fair trade: adoption, assimilation, appropriation" (2006) 14(4) *Journal of Strategic Marketing* 315 at 320.

⁷⁵ Marie-Christine Renard "Quality certification, regulation and power in fair trade" (2005) 21 *Journal of Rural Studies* 419 at 422.

V International regulatory environment

A Challenges

International regulation is a particularly ripe area for NGOs regulatory activities. In some areas of international regulation, there occurs a certain type of regulatory failure: while the regulatory institutions are intact, they do not achieve their purpose, and the regulations promulgated are largely symbolic.⁷⁶ In several cases, such as international trade law, international regulation is successful, but in others, like reducing carbon emissions, regulation has been ineffective.⁷⁷ There are a plethora of reasons why this is so, but some main features of the international regulatory environment that hamper the ability of international governmental organisations to undertake traditional regulation will be outlined here.

First, and most marked, there is a lack of authority and coercive power at the international level. States have been reluctant to grant extensive authority to international government organisations for many reasons, including concerns over the democratic deficit of international organisations.⁷⁸ Domestic actors often view international organisations with suspicion, as their very existence involves a loss of state sovereignty.⁷⁹ Therefore while some international institutions enjoy the ability to impose significant sanctions, most notably the World Trade Organisation, this is an uncommon example. With no overarching coercive power at the international level equivalent to that of the nation-state at the domestic level that is able to force compliance, international regulatory bodies do not have available the full "pyramid of enforcement strategies".⁸⁰ Instead, they operate at the lower, cooperative end of

⁷⁶ Bronwen Morgan & Karen Yeung *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007).

⁷⁷ Grabosky, above n 12, at 116.

⁷⁸ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) *5 Rev Int Organ* 315 at 336.

⁷⁹ Dan Sarooshi *International Organizations and the Exercise of Sovereign Powers* (Oxford University Press, New York 2005 at 3.

⁸⁰ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 39.

the pyramid. Yet Ayers and Braithwaite found that the regulatory agencies that could operate the most at this lower level also had the most punitive options available: they "spoke softly while carrying big sticks".⁸¹ At the international level, many actors are trying to operate exclusively at the cooperative end of the pyramid but without the coercive benefit of a "benign big gun". This means that regulators at the international level seeking to regulate via cooperation may need to explore alternative methods of enforcement, to provide some form of "benign big gun" incentive.

There are other problems related to the absence of an overarching 'world government'. Attempts to regulate are more likely to be incoherent and unorganised because of the lack of a coordinating power.⁸² Regulation is fragmented, with different international governmental organisations and other actors covering different areas, resulting in repetition and gaps.⁸³ Consequently, regulation is generally less well-coordinated than at the domestic level. With no single authority, there is competition for legitimacy, public attention and resources between different schemes.⁸⁴

Another notable element of the international regulatory environment is that identifying and influencing the targets of the regulation is difficult. For one, international laws often target nation-states, relying on them to change their domestic laws, which are then intended to change the behaviour of the individuals or organisations engaging in the behaviour that requires regulation.⁸⁵ This is problematic from the perspective of the international

⁸¹ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 39.

⁸² Nils Brunsson, Bengt Jacobsson & Associates *A World of Standards* (Oxford University Press, New York, 2000) at 38.

⁸³ Kenneth W Abbott and Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) 7 *Regulation & Governance* 95 at 97.

⁸⁴ Kenneth W Abbott & Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) 7 *Regulation & Governance* 95 at 102.

⁸⁵ Kenneth W Abbott & Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) 7 *Regulation & Governance* 95 at 101.

organisation as the influence of international regulation is diluted, and 'slippage' in the stringency of the regulation can occur.⁸⁶ Furthermore, even if the regulation is adopted as intended, national authorities encounter problems in attempting to make a difference to the activities of intended targets. The national authorities do not have the necessary jurisdiction nor the capacity to access all the relevant targets.⁸⁷ Many targets of regulation are large international organisations, and have the ability to circumvent rules imposed by national laws by acting in different jurisdictions.⁸⁸ A prevalent example is the different labour standards across the globe. Companies based in countries with strict labour regulations have undertaken enormous outsourcing operations to countries with cheaper, and in many instances less regulated, labour. Thus a perverse incentive can be created for states to have weak national regulation to attract business.⁸⁹ In some cases the international organisation is the regulatory authority, and so has a broader jurisdiction, but aiming the regulatory gun is difficult with scattered and diffuse targets.⁹⁰ Abbot and Snidal sum up the issue: "not only do [international regulators] lack a big gun, they would not know where to aim it if they had one".⁹¹

While these factors are generalisations and do not apply in every case, they and other limitations have meant that in multiple instances, international regulation by states or international governmental organisations made up of states have been ineffective in terms of

⁸⁶Kenneth W Abbott and Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) 7 *Regulation & Governance* 95 at 99, Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 316.

⁸⁷Kenneth W Abbott and Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) 7 *Regulation & Governance* 95 at 96.

⁸⁸ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 323.

⁸⁹ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 323.

⁹⁰ Kenneth W Abbott & Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) 7 *Regulation & Governance* 95 at 102.

⁹¹ Kenneth W Abbott and Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) 7 *Regulation & Governance* 95 at 102.

the goal they were pursuing. Initial solutions focused on recreating traditional domestic regulatory tools.⁹² This often meant arguing for more international organisations with stronger powers.⁹³ However, this is an unrealistic opinion the current environment where nation-states fiercely defend their rights to unrestrained state sovereignty.⁹⁴ Many commentators have abandoned this solution, pointing instead to new kinds of governance that include many different actors.⁹⁵ This also recognised that in international relations, cooperation is often vital. However, official considerations have tended to focus on the old forms.⁹⁶ For NGOs, frustration with ineffectiveness can lead to the creation of non-state initiatives.⁹⁷ The FSC, as noted previously, was created after NGOs became disillusioned with the formal international forest negotiation process.⁹⁸ The FSC "implemented what the Rio Process was still talking about".⁹⁹ The Max Havelaar coffee certification, which is now part of the Fair Trade group, was initially created at the behest of producers suffering from falling coffee prices, despite an International Coffee Agreement designed to support prices.¹⁰⁰

⁹² Kenneth W Abbott & Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) 7 *Regulation & Governance* 95 at 99.

⁹³ Kenneth W Abbott & Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) 7 *Regulation & Governance* 95 at 99.

⁹⁴ Dan Sarooshi *International Organizations and the Exercise of Sovereign Powers* (Oxford University Press, New York 2005) at 3.

⁹⁵ Tanja A Borzel & Thomas Risse "Governance without a state: Can it work?" (2010) 4 *Regulation & Governance* 113 at 127.

⁹⁶ Kenneth W Abbott & Duncan Snidal "international regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 316.

⁹⁷ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) at 87.

⁹⁸ Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007 at 4.

⁹⁹ Marion Karmann and Alan Smith (eds) *FSC reflected in scientific and professional literature* (Forest Stewardship Council, Policy Series 2009-P001, 2009) at 8.

¹⁰⁰ Will Low and Eileen Davenport "Mainstreaming fair trade: adoption, assimilation, appropriation" (2006) 14(4) *Journal of Strategic Marketing* 315 at 319.

B The Case for Collaboration

Throughout the literature on international regulation, and particularly in relation to standard-setting, the usefulness and prevalence of collaboration is a common theme. A variety of different actors contributing to regulation have been popular in new kinds of thinking about regulation at the domestic and international level:¹⁰¹

The classical command and control conception of regulation pays insufficient attention to the complex causality of regulatory effects. Essentially, the decentralized approach sees regulation as involving a plurality of types of actors, a variety of legal and non-legal norms and the use of techniques beyond that of the sovereign command of the state. This decentralized understanding of regulation has become the dominant paradigm in regulatory scholarship, including the study of global regulation.

The three groups of actors typically identified are international governing organisations, business organisations, and the international civil society. This reflects the domestic triad of state, economic society and civil society. The different actor groups each possess different regulatory capacities.¹⁰² Facilitating collaboration and cooperation between the three has therefore been touted as a way to regulate at the international level, and to overcome the regulatory challenges posed by the particular structure of the international society. Increasingly, regulation occurs via "networks" of different actors.¹⁰³ Describing the importance of "networks of governance", Braithwaite and Drahos note in their study of international business regulation that economic might does not necessarily equate to global influence, rather an actors' connections to other actors in the world system.¹⁰⁴ This, they

¹⁰¹ Peter Drahos "The Regulation of Public Goods" in Keith E Maskus and Jerome H Reichman (eds) *International Public Goods and Transfer of Technology Under a Globalized intellectual Property Regime* (Cambridge University Press, New York, 2005) and Simon Counsell and Kim Terje Koraas (eds) *Trading in Credibility: The myth and reality of the Forest Stewardship Council* (The Rainforest Foundation, November 2002) at 48.

¹⁰² Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009).

¹⁰³ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) at

¹⁰⁴ Braithwaite and Drahos, above n 21, at 505.

explain, is why an NGO such as Greenpeace can have more global regulatory influence than a large multinational corporation such as Mitsubishi.¹⁰⁵ At the core of transnational collaborative regulation is standard-setting.¹⁰⁶ Transnational certification schemes, made through alliances between two of the groups, and on occasion all three, are rapidly becoming more common.¹⁰⁷

Collaborative regulation is not novel, although it took time for scholars to fully recognise its occurrence.¹⁰⁸ From 1994 there has been a rapid expansion of international collaborative standard-setting schemes.¹⁰⁹ An important development was the recognition that states do not have a monopoly on regulation, certainly not at the international level, and non-state actors like businesses and NGOs have their own sets of regulatory capacities.¹¹⁰ As thinking has moved from 'government' to 'governance', one of the aspects of this shift has been the rejection of the traditional political model where government authorities are the only actors responsible for public affairs.¹¹¹ The sources of international power are diffuse, and no single sector has the competencies required to regulate alone at the international level.¹¹² Collaboration enables the different capabilities of the three sectors to be utilised, and to counterbalance each other. The power of business in international sphere is often significant,

¹⁰⁵ Braithwaite and Drahos, above n 21, at 505.

¹⁰⁶ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 316.

¹⁰⁷ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 322.

¹⁰⁸ Peter N Grabosky "Using Non-governmental Resources to Foster Regulatory Compliance" (1995) 8(4) *Governance: An International Journal of Policy & Administration* 527 at 527-8.

¹⁰⁹ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 322.

¹¹⁰ Bronwen Morgan & Karen Yeung *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) at 4.

¹¹¹ Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007 at 5.

¹¹² Kenneth W Abbott and Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) 7 *Regulation & Governance* 95 at 97 & 103.

with the biggest organisations being larger and better funded than some states, even displaying some of the regulatory capabilities of government institutions.¹¹³ Even powerful states can be "captives of concentrated corporate interests which care enough about an issue to be willing to hurt their state's political leaders unless they do what they're told".¹¹⁴ However, commentators also note that those large international corporations are not as unconstrained as they may appear.¹¹⁵ Economic interests are still vulnerable to the pressure of civil society and governing organisations.

Abbot and Snidal undertake a detailed analysis of the different actors' competencies and how they may contribute to regulatory standard-setting.¹¹⁶ They identify independence, representativeness, expertise and operational capacity as an essential quadrant of qualities.¹¹⁷ These are necessary in different ways at different stages of the governance process, which includes agenda-setting, rule-making, monitoring, enforcement and adjudication.¹¹⁸ These steps and the competencies cannot be neatly delineated from each other: different competencies are important at several steps in the process.¹¹⁹ Observing the necessary capacities for regulation supports an argument for collaboration, as at the international level

¹¹³ Bronwen Morgan & Karen Yeung *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) at 62.

¹¹⁴ Braithwaite and Drahos, above n 21, at 482.

¹¹⁵ Kenneth W Abbott and Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) 7 *Regulation & Governance* 95 at 103, Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 14.

¹¹⁶ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009).

¹¹⁷ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) at 46.

¹¹⁸ Virginia Haufler "The Kimberly Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention" (2009) 89 *Journal of Business Ethics* 403 at 404.

¹¹⁹ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009)

no single actor consistently possesses the necessary capacities.¹²⁰ Well-functioning nation states in theory display these capabilities, even they at the international level will be somewhat lacking.¹²¹

Collaboration is lauded as bringing with it a variety of benefits. It is argued that the parties are more committed to making a regulation work when they have participated in its development and so implementation is more likely to be successful.¹²² NGOs in particular, are often locked out of the process, with their only option being to "hurl missiles across the fence (mostly by scattergun media assaults)".¹²³ Involving them is more productive and can moderate their position.¹²⁴ Bringing in many actors also increases legitimacy and representation, and dialogue can help resolve conflicting values.¹²⁵ Ultimately, much of the international regulatory community relies on norms and cross-sector pressure rather than coercion to affect behaviour.¹²⁶

...complex interdependency can induce cooperation, constituting normative communities, nurturing habits of compliance that are then institutionalized into bureaucratic routines, communicating informal praise and shame that are then institutionalized, and building capacity. When many different types of actors use many dialogic mechanisms of this sort, both impressive regime-building and impressive compliance have been repeatedly demonstrated.

¹²⁰ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) *5 Rev Int Organ* 315 at 325.

¹²¹ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) at 46.

¹²² Peter N Grabosky "Using Non-governmental Resources to Foster Regulatory Compliance" (1995) *8(4) Governance: An International Journal of Policy & Administration* 527 at 533.

¹²³ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 86.

¹²⁴ Kenneth W Abbott and Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) *7 Regulation & Governance* 95 at 108.

¹²⁵ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 97.

¹²⁶ Braithwaite and Drahos, above n 21, at 32.

Many regulatory commentators therefore argue for a mix of actors.¹²⁷ Borrowing from domestic regulatory developments, then, international regulation has adopted the idea of regulation via non-hierarchical coordination involving many non-state actors, as an alternative or supplement to state governance.¹²⁸ There are a variety of regulatory theorists, some responding to decentralisation at the domestic level, others to the lack of hierarchy at the international, whose theories that incorporate collaboration, and recognise the value of exercising the capabilities of NGOs.¹²⁹

In their seminal *Responsive Regulation* Ayers and Braithwaite support a domestic "mixed institutional order" where "the community, market, state, and associational order each are important in both challenging and constituting the power of the other".¹³⁰ In particular, they argue for the inclusion of public interest groups under the theory of "tripartism".¹³¹ This involves certain public interest groups being selected to become fully-fledged third players in the regulatory game.¹³² The groups are given access to information, a seat at the negotiating table, and the same ability to enforce as the regulator.¹³³ Among several other benefits, Ayers and Braithwaite argue that the groups will then act as a check on the regulator, by identifying and therefore holding accountable the regulator who fails to punish noncompliance.¹³⁴ In this

¹²⁷ Bridget M Hutter *The Role of Non-State Actors in Regulation* (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, April 2006, discussion paper 37) at 14.

¹²⁸ Tanja A Borzel and Thomas Risse "Governance without a state: Can it work?" (2010) 4 *Regulation & Governance* 113 at 126.

¹²⁹ See for example 3, 6, and Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992).

¹³⁰ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 14 and 17.

¹³¹ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992).

¹³² Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 56.

¹³³ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 57.

¹³⁴ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 56.

they are enforcing a "metanorm" as they are regulating the regulator. Ayers and Braithwaite also argue that the inclusion of public interest groups can act as a counterweight to economic interests, in a similar argument to those made in support of civil society groups being a part of collaborative international regulation.¹³⁵ A final aspect of tripartism that is relevant is the idea of contestability.¹³⁶ This is based on the idea that only some of the public interest groups are given greater access. In theory, then, only legitimate groups are granted access, because those groups seeking to be a part of the process but not given access will act as a check. For example, if an NGO with the access rights is corrupt there will be a strong incentive on those NGOs without access to identify the corruption and publicise it, arguing for the corrupt NGO's removal.

Tripartism is taken from domestic regulatory theory, premised on a strong state presence, and conceived from the state point of view. Therefore it is less relevant for looking at the role NGOs have in organising regulation or setting standards at the international level, but it does provide insight into how NGOs may be utilised in the global regulatory community, and the benefits of their role. The discussion is relevant for campaigns that argue for NGO standing in international courts and seats at negotiating tables. In terms of more access to information, tripartism's empowerment may be less relevant to international NGOs as their information capabilities can be greater than the international governing organisation. However, tripartism does provide a theoretical basis for a way to ensure that the most legitimate NGOs are involved. This is a helpful point, considering the difficulties defining NGO, and because the risk of accidentally empowering illegitimate NGOs is a difficulty if NGOs were to be more formally involved in international regulation.

¹³⁵ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 82.

¹³⁶ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 57.

C Blurring public and private regulation

The increased involvement of various non-state actors in international regulation is part of a trend whereby the line between public and private regulation is becoming increasingly blurred, even at the domestic level. Morgan and Yeung note the variety of regulatory theories that have moved away from making a distinction between public and private interests.¹³⁷ Arguably, it is not possible to objectively distinguish between a public and a private interest.¹³⁸ According to Ayers and Braithwaite, good policy is not a decision between the free market and government regulation.¹³⁹ At the international level, the rise of international public-private partnerships is evidence of this lack of demarcation, with different actors motivated by different interests participating in regulatory standard-setting.¹⁴⁰

The blurring of regulatory boundaries is also a new development from the perspective of many NGOs: historically they have been suspicious of market mechanisms and privatised regulation.¹⁴¹ Many NGOs were active in arguing against the tide of globalisation. Now, however, the focus is on the problems themselves, such as social injustice or environmental degradation that may be fostered by free markets or globalisation.¹⁴² NGOs have become more willing to utilise market mechanisms on a global scale to change behaviour, particularly

¹³⁷ Bronwen Morgan & Karen Yeung *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) and Jennifer A Zerk *Multinationals and Corporate Social Responsibility* (New York, Cambridge University Press, 2006) and Jason Potts and others, *The State of Sustainability Initiatives Review 2014: Standards and the Green Economy* (International Institute for Sustainable Development, 2014).

¹³⁸ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 58.

¹³⁹ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 3.

¹⁴⁰ Christopher Hood, Henry Rothstein & and Robert Baldwin *The Government of Risk* (Oxford University Press, Oxford, 2001).

¹⁴¹ O'Rourke, above n 11, at 5.

¹⁴² Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 129.

with the increase in certification schemes. As Robert Howse notes, "the antiglobalizers have themselves gone global".¹⁴³

Certifications schemes are the epitome of the integration between public and private: they involve using private instruments to further what are usually public goals. They are "in the market, but not of it".¹⁴⁴ Such schemes tend to aim to influence corporate behaviour in order to induce social or political change.¹⁴⁵ This recognises that markets do not operate in profit-orientated isolation, but are in fact influenced by social and political contexts.¹⁴⁶ NGOs activities in this regard are different from other activities such as agenda setting or implementing agreements that are more likely emanate from or target international governmental actors.¹⁴⁷ This means that NGOs and other non-state actors have gone from trying to influence public international regulation to creating regulation that sits outside of it.¹⁴⁸

The increase in private regulation at the global level comes with a proviso. Regulation by non-state actors will not always be an effective substitute for public regulation. First, there are democratic and accountability concerns with blurring the line between governments and

¹⁴³ Robert Howse "The End of the Globalization debate: A Review Essay" (2008) 121(6) *Harvard Law Review* 15 and Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 1530.

¹⁴⁴ Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129.

¹⁴⁵ Virginia Haufler "The Kimberly Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention" (2009) 89 *Journal of Business Ethics* 403 at 407.

¹⁴⁶ Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 131.

¹⁴⁷ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) at 45, Phillip Pattberg "What Role for Private Rule-Making in Global Environmental Governance? Analysing the Forest Stewardship Council (FSC)" (2005) 5 *International Environmental Agreements* 175 at 176.

¹⁴⁸ Phillip Pattberg "What Role for Private Rule-Making in Global Environmental Governance? Analysing the Forest Stewardship Council (FSC)" (2005) 5 *International Environmental Agreements* 175 at 176.

other actors. Corporate and civic actors may not be representative as they are driven by "profits and passions, respectively," yet they are posited alongside governments.¹⁴⁹ Moreover, non-state regulation will not always be effective: in some situations, market mechanisms will not be sufficient.¹⁵⁰ There is a danger that focusing too much on private actor regulation will be to the detriment of necessary public regulation, or that public institutions will atrophy or fail to develop.¹⁵¹ For example, the Forest Stewardship Council certification standards cannot address fundamental problems with forest management such as land tenure insecurity; this requires legal intervention.¹⁵² As such, NGO regulation cannot be seen as a substitute for state or state-led regulatory systems,¹⁵³ and any active delegation to non-state actors should not be wholesale.¹⁵⁴ The limitations to certification scheme effectiveness, and NGO regulatory legitimacy, including their representative relative to elected or non-elected governments, are discussed later in this paper.

D The limitations of collaboration

The nature of collaboration means that it has inherent limitations. Bargaining among different actors with disparate goals and capacities is generally expensive, time-consuming and contentious.¹⁵⁵ It involves voluntary commitment and compliance when the actors are not subject to each other's command, and yet they will likely have different interests and

¹⁴⁹ Anne-Marie Slaughter *A New World Order* (Princeton University Press, Princeton, 2004) at 9–10.

¹⁵⁰ Robert Howse "The End of the Globalization debate: A Review Essay" (2008) 121(6) *Harvard Law Review* 1528 at 1543.

¹⁵¹ Grabosky, above n 12, at 115.

¹⁵² Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007 at 18.

¹⁵³ Grabosky, above n 12, at 115.

¹⁵⁴ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 4.

¹⁵⁵ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) at 82.

perspectives.¹⁵⁶ Without any incentive, or something aligning their interests there is the danger that agreement will not be reached. At the domestic level, empirical evidence suggests that, akin to the description in the "benign big gun" theory, collaborative non-hierarchical coordination involving non-state actors tends not to succeed unless it has a strong state in the background.¹⁵⁷ Often, at the international level, a state-like coercive power to incentivise collaboration will be absent, particularly if it is a situation where a certification scheme is being created as a response to international governmental organisation or state failure. Borzel and Risse consider options for a functional equivalent to a state 'shadow'. Because collaboration is voluntary, some kind of incentive needs to be present for actors to come to the table. It is beyond the scope of this paper to consider the different motivations of the different groups of actors that may collaborate at the international level, but two incentives relevant to certification scheme standard setting will be touched on.

Borzel and Risse rely on two logics in considering alternatives to a strong state. The logic of consequences taps into incentives that could influence self-interested, utility-maximising actors. The logic of appropriateness looks to normative structures that could induce actors to follow social rules.¹⁵⁸ Under the logic of appropriateness, Borzel and Risse argue that it is possible to establish norms that put societal pressure on firms.¹⁵⁹ Commentators acknowledge the role that NGOs have in establishing norms.¹⁶⁰ NGOs are central in this regard as many use publicity and reputational targeting which create changes in expectations. In contributing to the establishment of norms, NGOs are acting in the "backdrop" of regulation; in the

¹⁵⁶ Tanja A Borzel and Thomas Risse "Governance without a state: Can it work?" (2010) 4 *Regulation & Governance* 113 at 115.

¹⁵⁷ Tanja A Borzel and Thomas Risse "Governance without a state: Can it work?" (2010) 4 *Regulation & Governance* 113 at 115.

¹⁵⁸ Tanja A Borzel and Thomas Risse "Governance without a state: Can it work?" (2010) 4 *Regulation & Governance* 113 at 120.

¹⁵⁹ Tanja A Borzel and Thomas Risse "Governance without a state: Can it work?" (2010) 4 *Regulation & Governance* 113 at 124.

¹⁶⁰ Jennifer A Zerk *Multinationals and Corporate Social Responsibility* (New York, Cambridge University Press, 2006) at 94, Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 94, Braithwaite and Drahos, above n 2, at 36.

context rather than the content.¹⁶¹ However, many are then involved in partnerships with corporations to create standards for firms to comply with. An example is the increase in prevalence of the idea of Corporate Social Responsibility, and the significant number of NGO-firm collaborative schemes to improve firm practices.¹⁶² As these norms become more ingrained, firms become induced to comply via the logic of consequences. That is, as norms are well-established, and consumers care more about them, the firms gain a commercial advantage by complying.¹⁶³ In this way, a socially conscious market can act as an incentive for collaboration. These logics support the use of certification schemes in being effective collaborative regulation at the international level, as in theory they are collaborations driven by norms and/or a socially conscious market.

Under the self-interested logic of consequences, a potential incentive is the risk that if 'soft' regulation is not implemented, there will be stricter regulation created by states or international governmental organisations.¹⁶⁴ Corporations have an interest in having more flexible regulation, and so may create their own standards, partnering with NGOs to improve the policies and provide legitimacy. These incentives to collaborate relate to the reasons a firm may adopt a certification scheme, which are discussed later in this paper.

E Theoretical nature of the literature

As a final point, an issue with the theories developed in the literature is that they are abstract and highly theoretical, and rarely supported by empirical evidence. The theorists do often appreciate this shortcoming: Ayers and Braithwaite concede that their tripartism is "purely

¹⁶¹ Bridget M Hutter & Clive J Jones *Business Risk Management Practices: The Influence of State Regulatory Agencies and Non-State Sources* (The Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, Discussion paper) at 3.

¹⁶² Tanja A Borzel and Thomas Risse "Governance without a state: Can it work?" (2010) 4 *Regulation & Governance* 113 at 124.

¹⁶³ Tanja A Borzel and Thomas Risse "Governance without a state: Can it work?" (2010) 4 *Regulation & Governance* 113 at 124.

¹⁶⁴ Tanja A Borzel and Thomas Risse "Governance without a state: Can it work?" (2010) 4 *Regulation & Governance* 113 at 116.

theoretical and generally in its application" and is not "a practical proposal ready for implementation".¹⁶⁵ They recognise that all they have done is show that there are theoretical reasons that indicate that tripartism may work, and so recommend a practical analysis to determine the conditions where it would work and when it would not.¹⁶⁶ Abbot and Snidal acknowledge that their theory of orchestration is "somewhat speculative and suggestive at this stage".¹⁶⁷ Borzel and Risse make a similar concession, noting that there are likely to be conditions under which their theories will work and others where it will not.¹⁶⁸ Hutter notes that there has been little practical research into the regulatory activities of NGOs, and this hinders assessment of the theories in practice.¹⁶⁹ Therefore in any application of these theories, the fact that their limits have not been tested must be remembered.

VI Certification Scheme Mechanisms

In this Part, the mechanisms of certification schemes are canvassed. Being a general discussion, the quirks of individual schemes are not provided for. Further, the sections are not completely distinct and often interrelate. Finally, note that the "template" certification scheme in this analysis is a scheme holding a social value as a purpose, with corporations as its main regulatory target, created via a collaboration of actors.

¹⁶⁵ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 54 & 97.

¹⁶⁶ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 97.

¹⁶⁷ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 317.

¹⁶⁸ Tanja A Borzel and Thomas Risse "Governance without a state: Can it work?" (2010) 4 *Regulation & Governance* 113 at 127.

¹⁶⁹ Bridget M Hutter & Joan O'Mahony *The Role of Civil Society Organisations in Regulating Business* (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, September 2004 discussion paper) at 12.

A *Agenda-setting*

Agenda-setting is a core regulatory activity, undertaken at the beginning of the process.¹⁷⁰ Before anything can be done, the issue must first be placed on the political agenda and the relevant groups must be galvanised to act.¹⁷¹ As discussed above, this may require some external incentive. NGOs often play a significant role in this stage at the international level generally,¹⁷² but particularly in relation to certification scheme standard-setting. NGOs are able to conduct core agenda-setting activities such as collecting and disseminating information, framing issues powerfully and capturing public attention.¹⁷³ For example, when the movement against blood diamonds was created, it involved NGOs framing the issue; creating the "new" problem that trade in diamonds funded wars.¹⁷⁴ Often, the impetus of a certification scheme is some kind of consumer action, led by NGOs. Forest certification schemes are an example: several forest certification schemes, precursors to the FSC, were created as a response to consumer boycotts.¹⁷⁵ Activist groups across Europe protested, picketed and petitioned against retailers known to be selling tropical timber, most of which was unsustainable. Imports of tropical timber plummeted.¹⁷⁶ Producers thus had a strong

¹⁷⁰ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) at 63.

¹⁷¹ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) at 46.

¹⁷² Steve Charnovitz "The Illegitimacy of Preventing NGO Participation" [2011] 36 *Brook J Int'l L* 891 at 895.

¹⁷³ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) at 63.

¹⁷⁴ Virginia Haufler "The Kimberly Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention" (2009) 89 *Journal of Business Ethics* 403 at 407.

¹⁷⁵ Simon Counsell and Kim Terje Koraas (eds) *Trading in Credibility: The myth and reality of the Forest Stewardship Council* (The Rainforest Foundation, November 2002) at 11-12.

¹⁷⁶ Simon Counsell and Kim Terje Koraas (eds) *Trading in Credibility: The myth and reality of the Forest Stewardship Council* (The Rainforest Foundation, November 2002) at 11-12.

incentive to establish labelling to open markets that were closing by consumer activism.¹⁷⁷ Bartley, in fact, considers that the emergence of the private regulation was caused in part by social movement campaigns targeting companies.¹⁷⁸ Civic action, as evidence of Borzel and Risse's "socially conscious market" can push issues onto the agenda of the relevant international actors.¹⁷⁹

B Creating standards

Creating the standards and the systems around them is a difficult process, particularly if it a collaborative effort with a variety of different actors involved. The types of standards made are vital for the success of the scheme. The Forest Stewardship Council, for example, stands out among other forestry certification schemes because its standards are stricter.¹⁸⁰ However, the standards must be rationally connected to the purpose: the Forest Stewardship Council has nevertheless been criticised for not actually changing the behaviour of corporations, as many of the corporations' forestry activities were above the standards that the FSC set when it was implemented.¹⁸¹ Being international certification schemes, setting consistent and meaningful standards for different countries and contexts is also challenging. For example, the FSC has had problems with its standards being impractical at local levels, particularly in

¹⁷⁷ Simon Counsell and Kim Terje Koraas (eds) *Trading in Credibility: The myth and reality of the Forest Stewardship Council* (The Rainforest Foundation, November 2002) at 11-12

¹⁷⁸Will Low & Eileen Davenport "Mainstreaming fair trade: adoption, assimilation, appropriation" (2006) 14(4) *Journal of Strategic Marketing* 315 at 320.at 319, citing T Bartley "Certifying forests and factories: states, social movements, and the rise of private regulation in the apparel and forest products fields" (2003) 31(3) *Politics and Society* 433.

¹⁷⁹ Tanja A Borzel and Thomas Risse "Governance without a state: Can it work?" (2010) 4 *Regulation & Governance* 113 at 124.

¹⁸⁰ Donald H Schepers "Challenges to Legitimacy at the Forest Stewardship Council" (2010) 92 *Journal of Business Ethics* 279, at 280.

¹⁸¹ Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007 at 13.

tropical countries. In some countries the standards even conflicted with local laws.¹⁸² The FSC therefore created national initiatives in certain tropical countries to adapt FSC principles to the local context.¹⁸³ This, however, risks undermining the legitimacy and effectiveness of the scheme by having inconsistent standards.

In overseeing and modifying the standards, schemes such as Fair Trade and the FSC have sought to have a diverse range of representation within their governing structure.¹⁸⁴ This arguably improves the schemes' legitimacy and makes them democratic, but involving a variety of stakeholders has an ancillary benefit. In doing so, a scheme can provide a political space that may not be available elsewhere. Both Fair Trade and the FSC act as a political forum for their respective stakeholders, by requiring their national bodies to consult with the local stakeholders. This aspect of both schemes is significant, as in some countries they are the only forums for discussion and consultation of broader forest issues,¹⁸⁵ and some governments have limited opportunities for negotiation in regulation of markets in products such as coffee.¹⁸⁶ Consequently, community and indigenous groups are provided with better access to public policy.¹⁸⁷ Furthermore, explicit inclusion of national NGOs in deliberations, in some cases providing greater access than the rights granted under national legislation, acts

¹⁸² Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007 at 9.

¹⁸³ Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007 at 12.

¹⁸⁴ Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 142.

¹⁸⁵ Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007 at 16.

¹⁸⁶ Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 137.

¹⁸⁷ Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 138.

to develop the civil society of the particular country.¹⁸⁸ This, as discussed previously, is considered positive for the democratic development of a society.

C Scheme Adoption

The default impression of business is that in profit maximising, they seek to externalise all possible costs.¹⁸⁹ On this view, it does not logically follow that they would voluntarily adhere to standards that in many cases increase costs. However, if NGOs can provide norms that appeal to the logic of appropriateness and economic incentives that appeal to the logic of consequences, both discussed earlier, there can be impressive take-up of standards.¹⁹⁰ Certification schemes, characterised as "clubs" by one author, provide benefits for those who comply with the standards, and those who do not comply are excluded.¹⁹¹ The benefit is usually some kind of positive image and reputation that will, in theory, make an impression on stakeholders.

From the perspective of a rational, profit-maximising firm, the benefit provided by the schemes is competitive advantage in a world where consumers are increasingly concerned with corporate responsibility:¹⁹²

Selling poorly performing, unsafe, or environmentally damaging products is not a route to real competitive advantage in sophisticated industry and industry segments, especially in a world where environmental sensitivity and concern for social welfare are rising in all advanced nations.

While initially the firms who chose to comply with the standards may suffer a cost disadvantage, in the longer-term they can generate sustainable competitive advantage.¹⁹³ Porter even contends that strict standards result in more innovation and more long-sighted

¹⁸⁸ Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007 at 16.

¹⁸⁹ Aseem Prakash and Matthew Potoski *The Voluntary Environmentalists* (Cambridge University Press, New York, 2006) at x.

¹⁹⁰ Braithwaite and Drahos, above n 21, at 32.

¹⁹¹ Aseem Prakash and Matthew Potoski *The Voluntary Environmentalists* (Cambridge University Press, New York, 2006) at xi.

¹⁹² Braithwaite and Drahos, above n 21, at 616.

¹⁹³ Braithwaite and Drahos, above n 21, at 616.

planning, both of which he alleges, are beneficial to businesses.¹⁹⁴ Certification schemes are an effective way of communicating with consumers; they provide firms with a way for their potential customers to easily and cheaply differentiate socially conscious firms from laggards.¹⁹⁵ Joining a scheme is also better than an organisation trying to get these benefits alone, as generating the necessary legitimacy is easier with many players, and there are economies of scale in terms of communicating the scheme. Firms can also use schemes as a risk management strategy, to hedge their bets in the reputation game.¹⁹⁶ One manager said of the reasons for joining the Forest Stewardship Council:

We weren't ever going to have customers demanding sustainable timber in our stores. But we knew that if our name, B&Q, was associated with destruction of tropical forests or even temperate forests, our brand name . . . would be damaged.

Reputation played a significant part in the establishment of the Kimberly Process Certification Scheme. The diamond industry felt that the association with international conflict would undermine the image of diamonds as high-quality symbols of love. For them, the "blood diamond" campaign created a high risk of irrevocable consumer backlash.¹⁹⁷ Creating a certification process was a way to maintain demand, which was threatening to plummet, by creating "conflict-free" diamonds.¹⁹⁸ Finally, it is possible for other international actors to encourage the adoption of schemes. The Forest Stewardship Council, for example, is supported by other NGOs such as Greenpeace; the World Trade organisation has officially endorsed it; and some investment banks require FSC certification as a condition for capital.¹⁹⁹

¹⁹⁴ Braithwaite and Drahos, above n 21, at 616 citing Porter's *The Competitive Advantage of Nations*.

¹⁹⁵ Aseem Prakash and Matthew Potoski *The Voluntary Environmentalists* (Cambridge University Press, New York, 2006) at 18.

¹⁹⁶ O'Rourke, above n 11 at 4.

¹⁹⁷ Virginia Hafler "The Kimberly Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention" (2009) 89 *Journal of Business Ethics* 403 at 408.

¹⁹⁸ Virginia Hafler "The Kimberly Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention" (2009) 89 *Journal of Business Ethics* 403 at 411.

¹⁹⁹ Donald H Schepers "Challenges to Legitimacy at the Forest Stewardship Council" (2010) 92 *Journal of Business Ethics* 279, at 284.

In using certification to manage reputation risk, there is a more indirect benefit than a direct price premium or market access advantage. This is part of a broader trend towards Corporate Social Responsibility, whereby firms are expected to consider broader social issues, not just their shareholders.²⁰⁰ This is an example of the norms or societal pressure discussed in Part III. As such, firms are being motivated less by direct profit advantage (the logic of consequences) and more by the norms and expectations (the logic of appropriateness). For example, companies that fail to acknowledge ethical and social issues "risk being labelled dinosaurs".²⁰¹ This more indirect motivation for joining a certification scheme is evident in when suppliers and retailers commit to certified products even when there is not necessarily the consumer demand for certified products, or the certified product does not attract a premium price. This is the case with certified forest products.²⁰² Strategically, the FSC has campaigned retailers and importers to commit to buying only FSC-certified products.²⁰³ This they have done, particularly in certain industries dominated by a small number of large multinationals with strong brand names.²⁰⁴ Consequently, the general expectation of responsibility, often driven by NGO campaigns, can lead to adoption of certification schemes even if the profit benefit is less immediate.

A challenge for this part of certification schemes is in the initial stage, where firms need to be convinced of the advantages of joining the scheme. Without participants, the scheme will

²⁰⁰ Jennifer A Zerk *Multinationals and Corporate Social Responsibility* (New York, Cambridge University Press, 2006 at 30–32.

²⁰¹ Jennifer A Zerk *Multinationals and Corporate Social Responsibility* (New York, Cambridge University Press, 2006 at 25.

²⁰² Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007 at 8.

²⁰³ Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007 at 8.

²⁰⁴ Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007 at 8.

lack recognition and legitimacy. Creating sufficient momentum and support is vital. Braithwaite and Drahos propose a 'divide and conquer' strategy as a way for NGOs to achieve global adoption of standards.²⁰⁵ Essentially, if an NGO can persuade an innovator of the benefits of adopting a scheme early, then that firm becomes an advocate for the standard being adopted, as greater adoption tends to bring more recognition.²⁰⁶ Something of the kind occurred in the international market for Fair Trade coffee. The major players in the supply chain were the roasters, and they were large transnational corporations that dominated the market.²⁰⁷ Smaller roasters were successful in targeting niche markets, such as those consumers who valued sustainable or ethical coffee (Fair Trade), as a way to compete.²⁰⁸ Demand for such coffee grew, and the Fair Trade brand has subsequently been adopted by larger roasters.²⁰⁹

Getting groups of firms on board can also lead to those firms arguing for the adoption of the standards into international law, as it may be a significant advantage to them, if they are already compliant, for the standards to then be imposed on their competitors, who would have to adapt their practices potentially at a great up-front cost.²¹⁰ Germany, as a nation-state example, led the European nitrogen oxide emissions reductions negotiations aimed at reducing acid rain, because German cars were already required to have the necessary technology, and German firms were leading emissions-reduction technology.²¹¹

²⁰⁵ Braithwaite and Drahos, above n 21, at 612.

²⁰⁶ Braithwaite and Drahos, above n 21, at 616.

²⁰⁷ Marie-Christine Renard "Quality certification, regulation and power in fair trade" (2005) 21 *Journal of Rural Studies* 419 at 421.

²⁰⁸ Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 134.

²⁰⁹ Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 134.

²¹⁰ Braithwaite and Drahos, above n 21, at 616.

²¹¹ Braithwaite and Drahos, above n 21, at 614.

D Creating consumer demand

Consumers are crucial elements in the certification scheme standard-setting: "the most vivid examples of private regulation may be seen in situations characterized by supply chain pressure, inspired by consumer preferences".²¹² The success of a certification scheme can be contingent on firms thinking that their target market is going to be more likely to purchase their product or pay more for it if the firm complies with standards that reflect certain values. Whether consumers do so depends on their awareness and acceptance of the issue; awareness and acceptance of the particular scheme; and then the consumers changing their purchasing habits as a result of the scheme's influence.

In today's world, concern for the negative global consequences of international trade, such as environmental damage and threats to social welfare, is rising in the general population.²¹³ Many buyers now appreciate safer, cleaner, quieter products,²¹⁴ and are demanding more information about supply chains.²¹⁵ Forms of consumption are changing, and buyers now look for products that represent certain values, as "self-actualising consumers".²¹⁶ The problem, however, with these kinds of values is that many are process-based, or they are attributes that cannot be verified by the consumers themselves.²¹⁷ Such goods are called "credence goods", which have "credence attributes", such as paying workers a fair wage or being environmentally sustainable.²¹⁸ The attributes then must be communicated to consumers in some way, but it requires their confidence in the source of the information. This

²¹² Grabosky, above n 12, at 115

²¹³ Marie-Christine Renard "Quality certification, regulation and power in fair trade" (2005) 21 *Journal of Rural Studies* 419 at 412

²¹⁴ Braithwaite and Drahos, above n 21, at 616.

²¹⁵ O'Rourke, above n 11, at 4.

²¹⁶ Marie-Christine Renard "Quality certification, regulation and power in fair trade" (2005) 21 *Journal of Rural Studies* 419 at 415 and 419.

²¹⁷ Marie-Christine Renard "Quality certification, regulation and power in fair trade" (2005) 21 *Journal of Rural Studies* 419 at 422.

²¹⁸ Meike Janssen and Ulrich Hamm *Certification logos in the market for organic food: What are consumers willing to pay for different logos?* Paper presented to the EAAE Congress Change and Uncertainty (August 30-September 2, 2011, Zurich) at 2.

confidence, however, is difficult to earn, and credence goods are vulnerable to fraud or opportunistic behaviour.²¹⁹ Therefore there is a vital role for independent certification schemes to play, in providing such information and facilitating consumers' desire to enforce social values through their purchasing decisions. This also means that when the certification mark message is being conveyed, legitimacy is crucial, as consumers need to trust the scheme's effectiveness. The perceived legitimacy of the standard scheme turns on whether the standards themselves are sufficiently strict and are able to achieve the goal; and on whether there is compliance, or at least perceived compliance, with those standards.

Certification schemes are advantageous because, as mentioned above, they are an easy and low-cost way for consumers to discriminate between different organisations.²²⁰ Empirical research has shown that consumers are willing to pay more for "credence products" that are certified,²²¹ although this willingness does depend on the particular value or process.²²² Consumer awareness of both the issue and the certification scheme is central to their ability to discriminate, and awareness requires effective marketing by the scheme and its participants. This is often challenging, as the scheme in some cases represents a complex ideology. Fair Trade, for example is about more than just fair prices for producers, but about long-term relationships with suppliers, caring for the environment, flexible financial terms, community development, and a quality product.²²³ However, rapid communication of so

²¹⁹ Meike Janssen and Ulrich Hamm *Certification logos in the market for organic food: What are consumers willing to pay for different logos?* Paper presented to the EAAE Congress Change and Uncertainty (August 30-September 2, 2011, Zurich) at 3.

²²⁰ Aseem Prakash and Matthew Potoski *The Voluntary Environmentalists* (Cambridge University Press, New York, 2006) at 18.

²²¹ Meike Janssen and Ulrich Hamm *Certification logos in the market for organic food: What are consumers willing to pay for different logos?* Paper presented to the EAAE Congress Change and Uncertainty (August 30-September 2, 2011, Zurich) at 10.

²²² Will Low & Eileen Davenport "Mainstreaming fair trade: adoption, assimilation, appropriation" (2006) 14(4) *Journal of Strategic Marketing* 315 at 320.

²²³ Will Low & Eileen Davenport "Mainstreaming fair trade: adoption, assimilation, appropriation" (2006) 14(4) *Journal of Strategic Marketing* 315 at 320.

many characteristics is difficult.²²⁴ Market research has found that customers did not have a clear idea of the full ideology behind the Fair Trade brand.²²⁵ Overcoming this is particularly difficult if consumers lack the time or motivation to ascertain the meaning of Fair Trade for themselves.²²⁶ Studies have shown that customers may spend as little as four seconds examining a supermarket shelf.²²⁷ The danger with a lack of full understanding or with oversimplification is that there will be approbation of the Fair Trade idea by other companies, who can exploit the consumers' weak understanding of what Fair Trade stands for by presenting their own "ethical" product as akin to the Fair Trade label.²²⁸ This results in consumer confusion and reduced loyalty at the point of sale.²²⁹

A challenge that results from this consumer-driven element of certification schemes is that some markets lack ethically minded consumers, such as business to business commodities or markets in developing countries.²³⁰ Forest products are predominantly sold on domestic markets, many of which care little about certification, with only 10% of global timber production entering international trade.²³¹ Africa produces 36% of the world's bananas, yet

²²⁴ Meike Janssen and Ulrich Hamm *Certification logos in the market for organic food: What are consumers willing to pay for different logos?* Paper presented to the EAAE Congress Change and Uncertainty (August 30-September 2, 2011, Zurich) at 10.

²²⁵ Len Tiu Wright & Simon Heaton "Fair Trade marketing: an exploration through qualitative research" (2006) 14(4) *Journal of Strategic Marketing* 411 at 424.

²²⁶ Len Tiu Wright & Simon Heaton "Fair Trade marketing: an exploration through qualitative research" (2006) 14(4) *Journal of Strategic Marketing* 411 at 420.

²²⁷ Will Low & Eileen Davenport "Mainstreaming fair trade: adoption, assimilation, appropriation" (2006) 14(4) *Journal of Strategic Marketing* 315 at 32.

²²⁸ Will Low & Eileen Davenport "Mainstreaming fair trade: adoption, assimilation, appropriation" (2006) 14(4) *Journal of Strategic Marketing* 315 at 322.

²²⁹ Len Tiu Wright & Simon Heaton "Fair Trade marketing: an exploration through qualitative research" (2006) 14(4) *Journal of Strategic Marketing* 411 at 424.

²³⁰ O'Rourke, above n 11 at 22.

²³¹ Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* (Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007) at 9.

makes up only 1% of the global certified bananas.²³² Moreover, when there does exist a market with ethical consumers, there is evidence to suggest that is consumers' good intentions do not always correlate with a change in behaviour.²³³ A recent poll found that while 83% of consumers intended to act ethically, only 18% did so.²³⁴ These issues highlight the importance of a certification scheme's communication and marketing, and the difficulty in relying on global markets as regulatory tools.

E The role of supply chains

Different players in the chain can have significant influence over other actors in the same supply chain. Certification scheme regulation is particularly successful where large international bodies dominate a part of the supply chain, creating a bottleneck, and demand certification from those above them in the chain.²³⁵ Major transnational corporations enjoy enormous purchasing power: one study quoted a source who said "When McDonald's says 'Jump', 500 suppliers say 'How high?'".²³⁶ In April 2005, Greenpeace protested at several McDonald's restaurants, accusing the corporation of purchasing soy from companies that were causing deforestation of the Amazon.²³⁷ McDonalds and other similarly targeted companies reacted rapidly, demanding that their Brazilian soy traders join ABIOVE (Brazilian Association of Vegetable Oil Industries) and cease trading products that contribute

²³² Jason Potts and others, *The State of Sustainability Initiatives Review 2014: Standards and the Green Economy* (International Institute for Sustainable Development, 2014) at 93.

²³³ Len Tiu Wright & Simon Heaton "Fair Trade marketing: an exploration through qualitative research" (2006) 14(4) *Journal of Strategic Marketing* 411 at 415.

²³⁴ Len Tiu Wright & Simon Heaton "Fair Trade marketing: an exploration through qualitative research" (2006) 14(4) *Journal of Strategic Marketing* 411 at 415.

²³⁵ Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007, at 8-9.

²³⁶ Grabosky, above n 12, at 115 and 117.

²³⁷ Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007, at 5.

to Amazon deforestation.²³⁸ Less punitively, some transnational corporations favour certified suppliers: IBM have said that they prefer suppliers certified by the environmental management standard promulgated by the International Organisation for Standardization (ISO 14000). A firm that adopted ISO 14000 would therefore gain an advantage over competitors.²³⁹ For companies in developing countries, compliance with international standards can be a prerequisite to enter global markets.²⁴⁰ Environmental standards have been particularly wide-spread, with Vandenberg noting in 2007 that more than half of the largest US firms in eight different retail and industrial sectors impose environmental requirements on their suppliers.²⁴¹ In this way, the push for the adoption of the scheme comes not from a producer seeking a particular benefit, but by purchasers lower in the supply chain requiring the certification of their suppliers. This power is akin to the consumer power in choosing certified products, but amplified as individual purchasers have significantly more purchasing power than individual consumers.

F Monitoring and Enforcement

As mentioned above, monitoring and enforcement is crucial for the scheme to be taken seriously. Weak or unconvincing compliance is where schemes may fall down. Without effective monitoring and enforcement, the incentive is for firms to free-ride on the benefits of the scheme without complying, and this undermines the legitimacy of the scheme.²⁴² The reputation of the scheme and its achievement of its objectives is reliant on members improving their performance.²⁴³

²³⁸ Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007, at 6.

²³⁹ Braithwaite and Drahos, above n 21, at 281.

²⁴⁰ O'Rourke, above n 11 at 5.

²⁴¹ Grabosky, above n 12, at 117 quoting M Vandenberg "The New Wal-Mart Effect: The Role of Private Contracting in Global Governance" (2007) 54 *UCLA Law Review* 913.

²⁴² Aseem Prakash and Matthew Potoski *The Voluntary Environmentalists* (Cambridge University Press, New York, 2006) at 21.

²⁴³ Aseem Prakash and Matthew Potoski *The Voluntary Environmentalists* (Cambridge University Press, New York, 2006) at 18-19.

Monitoring aims to assess compliance with the standard, and in doing so to improve compliance levels.²⁴⁴ There are many practical considerations for designing methods of monitoring compliance with schemes, and these depend on a variety of factors, including the subject of the standard, the target of the regulation and the resources of the standard-setter or enforcer. Different versions of monitoring activities can be more or less effective, but an important element is independence from the organisation being assessed, to provide legitimacy. It is not uncommon for auditors responsible for monitoring compliance to be paid by the firms they are tasked with monitoring,²⁴⁵ which is problematic for the actual effectiveness of the monitoring and the appearance of effectiveness. To improve this, a system of independent certification bodies have been established for many schemes, certified be a separate NGO.²⁴⁶

Enforcement is defined as "the application of rewards and penalties" but can also include "managerial" techniques as well.²⁴⁷ Certification schemes, while not being tradition regulatory tools, are able to have sanctions analogous to the "pyramids of enforcement" exercised by domestic regulatory agencies, where less severe sanctions are used initially, and escalated as necessary.²⁴⁸ For example, if a firm fails to comply, the scheme can remove the benefit bestowed by the scheme; by withdrawing the license to use the brand, for example.²⁴⁹ This withdrawal can be subsequently reversed. In the case of continued noncompliance, the scheme can permanently ban a member. Finally, in the most severe cases, the scheme could

²⁴⁴ O'Rourke, above n 11 at 20.

²⁴⁵ O'Rourke, above n 11 at 4.

²⁴⁶ Accreditation Services International "Certification Bodies" http://www.accreditation-services.com/archives/certification_bodies

²⁴⁷ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) at 64.

²⁴⁸ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 39.

²⁴⁹ Kenneth W Abbott and Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) 7 *Regulation & Governance* 95 at 104.

publicly denounce the firm, so that consumers can "heap scorn and punishment" on the firms.²⁵⁰ Naming and shaming is thus an important tool to enforce compliance,²⁵¹ and this is particularly effective if the firm has a strong brand name to protect.²⁵²

The underlying theory of the sanctioning tools, and how to escalate them, can be applied in practice in a variety of ways. For example, in enforcing the Congo Basin forest concession monitoring system, breaches are given media coverage, which applies reputational pressure to the company at fault. If the company fails to comply after a certain timeframe, its certificate of legality can be withdrawn.²⁵³ This displays a pyramid of escalation, if a somewhat limited one.

Enforcement can be problematic for many schemes. For example, the Kimberley Process is criticised for its lack of clear sanctions.²⁵⁴ It is a scheme where states are the targets, and it has encountered enforcement difficulties with weak states, corruption and inconsistent commitment to its standards.²⁵⁵ Fair Trade, which has high reliance on the support of large corporations may encounter problems enforcing noncompliance by those bodies. For example, if Starbucks was shown to be noncompliant, would it be practically possible for the

²⁵⁰ Aseem Prakash and Matthew Potoski *The Voluntary Environmentalists* (Cambridge University Press, New York, 2006) at 18.

²⁵¹ Kenneth W Abbott and Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) 7 *Regulation & Governance* 95 at 97-104, Braithwaite and Drahos, above n 21, at 239 and Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 94.

²⁵² Tanja A Borzel and Thomas Risse "Governance without a state: Can it work?" (2010) 4 *Regulation & Governance* 113 at 124.

²⁵³ Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007, at 7.

²⁵⁴ Virginia Hafler "The Kimberly Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention" (2009) 89 *Journal of Business Ethics* 403 at 410.

²⁵⁵ Virginia Hafler "The Kimberly Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention" (2009) 89 *Journal of Business Ethics* 403 at 412.

American Fair Trade body, Transfair, to strip Starbucks of its label?²⁵⁶ This kind of reliance is major danger for schemes reliant on powerful external actors for support.

The mechanisms of certification schemes demonstrate the many different facets to a functional scheme and the different ways international actors participate in the schemes. NGOs are valuable throughout the process, particularly in their ability to communicate with the public and to provide legitimacy.

VIIAn Evaluation of NGO participation

NGOs are highly involved in certifications scheme standard setting. Many of their capabilities are beneficial for a functional scheme, such as their independence and information sharing abilities. In this section, the contribution of NGOs is assessed. A weakness of this assessment is that it is a generalisation: not all NGOs will display the attributes discussed.

A Improving regulation

One obvious advantage of NGO involvement in collaborative standard-setting is that they have capabilities that other actors lack.²⁵⁷ These activities include the ability to use reputational damage as a sanction, to communicate with local communities, and to gather information. Further, NGOs provide a different perspective, which may improve the end result of the regulation.²⁵⁸ One academic said that NGOs are often the source of more innovative regulatory solutions.²⁵⁹ NGOs do, however, have their own weaknesses: for

²⁵⁶ Simon Counsell and Kim Terje Koraas (eds) *Trading in Credibility: The myth and reality of the Forest Stewardship Council* (The Rainforest Foundation, November 2002) at 430.

²⁵⁷ Kenneth W Abbott & Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) 7 *Regulation & Governance* 95 at 106.

²⁵⁸ Tanja A Borzel and Thomas Risse "Governance without a state: Can it work?" (2010) 4 *Regulation & Governance* 113, at 113.

²⁵⁹ Bridget M Hutter *The Role of Non-State Actors in Regulation* (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, April 2006, discussion paper 37) at 9.

example they often lack business expertise, resources, and access.²⁶⁰ As mentioned above, many commentators, speaking to both domestic and international regulation, say that a mix of regulatory actors is desirable to balance the different capabilities.²⁶¹

NGOs are particularly capable at mobilising public opinion. This is vital for bringing issues onto the agenda. Several commentators opine that NGOs are at their most influential in this area, for example when organising consumer boycotts or igniting public opinion.²⁶² This ability is useful for creating concern for the issue itself; the more consumers know and care about issues, the more they will apply economic pressure to firms.²⁶³ An example is the rise of the concept of Corporate Social Responsibility. This concept was transformed from a fringe issue to a mainstream concern largely because of the efforts of a diverse group of NGOs.²⁶⁴

A potential problem here is the danger that NGOs are *too* effective, being overzealous in fanning the flame of public opinion. Inciting a mass response can cause extreme policy incoherence.²⁶⁵ Grabosky notes that the sword of citizen participation is double-edged, and warns of 'wiki witch hunts'.²⁶⁶ Such is the uncontrollable and unpredictable nature of the tool some NGOs are trying to use on targets. This can result in disproportionate or misdirected results relative to the regulatory goal, and so should be a consideration when escalating enforcement mechanisms in a certification scheme.

²⁶⁰ Kenneth W Abbott & Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) 7 *Regulation & Governance* 95 at 100.

²⁶¹ Grabosky, above n 12, at 212.

²⁶² Kenneth W Abbott and Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) 7 *Regulation & Governance* 95 at 106, Braithwaite and Drahos, above n 21, at 31.

²⁶³ Tanja A Borzel and Thomas Risse "Governance without a state: Can it work?" (2010) 4 *Regulation & Governance* 113 at 124.

²⁶⁴ Jennifer A Zerk *Multinationals and Corporate Social Responsibility* (New York, Cambridge University Press, 2006 at 95.

²⁶⁵ Tanja A Borzel & Thomas Risse "Governance without a state: Can it work?" (2010) 4 *Regulation & Governance* 113 at 542.

²⁶⁶ Grabosky, above n 12, at 119.

While NGO regulation has strengths, it is important that any regulatory activities they engage in are actually effective. Some skeptics question whether NGOs are capable of being effectively influential.²⁶⁷ A particular risk for environmental certification schemes, for example, is 'greenwashing' where firms claim to be following a set of environmental standards, but are simply using the standards as publicity while not making environmental improvements. Ineffectiveness, besides failing to achieve the regulatory goal, undermines public confidence in the schemes generally.²⁶⁸ This is a particular issue for certification schemes: as mentioned above, they are reliant on the public to trust the regulation, to be induced to change their purchase decisions. Unfortunately, environmental certification programmes in particular vary in effectiveness.²⁶⁹ Certification scheme effectiveness is more thoroughly discussed in the next section.

Being ineffective is one danger, but the greater one is making the situation worse. NGO activities are not necessarily going to improve the situation.²⁷⁰ Some standards have been criticised for having unintended consequences that go against the goal of the scheme. An example is the market barrier effect that the FSC has had on small producers: the cost of being certified hinders producers in the areas with the most threatened forests from joining.²⁷¹ This is clearly an issue, as ineffective NGO activities, more than anything, would mean a significant amount of capital from a variety of donors was misemployed.

²⁶⁷ Daniel C Thomas "International NGOs, state sovereignty, and democratic values" (2001) 2 *Chicago Journal of International Law* 389 at 392.

²⁶⁸ Kenneth W Abbott & Duncan Snidal "international regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 324.

²⁶⁹ Aseem Prakash and Matthew Potoski *The Voluntary Environmentalists* (Cambridge University Press, New York, 2006) at 3.

²⁷⁰ Grabosky, above n 12, at 119.

²⁷¹ Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 138.

B Legitimacy and accountability

Alongside the more practical benefits, NGOs participation is also arguably an inherent good, independent of outcomes.²⁷² The basis for this is the idea that participation by different actors is per se beneficial, as it means a broad range of interests are represented, and so the process is more democratic and legitimate.²⁷³ Empowering NGOs "means creating a more vital, active democracy – a democracy less under the thumb of the corporate sector."²⁷⁴ As representatives of the international civil society, NGOs are often included in the process because their presence is seen as legitimising or democratising it.²⁷⁵ This is particularly relevant at the international level because of criticisms of a democratic deficit within international organisations.²⁷⁶ NGOs can counteract governments' tendency to "exaggerate the divergent interests of territorial groups organized into nation states, and to under emphasize the common interests that cut across national boundaries".²⁷⁷ Furthermore, an NGO's legitimitising influence is important for building trust in the certification scheme, as discussed previously.

NGOs' democratic and representative influence is not unequivocally accepted. Many point out that NGOs are not democratic themselves, and they do not necessarily have internal or external accountability mechanisms.²⁷⁸ That is, members may not scrutinising the activities of their leaders;²⁷⁹ and that unlike many international public organisations, NGOs are not

²⁷² Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 82.

²⁷³ Kerstin Martens "Examining the (Non-) Status of NGOs in International Law" (2003) 10 *Ind J Global Legal Stud* 1 at 24, Bronwen Morgan & Karen Yeung *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) at 27.

²⁷⁴ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 82.

²⁷⁵ Kerstin Martens "Examining the (Non-) Status of NGOs in International Law" (2003) 10 *Ind J Global Legal Stud* 1 at 24.

²⁷⁶ Anna-Karin Lindblom *Non-Governmental Organisations in International Law* (Cambridge University Press, New York, 2005) at 33.

²⁷⁷ Charnovitz, above n 3, at 249.

²⁷⁸ Peter J Spiro "Accounting for NGOs" (2003) 3 *Chicago Journal of International Law* 161 at 162

²⁷⁹ Peter J Spiro "Accounting for NGOs" (2003) 3 *Chicago Journal of International Law* 161 at 163.

held to any set of external standards.²⁸⁰ There have been situations where NGOs have been accused, whether well-founded or not, of distorting facts, manipulating evidence, exaggerating risk and misleading their supporters. "[H]istory is littered with cases of [NGOs] caught with their snouts in the trough".²⁸¹ This undermines part of the rationale for including NGOs in international regulation. There is a counter-argument, however, which is that the structure of many NGOs, requiring membership and support in order to exist, with easy opt-out options, does provide accountability mechanisms.²⁸² While states are put on a pedestal as being representatives of their people,²⁸³ not all states are functioning, democratic or accountable.²⁸⁴ Further, even in those democratic states accountable to an electorate, voting is a crude tool for holding governments' accountable for their international activities.²⁸⁵ Nevertheless, the accountability of NGOs is in question, and as a result there have been calls for an NGO code of conduct or greater transparency.²⁸⁶

Paralleling the legitimising function, NGOs are often perceived as independent. This is part of what provides legitimacy, but is also a useful regulatory capability. It enables NGOs to act as a check on other international actors, in some cases as external watchdogs.²⁸⁷ Independence is particularly relevant for monitoring and enforcement of certification

²⁸⁰ Grabosky, above n 12, at 119.

²⁸¹ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 57.

²⁸² Steve Charnovitz "The Illegitimacy of Preventing NGO Participation" [2011] 36 *Brook J Int'l L* 891 at 896.

²⁸³ Anne-Marie Slaughter *A New World Order* (Princeton University Press, Princeton, 2004) at 9–10.

²⁸⁴ Anna-Karin Lindblom *Non-Governmental Organisations in International Law* (Cambridge University Press, New York, 2005) at 6.

²⁸⁵ Peter J Spiro "Accounting for NGOs" (2003) 3 *Chicago Journal of International Law* 161 at 164-165.

²⁸⁶ Bridget M Hutter & Joan O'Mahony *The Role of Civil Society Organisations in Regulating Business* (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, September 2004 discussion paper) at 11.

²⁸⁷ Bronwen Morgan & Karen Yeung *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) at 56.

schemes.²⁸⁸ NGOs can facilitate trust in a certification scheme's authenticity and effectiveness. NGOs often have goals that are equal to or closely aligned with the certification schemes, making their intentions in supporting a scheme more transparent and genuine. Surveys have shown that NGOs are trusted information providers, particularly when compared to other sources.²⁸⁹ A poll found that NGOs were trusted more than government ministers or scientists when it came to advice on pollution, and scientists were trusted significantly more if they worked for an NGO than if they worked for industry or even the government.²⁹⁰ If a certification scheme is run solely by business interests, it is inherently not independent, and so can lack credibility from the consumers' perspective, even if the businesses are sincere.²⁹¹

However, there are suspicions around whether NGOs are genuinely a benevolent and independent influence.²⁹² Studies have shown that NGOs are less effective,²⁹³ and less vocal in their criticism²⁹⁴ when they are funded by a single source, or by governments. More directly, dependence on certain funding may hinder an NGO's independence: for example,

²⁸⁸ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) at 64.

²⁸⁹ Bridget M Hutter & Joan O'Mahony *The Role of Civil Society Organisations in Regulating Business* (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, September 2004 discussion paper) at 4.

²⁹⁰ Bridget M Hutter & Joan O'Mahony *The Role of Civil Society Organisations in Regulating Business* (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, September 2004 discussion paper) at 4.

²⁹¹ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) at 67.

²⁹² Richard Youngs *International Democracy and the West: The Roles of Governments, Civil Society, and Multinational Business* (Oxford University Press, New York 2004) at 143.

²⁹³ Bridget M Hutter & Joan O'Mahony *The Role of Civil Society Organisations in Regulating Business* (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, September 2004 discussion paper) at 10.

²⁹⁴ Sarah S Stroup & Amanda Murdie "There's no place like home: Explaining international NGO advocacy" (2012) 7 *Rev Int Organ* 425 at 430.

NGOs funded by the European Commission "must not, directly or indirectly, send messages which conflict with Community policies or be associated with an image which is not in keeping with that of the institutions." In some cases NGOs have even been accused of being used as instruments to boost governmental strategic interests.²⁹⁵ The fact that there is a "revolving door" of personnel between government and NGOs may also mar their independence.²⁹⁶ However, this criticism is something NGOs are aware of and attempting to refuse: the FSC for example explicitly excludes governments from their membership to maintain their independence.²⁹⁷

C Driven by ideologies

A distinctive attribute of NGOs is that often they represent specific ideals: many NGOs are "value actors" who are motivated by principled beliefs rather than a direct stake.²⁹⁸ By being ideologically motivated they temper the self-interest of the private sector, and even of international governmental organisations.²⁹⁹ They can also act as a counterweight to the nationalism of states.³⁰⁰ Furthermore, by representing particular issues NGOs can be a mechanism for people to express political preferences, better than a market can. Often an individual's political and consumption choices are different, with political choices being more aspirational.³⁰¹ Individuals may want to pre-commit to something they consider to be

²⁹⁵ Richard Youngs *International Democracy and the West: The Roles of Governments, Civil Society, and Multinational Business* (Oxford University Press, New York 2004) at 144.

²⁹⁶ Richard Youngs *International Democracy and the West: The Roles of Governments, Civil Society, and Multinational Business* (Oxford University Press, New York 2004) at 146.

²⁹⁷ Donald H Schepers "Challenges to Legitimacy at the Forest Stewardship Council" (2010) 92 *Journal of Business Ethics* 279, at 283.

²⁹⁸ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) and Jason Potts and others, *The State of Sustainability Initiatives Review 2014: Standards and the Green Economy* (International Institute for Sustainable Development, 2014).

²⁹⁹ Richard Youngs *International Democracy and the West: The Roles of Governments, Civil Society, and Multinational Business* (Oxford University Press, New York 2004) at 137.

³⁰⁰ Steve Charnovitz "The Illegitimacy of Preventing NGO Participation" [2011] 36 *Brook J Int'l L* 891 at 894-5.

³⁰¹ Bronwen Morgan & Karen Yeung *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) at 29.

beneficial to society, even if their consumption choices do not reflect this.³⁰² For example, a person may value environmental protection, and so donate money to an NGO such as Greenpeace, but then go on to make consumption choices that are bad for the environment. In this way, NGOs can represent the values of society better than markets can, because relying solely on a free market results in individual action, which may not be consistent with the individual's political beliefs.³⁰³ In this situation, the fact that NGOs often represent specific interests or issues is democratically useful, and reinforces their role as civil society representatives.

Being ideologically motivated can have negative results. NGOs may argue for their cause regardless of the trade-offs, such as protecting a species from extinction regardless of the economic effects. That is, NGOs may not act "rational maximisers of public interest" but instead as a "knight on a white charger."³⁰⁴ NGOs may have to act in this way: an NGO that compromises could be seen as selling out, and lose their public support.³⁰⁵ A way to mitigate this tendency to be uncompromising is involving the NGOs in the regulation. The argument is that an un-empowered NGO only has symbolic but largely unhelpful victories to report to their supporters, but that an empowered NGO will be encouraged to moderate its position and will be more willing to work towards more realistic solutions.³⁰⁶

³⁰² Bronwen Morgan & Karen Yeung *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) at 28-29.

³⁰³ Bronwen Morgan & Karen Yeung *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) at 29.

³⁰⁴ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 76.

³⁰⁵ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 76.

³⁰⁶ Ian Ayers and John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Inc, New York, 1992) at 76.

VIII Certification Scheme Weaknesses

A Scheme Effectiveness

Effectiveness means the ability to produce a desired or intended result.³⁰⁷ Certification schemes' goals are generally particular to the individual scheme, although many overlap. Assessing any schemes' ability to achieve its goal is incredibly difficult, as there are many different variables and the counterfactuals are highly complex.³⁰⁸ Even measuring the impacts of a scheme is challenging, with a multiplicity of methodological issues.³⁰⁹ Furthermore the publicly available data is incomplete, blocking complete analysis of how well these systems of regulation perform.³¹⁰ Moreover, the goals of a scheme may not provide a concrete measure of success for impacts to be evaluated against. For example, the FSC's mission is to "promote environmentally appropriate, socially beneficial, and economically viable management of the world's forests".³¹¹ The Kimberley Processes' goal is to "stem the flow of conflict diamonds".³¹² Furthermore, often for practical reasons a proxy measurement is used, for example measuring the proportion of the particular industry that has been certified rather than the improvement in biodiversity. If the standard itself is not stringent, or the enforcement lacking, the proxy will not be an accurate reflection of the scheme's impact.

The two schemes mentioned above have had their effectiveness questioned. It is estimated that the Kimberley Process has had a significant increase in the level of certified diamonds

³⁰⁷ Angus Stevenson and Maurice Waite *Concise Oxford English Dictionary* (Oxford University Press, 12 ed, New York 2011).

³⁰⁸ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009), at 62.

³⁰⁹ Marion Karmann and Alan Smith (eds) *FSC reflected in scientific and professional literature* (Forest Stewardship Council, Policy Series 2009-P001, 2009) at 20.

³¹⁰ O'Rourke, above n 11, at 20.

³¹¹ Forest Stewardship Council "Our Vision and Mission" <ic.fsc.org>

³¹² The Kimberley Process "Home" <www.kimberleyprocess.com>

and was associated with a perceived decline in violence.³¹³ However, the scheme has been criticised for weaknesses in enforcement and sanctions.³¹⁴ Global Witness, one of the NGOs involved in the scheme from its inception, resigned from the Kimberley Process in 2011, saying that because of loopholes in the Process "diamonds association with [human rights] abuses are still contaminating global markets".³¹⁵

The FSC has been criticised for not creating meaningful change, and for failing to make a difference in areas where change is most needed. The majority of certification has occurred in temperate and boreal Northern forests, where some corporations were already compliant, and where the forests are less vital to global biodiversity than the tropical areas.³¹⁶ Some inadvertent negative consequences of the scheme have been recognised: that the scheme has benefitted the larger market incumbents, possibly creating an expensive barrier to entry that exacerbates inequalities among the different producers.³¹⁷ This in turn affects effectiveness as it is one of the reasons certification is more uncommon in the most threatened, tropical forests.³¹⁸ Similarly problematic is the scheme's failure to provide a minimum price for

³¹³ Virginia Hafler "The Kimberly Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention" (2009) 89 *Journal of Business Ethics* 403 at 403 and 411.

³¹⁴ Virginia Hafler "The Kimberly Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention" (2009) 89 *Journal of Business Ethics* 403 at 412.

³¹⁵ Global Witness "The Kimberly Process" (1 April 2013) <www.globalwitness.org>

³¹⁶ Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 136, Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007, at 13.

³¹⁷ Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 137 and Phillip Pattberg "What Role for Private Rule-Making in Global Environmental Governance? Analysing the Forest Stewardship Council (FSC)" (2005) 5 *International Environmental Agreements* 175 at 186.

³¹⁸ Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 138.

small-scale producers, which is clearly beyond the direct purpose of the scheme, but is nevertheless an issue for the viability of it in the more threatened areas.³¹⁹

To summarise, schemes are criticised for making too little difference, but also for failing to address interrelated issues that hinder effectiveness. It is highly difficult to decide what a schemes' measure of success is, and usually even more difficult to then assess the scheme's impact on that measure. This is problematic for analysing the scheme, but also for assessing the value of NGOs' contribution to international regulation.

B Market Management

For the main schemes discussed in this paper, a significant challenge is their reliance on the market as an integral part of the regulation. Challenges mentioned earlier in this paper are the reliance on there existing a market for products with the particular social value; distinguishing the scheme from less robust ones; and communicating complex values to time-poor consumers. These challenges require careful marketing strategies and management of supply and demand.

In addition, schemes have encountered difficulties with the supply and demand of certified products. For products certified by a sustainability scheme, supply significantly outstrips demand.³²⁰ This oversupply means that a significant amount of produce is compliant with a certification scheme but sold as a normal product. On all the commodities in a State of Sustainability Initiative report, on average only 44% of all compliant produce was actually sold as compliant.³²¹ It is estimated that Latin America, Africa and Asia have the ability to

³¹⁹ Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 138.

³²⁰ Jason Potts and others, *The State of Sustainability Initiatives Review 2014: Standards and the Green Economy* (International Institute for Sustainable Development, 2014) at 90.

³²¹ Jason Potts and others, *The State of Sustainability Initiatives Review 2014: Standards and the Green Economy* (International Institute for Sustainable Development, 2014) at 91.

supply *seven times* the demand of Fair Trade product.³²² Oversupply is positive in that companies have choice for sourcing certified products, but is negative in that oversupply will generally reduce the price that may be charged for certified products, lessening the incentive for the scheme to be adopted.³²³ It is possible, however, that this "relatively persistent condition of oversupply" is a sign of the global markets adjusting to the rapid growth in certified products and the markets are "undergoing a transformation toward compliance with voluntary sustainability standards".³²⁴

A risk that NGOs should be wary of is that in utilising market mechanisms to pursue their values, there is a risk that they may be captured by market principles.³²⁵ That is, it is important to focus on the ends without being caught up in the means. Both the Forest Stewardship Council and the Fair Trade system have struggled to manage the schemes' market strategies while maintaining their underlying goals. This stems from the inherent contradiction in certification schemes: they cannot isolate themselves from mainstream markets and the strategies that come with them, but nor can they abandon the schemes' non-market values.³²⁶ Initially, growth in the "ethical" markets were led by early adopting firms and consumers.³²⁷ As schemes grew, and consumers became more aware, schemes have tended to adopt a "mainstreaming" strategy, whereby larger actors are encouraged to support the schemes, resulting in rapid growth in the schemes' market share and a broader customer

³²² Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 137.

³²³ Jason Potts and others, *The State of Sustainability Initiatives Review 2014: Standards and the Green Economy* (International Institute for Sustainable Development, 2014) at 8.

³²⁴ Jason Potts and others, *The State of Sustainability Initiatives Review 2014: Standards and the Green Economy* (International Institute for Sustainable Development, 2014) at 91.

³²⁵ Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 130; Simon Counsell and Kim Terje Koraas (eds) *Trading in Credibility: The myth and reality of the Forest Stewardship Council* (The Rainforest Foundation, November 2002) at 426.

³²⁶ Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 143.

³²⁷ Jason Potts and others, *The State of Sustainability Initiatives Review 2014: Standards and the Green Economy* (International Institute for Sustainable Development, 2014) at 90.

base.³²⁸ While mainstream adoption of the schemes is positive for widespread change, there are some dangers. First, as mentioned in Part IV, to communicate with mainstream consumers, the message of these schemes may be simplified and diluted, which has arguably occurred with Fair Trade. A rather dramatic articulation of the problem, referring specifically to Fair Trade, said the organisers are facing the choice between "continuing to be pure (and marginal) or aligning with large distribution (and losing their soul)".³²⁹ In addition, there is more at stake than ideology, for mainstreaming usually means there are larger organisations in the schemes' respective supply chains.³³⁰ This opens schemes up to the risk of being beholden to the purchasing power of the large corporations.³³¹ This issue is connected to the problem of oversupply, as it lies in the rapid expansion of the certified product market. Consequently, while the schemes' growth is positive for the success of certification schemes, rapid growth contains risks that must be managed carefully.

C Incomplete coverage: twin problems

One of the issues with the international regulatory environment identified earlier was that regulation was fragmented, lacking a coordinating power. Certification schemes do not address this issue, and may even exacerbate it. The problem is that there are both too many and too few schemes: there are multiple overlapping schemes in some issue-areas and gaps in coverage elsewhere. The schemes are spontaneously created and their evolution is

³²⁸ Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 134.

³²⁹ Will Low & Eileen Davenport "Mainstreaming fair trade: adoption, assimilation, appropriation" (2006) 14(4) *Journal of Strategic Marketing* 315 at 320- 321.

³³⁰ Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 140-141.

³³¹ Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 142.

decentralised.³³² The result is a "patchwork of uncoordinated schemes competing vigorously for adherents, resources, legitimacy and public notice."³³³

1. Too many schemes

The lack of coordinating power and the relatively low cost of schemes, among other factors, has led to a proliferation of different schemes, established and managed by different actors yet addressing similar issues.³³⁴ For example, just in the area of forestry certification schemes, there are over fifty competing initiatives.³³⁵ This leads to firms being able to do the certification scheme equivalent of jurisdiction shopping, picking the less stringent, often industry-led schemes.³³⁶ Furthermore, because there are so many different schemes, it is difficult to communicate to consumers what the more effective ones are, and thus the less strict schemes are able to exploit the general goodwill associated with a certification schemes, while weakening the credibility of the responsible consumption movement.³³⁷ A comprehensive study of the certification scheme market found that newer, mainstream-orientated schemes have standards with less depth and breadth, which enables faster uptake of the standards, but reduced effects.³³⁸ Moreover, having many schemes that cover the same issue-areas raises questions of efficiency and appropriate use of resources. Overlapping

³³² Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) *5 Rev Int Organ* 315 at 317.

³³³ Kenneth W Abbott and Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) *7 Regulation & Governance* 95 at 102.

³³⁴ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) at 57.

³³⁵ Donald H Schepers "Challenges to Legitimacy at the Forest Stewardship Council" (2010) *92 Journal of Business Ethics* 279 at 248.

³³⁶ Donald H Schepers "Challenges to Legitimacy at the Forest Stewardship Council" (2010) *92 Journal of Business Ethics* 279 at 285.

³³⁷ Stéphane Guéneau "Certification as a new private global forest governance system: The regulatory potential of the Forest Stewardship Council" paper for the conference *Non-state Actors as Standard Setters: The Erosion of the Public-Private Divide* Basel Institution on Governance, Basel, Switzerland 8 – 9 Feb 2007, at 15.

³³⁸ Jason Potts and others, *The State of Sustainability Initiatives Review 2014: Standards and the Green Economy* (International Institute for Sustainable Development, 2014) at 9.

schemes may provide some benefits, such as competition and innovation, but their negative effects outweigh the positive.³³⁹

2. *Too few schemes*

Second, there are many gaps in the coverage of schemes. There is no coordinating power, so attention to issues is reliant on the many different NGOs or other actors identifying areas of concern. As a result, schemes are ad hoc and there is arbitrary discrimination of policy areas. For example while there is a well-established and robust certification scheme for conflict-free diamonds, the one for conflict-free gold is weak, and industry-run.³⁴⁰ Naturally, some problems will be more difficult to address via certification schemes, or completely unfeasible, requiring a different type of regulatory tool. It is unknown how far the schemes in existence can be generalised.³⁴¹ As illustrated in this paper, even initiatives that could be considered successes, such as the Forest Stewardship Council, Fair Trade and the Kimberly Process continue to face issues that threaten the schemes' abilities to achieve their goals. Attempting to create schemes in less conducive conditions is likely to be extremely difficult. However, this could be mitigated by using the existing schemes as institutional models: the Forest Stewardship Council for example was a model for the Marine Stewardship Council.³⁴² Furthermore, the potential for regulatory standard-setting to be successful in different contexts should not be underestimated. A commentator in 2009 noted that the Kimberly Process would be unlikely to be successfully repeated with other goods that were linked to conflict because "consumers buy cellphones, not coltan".³⁴³ However, the raising the issue of

³³⁹ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) *5 Rev Int Organ* 315 at 323-324

³⁴⁰ The World Gold Council *Conflict-Free Gold Standard* (October 2012)

³⁴¹ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) *5 Rev Int Organ* 315 at 317.

³⁴² Phillipp Pattberg "What Role for Private Rule-Making in Global Environmental Governance? Analysing the Forest Stewardship Council (FSC)" (2005) *5 International Environmental Agreements* 175 at 182.

³⁴³ Virginia Haufler "The Kimberly Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention" (2009) *89 Journal of Business Ethics* 403 at 413.

conflict diamonds has been the catalyst for concern with other "conflict resources".³⁴⁴ There is currently a "fairphone" on the market that aims to use conflict-free materials,³⁴⁵ and Intel has committed to a conflict-free supply chain, paring with NGO The Enough Project.³⁴⁶ These initiatives show that the industries disagree, and consider there to be a market for conflict free products generally, including coltan. To conclude, while the different schemes are patchy and are unlikely to transform their markets into institutions where broader social values are at the center of production, trade and consumption decisions,³⁴⁷ they are beginning to connect, and could in time achieve more complete coverage:³⁴⁸

... all these hybrid forms of governance are beginning to overlap and occupy the same global 'space'... global voluntary regulatory programs in which business plays a critical role have grown in number and size in the last few years. ... they are beginning to connect and overlap in ways that may strengthen them. It may be that we cannot and should not evaluate each of them in isolation, but consider the totality of new forms of governance and their larger impact on relations between citizens, governments, and markets. (citations omitted)

3. *Potential Solutions*

Undoubtedly there are many ways to accelerate certification schemes' global cohesion. Two options are collaboration between different schemes and orchestration by international governmental organisations. The case for collaboration between the three main actors in international regulation is made earlier in this paper, but in terms of addressing scheme fragmentation, collaboration between different schemes with similar goals may ameliorate the problem.³⁴⁹ They can continue to operate independently, but collaborate on procedures

³⁴⁴ See for example House of Commons International Development Committee *Conflict and Development: Peacebuilding and Post-conflict Reconstruction* (London 25 October 2006, HC 923-I).

³⁴⁵ Dan Church Aid "Is There Blood on Your Mobile Phone?" (22 September 2006) <www.danchurchaid.org> and Fairphone "Mining" <www.fairphone.com>.

³⁴⁶ Intel Corporation "Intel Commits to a Responsible, Conflict-Free Supply Chain" <www.intel.com>.

³⁴⁷ Peter Leigh Taylor "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change" (2005) 33(1) *World Development* 129 at 144.

³⁴⁸ Virginia Haufler "The Kimberly Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention" (2009) 89 *Journal of Business Ethics* 403 at 414.

³⁴⁹ O'Rourke, above n 11, at 24.

and standards, facilitating the evening-out of standards to "reduce the confusion of multiple schemes" and help "establish shared practices as international standards, undercutting the legitimacy of less stringent schemes".³⁵⁰ Such cooperation provides mutual support and learning, facilitates harmonization to reduce the burden and confusion of multiple schemes, and boosts the influence of the schemes in international forums.³⁵¹ Fair Trade itself is an example of coordination, as the international body is an umbrella agency for different national fair trade schemes that were previously independent schemes.³⁵²

The second option is for international governmental organisations to take more of a coordinating role in non-state regulation. Abbot and Snidal propose a theory of "orchestration" for international standard-setting regulation, which applies to global certification schemes. Orchestration involves international organisations "reaching out to private actors and institutions, collaborating with them, and supporting and shaping their activities".³⁵³ The theory is advanced on the argument that international governmental organisations have coordinating capabilities that ought to be taken advantage of, to coherently utilise the regulatory capabilities of the other actors in the system.³⁵⁴ Abbot and

³⁵⁰ Peter Drahos "The Regulation of Public Goods" in Keith E Maskus and Jerome H Reichman (eds) *International Public Goods and Transfer of Technology Under a Globalized intellectual Property Regime* (Cambridge University Press, New York, 2005) 46 at 82.

³⁵¹ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) at 82.

³⁵² Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009) at 82.

³⁵³ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 315.

³⁵⁴ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 326.

Snidal propose that such organisations have the global reach, representativeness and legitimacy to coordinate a successful system of transnational standard-setting.³⁵⁵

Orchestration is only a theory, and as mentioned in Part V, any practical reliance on untested theories should be done with caution. There is evidence of the occurrence of orchestration, but its effectiveness in practice is questionable.³⁵⁶ Currently, international governmental organisations tend to resist combining standards. For example, many United Nations agencies only endorse the UN Global Compact scheme, even though it is not necessarily the most effective.³⁵⁷ United Nations Environment Programme has been fairly aggressive in seeking possibilities for standard-setting orchestration, but other international governmental organisations have been less enthusiastic, or even in the case of the International Labour Organisation, surprisingly hostile.³⁵⁸ The organisations' particular bureaucratic structure and culture will have an impact on its willingness to play a role in coordinating groups of certification schemes.³⁵⁹

An additional qualification is that the certification bodies themselves may not be willing to cooperate. The plethora of different schemes are evidence of different, and sometimes conflicting, perspectives on the standards that should be implemented held by different NGOs, corporations and international governmental organisations.³⁶⁰ However, non-state actors are often more willing to work with international governmental organisations than

³⁵⁵ Kenneth W Abbott and Duncan Snidal "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton University Press, 2009).

³⁵⁶ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 317.

³⁵⁷ Kenneth W Abbott and Duncan Snidal "Taking responsive regulation transnational: Strategies for international organizations" (2013) 7 *Regulation & Governance* 95 at 107.

³⁵⁸ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 334.

³⁵⁹ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 325.

³⁶⁰ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 317.

state are, as the issue of sovereignty is not present.³⁶¹ NGOs may see international governmental organisations as allies because often the two actors have parallel goals.³⁶² In terms of other non-state actors, firms are likely to prefer coordinated regulation through international government organisations than uncoordinated regulation by many states and external pressure from NGOs.³⁶³ Abbot and Snidal detail many practical ways that a motivated international government organisation may take steps to orchestrate,³⁶⁴ and in doing so, mitigate some of the weaknesses in the decentralised standard-setting network.³⁶⁵ There are likely to be barriers to effective orchestration, but if successful it could significantly increase the regulatory value of certification schemes by facilitating more coherent application.

IX Conclusion

To conclude, the emergence of NGOs as international regulatory actors is part of a trend towards collaborative network regulation, and is an example of the value in exploiting the different regulatory capacities of different actor groups. Certification schemes are an example of NGOs' regulatory abilities, and also a symptom of the blurring between public and private regulation. Certification schemes harness market mechanisms to change behaviour, and in doing so can be more effective than an international regulation without coercive sanctions. The effectiveness of such schemes is difficult to assess and can be contentious. In using market forces, the schemes run into problems with effective marketing and with managing supply and demand. The extremely decentered aspect of NGO regulation means that there is fragmentation across different issue areas. Furthermore, not all NGOs are created equal, and

³⁶¹ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 326.

³⁶² Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 326.

³⁶³ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 326.

³⁶⁴ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315.

³⁶⁵ Kenneth W Abbott & Duncan Snidal "International regulation without international government: Improving IO performance through orchestration" (2010) 5 *Rev Int Organ* 315 at 317.

there remain issues around accountability and effectiveness that need to be considered. Thus there is potential for positive contribution by NGOs to international regulation, particularly in their use of certification schemes, but these risks need to be managed. Finally, certification schemes should be embraced, for "all the schemes that have emerged are not optimal, and all the optimal schemes have not emerged".³⁶⁶

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