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ORIGINAL ARTICLE

Meta-Regulation of Private Standards: The Role of Regional and International Organizations in Comparison with the WTO

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Abstract

The rise and proliferation of private standards have been recognized in international trade law, and various concerns have been raised. Existing literature analyses how the World Trade Organization (WTO), particularly the SPS (Sanitary and Phytosanitary) Committee and the TBT (Technical Barriers to Trade) Committee, have responded (or cannot respond) to the proliferation of private standards. This paper goes one step further by focusing specifically on the meta-regulatory function performed by regional and international organizations other than the WTO. This paper sheds light on three types of governance techniques that can serve as meta-regulatory activities in relation to private standards by regional and international organizations: (1) governance by delegation; (2) governance by information; and (3) governance by soft law. This paper analyses features of these governance techniques and considers the relation between these governance techniques and the WTO's approach.

Keywords: private standards; meta-regulation; governance techniques

1. Introduction

The rise and proliferation of private standards have been recognized in international trade law, and various concerns have been raised. Debates over the relations and interactions between the World Trade Organization (WTO) and private standards are hardly new. Scholars have discussed the status of private standards in the context of the WTO's Agreement on Sanitary and Phytosanitary Measures ('SPS Agreement') and the Agreement on Technical Barriers to Trade ('TBT Agreement').[1]

This paper addresses the question of how, in addition to the WTO, other regional and international organizations have responded to the proliferation of private standards through meta-regulatory activities. The involvement of regional and international organizations in meta-regulatory activities is long overdue.[2] This paper demonstrates that the variation of meta-regulators

‡The original version of this article was published with incorrect author information. A notice detailing this has been published and the error rectified in the online PDF and HTML copies.

[1]For a recent discussion, see Ming Du, 'WTO Regulation of Transnational Private Authority in Global Governance', 67 *International and Comparative Law Quarterly* (2018) 867; Eva Van Der Zee, 'Disciplining Private Standards under the SPS and TBT Agreement: A Plea for Market-State Procedural Guidelines', 52 *Journal of World Trade* (2018) 393; Petros C. Mavroidis and Robert Wolfe, 'Private Standards and the WTO: Reclusive No More', 16 *World Trade Review* (2017) 1; Enrico Partiti, 'What Use is an Unloaded Gun? The Discipline of the WTO TBT Code of Good Practice and Its Application to Private Standards Pursuing Public Objectives', 20 *Journal of International Economic Law* (2017) 829.

[2]See, Axel Marx and Jan Wouters, 'Competition and Cooperation in the Market of Voluntary Sustainability Standards', in Panagiotis Delimatsis (ed.), *The Law, Economics and Politics of International Standardisation* (Cambridge University Press,

and meta-regulation has become more widespread than was previously observed, with the involvement of regional organizations – in particular, the European Union (EU) – and international organizations (in addition to the WTO).

The interface between the WTO and private standards has been debated with consideration for private standards' function as trade barriers to developing countries' agricultural products exports. The WTO's SPS Committee began discussing this topic in 2005. The SPS Committee meets three times per year with all WTO Members, and one of its main functions is to receive and discuss 'specific trade concerns' raised by WTO Members. At the 2005 meeting, St Vincent and the Grenadines, supported by Jamaica, raised a concern that EurepGAP standards had been functioning as trade barriers in the UK for these member states' banana exports, because UK supermarkets do not source bananas that are not compliant with EurepGAP standards.[3] EurepGAP was originally started by UK retailers in 1997, focusing on GAP (good agricultural practices), and renamed GLOBALG.A.P. in 2007. GLOBALG.A.P. is probably the most famous example of private standards in the trade context, and it has significant impacts outside of Europe.[4]

Here, it may be instructive to highlight a few points regarding the scope of 'private standards'. 'Private standards' currently under debate are distinct from governmental regulations/standards or international standards. Decisions to adopt private standards are made by non-governmental entities and private actors. The important point pertains to the wide variation of 'private standards'. As noted, in the WTO context, private standards that initially raised concerns were mainly those addressing food safety in the agricultural trade. However, at present, various private standards could impact the trade context. Private standards have been established by various actors, such as multi-stakeholder (or 'roundtable') initiatives, non-governmental organizations, business or producer associations, and corporations or retailers. In the era of the implementation of the 17 Sustainable Development Goals (SDGs) adopted under the United Nations in 2015, demands for sustainable supply chains have been increasing. Currently, private standards regulate sustainable supply chains in various fields, e.g., agricultural products and food, consumer products, energy products, mining products, timber, fish, and services such as tourism or education.

After private standard-setting actors develop standards, detailed procedures to verify compliance with their standards may be provided by third parties: such private systems are called 'private certification schemes' (e.g., GLOBALG.A.P.). In some cases, eco-labels may be used for certified products to inform consumers. Well-known cases of such private standards with labels include the Marine Stewardship Council (MSC) for fishery, the Forest Stewardship Council (FSC) for forestry, and the Rainforest Alliance for biodiversity conservation. By conducting these tasks, these private actors are now called 'private authority',[5] which led to the emergence of 'transnational sustainability governance'.

Accordingly, the rise of private standards is a general trend in law and governance, beyond international trade law. Private governance has been a major focus of research in international relations (IR) and has recently received attention from legal scholarship, especially in environmental regulation and governance.[6] However, even outside of the trade context, the same concern

2012) 238; Axel Marx, 'Global Governance and the Certification Revolution: Types, Trends and Challenges', in David Levi-Faur (ed.), *Handbook on the Politics of Regulation* (Edward Elgar Publishing, 2013) 599; Luc Fransen, 'The Politics of Meta-governance in Transnational Private Sustainability Governance', 48 *Policy Sciences* (2015) 293, at 297.

[3]SPS Committee, 'Summary of the Meeting Held on 29–30 June', G/SPS/R/37/Rev (18 August 2005).

[4]Nicolas Hachez and Jan Wouters, 'A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GlobalG.A.P', 14 *Journal of International Economic Law* (2011) 677; Yoshiko Naiki, 'The Dynamics of Private Food Safety Standards: A Case Study on the Regulatory Diffusion of GLOBALG.A.P.', 63 *International and Comparative Law Quarterly* (2014) 137.

[5]Jessica F. Green, *Rethinking Private Authority: Agents and Entrepreneurs in Global Environmental Governance* (Princeton University Press, 2014) 36.

[6]Joanne Scott, Tristan Smith, Nishatabbas Rehmatulla, and Ben Milligan, 'The Promise and Limits of Private Standards in Reducing Greenhouse Gas Emissions from Shipping', 29 *Journal of Environmental Law* (2017) 231; Jolene Lin, 'Emergence of Transnational Environmental Law in the Anthropocene', in Louis Kotzé (ed.), *Environmental Law and Governance for the*

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has been raised: multiple private standards coexist and operate within the same sector, including fishery, forestry, and agriculture.

Against such a backdrop, this paper explores several approaches toward private standards *outside* of the WTO. This paper focuses on the meta-regulatory function performed by regional and international organizations. As will be explained in more detail in the next section, meta-regulation includes various activities of oversight and control, and, more broadly, raising awareness about the quality of multiple standards. The WTO is not the sole body taking actions. Other regional and international organizations have responded practically toward multiple private standards using various governance techniques that contrast with the WTO's approach. The role of regional and international organizations in the meta-regulation of private standards has not been sufficiently addressed in the literature. This is largely because, in transnational settings, it was private rather than public actors that were the first to engage in meta-regulatory activities in response to concerns arising from the proliferation of private standards.

The aim of this article is to explore the link between the WTO's approach toward private standards and approaches of other regional and international organizations, with a focus on variations in governance techniques for meta-regulation. More specifically, this paper provides a typology of meta-regulatory techniques as an analytical framework for explaining different approaches toward private standards. While the WTO's approach in the SPS and TBT Committees deals with WTO Members' concerns over trade and private standards, and basically encourages member governments to take actions, there are other approaches as well. Notably, approaches taken by the EU, the International Trade Centre (ITC), and the Food Agriculture Organization (FAO) allow these organizations to engage directly with private standard-setting actors in a variety of ways. These three approaches are: (1) governance by delegation; (2) governance by information; and (3) governance by soft law. This paper also explains why and how each technique for meta-regulation is adopted by these organizations.

The remainder of this paper proceeds as follows. Section 2 provides an analytical framework for explaining the different approaches toward private standards. To do so, it first explains why private standards have increased in number, and then argues the need for meta-regulation in transnational settings. The analytical framework is based on three governance techniques that can serve to facilitate meta-regulatory activities (governance by delegation; governance by information; and governance by soft law). Against this backdrop, Section 3 first reviews the ways in which private standards have been addressed within the WTO's SPS and TBT Committees. Then, Section 4 looks at meta-regulatory activities by the EU, ITC, and FAO as these organizations are typical examples of engagement with three governance techniques for meta-regulation. Section 5 evaluates those meta-regulatory activities in light of questions about why these organizations take up specific governance techniques and to what extent such techniques are effective for meta-regulation. It also considers what broader inferences can be drawn for the WTO from these governance techniques that are used by other regional and international organizations. The final section presents the conclusions.

2. Analytical Framework: Proliferation of Private Standards and the Concept of 'Meta-Regulation'

As explained above, when St Vincent and the Grenadines raised a concern in the WTO's SPS Committee regarding GLOBALG.A.P. standards (named EurepGAP at that time), the main concerns were the existence of private standards creating trade barriers for agricultural exports from developing countries. One of the early SPS Committee's documents in 2009 thoroughly summarized the empirics of the problems created by private standards based on questions and responses from WTO Members. The most common negative effects of private standards were described as follows:

Anthropocene (Hart Publishing, 2017) 331; Markos Karavias, 'Interactions between International Law and Private Fisheries Certification', 7 *Transnational Environmental Law* (2018) 165; Veerle Heyvaert, *Transnational Environmental Regulation and Governance: Purpose, Strategies and Principle* (Cambridge University Press, 2018).

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> compliance with private standards is considered by exporters to be the prerequisite for exporting to a large number of developed country markets. Those farmers and producers who cannot achieve compliance with private standards, even if they could meet official standards, are losing market access opportunities and trying to switch to alternative markets.[7]

This description presents a typical negative view of the way in which 'Northern private standards' inhibit 'Southern exports'. Furthermore, concerns generated from such adverse effects on trade were as follows:

> The most commonly raised concerns relate to the number of standards imposed on a single product, the lack of harmonization, and the cost of compliance.[8]

This statement expresses that the increase in the number of private standards[9] has caused problems; one noticeable problem for producers in developing countries is the increase in costs for the producers when retailers require them to be certified under multiple standards. Limited harmonization efforts are initiated from private standard-setting actors,[10] which have further expanded the proliferation of private standards.

2.1 Explaining Proliferation of Private Standards

The proliferation of private standards has raised various important research questions as the phenomenon of such proliferation has multiple dimensions. While this paper is not the place for a deep review of the IR scholarship on private governance, this subsection highlights how the existing research has explained the proliferation of private standards.

As a starting point, Büthe and Mattli suggested that the proliferation of private regulation is one phenomenon of 'global regulation'. Global regulation can be categorized in four types: (1) traditional public standard-setting activities; (2) private market-based regulation; (3) private nonmarket-based regulation; and (4) public regulatory competition (among public regulatory agencies).[11]

According to the typology of Büthe and Mattli, globalization of regulation occurs in both public and private domains; however, this paper focuses on private standards – regulatory activities in the private domain. Types (2) and (3) address private regulation. Type (2) is 'private market-based regulation', which differs from type (3), 'private nonmarket-based regulation'. Type (2) is explained as 'rule-making by firms or other bodies competing, individually or in groups, to establish their preferred technologies or practices as the de facto standards through market dominance or other strategies'.[12] Private standards addressed in the WTO's SPS Committee belong to type (2). On the other hand, type (3) refers to regulation by the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC), whose activities are largely recognized as international standards by the WTO.[13]

[7]SPS Committee, Effects of SPS-Related Private Standards – Compilation of Replies, G/SPS/GEN/932/Rev.1 (10 December 2009), para. 27 (Question 11. Negative (trade inhibiting) effects of the private standard(s) on the exports of a product).

[8]Ibid., para. 49 (Question 15. What is the main concern regarding private standard(s) faced by your export product(s)?).

[9]While it is not easy to count the number of private standards, the ITC's Standards Map database currently lists up 197 private standards. See, ITC's website, *infra* note 101.

[10]For the discussion of limited cooperation across competing private standards via equivalence or mutual recognition, see Marx and Wouters, *supra* note 2, at 233–237.

[11]Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press, 2011) 14.

[12]Ibid.

[13]In the *US–Tuna II (Mexico)* case, the Appellate Body explained when standards could be recognized as international standards: a recognized international standard is an approved standard by an international standardizing body, that is, 'a body that has recognized activities in standardization and whose membership is open to the relevant bodies of at least

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Furthermore, the literature distinguishes two patterns of competitive relationships of 'private market-based regulation': regulatory competition at the global level due to 'the emergence of one or more contender programs within the same industry at the global level',[14] and vertical level regulatory competition due to 'the emergence of meaningful contender programs…at the domestic tier [against the global ones]'.[15]

Recently, this second pattern of the regulatory competition (i.e., 'global' versus 'local' standard competition) has attracted scholarly attention. Recent studies have focused on the emergence of new 'local' standards in developing countries to rival existing 'global' standards (such as GLOBALG.A.P., FSC, and MSC). This trend is regarded as a phenomenon of 'Northern versus Southern certification standards'. As Schouten and Bitzer explained, 'Southern standards' emerged out of a situation where producers in Southern countries (developing countries) felt excluded from the development of Northern standards and found it difficult to implement the high standards of Northern countries (developed countries) in their local production processes.[16] Note that these Southern standards are often developed and supported by governments – in that sense, these are not private standards.[17] Also, these Southern standards are created for the purpose of promoting exports from developing countries, and thereby do not give rise to concerns regarding the trade restrictiveness of standards.

Accordingly, there are various levels and settings for the proliferation of standards. Existing studies in IR have already noted this trend, referring to this situation as 'regulatory fragmentation and competition'. Scholars in IR have studied regulatory fragmentation comparatively across sectors such as forestry, fishery, and coffee.[18] While fragmentation is also observed in international law and international institutions,[19] the phenomenon of fragmentation and the intensity of competition are much more serious in the context of private standards due to the abundance of such standards. Why is there such a considerable increase in the number of private standards? The literature has explained why private standards have become more abundant, thereby resulting in a more fragmented regulatory structure.

The first explanation is extracted from research on 'organizational ecology' by Abbott, Green, and Keohane, who investigated 'the abundance and diversity of organizational populations, their viability, and their life cycles of growth and decline'.[20] One of their primary areas of interest was the abundance of 'private transnational regulatory organizations (PTROs)' (including private standards/certification schemes) in contrast to other forms of organizations, such as international organizations, with a relatively stable number. They explain the abundance of PTROs as a result of lower entry costs and organizational flexibility: 'PTROs frequently have less costly decision

all Members'. Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (*US–Tuna II (Mexico)*), WT/DS381/AB/R (16 May 2012), para. 359. In other words, 'the body's standardization activities are recognized, for example, if a large number of WTO Members participate in the development of the standard, and acknowledge the validity and legality of the standard'. Appellate Body Report, *US–Tuna II (Mexico),* para. 394.

[14]Luc Fransen and Thomas Conzelmann, 'Fragmented or Cohesive Transnational Private Regulation of Sustainability Standards? A Comparative Study', 9 *Regulation & Governance* (2015) 259, at 260.

[15]Ibid.

[16]Greetje Schouten and Verena Bitzer, 'The Emergence of Southern Standards in Agricultural Value Chains: A New Trend in Sustainability Governance?', 120 *Ecological Economics* (2015) 175.

[17]Accordingly, the scope of standards operating in reality includes governmental standards as well as private initiatives. On this point, the term 'voluntary sustainability standards (VSS)', rather than 'private standards', has also been used in the literature. For discussions of VSS, see the United Nations Forum on Sustainability Standards (UNFSS), 'UNFSS Objectives', https://unfss.org/home/objective-of-unfss/ (accessed 17 September 2019).

[18]Graeme Auld, *Constructing Private Governance: The Rise and Evolution of Forest, Coffee, and Fisheries Certification* (Yale University Press, 2014).

[19]Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012); Kal Raustiala, 'Institutional Proliferation and the International Legal Order', in Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press, 2012).

[20]Kenneth W. Abbott, Jessica F. Green, and Robert O. Keohane, 'Organizational Ecology and Organizational Diversity in Global Governance', 70 *International Organization* (2016) 247, at 272.

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procedures and more flexible mandates than [intergovernmental organizations].'[21] From this perspective, it is natural that the number of private standards has increased.

The second explanation is related to a market perspective: Auld argues that if the sustainability demand for certified products increases in a market, a new private standard-setting initiative is likely to emerge to develop alternative standards, because a new initiative would more easily enter the sustainability market after an increased 'market demand for certified products' is fostered by earlier sustainability initiatives.[22] Moreover, barriers to entry into the market would be lowered not only by strengthening the market demand. In entering the sustainability market, later initiatives can copy the early initiatives' values, contents, and structures. Thus, once a sustainability market has been established by early initiatives, it would be difficult to prevent new regulatory initiatives that result in fragmentation.

While regulatory fragmentation has been generally asserted in the literature, the scholars have also argued that the degree of congestion of standards and the intensity of competition among standards are not universal among products and sectors. In some sectors, multiple private standards emerge and compete, but in others, a single or few dominant standards are established.[23] Fransen and Conselmann provided examples of several factors that may or may not cause fragmentation. They explained that when a sector has a high industrial concentration and the development of standards is an initiative led by industry (instead of by NGOs), more lenient standards tend to be established; consequently, a new competitor to create alternative standards will not emerge in that industry.[24] Thus, in the trade context, the degree of congestion of private standards and confusion that arise from the multiplicity may differ from products and industries in export destinations.

2.2 The Concept of Meta-Regulation

As seen above, the proliferation of private standards (or private regulatory fragmentation and competition) has different dimensions; however, in many cases, it has been generally asserted that the proliferation of private standards has generated a number of issues and concerns. In the context of the WTO, one major problem of private standards has been trade restrictiveness created by the number of private standards and increasing costs for multiple certifications. The literature has also identified other problems: inconsistences between public rules and private standards, concerns of confusion and a lack of credibility, anxieties about 'a race to the bottom', a need for inclusive processes and support systems for improvement, a quest for policy convergence etc.[25] In this context, the need for meta-regulation has been discussed, and the rise of varieties of meta-regulation has been observed. In particular, this paper focuses on meta-regulation by regional and international organizations in response to private regulatory fragmentation.

The concept of 'meta-regulation' is not new in the literature. However, as one commentator observed, 'the term "meta-regulation" has meant different things to different people'.[26] Another commentator has also argued that 'there is no universally agreed-upon definition'.[27]

[21]Ibid., at 263.

[22]Auld, *supra* note 18, at 14.

[23]Fabrizio Cafaggi, 'Transnational Private Regulation: Regulating Global Private Regulators', in Sabino Cassese (ed.), *Research Handbook of Global Administrative Law* (Edward Elgar Publishing, 2016) 212, at 213.

[24]Fransen and Conzelmann, *supra* note 14, at 270.

[25]For various consequences generated from multiple private standards, see, e.g., Fransen, *supra* note 2, at 295.

[26]Peter Grabosky, 'Meta-regulation', in Peter Drahos (ed.), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017), at 149.

[27]Cary Coglianese and Evan Mendelson, 'Meta-Regulation and Self-Regulation', in Robert Baldwin et al. (eds.), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 146, at 147.

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While no unified definition of 'meta-regulation' exists, the literature identifies several features of meta-regulation. In one sense, 'meta-regulation' in the private sector is defined as activities 'reshaping the freedom of individual private regulators to define both their organizational arrangements and the procedural features of their regulatory process'.[28] On this point, 'meta-regulation' is closer to the concept of 'meta-standardization', notably 'standards for the standard-setters' and 'certification of the certifiers'.[29] On the other hand, more broadly, 'meta-regulation' is noted as regulatory activity in which 'outside regulators deliberately – rather than unintentionally – seek to induce targets to develop their own internal, self-regulatory responses to public problems'.[30] Thus, it is explained that '[m]eta-regulation … generally preserves some substantial discretion to targets because they are enlisted or encouraged to develop their own internal system of regulation'.[31] On this point, 'the meta-regulator … operates at a distance by focusing on other actors' mechanisms'.[32]

These perspectives suggest a certain scope of meta-regulatory activities: meta-regulation does not necessarily involve setting principles and criteria for private standard-setting actors – it can also include a wide range of activities of oversight and control, and, more broadly, raising awareness about the quality of standards.[33] Thus, this paper uses a flexible definition of meta-regulation that includes a wide range of activities that induce convergence among multiple standards (in a limited sense) to those affecting the quality of standards (in a broad sense). While regional and international organizations can play various roles in response to private regulatory fragmentation, such as promoting exchange information, dialogue, and learning,[34] this paper focuses on activities that fall into the scope of this flexible definition.

Research on 'meta-regulation' for private standards is not new. Existing studies endeavour 'to distinguish between the various models [of meta-regulation] and to explain how and why they differ'.[35] However, the role of regional and international organizations in the meta-regulation of private standards has not been sufficiently investigated in the literature. This is largely because, in transnational settings, it was private, rather than public actors, that were the first to engage in meta-regulatory activities in response to concerns arising from fragmented private regulation.[36] The best-known case is the ISEAL Alliance, which was established in 2002.[37] The ISEAL Alliance system provides 'full ISEAL membership' to credible private sustainability standards that are compliant with the three ISEAL Codes. However, at present, only 19 systems have gained full membership[38] – the number of 'full membership' seems to be slow to increase, and this number is quite low in contrast to a number of private standard-setting actors operating in the current sustainability governance.

[28]Cafaggi, *supra* note 23, at 219.

[29]Tim Bartley, 'Certification as a Mode of Social Regulation', in David Levi-Faur (ed.), *Handbook on the Politics of Regulation* (Edward Elgar Publishing, 2013) 441, at 447.

[30]Coglianese and Mendelson, *supra* note 27, at 150.

[31]Ibid., at 151.

[32]Paul Verbruggen and Tetty Havinga, 'Food Safety Meta-Controls in the Netherlands', 4 *European Journal of Risk Regulation* (2015) 512, at 514.

[33]See, Paul Verbruggen and Tetty Havinga, 'The Rise of Transnational Private Meta-Regulators', 21 *Tilburg Law Review* (2016) 116, at 120–122.

[34]For instance, the UNFSS is one such platform, explained as 'the only forum to provide information, analysis and discussions on Voluntary Sustainability Standards at the intergovernmental level'. See, UNFSS, *supra* note 17.

[35]Cafaggi, *supra* note 23, at 222.

[36]For a variety of meta-regulatory efforts by private actors, see, Fransen, *supra* note 2. This paper also categorizes the work of the ISO within the scope of private meta-regulatory activities, as the ISO is often described as 'a private organization' or one comprising 'hybrid public–private bodies'. For the ISO's meta-regulatory activities, see Alessandra Arcuri, 'The TBT Agreement and Private Standards', in Tracey Epps and Michael J. Trebilcock (eds.), *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar Publishing, 2014) 485, at 496.

[37]See Fransen, *supra* note 2, at 297; Cafaggi, *supra* note 23, at 222; Marx and Wouters, *supra* note 2, at 239–240.

[38]ISEAL, View ISEAL full members, www.isealalliance.org/about-iseal/iseal-members (accessed 17 September 2019).

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Another well-known private-led system operating as meta-regulation is the Global Food Safety Initiative (GFSI).[39] The GFSI adopts a 'benchmarking' system,[40] offering 'recognition' for private standard-setting actors when these bodies meet requirements established in their benchmark documents and tools, thereby promoting harmonization among such bodies.[41] The GFSI was initiated by retailers and companies in the food sector (e.g., participants in the Consumer Goods Forums), and their 'recognition' process began in the early 2000s. While only 11 food safety systems have been recognized,[42] it is explained that '[a]s early as 2006, a survey of the world's leading supermarkets found that an estimated 75–79% of food supplies sold by supermarket chains were certified against GFSI benchmarked schemes'.[43] Thus, the GFSI's benchmarking activities seem to have certain effects, but its scope only covers the food safety area; there are many other sectors calling for meta-regulation over regulatory fragmentation.

2.3 Three Governance Techniques for Meta-Regulation

While this paper adopts a flexible definition of the term 'meta-regulation', for the analysis of whether and how regional and international organizations actually engage in meta-regulation, it is useful to differentiate three governance techniques that can serve to facilitate meta-regulatory activities: (1) governance by delegation; (2) governance by information; and (3) governance by soft law. Under the 'delegation' approach, organizations select certain private standard-setting actors to delegate certain tasks. Under the 'information' approach (which is distinguished from the mere information exchange activities), organizations conduct and publicize comparisons and evaluations across standards adopted by private standard-setting actors. Under the 'soft law' approach, organizations create voluntary standards for private standard-setting actors to encourage their convergence and harmonization.

Those governance techniques are commonly used when regional and international organizations are called on to manage the relevant actors' relationships and interactions in global governance. Thus, these three governance techniques provide useful insights for analyzing meta-regulation by regional and international organizations among multiple private standards.

This paper will now turn to various initiatives by regional and international organizations and evaluate their meta-regulatory activities in light of these governance techniques. The next section starts by reviewing how the WTO's SPS and TBT Committees have addressed private standards and examines whether the Committees engage in the three governance techniques for meta-regulation.[44]

3. Meta-regulation by the WTO – Discussion in the SPS and TBT Committees

3.1 The SPS Committee

As noted earlier in this paper, the SPS Committee began discussing this topic when concerns over private standards were first raised during a 2005 SPS Committee meeting, and the issue of

[39]For an overview of the GFSI, see Tetty Havinga and Paul Verbruggen, 'The Global Safety Initiative and State Actors: Paving the Way for hybrid Food Safety Governance', in Paul Verbruggen and Tetty Havinga (eds.), *Hybridization of Food Governance: Trends, Types and Results* (Edward Elgar Publishing, 2017) 184–214.

[40]See GFSI, Benchmarking Overview, https://www.mygfsi.com/certification/benchmarking/benchmarking-overview.html (accessed 17 September 2019).

[41]In 2015, another benchmarking system was launched in the seafood sector – the Global Sustainable Seafood Initiative (GSSI). There are seven recognized seafood certification schemes so far. See GSSI-recognized Seafood Certification Schemes, www.ourgssi.org/gssi-recognized-certifcation/ (accessed 17 September 2019).

[42]See GFSI Recognised Schemes, www.mygfsi.com/certification/recognised-certification-programmes.html (accessed 17 September 2019).

[43]Havinga and Verbruggen, *supra* note 39, at 192.

[44]This paper does not address the work of the three sister organizations, i.e., Codex, IPPC, and OIE, as their activities in relation to private standards are already recognized and shared in the SPS Committee. See, the SPS Committee, 'Review of the Operation and Implementation of the SPS Agreement, Draft Background Document, Note by the Secretariat', G/SPS/GEN/1612 (4 May 2018), para. 14.10.

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private standards has been continuously discussed since then.[45] The turning point was March 2011, when the SPS Committee adopted a decision on five 'actions' for private standards. The five actions include: (1) to develop a working definition of private standards related to SPS; (2) for the SPS Committee and relevant international organizations to inform each other regularly about the work they are doing in the area; (3) for the WTO Secretariat to inform the committee of relevant developments in other WTO councils and committees; (4) for member governments to help relevant private sector bodies understand the issues raised in the SPS Committee; (5) for the committee to explore co-operation with relevant international organizations in developing/disseminating information materials underlining the importance of international SPS standards.[46] Initially, more than five actions were proposed, some of which were more directly related to meta-regulation, such as 'to develop a transparency mechanism regarding SPS-related private standards' and 'to develop a Code of Good Practice for the preparation, adoption and application of SPS-related private standards'.[47] However, these actions were not ultimately agreed upon by WTO Members; thus, only Actions 1 to 5 were adopted.

The most focused work in the SPS Committee was that pertaining to Action 1: 'the SPS Committee should develop a working definition of SPS-related private standards and limit any discussions to these'.[48] It appears that no other international organizations have yet adopted an official definition of 'private standards'.[49] If the SPS Committee was to adopt the working definition of 'private standards', it would become the first official definition agreed upon by international organizations.

Several proposed texts have been on the agenda since then, which indicate difficulty reaching consensus within the WTO. Since the October 2013 SPS Committee meeting, WTO Members formed an electronic working group ('e-working group') under 'co-stewards', served by China and New Zealand.[50] The following WTO Members participated in the e-working group: Argentina, Australia, Belize, Brazil, Burkina Faso, Canada, the EU, Japan, Singapore, and the US.[51] These Members held discussions for a year regarding proposed texts of a working definition. By March 2015, the proposed text was as follows[52]:

[45]Scholars have considered whether the SPS Agreement applies to private standards in light of the interpretation of Article 13 of the SPS Agreement. It provides that WTO Members shall take reasonable measures to ensure that 'non-governmental entities' within their territories comply with the Agreement. A specific question has been whether the term 'non-governmental entities' includes private standards-setting actors such as GLOBALG.A.P. The views of commentators have been negative. See, Denise Prevost, 'Private Sector Food-Safety Standards and the SPS Agreement: Challenges and Possibilities', 33 *South African Yearbook of International Law* (2008) 1, at 19; Tracey Epps, 'Demanding Perfection: Private Food Standards and the SPS Agreement', in Meredith Lewis and Susy Frankel (eds.), *International Economic Law and National Autonomy* (Cambridge University Press, 2009) 89; Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (Oxford University Press, 2007) 306.

[46]The SPS Committee, 'Actions Regarding SPS-Related Private Standards (Decision of the Committee)', G/SPS/55 (6 April 2011).

[47]The SPS Committee, 'Report of the Ad Hoc Working Group on SPS-Related Private Standards to the SPS Committee', G/SPS/W/256 (3 March 2011), at 9.

[48]The SPS Committee Decision, *supra* note 46, at 1.

[49]While there was no official definition, several international organizations have used the term 'non-governmental entity', but not the term 'private standards'. The SPS Committee, 'Existing Definitions of Private Standards in Other International Organizations', Note by the Secretariat, G/SPS/GEN/1334 (18 June 2014) and G/SPS/GEN/1334/Rev.1 (5 August 2014).

[50]SPS Committee, 'Summary of the Meeting of 16–17 October 2013', G/SPS/R/73 (15 January 2014), at 26, para. 11.7

[51]SPS Committee, 'Summary of the Meeting of 25–26 March 2014', G/SPS/R/74 (6 June 2014), at 22, para. 11.6.

[52]SPS Committee, 'Report of the Co-Stewards of the Private Standards E-working Group on Action 1 (G/SPS/55)', Submission by the Co-stewards of the E-working group on Private Standards, G/SPS/W/283 (17 March 2015), at 1, para. 2. This proposed text had a footnote: 'This working definition is without prejudice to the rights and obligations of Members, or the views of Members on the scope of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.'

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> An SPS-related private standard is a written requirement or condition, or a set of written requirements or conditions, related to food safety, or animal or plant life or health that may be used in commercial transactions and that is applied by a non-governmental entity that is not exercising governmental authority.

Developing countries in the e-working group supported adopting the text, and among developed countries in the group, Canada supported the text, and Australia and Japan indicated their openness to accepting the text.[53] Consensus was nearly reached. However, the EU and the US opposed the use of the term 'non-governmental entity', and proposed the use of another term, 'private body'.[54] Faced with a hard stance of the EU and US, the co-stewards proposed a cooling-off period for consideration.[55]

Why did the EU and the US not support the text? One important factor may explain this situation – that is, the legal status of the Committee Decision in the WTO dispute settlement. This issue was addressed in the 2012 *US–Tuna II* ruling, in which the legal status of a specific TBT Committee Decision was debated. The TBT Committee Decision at issue provides six principles (transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and development) that should be observed in the creation of international standards.[56] The question was whether this TBT Committee Decision could be considered a 'subsequent agreement between the parties' regarding the interpretation or the application of treaty provisions under Article 31(3)(a) of the Vienna Convention on the Law of Treaties. The Appellate Body in *US–Tuna II* admitted the TBT Committee Decision at issue is regarded as a 'subsequent agreement between the parties'.[57]

While it may be acceptable to regard the TBT Committee Decision at issue as a 'subsequent agreement between the parties', this ruling presented WTO Members with a real concern: a Committee Decision can be treated as a 'subsequent agreement between the parties' in future WTO dispute settlements, which may 'inform the interpretation and application of a term or provision of [Agreements]'.[58] If the SPS Committee adopted the working definition as a Committee Decision, it could inform the interpretation of the term, 'non-governmental entity', of the SPS Agreement in future disputes involving the EU or the US, which both countries wanted to avoid.[59]

[53]Ibid., paras. 10–11.

[54]Ibid., para. 9. The term 'private body' is found in Article 1.1(a)(1)(iv) of the WTO's Agreement on Subsidies and Countervailing Measures, which addresses a definition of subsidies.

[55]SPS Committee, 'Summary of the Meeting of 26–27 March, 2015', G/SPS/R/78, at 22, para. 11.5 (21 May 2015). See also, WTO news, 26 and 27 March 2015, 'Food Safety Body Agrees to e-working Group "Time Out" on Definition of Private Standards', www.wto.org/english/news_e/news15_e/sps_26mar15_e.htm (accessed 17 September 2019). For a recent discussion in the SPS Committee on private standards, see, the SPS Committee, 'Review of the Operation and Implementation of the SPS Agreement', G/SPS/62, Section.14 'SPS-Related Private Standards' (14 July 2017).

[56]TBT Committee, Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the TBT Agreement, G/TBT/1/Rev.12, Annex 2 (Part 1), at 47–49 (21 January 2015).

[57]Appellate Body Report, *US–Tuna II (Mexico)*, WT/DS381/AB/R (16 May 2012), paras. 371–372. A decision adopted by Members may qualify as a 'subsequent agreement between the parties' in light of two conditions: '(i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an *agreement* between Members on the *interpretation* or *application* of a provision of WTO law [emphasis original]'. Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes (*US – Clove Cigarettes*) WT/DS406/AB/R (4 April 2012), para. 262.

[58]Appellate Body Report, *US–Tuna II (Mexico)*, WT/DS381/AB/R (16 May 2012), para. 372.

[59]Further 'chilling effects' on Committees' work that may be generated from the *US–Tuna II* ruling have already prompted the concern of scholars. See, Devin McDaniels, Ana Cristina Molina, and Erik N. Wijkström, 'A Closer Look At WTO's Third Pillar: How WTO Committees Influence Regional Trade Agreements', 21 *Journal of International Economic Law* (2018) 815, at 830–831; Petros C. Mavroidis, *The Regulation of International Trade: Volume 2 The WTO Agreements on Trade in Goods*

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There is likely no way to propose and reach consensus on further actions related to meta-regulation in the SPS Committee. Some commentators have argued that the WTO should create a 'code of conduct' for private standards, but reaching consensus among all WTO Members is impossible. On this point, Mavroidis and Wolfe have suggested that 'several interested WTO member states' can agree on 'the Reference Paper', which is 'a set of commitments on how each Member would treat private standards bodies in its jurisdiction, and how they would keep other Members informed'.[60] This would be a useful approach, but again, the challenge lies in its realization.

3.2 The TBT Committee

Private standards exist in the TBT regime as well as in the SPS regime. For instance, the question has been raised as to whether every dimension of the GLOBALG.A.P. standards truly falls within the scope of the SPS Agreement.[61] This is also recognized in the discussions of the SPS Committee: 'some elements of private standards address matters outside the scope of the SPS Agreement. For example, EurepGAP standards contain chapters dealing with, amongst other topics, worker health, safety and welfare and waste and pollution management'.[62] Thus, the SPS Committee expected that the TBT Committee would address the same 'private standards' issue in their meetings. However, '[t]here has thus far been limited discussion on the issue of private standards in the TBT Committee'.[63] During the Fifth Triennial Review of the TBT Agreement held in 2009, it was noted that 'several Members have raised concerns regarding "private standards" and trade impacts thereof, including actual or potential unnecessary barriers to trade', while 'other Members consider that the term lacks clarity and that its relevance to the implementation of the TBT Agreement has not been established'.[64] The same issue was noted during the Sixth Triennial Review of the Agreement in 2012.[65] On both occasions, it was discussed under the agenda of 'Standards' regarding Article 4 and the Code of Good Practice in Annex 3 of the TBT Agreement (hereinafter, 'the TBT Code of Good Practice').

The TBT Code of Good Practice requires the avoidance of unnecessary obstacles to international trade and the duplication of standardization.[66] Moreover, the TBT Code addresses various 'transparency' issues in developing standards, such as a prior publication of a standardizing work program, setting up a public consultation phase, responding to submitted comments, and resolving complaints.[67] These requirements are precisely those which are lacking in the SPS Agreement.[68]

Article 4.1 of the TBT Agreement provides that WTO Members shall take 'reasonable measures' to ensure that 'non-governmental standardizing bodies' accept and comply with the

(MIT Press, 2016) 405; Gregory Shaffer, 'United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products', 107 *American Journal of International Law* (2013) 192, at 197 footnote 22.

[60]Mavroidis and Wolfe, *supra* note 1, at 18. For a similar concept of seeking a new type of agreement among groups of WTO Members, see Bernard Hoekman and Charles Sabel, 'Open Plurilateral Agreements, International Regulatory Cooperation and the WTO', *EUI Working Paper RSCAS 2019/10* (2019).

[61]Scott, *supra* note 45, at 303.

[62]See, SPS Committee, 'Private Standards and the SPS Agreement', G/SPS/GEN/746 (24 January 2007), para. 18.

[63]SPS Committee, Report of the Ad hoc Working Group on SPS-Related Private Standards to the SPS Committee, 'Annex IV Updates on Developments in Other WTO fora Regarding Private Standards', G/SPS/W/256 (3 March 2011), at 18.

[64]TBT Committee, 'Fifth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4' (G/TBT/26) (13 November 2009), para. 26.

[65]TBT Committee, 'Sixth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4' (G/TBT/32) (29 November 2012), para. 7.

[66]Annex 3, paras. E and H of the TBT Agreement.

[67]Annex 3, paras. J, L, N, and Q of the TBT Agreement.

[68]Jan Wouters and Dylan Geraets, 'Private Food Standards and the World Trade Organization: Some Legal Considerations', 11 *World Trade Review* (2012) 479, at 486.

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TBT Code of Good Practice. One important question should be whether 'a non-governmental body' includes private entities such as GLOBALG.A.P., an issue previously discussed by WTO academics.[69] However, the TBT Committee has not discussed the meaning of 'a non-governmental body'. It appears that the very existence of the TBT Code of Good Practice, which is open to 'any standardizing body within the territory of a Member of the WTO, whether a central government body, a local government body, or a non-governmental body (Annex 3, para. B of the TBT Agreement)', is making the TBT Committee reluctant to discuss the matter further. Some scholars assert that the TBT Code of Good Practice would apply to private standard-setting actors, such as GLOBALG.A.P.[70] Even if the TBT Code of Good Practice has the potential to meta-regulate, its potential nonetheless remains uncertain at present.

3.3 Evaluation

It appears that some of the actions in the WTO's SPS and TBT Committees fall under the scope of the flexible definition of meta-regulation in this paper (from activities that induce convergence among multiple standards into those affecting the quality of standards). However, a deeper question is whether the WTO Committees have engaged in meta-regulation based on the three governance techniques (governance by delegation, governance by information, and governance by soft law).

In terms of the work in the SPS Committee, it does not seem to serve as meta-regulation based on the three governance techniques for the following reasons. First, while the SPS Committee invested a lot of time in adopting an official definition of private standards, this attempt is not directly related to meta-regulation, because it is an attempt to define the scope of private standards addressed in the SPS Committee. Also, other actions (the actions adopted by the SPS Committee in 2011)[71] do not seem to serve as meta-regulation either, because other actions do not go beyond information exchange. Action 4 – member governments are encouraged to help relevant private sector bodies understand the issues regarding private standards raised in the SPS Committee – can be categorized as one form of meta-regulation that can improve the quality of standards by raising awareness. However, the ways to do so are not specified in relation to the three governance techniques – it all depends on how WTO Members deal with this Action in each domestic setting.

In terms of the TBT Committee, the TBT Code of Good Practice is one form of meta-regulation. However, even if the requirements under the TBT Code of Good Practice apply to private actors, the requirements are needed to be realized by measures taken by WTO Members. So, there are always ambiguities in meta-regulatory activities by member governments. Also, it does not seem that the TBT Committee works further to facilitate meta-regulation based on the three governance techniques.

While the WTO Committees are generally understood as turning to a soft governance approach,[72] it is incongruous that both Committees have not constructed soft forms of governance toward private standards. This is perhaps because WTO Members are concerned that any Committee's decisions may have a legal impact on the future WTO dispute settlements between developing countries and developed countries. This is one lesson we can learn from the SPS Committee's attempt to adopt an official definition of private standards.

[69]For a related discussion under Article 13 of the SPS Agreement, see literature, *supra* note 45. Another question arises as to the scope of 'reasonable measures' available to WTO Members. See, Partiti, *supra* note 1, at 836–837.

[70]Partiti, *supra* note 1, at 836; Van Der Zee, *supra* note 1, at 410; Christian Vidal-León, 'Corporate Social Responsibility, Human Rights, and the World Trade Organization', 16 *Journal of International Economic Law* (2013) 893, at 905–906; Arcuri, *supra* note 36, at 505.

[71]See text accompanied by footnote 46.

[72]Andrew Lang and Joanne Scott, 'The Hidden World of WTO Governance', 20 *European Journal of International Law* (2009) 575.

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4. Meta-Regulation by Other Regional and International Organizations

Then how are other regional and international organizations performing a meta-regulatory function? This Section looks at cases of meta-regulation based on the three governance techniques – a deeper analysis reveals key features of these governance techniques.

4.1 The Role of EU as a Meta-Regulator – Governance by Delegation

A governance tool of 'delegation' is often compared with a direct 'hierarchy' tool where actors (e.g., states) act 'hierarchically' over private actors by using hard, binding instruments.[73] In contrast, under the 'delegation' approach, regional and international organizations delegate certain tasks to third parties under hard law. In the EU, delegating regulatory tasks to private actors is not a new phenomenon. One early example of delegation by the EU is to assign tasks of standard-setting to the European Committee for Standardization (CEN) and the European Committee for Electrotechnical Standardization (CENELEC).[74] The CEN and CENELEC are both private standard-setting organizations 'delegated' the task of producing voluntary European standards under the EU's 'New Approach' of harmonization processes.

In the context of this paper, the concept of delegation means that the EU, based on EU legislation, selects certain private standard-setting actors that can be used by producers and traders to 'verify' their sustainability performance. In such cases, the EU plays the role of a meta-regulatory function, in practice.[75] It can be presumed that those private actors 'delegated' tasks of verification are at least qualified to conduct such tasks. Thus, opportunities for quality controls over different private standards can be expected.

One prominent example of such a meta-regulatory function can be found in the promotion of using sustainable biofuels under the EU directive on renewable energy. The sustainability of biofuels is one important EU climate action concerning transport emission reduction. The EU renewable energy directive requires that each EU member state ensure a 10% share for renewable energy in the transport sector; to fulfil this mandatory 10% target, biofuel energy placed on the EU market (either EU-produced or imported biofuels) must meet the sustainability criteria, such as the level of greenhouse gas emission savings or the protection of biodiversity.[76] In this respect, the European Commission approves and recognizes private actors – 'voluntary schemes' – that can undertake tasks related to verifying and certifying biofuels that satisfy the EU's sustainable criteria. Currently, the European Commission has approved 15 such private schemes.[77]

We can presume that those approved private actors are qualified to conduct the task of certification to a certain extent. Interestingly, however, as will be discussed in more detail in the next subsection, NGOs have undertaken evaluations and comparisons of performance credibility of those private actors, arguing that one scheme is more sustainable than another. Thus, these

[73]The comparative notions of 'hierarchy' and 'delegation' are drawn from Abbott et al., which presents four types of governance tools – hierarchy, delegation, collaboration and orchestration – that international organizations can utilize in general (not necessarily serve to meta-regulation). Kenneth Abbott et al. (eds.), *International Organizations as Orchestrators* (Cambridge University Press, 2015) 10. Note that those four types of governance tools are introduced in the volume in order to develop the concept of 'orchestration', which this paper does not address.

[74]See, Jacques Pelkmans, 'The New Approach to Technical Harmonization and Standardization', 25 *Journal of Common Market Studies* (1987) 249, at 256.

[75]Scott et al., *supra* note 6, at 27; Jolene Lin, 'Governing Biofuels: A Principal-Agent Analysis of the European Union Biofuels Certification Regime and the Clean Development Mechanism', 24 *Journal of Environmental Law* (2012) 43, at 53–59; Yoshiko Naiki, 'Bioenergy and Trade: Explaining and Assessing the Regime Complex for Sustainable Bioenergy', 27 *European Journal of International Law* (2016) 129, at 147.

[76]Commission Directive 2009/28/EC, OJ 2009L 140/16.

[77]European Commission, 'List of Approved Voluntary Schemes', http://ec.europa.eu/energy/en/topics/renewable-energy/biofuels/voluntary-schemes (accessed 17 September 2019).

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critical ratings over the approved schemes suggest that the EU's sustainability criteria were not sufficiently rigid and detailed in terms of selecting private actors.[78]

It was probably in light of such criticisms and concerns that the reformation process of the EU renewable energy directive went forward. The directive was amended in 2015; one major reform was the addition of more detailed conditions for competent private schemes. For example, private schemes seeking recognition are checked with independence, transparency, stakeholder involvement, the effectiveness of implementation, and so on.[79] Furthermore, in December 2018, the recast Renewable Energy Directive was adopted, which involves various changes for the EU's renewable energy legal framework, now covering not only biofuels but also biomass for heating/cooling and power generation.[80] While the verification based on private schemes remains in the recast Directive, new rules for the approval will be adopted by the European Commission.

Similarly, the EU engaged with private actors in its so-called 'Timber Regulation', which entered into force in 2013.[81] Forest protection and sustainable forest management are one important objective of the EU environmental policy. The EU Timber Regulation prohibits the placement of illegally harvested timber or products made from such timber on the EU market. Before placing timber products, it requires operators to conduct 'due diligence', which is explained as follows: 'operators undertake a risk management exercise so as to minimize the risk of placing illegally harvested timber'.[82] This can be demonstrated by either using operators' own due diligence system or using a system provided by 'monitoring organizations'.[83] Such private monitoring organizations are recognized by the European Commission – which currently includes 13 such organizations.[84]

The use of private actors to reduce greenhouse gas emissions in the shipping sector is an additional example of the EU's meta-regulatory function.[85] Shipping is becoming one growing source of emissions in the transport sector; thus, the shipping sector has been included in the EU's policy on climate change. The EU legislation requires large ships using EU ports to monitor and report their emissions.[86] A ship's monitoring plan and emissions report are assessed by competent private 'verifiers'.[87] The detailed requirements and descriptions of verification activities, such as the verification of reported data and carrying out site visits, are also provided in EU legislation.[88] In this case, verifiers are not recognized by the European Commission; instead, they are accredited by national accreditation bodies.[89]

[78]For a criticism of the European Commission's approval system on private schemes, Philip Schleifer, 'Orchestrating Sustainability: The Case of European Union Biofuel Governance', 7 *Regulation & Governance* (2013) 533, at 542; Hans Morten Haugen, 'Coherence or Forum-shopping in Bioenergy Sustainability Schemes?', 33 *Nordic Journal of Human Rights* (2015) 52, at 66–67.

[79]Commission Directive 2015/1513 amending Directive 98/70/EC and Directive 2009/28/EC, OJ 2015 L239/1. See, art.18 (6) subpara. 3, Consolidated version of the Directive, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02009L0028-20151005 (accessed 17 September 2019).

[80]Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (Text with EEA relevance), OJ L328/82.

[81]Regulation (EU) No. 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market [2010] OJ L/295/23.

[82]European Commission, Timber Regulation, 'What is due diligence?', http://ec.europa.eu/environment/forests/timber_regulation.htm (accessed 17 September 2019).

[83]Regulation 995/2010, above n 81, art. 4(2) and (3).

[84]European Commission, Timber Regulation, 'List of Recognized Monitoring Organisations', http://ec.europa.eu/environment/forests/pdf/List%20of%20recognised%20MOs%20for%20web%20updated%2024MAY18.pdf (accessed 17 September 2019).

[85]Scott et al., *supra* note 6, at 28.

[86]Regulation (EU) 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16/EC, OJ L123/55.

[87]Ibid., arts. 13–16.

[88]Commission Delegated Regulation (EU) 2016/2071 of 22 September, OL L320/1.

[89]Commission Delegated Regulation, ibid., arts. 31–41.

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Delegation to private actors shapes standard-setting activities and verification services provided by different private actors. However, the EU's case reveals some concerns over delegation. First, as suggested by the sustainable biofuels case, even with the recognition of the European Commission, the approved schemes were still varied in terms of governance structure and standard-setting procedures. In other words, even among the approved schemes, there are 'good' schemes and 'not so good' ones. Of course, recognized schemes all cleared a baseline of the EU requirements. However, once schemes cleared the baseline and obtained approval from the European Commission, they may not be motivated any more to upgrade and make improvements in their sustainability standards and governance structures. On this point, one drawback is that meta-regulation based on delegation may not generate further dynamics for upward convergence among private actors' standards and governance structures.

Also, there is another concern of delegation, which is again drawn from the biofuels case. The European Court of Auditors published a special report in 2016 concerning the reliability of approved schemes in sustainable biofuels, which still revealed the weaknesses in the EU approval system. One reason was that 'the standards presented by the voluntary schemes as a basis for their recognition are not always applied in practice', which thereby criticizes that the European Commission 'does not supervise how voluntary schemes operate'.[90] This is a risk of delegation, which calls for the European Commission's proper role in monitoring.[91]

4.2 The ITC's Standards Map – Governance by Information

When multiple private standards coexist and compete in one sector, one prominent oversight mechanism is to conduct and publicize comparisons and evaluation across these competing standards. Such independent comparative studies are ad-hoc responses to regulatory fragmentation; thus, they are sometimes overlooked, but they have the potential to contribute to controlling the negative effects of fragmentation. Comparative studies fall into one form of governance by information, because they provide private actors with information and transparency that offer knowledge and choices, thereby influencing their decision-making.[92] Using information disclosure to achieve behavioural changes is not a new governance tool.[93]

On this point, one may recall a recent study on 'governance by indicators'[94] – another type of governance by information. However, this subsection does not use the concept of governance by indicators, because there is a difference between information disclosure by comparative studies and indicators. Indeed, both are similar in that they involve standard-setting to measure targets' performance. However, governance by indicators focuses on a form of information disclosure using rankings or ratings.[95] Conversely, examples of comparative studies in this subsection do

[90]European Court of Auditors, 'The EU Systems for the Certification of Sustainable Biofuels', Special Report No. 18 (2016), paras. 51–52, https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=37264 (accessed 17 September 2019).

[91]For the importance of the Commission's monitoring capabilities in the context of delegation, see Lin, *supra* note 75, at 69–70.

[92]For an overview of 'regulation by information', see Marc Schneiberg and Tim Bartley, 'Organizations, Regulation, and Economic Behavior: Regulatory Dynamics and Forms from the Nineteenth to Twenty-First Century', 4 *Annual Review of Law and Social Science* (2008) 31, at 43–45.

[93]See, Archon Fung et al., *Full Disclosure: The Perils and Promise of Transparency* (Cambridge University Press, 2007).

[94]See, e.g., Kevin Davis et al. (eds.), *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford University Press, 2012); Sally Engle Merry et al. (eds.), *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law* (Cambridge University Press, 2015); Richard Rottenburg et al. (eds.), *The World of Indicators: The Making of Governmental Knowledge through Quantifications* (Cambridge University Press, 2015); Alexander Cooley and Jack Snyder (eds.), *Ranking the World: Grading States as a Tool of Global Governance* (Cambridge University Press, 2015); Debora Valentina Malito et al. (eds.), *The Palgrave Handbook of Indicators in Global Governance* (Palgrave Macmillan, 2018).

[95]Kevin Davis, Benedict Kingsbury, and Sally Engle Merry, 'Introduction: Global Governance by Indicators', in *Governance by Indicators*, ibid., at 8 ('Some listings with most of the attributes of indicators may merely divide units into categories described nominally, identifying difference without ranking the categories. These do not fall within our definition of an indicator').

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not necessarily release information through rankings or ratings. Rankings or ratings may have more influences than comparative studies with the simple disclosure of differences; however, comparative studies do have the potential for transformation.

An early famous case of the emergence of such comparative studies against multiple private standards is found in forestry where the industry created new competing standards to rival the FSC standards. In the early 2000s, several comparative studies were released. The publication of such comparative studies effectively diffused information on the differences – the strengths and weaknesses – between the FSC standards and the competing ones.[96] It was argued that in the end, such comparative information generated public pressure on the competitor to change and upgrade their standards to align with the FSC standards.

A similar movement was observed in biofuels: the sustainable biofuels sector is one example of the multiplicity of private standards. In 2014, three independent comparative studies were released by NGOs and a research institute. 'Searching for Sustainability'[97] was published by the World Wide Fund (WWF), Germany, 'Betting on Best Quality'[98] was published by the International Union for the Conservation of Nature (IUCN) National Committee of the Netherlands, and 'Biofuel Sustainability Performance Guidelines'[99] was published by the Natural Resources Defense Council (NRDC). These comparison studies have been published against the backdrop of EU legislation on biofuels, as discussed above. The comparison aimed to raise awareness for suppliers of biofuels regarding the existence of significant discrepancies between biofuel standards – even those approved by the European Commission.

Moreover, comparative studies with a wider and more general scope are also available. A think tank – the International Institute for Sustainable Development – launched a 'State of Sustainability Initiatives' project.[100] Under this project, the review of 'Standards and Green Economy' analysed sustainability standards operating in 10 different commodity sectors. The review of 'Standards and Blue Economy' examined nine sustainability standards operating in the seafood sector, covering both wild-catch and aquaculture.

In these cases, experts in certain sectors, such as NGOs and research institutes, spontaneously conducted comparative evaluation. It would be more convenient and useful if relevant actors could make comparisons across relevant standards at any point in time, without having to wait on the production of comparative evaluation by experts. On this point, the role of an international organization – ITC – should be noted. The ITC was established in 1964 and has a joint mandate from the WTO and the United Nations Conference on Trade and Development (UNCTAD). The ITC's Trade for Sustainable Development (hereinafter, 'T4SD') team began developing the indicators for comparative evaluation, which resulted in the 'Standards Map' database, currently listing over 255 existing (private, public, and international) standards and certification programs.[101]

The ITC Standards Map online database offers detailed and customized information about different standards: a user first selects a product/sector, the producing country, and the destination market; the database then lists relevant standards that correspond to the user's business. According to the database, it is possible for users to compare listed standards in terms of substantive requirements in five 'sustainability' areas: environment, social, economic, quality, and ethics.

[96]Christine Overdevest, 'Comparing Forest Certification Schemes: The Case of Ratcheting Standards in the Forest Sector', 8 *Socio-Economic Review* (2010) 47.

[97]WWF, 'Searching for Sustainability', http://awsassets.panda.org/downloads/wwf_searching_for_sustainability_2013_2.pdf (accessed 17 September 2019).

[98]IUCN National Committee of the Netherlands, 'Betting on Best Quality', www.iucn.nl/files/publicaties/betting_on_best_quality.pdf (accessed 17 September 2019).

[99]NRDC, 'Biofuel Sustainability Performance Guidelines', www.nrdc.org/energy/files/biofuels-sustainability-certification-report.pdf (accessed 17 September 2019).

[100]State of Sustainability Initiatives, 'SSI Reviews', www.iisd.org/ssi/ssi-reviews/ (accessed 17 September 2019).

[101]ITC Sustainability Map, Standards, www.sustainabilitymap.org/standards (accessed 17 September 2019).

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In addition, users can compare the standards according to 'process' requirements in four areas: standards (in the sense of the process of standard setting and review), audits, claims and labelling, and support (including the availability and accessibility of technical assistance and financing for users). The comparison results are presented as tables for ease of understanding.

As such, comparative evaluation is carried out by producers, manufacturers, brands, and retailers through online databases on a daily business basis. It seems that the ITC Standards Map project plays two important functions relevant to meta-regulation. First, comparative evaluation through the Standards Map will present producers, buyers, and retailers with a choice of private standards, allowing them to select those that are more appropriate for their business. To present possible choices or alternative business options through comparative evaluation is regarded as one important task of meta-regulation.[102] Second, as the Standards Map offers an index to compare existing sustainability standards, private standard-setting actors can also find and realize the gaps their standards may possess, relative to other rival standards. There are no obligations to fill the gaps, but they are at least released as information through the database. As noted, information disclosure through comparative studies should not be overlooked: weaker and lower private standards are publicized and may be criticized, which could generate public pressure to improve the standards.

4.3 The FAO's SAFA project – Governance by soft law

This section examines a project of the FAO's Sustainability Assessment of Food and Agricultural Systems (SAFA) as a feasible approach to meta-regulation led by an international organization. The SAFA project can be categorized as governance by soft law – setting 'voluntary standards'.[103] One typical function of soft law includes 'norm setting and harmonization projects in governmental, intergovernmental, or transnational arenas'.[104] Indeed, the SAFA project was launched amid concerns over the lack of a concept of sustainability among private standards in the agricultural sector. One exception was the organic food sector, where harmonization efforts have been carried out since 2003.[105] Similar harmonizing efforts were needed to create a common sustainability framework for all food and agriculture sectors. Thus, the objective of the SAFA was to establish 'a common framework for measuring performance according to core sustainability themes', thereby inspiring convergence among different standards.[106]

Literature on soft law has noted that governance by soft law is distinctive in two dimensions, in contrast to a traditional hard law approach: (i) open and flexible standard-setting process and (ii) informal implementation mechanisms relying on peer pressure and social dynamics.[107] This subsection explores how the FAO's SAFA project has been developed and how they are operating.

Regarding the SAFA development process, the SAFA team invited relevant stakeholders to join the process of developing their documents. Indeed, drafting and creating these structures was 'the result of five years of participatory development, together with practitioners from civil society and private sector'.[108] El-Hage Scialabba (former leader of the SAFA team at the Climate, Biodiversity, Land and Water Department of the FAO) believes that with the SAFA, the

[102]Cafaggi, *supra* note 23, at 220.

[103]For a definition of soft law, see John J. Kirton and Michael J. Trebilcock, 'Introduction: Hard Choices and Soft Law in Sustainable Global Governance', in John J. Kirton and Michael J. Trebilcock (eds.), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Ashgate Publishing, 2004) 3, at 10.

[104]Schneiberg and Bartley, *supra* note 92, at 47.

[105]Nadia El-Hage Scialabba, 'Lessons from the Past and the Emergence of International Guidelines on Sustainability Assessment of Food and Agriculture Systems', in Alexandre Meybeck and Suzanne Redfern (eds.), *Voluntary Standards for Sustainable Food Systems: Challenges and Opportunities* (FAO, 2014) 33, at 34.

[106]The SAFA Guidelines (version 3.0), at 6, www.fao.org/3/a-i3957e.pdf (accessed 17 September 2019).

[107]Schneiberg and Bartley, *supra* note 92, at 47.

[108]The SAFA Guidelines, *supra* note 106, 'Preface' at v.

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participation of stakeholders was vitally important for building a common understanding of sustainability.[109] The 'Short history of SAFA', which is available on the SAFA website, presents documents from past meetings and workshop reports, and reveals the detailed processes of the SAFA. First, a draft text was created by the SAFA team after comparing and reviewing 'dozens of corporate responsibility, social and environmental standards, and sustainability reports of food chain actors'.[110] Then, the draft was presented to stakeholders at two e-forums held in 2011 and 2012: 410 people registered to attend in the two forums.[111] Between the two e-forums, a stakeholders' survey was conducted via telephone interview or questionnaire sheet.[112]

These engagement efforts are understood as attempts toward 'constructing legitimacy' by the SAFA team. Although their documents are for voluntary use, the SAFA team expects users' behavioural changes based on the SAFA documents. The change in behaviours takes place because of legitimacy: 'how [users] respond to regulatory regimes can depend significantly on their perceptions of the legitimacy of those regimes'.[113] Such perceptions of the 'legitimacy' of the SAFA build on transparency and participation during the development process.

Ultimately, the FAO's SAFA consists of four documents (hereinafter, these are referred to as 'the SAFA documents' altogether): the SAFA guidelines, the SAFA indicators, the SAFA tool, and a user manual for small-scale producers.[114] The main document is the SAFA guidelines (at the time of this writing, 3.0 was the current version), which consist of 253 pages that explain the SAFA's purposes, structures, and ways of use. The SAFA comprises 21 themes, 58 sub-themes, and 118 indicators. The 21 themes – within the four dimensions of good governance, environmental integrity, economic resilience, and social well-being – are a set of core sustainability issues.

Major reactions to the SAFA have come from producers, retailers, and traders, who can be regarded as 'users' of the SAFA documents. After the SAFA Guidelines were finalized and released in 2013, the number of SAFA users has continuously increased. Those who wish to download and use the SAFA tool (currently, version 2.2.40) must register online;[115] thus, the SAFA team can track the number of users. In 2016, the SAFA team surveyed those registered users (about 700), which resulted in a 'SAFA usage' website,[116] explaining how the SAFA has been used for various purposes and by different actors. According to this website, there are many examples of utilizing the SAFA documents to assess sustainability production or management processes. For instance, the SAFA is used to evaluate the impact of country-specific projects that set up food and farming systems in Argentina, Brazil, Indonesia, and Kenya.[117] When NGOs and firms develop new tools and guidelines to assess sustainability in the various areas of agricultural systems, these tools are based on and adopt the SAFA guidelines.[118] Some industries also utilize the SAFA guidelines as their corporate social responsibility reporting method.[119]

[109]Interview by the author with Ms. Nadia El-Hage Scialabba, at the FAO in Rome, on 18 May 2015.

[110]See Short history of SAFA, 'Mapping sustainability indicators for the food sector (2010)', www.fao.org/fileadmin/templates/nr/sustainability_pathways/docs/SAFA_History10.9.14.pdf (accessed 17 September 2019).

[111]SAFA, Reflections on the 2012 E-forum (March 2012), at 4, www.fao.org/fileadmin/templates/nr/sustainability_pathways/docs/Reflections_SAFA_E_Forum_2012_final.pdf (accessed 17 September 2019).

[112]See Short history of SAFA, *supra* note 104.

[113]Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes', 2 *Regulation & Governance* (2008) 137, at 148.

[114]See the SAFA homepage, www.fao.org/nr/sustainability/sustainability-assessments-safa/en/ (accessed 17 September 2019).

[115]See SAFA Tool 'Free and Open Access SAFA Tool 2.2.40', www.fao.org/nr/sustainability/sustainability-assessments-safa/safa-tool/en/ (accessed 17 September 2019).

[116]See SAFA Usage 'Examples of SAFA Applications', www.fao.org/nr/sustainability/sustainability-assessments-safa/safa-usage/en/ (accessed 17 September 2019).

[117]See SAFA Usage, 'Assessments' examples, ibid.

[118]See SAFA Usage, 'Tools' and 'Guidelines' examples, ibid.

[119]See SAFA Usage, 'Reporting' examples, ibid.

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If actors start assessing their sustainability activities using the SAFA themes and indicators, a certain level of convergence and harmonization can be achieved.

One important question is the extent to which the SAFA project could create incentives for private standard-setting actors – to encourage convergence and harmonization considering the current regulatory fragmentation. The website of 'SAFA usage' does not indicate examples of reactions from private standard-setting actors, and, in fact, it may be difficult to chart the process of convergence, following changes in the behaviours of these private actors. This is because private actors may not necessarily be so explicit regarding the impact of external entities such as the FAO. On this point, El-Hage Scialabba mentioned that there have seen suggestive signs that private standard-setting actors are inspired to find gaps in their sustainability standards (i.e., lack of some sustainability issues in their current standards), and thereby attempt to improve their standards.[120] The SAFA documents seem to have succeeded in raising awareness among private standard-setting actors.

5. Assessment – Comparing Different Strategies of Meta-Regulation

This section evaluates meta-regulatory functions by regional and international organizations compared to the approaches of the WTO's SPS and TBT Committees. As noted, some of the actions in the WTO's SPS and TBT Committees may fall into the scope of the flexible definition of meta-regulation in this paper (from activities that induce convergence among multiple standards to those that affect the quality of standards). However, their activities are not based on the three governance techniques. One crucial reason for this is that the WTO actions do not directly address private actors. Rather, the WTO addresses the WTO Members' concerns, i.e., the need for removing trade restrictiveness of private standards. This constitutes an important difference from meta-regulation by other regional and international organizations: other organizations directly engage in private actors. Furthermore, the degree of engagements with private actors also differs among the governance techniques used by these organizations. These differences probably reflect differences in objectives of meta-regulation, which relate to the kinds of challenges and issues these organizations have attempted to respond in regulatory fragmentation and competition.

Table 1 summarizes the main objectives of different kinds of meta-regulation. While these organizations may have multiple objectives for meta-regulation, the table attempts to highlight a primary objective that can be inferred from each case. The 'delegation' approach, a typical case for the EU, is adopted to make use of private actors' expertise and resources in delegating regulatory tasks. At the same time, it can generate meta-regulatory effects among private actors by encouraging them to comply with the EU requirements ('public regulation'). The objective of the 'information' approach can be inferred from the ITC's explanation, stating that information on standards helps producers to 'review and analyse various standards requirements and processes'.[121] Such information release can generate meta-regulation by incentivizing private standard-setting actors to enhance credibility through improving their standards. Among the three governance techniques, the 'soft-law' approach, taken by the FAO's SAFA project, has a clearer purpose for meta-regulation, stating a goal of establishing 'a holistic global framework for the assessment of sustainability' by setting voluntary standards.[122]

5.1 Comparing Three Governance Techniques (i.e., 'Delegation', 'Information', and 'Soft Law')

This subsection first assesses and compares three governance techniques that facilitate meta-governance. The objective of 'delegation' mode used by the EU can be explained as fostering

[120]Interview by the author with Ms. Nadia El-Hage Scialabba, at the FAO in Rome, on 13 March 2017.

[121]ITC, 'Our Solutions' 'Sustainability Standards', www.sustainabilitymap.org/standards_intro (accessed 17 September 2019).

[122]The SAFA Guidelines, *supra* note 106, 'Preface' at v.

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Table 1. Summary of governance techniques and main objectives for meta-regulation

Governance techniques	Delegation approach (e.g., the EU)	Information approach (e.g., the ITC)	Soft-law approach (e.g., the FAO)
Objectives of meta-regulation	Fostering adherence to public regulation	Addressing a lack of credibility	Seeking a common sustainability framework

an adherence to public regulation, such as promoting the use of sustainable biofuels, ensuring non-use of illegally harvested timber, and reporting shipping emissions. One of the problems associated with the proliferation of private standards is the confusion generated by inconsistencies between public regulation and private standards. In this respect, delegation is one effective way to respond. Moreover, delegation helps reduce implementation costs through the use of the expertise of private actors.[123] Delegation also creates opportunities for regional and international organizations to engage with private actors since delegation necessarily goes with the selection process of the private actors to whom those organizations can outsource their work. However, as noted, delegation requires regional and international organizations to assume the responsibility of rigorous and appropriate monitoring of the work of private actors. Another disadvantage of the delegation approach may be that except for the EU, examples of delegation by regional and international organizations remain scarce, probably because member states are reluctant to allow an international organization to delegate its authority to third parties; member states are always concerned with exercising proper supervision over international organizations.[124]

While delegation is based on a hard, binding instrument, the governance techniques of the 'information' approach by the ITC and the 'soft law' approach in the FAO's SAFA project are based on non-binding, informal, and soft instruments. Those soft-governance techniques allow international organizations to engage with private actors in a variety of ways. The objective of governance by 'information' can be described as addressing the problem of a lack of credibility, and the objective of governance by 'soft law' can be explained as seeking a common sustainability framework among multiple standards. This is not to deny that meta-regulation through 'information' can also contribute to convergence among standards, and meta-regulation through 'soft law' can also contribute to tackling a problem of a lack of credibility. There are several objectives for meta-regulation. However, Table 1 attempts to identify the objective that has the greatest weight. The rest of this subsection examines the strategies of the governance techniques of the 'information' and 'soft law' approaches.

Meta-regulation through governance of 'information' is a response to a lack of credibility caused by the increase in the number of private standards. One of the concerns raised regularly as a result of fragmentation and competition is that there is 'a race to the bottom'. While existing studies still 'disagree whether [regulatory competition] produces a race to the bottom or the top',[125] a general concern over the credibility of standards in regulatory fragmentation and competition has been widely noted. For instance, one recent study pointed out that there are wide differences among private standards and certification schemes in terms of their transparent practices (e.g. decision-making, standard setting, verification, and dispute settlement).[126]

[123]Lin, *supra* note 75, at 60.

[124]For the discussion of limited capacities of international organizations in relation with member states, Abbott et al., *supra* note 73, at 10–11.

[125]Burkard Eberlein, Kenneth W. Abbott, Julia Black, Errol Meidinger, and Stepan Wood, 'Transnational Business Governance Interactions: Conceptualization and Framework for Analysis', 8 *Regulation & Governance* (2014) 1, at 5. See also, Bartley, *supra* note 29, at 446–447; Fransen and Conzelman, *supra* note 2, 260.

[126]Philip Schleifer, Matteo Fiorini, and Graeme Auld, 'Transparency in Transnational Governance: The Determinants of Information Disclosure of Voluntary Sustainability Programs', 13 *Regulation & Governance* (2019) 488.

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Governance by 'information' responds to this concern. In particular, information disclosure through the ITC Standards Map online database can be a powerful tool for shaping the quality of standards: 'simple disclosure can expose best and worst practices, structure attention, and facilitate learning'.[127] As stated, the ITC's Standards Map produces comparative information among various sustainability standards. Various actors can be users of information, including producers, exporters, retailers, consumers, and state governments. Private standards-setting actors, who are sensitive to questions about their credibility, may be concerned with how the quality of their standards is presented and publicized through the ITC's Standards Map.

In contrast, meta-regulation in the FAO's SAFA project using a 'soft law' approach seeks a common sustainability framework among the standards. The soft law approach has gained increasing scholarly attention. As noted in the literature, '[s]oft-law instruments can be propagated by non-state actors',[128] and the SAFA's targeted users are private actors as well as governments. Furthermore, scholars have argued that 'the world has increasingly turned to soft law solutions [rather than hard law solutions]' because 'the soft law approach offers many advantages: timely action … bottom-up initiatives … and an effective means for direct civil society participation'.[129] Indeed, the development process of the SAFA guidelines provided opportunities for promoting participation and raising awareness among private actors.

Conversely, the disadvantages of soft solutions are also recognized: '[the soft law approach] may lack the legitimacy and strong surveillance and enforcement mechanisms … may promote compromise … can lead to uncertainty'.[130] Indeed, in terms of effectiveness, the current meta-regulatory actions under the SAFA project may not be effective at all. Measuring the effectiveness of soft instruments is a significant challenge for social science. In the case of the SAFA project, a desired material consequence would be convergence among multiple different private standards; however, we have not as yet observed such a consequence yet.

Alternatively, the effects of meta-regulatory activities can be more broadly conceived. Instead of material results from the convergence, subtle but important effects may result, such as promoting learning, creating networks, and empowering actors. For example, one important consequence resulting from the SAFA project is that it has created networks of relevant actors and provided a basis for exchanging views and experiences via the SAFA system. The project has connected relevant actors in sustainability governance – the SAFA team, producers, retailers, traders, and private standard-setting actors – which can generate mutual learning. The ITC's project has similar potential.[131] However, some improvements in the SAFA's current soft governance structure are needed: it is likely that more 'systematic' and 'established' mechanisms for the continuous exchange of information and feedback would be required to generate mutual learning[132] – subsequently, we will be able to observe the real effects of meta-regulation.

[127]Schneiberg and Bartley, *supra* note 92, at 44.

[128]Gregory Shaffer and Mark A. Pollack, 'Hard and Soft Law', in Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press, 2012) 197, at 204.

[129]Kirton and Trebilcock, *supra* note 103, at 4–5.

[130]Ibid., at 6.

[131]Currently, the ITC's Sustainability Map project provides more than release of information. The T4SD team developed the 'Virtual Network' which can be used along with the Sustainability Standards Map. Because gaining comparative information via the Standards Map may not necessarily lead to a real business opportunity, the T4SD team, acting as a facilitator, helps 'connecting businesses, support organization and practitioners along sustainable value chains'. See, ITC Sustainability Map, Virtual Network, www.sustainabilitymap.org/network_intro (accessed 17 September 2019).

[132]The SAFA's governance by soft law can be improved if it adds some elements of 'experimentalist' governance. Space does not allow a detailed discussion of governance by experimentation. Briefly, experimentalist governance has five common features: (1) open participation; (2) a broadly agreed common problem; (3) lower-level implementation; (4) feedback, and reporting; and (5) peer review. Gráinne de Búrca, Robert O. Keohane, and Charles Sabel, 'New Modes of Pluralist Global Governance', 45 *NYU Journal of International Law & Politics* (2013) 723, at 739. Importantly, experimentalist systems 'regularize and officialize' the 'occasional and ad hoc practice' of exchanging views and experiences, thereby shifting to 'systematic

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5.2 Any Inferences to the WTO?

As discussed above, three governance techniques are used to achieve different objectives in response to regulatory fragmentation. At the same time, these techniques allow regional and international organizations to engage private actors in their meta-regulatory activities. The variations in meta-regulation actually reflect variations in 'public–private interactions' in transnational sustainability governance.[133]

On the other hand, it may not be particularly surprising that the WTO's approach differs from these approaches of other regional and international organizations, because the WTO's objective to address private standards is to tackle their trade restrictiveness raised by the WTO Members' concerns. This paper does not argue that meta-regulatory activities by other regional and international organizations have strong inferences to the WTO's approach; however, we can still draw a broader inference. That is, if meta-regulatory activities, engaging with private actors, outside the WTO are successful, negative perceptions towards private standards within the WTO may be changed.

This paper does not argue that meta-regulatory activities outside the WTO would remove the trade restrictiveness of private standards. For certain producers in Southern countries, standards in Northern countries will always remain trade barriers, regardless of whether the quality of standards are upgraded and converged. Indeed, improved private standards are more difficult for producers to comply with, which makes exporting their goods harder. Then, how can we connect the WTO's approach and other organizations' approaches? Are there any ways to sort out tensions between the WTO and other organizations?

One way to think about this issue is that the rise of meta-regulation by other organizations can provide opportunities for private standard-setting actors to improve the 'legitimacy' of their standards, which also has important implications for the WTO.[134] Legitimacy of private standards comprises two aspects: one is 'input legitimacy' or 'procedural legitimacy' that 'derives from the process by which decisions are made, including factors such as transparency, participation, and representation';[135] the other is 'output legitimacy' or 'substantive legitimacy', which is concerned with 'the results of governance', such as whether 'a [private] regime solve[s] problems effectively'.[136]

These two aspects of legitimacy are related to 'actual legitimacy' (or 'normative legitimacy') of private standards – the criteria of whether private standards are 'objectively' legitimate.[137] This is the matter of the 'rightfulness' of private regimes;[138] in other words, the qualities of private standards. However, the important question is whether WTO Members 'subjectively' believe the legitimacy of private standards. In this regard, the literature has further argued the importance of assessing 'perceived legitimacy' (or 'descriptive/sociological legitimacy').[139] The concept of 'perceived legitimacy' is explained as follows:

learning'. Ibid., at 740–741. More established 'systems of discovery and learning' make 'experimentalist' governance different from 'soft law' governance. Schneiberg and Bartley, *supra* note 92, at 49.

[133]For interactions between public and private authorities, see, e.g., Jessica Green and Graeme Auld, 'Unbundling the Regime Complex: The Effects of Private Authority', 6 *Transnational Environmental Law* (2017) 259; Jessica F. Green, 'Blurred Lines: Public-Private Interactions in Carbon Regulations', 43 *International Interactions* (2017) 103.

[134]For a discussion of legitimacy of private standards, see, e.g., Frank Biermann and Aarti Gupta, 'Accountability and Legitimacy in Earth System Governance: A Research Framework', 70 *Ecological Economics* (2011) 1856, at 1857.

[135]Daniel Bodansky, 'Legitimacy in International Law and International Relations', in Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press, 2012) 321, at 330.

[136]Ibid.

[137]Ibid., at 327.

[138]Zuzanna Godzimirska, 'Delegitimation of Global Courts: Lessons from the Past', in Avidan Kent et al. (eds.), *The Future of International Courts: Regional, Institutional and Procedural Challenges* (Routledge, 2019) 123, at 124.

[139]Cosette D. Creamer and Zuzanna Godzimirska, '(De)Legitimition at the WTO Dispute Settlement Mechanism', 49 *Vanderbilt Journal of Transnational Law* (2016) 275, at 281 (citing Daniel Bodansky, 'The Legitimacy of International

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> scholars are interested in why and when transnational governors are *believed to have the right to rule* as well as the processes through which institutions can gain or lose legitimacy. The main difference is that, from this perspective, legitimacy is defined in relational terms. It is granted or denied by an institution's audience in a dynamic process of legitimation.[140]

Various meta-regulatory activities outside the WTO can improve 'actual legitimacy' as well as 'perceived legitimacy' of private standards – and with regard to 'perceived legitimacy', the WTO (particularly, developing countries) can be a part of the audience of private standards' legitimation processes, involved in meta-regulatory activities. Engagement efforts by the EU, ITC, and FAO may transform the negative image of private standards into a positive image for producers in developing countries; the use of appropriate private standards can support their businesses and promote their exports. This is an attempt to integrate producers in developing countries into global supply chains.[141] Such efforts may change the negative picture in the WTO, in which Northern private standards inhibit Southern exports.[142]

This paper does not prove yet that various meta-regulatory activities outside the WTO actually improve 'perceived legitimacy' of private standards. Thus, the question still remains how the WTO – particularly developing countries – have currently perceived private standards that may impede their exports. This question should be addressed in future research, which also relates to a broader research agenda; that is, an analysis of the interactions between meta-regulation of different forms – in particular, the WTO and other organizations.[143]

6. Conclusion

This paper has discussed various ways in which regional and international organizations have been acting as meta-regulators against the backdrop of the proliferation of private standards. With a focus on the activities outside of the WTO, it has examined the relationship between different governance tools and strategies that can serve to facilitate meta-regulation, compared with the WTO's approach.

This paper has further implications for our understanding of global trade governance, providing a larger picture of its institutional environment. This paper suggests that even in one area of global trade governance (i.e. meta-regulation of sustainability), institutional environment is already complex. While the focus of this paper is on the meta-regulatory activities by regional and international organizations, various private initiatives have already been operating in the domain of the meta-regulation of sustainability, as noted earlier. Irrespective of whether we refer to this situation as 'regime complex', it is largely true that 'multilateral cooperation is giving

Governance: A Coming Challenge for International Environmental Law?' 93 *American Journal International Law* (1999) 596, at 602). See also, Bodansky, *supra* note 135, at 327 and 329 (arguing the importance of distinguishing 'normative legitimacy' and 'descriptive/sociological legitimacy', because we usually talk about an institution's normative legitimacy on the basis of normative criteria, such as 'input legitimacy', but this is different from 'an institution's descriptive or sociological legitimacy – with whether its authority is accepted by relevant audiences, such as states and civil society groups'.).

[140]Philip Schleifer, 'Varieties of Multi-Stakeholder Governance: Selecting Legitimation Strategies in Transnational Sustainability Politics', 16 *Globalizations* (2019) 50, at 52 (arguments based on Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions', 20 *Ethics & International Affairs* (2006) 405).

[141]For the importance of a focus on supply chains in the WTO negotiations, see Bernard M. Hoekman, *Supply Chains, Mega-Regionals and Multilateralism: A Road Map for the WTO* (CEPR Press, 2014), at 35–36.

[142]Note that the early SPS Committee's documents in 2009 pointed out a few positive effects of private standards according to responses from WTO Members. See, SPS Committee, *supra* note 7, paras. 38–40 (Question 12. Positive (trade creating) effects of the private standard(s) on the exports of a product).

[143]For the need for research on 'interplay and coevolution' of multiple forms, see Schneiberg and Bartley, *supra* note 92, at 53.

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way to multi-stakeholder cooperation'.[144] The examples of meta-regulatory arrangements by regional and international organizations (other than the WTO) in this paper have involved a certain degree of participation by private actors.

One last note on meta-regulation should be highlighted here. The value of meta-regulation always raises a political question: is meta-regulation – intervention by public actors – really necessary?[145] Fragmented regulatory structure may not always be disadvantageous; institutional fragmentation may create some benefits, such as diversity, learning opportunities, and innovations. Theoretically, both 'optimistic' and 'pessimistic' views exist on the decentralized situation.[146] To answer such a question, this paper argues that meta-regulation can also generate positive transformative effects through interactions among private and public actors.

That said, the desired material consequences of meta-regulation are always required in regulatory fragmentation and the impacts of meta-regulatory activities should be carefully measured. Meta-regulatory activities can generate more constructive solutions if their activities are connected with the SDGs, relating in particular to Goal 12 'Responsible consumption and production'. While current meta-regulation may seem imperfect, various governance tools can improve and evolve over time. Future research can examine which form of meta-regulation is more effective by revealing the consequences generated by meta-regulatory actions.

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[144]Karen J. Alter and Kal Raustiala, 'The Rise of International Regime Complexity', 14 *Annual Review of Law and Social Science* (2018) 329, at 345.

[145]For a discussion of such a non-interventionist approach, see Steven Bernstein and Erin Hannah, 'Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space', 11 *Journal of International Economic Law* (2008) 575, at 606.

[146]Fransen and Conzelmann, *supra* note 14, at 260.

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