

Nesting, Overlap and Parallelism: Governance Schemes for International Production Standards

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Some of our current research concerns the development of governance arrangements for international production such as labor, environmental or human rights standards. What we observe is a wide variety of different “regulatory” schemes, ranging from somewhat traditional governance by states or through international organizations to a plethora of innovative arrangements involving private actors -- including NGOs, industry groups and individual firms themselves.¹ We arrange these different schemes on the Governance Triangle, which is a three-dimensional simplex representing the respective shares of business, NGOs and states in standards governance.² Our puzzle is to explain the diversity of these arrangements -- which we do in terms of the structures of different problems and of international business transactions, the incentives of the actors, and the competencies of different actors relative to tasks involved in setting and implementing production standards. We are also interested in whether and when private schemes can be effective where state-based schemes fail, or whether the two can reinforce each other’s effectiveness. The interactions among this multiplicity and diversity of schemes are highly relevant to the nesting project.

An example of the sorts of arrangements we are interested in is the wide range of governance schemes that seek to promulgate and implement labor standards, especially for third world production by first world multinational firms. While labor standards are first and foremost a domestic concern that would seem to fall under domestic governance, the ILO has played a longstanding role in developing common international labor standards. The purposes of these standards are to assist states in their domestic efforts, to

¹ We use the term “regulation” below since it is the common word for governance of standards but many of the governance schemes evolving in the standards area are notable as representing very different approaches to standards governance than traditional state-led regulation. Also, governance of the standards process involves a series of elements (e.g., promulgation, implementation, monitoring and enforcing) that we do not differentiate here (Abbott and Snidal 2004).

² Abbott, Sceats and Snidal (manuscript, n.d.). “The Governance Triangle: States, Firms, NGOs and Global Business Standards. We reproduce the triangle at the end of this memo.

restrain any temptation for states to compete through lowering labor standards and, more recently, to deal with the impact of transnational supply chains in a global economy. Other IGOs have developed alternative or complementary schemes directed at firms, including the OECD Guidelines for Multinational Enterprises and the UN Global Compact.

The (partial) failure of these state-based initiatives has led to the emergence of a range of nonstate and public-private governance schemes to address labor rights problems. Nongovernmental organizations such as the Clean Clothes Campaign have promulgated their own standards codes and brought pressure on firms through threats of consumer action and positive incentives like labeling. Firms have responded to this pressure by implementing and advertising individual schemes of self-regulation to address labor problems (e.g., The Gap and Nike), or by participating in business-based NGOs such as the Prince of Wales International Business Leaders Forum or in industry-sponsored standards schemes such as Worldwide Responsible Apparel Production (WRAP). Among the most interesting schemes are those involving collaboration between firms and activist NGOs through organizations such as the Fair Labor Association and Social Accountability International.

This complex of governance arrangements for production standards does not conform perfectly to the conceptions of how regimes fit together as laid out by Alter and Meunier. Our hope is to use the differences we see both to help refine their concepts and to develop an additional one.

One significant difference is that traditional discussions of regimes (including the conference memo) focus almost exclusively on states (and occasionally IGOs) as actors; as a result they do not accommodate the role of nonstate actors such as firms and NGOs.³ In our regulatory settings, however, these actors often play a central role. Closely related to this, regime analysis often focuses heavily on formal and legalistic rules, whereas governance of production standards often combines softer rules and more direct political bargaining among the actors. Finally, although discussions of forum-shopping implicitly

³ Of course there are many regime studies that do recognize the central role of nonstate actors (Lipson on bankers; Sell on lawyers; Haas on scientists). But the role of these actors in the institutional relations across regimes has not been as well developed (to our knowledge).

focus on the choices of actors subject to conflicting regimes, we also see competition among regimes themselves. Such competition is an important feature of the regulatory setting even among state-based regimes (e.g., WTO vs. WIPO; UNCTAD vs. GATT). In our research, furthermore, we see such competition occurring between public and private regimes, and among private regimes. While these differences may be partly due to the still emerging character of non-state arrangements, they also point towards different approaches to governance emerging at both the domestic and international levels.

To draw out and clarify these differences, we begin with a brief conceptual discussion of different models of relations between regimes. One is “nesting,” as discussed by Aggarwal and elaborated by Meunier and Alter; another is the notion of “overlapping,” especially as developed by Victor and Raustiala in the notion of a “regime complex”; the final one is “parallelism,” which is our label for the sometimes supportive, sometimes competitive relations among independent governance schemes within an issue area.⁴ We next discuss how these different models apply to emerging governance of international production as well as to interstate regimes.

Relations among governance arrangements

In looking at the background readings for the conference, we find quite a variation in the use of the key concepts (nesting and overlapping). Here is a first attempt to reconcile these concepts, which we think is something the conference will have to address. Our goal is to define the basic concepts in those readings (nesting and overlap) clearly and exclusively at the outset, while recognizing that real world regimes do not correspond to these ideal types. In addition, we propose a third concept of parallelism, which is important in looking at international standards governance.⁵

⁴ Aggarwal uses “parallelism” in a somewhat different way to describe the division of labor among institutions doing separate but related activities (e.g., World Bank and IMF). We are open to other terms but think that parallelism is an apt label for arrangements that are operating in parallel trying to achieve roughly the same purpose.

⁵ We focus on the relation between governance rules in the issue areas. For conflict among rules to matter, of course, there must also be overlap in their substantive requirements and in the actors they apply to. One of the interesting differences we see with the public-private regimes in international standards is that the actors in the nested regime are typically different types of actors whereas in interstate regimes the actors are typically the same (or a proper subset) at both levels -- although IGOs might provide a unique actor at the upper level. But we focus on the relations among the rules themselves and leave these variations for later.

Alter and Meunier define nesting in terms of more specific institutions being part of broader institutions, where specificity and breadth are defined in terms of issues and/or members. Their metaphor of “Russian dolls” suggests a hierarchy where one set of rules sits neatly inside another so that rules are consistent. Hooghe and Marks (2003:236) use this same metaphor for their Type I Governance category, whose “pyramidal structure ... lends itself to hierarchical direction... [typically] bound together by a single court system with ultimate authority to adjudicate among contending jurisdictions.” (239) Aggarwal (1998) also speaks of “nesting broader and narrower institutions in hierarchical fashion.” By contrast, Alter and Meunier correctly observe that often at the international level it “is not clear who has the final authority to resolve conflicts ...”; they connect nesting to Hooghe and Marks Type II Governance. This suggests some inconsistency in the use of terms. We think it is more useful to treat nesting as hierarchical, and the international setting as one of generally incomplete nesting.

Thus we would define nesting as a hierarchical relation between institutional rules. A corollary of this definition is that when one issue is nested (through institutional rules) in another, then governance of the nested issue is subordinated to the overarching “rules” or “regime.” Of course, nesting need not be complete, as in the Russian Doll metaphor, but could involve only a partial hierarchy between rules on particular issues, with other rules of the two regimes neither in common nor in conflict.⁶ Because international rules are relatively undeveloped, we are most likely to see nesting either at a very general level (e.g., regime rules nested in broad notions of sovereignty) or within the “same” issue area (e.g., Aggarwal’s examples of specific apparel sector trade rules nested within general GATT rules and APEC’s concern to be GATT-consistent).

The production standards area shows some nesting at the general level but relatively little nesting of specific governance arrangements. For example, there has been incomplete convergence among private schemes such as the FLA, SAI and Global Compact on the use of ILO norms as baseline standards. Even here, however, these norms are sometimes seen only as a starting point requiring further elaboration (although explicit deviation is not common). And the actual operations of schemes like those

⁶ There could also be rules that do conflict between issues. Here nesting blurs into overlap (see below) but we will maintain the analytic distinction for clarity.

mentioned are not nested in ILO procedures at all, but are parallel to them, and sometimes competitive, as we outline below. Similar statements could be made about environmental or human rights schemes: private standards schemes like the Global Reporting Initiative and the CERES Principles draw on common sources such as UNEP environmental treaties and UN human rights conventions, but implement these standards in distinct, parallel ways. It is worth noting that many (but not all) of these baseline standards are promulgated by public regimes, although private standards schemes often adapt them to their own needs.

While Alter and Meunier treat nesting as a subset of “overlapping,” we believe it is preferable to distinguish these concepts more starkly. Here Raustiala and Victor’s (2004) notion of regime complex provides a useful conception of overlapping regimes. The relations between overlapping issues are horizontal, not vertical or hierarchical, and the problem is that as institutional density grows, the rules of formerly “separate” issues come into conflict with one another.⁷ Contradictions between the pre-existing rules in the two areas then may create conflict if the boundaries of issues cannot be carefully demarcated. These conflicts could be resolved in a “top down” fashion by negotiating new rules that create legal consistency – which would have the effect of imposing a type of hierarchical nesting. But Raustiala and Victor argue that “bottom up” processes of implementation and interpretation provide important alternative ways of achieving accommodation among conflicting rules through on-going practice and negotiations. Both directions open room for the creation of “strategic inconsistency” among rules and for forum-shopping, as parties seek to resolve issues in alternative fora that favor their interests. By contrast, forum-shopping should not be as prominent in nested regimes where the consistency of the rules eliminates the incentives.

Neither nesting nor overlapping properly describes what we see in standards regulation (as we’ll elaborate below). Instead, we see a number of different governance efforts working in parallel, sometimes cooperatively and sometimes competitively, to achieve roughly the same ends in the same issue area. As a highly stylized example, the perceived failure of traditional IO regulation may lead NGO activists to develop

⁷ Thus overlap is in the first instance an inadvertent consequence of (say) technology. Below we briefly consider how it can be the result of intentional and strategic behavior.

alternative standards schemes based on (say) consumer pressure, which may lead business to develop self-regulating schemes to address these pressures, which may ultimately lead to blended governance schemes involving various combinations of these actors. We currently observe schemes of all these types in operation simultaneously, all claiming to pursue the “same” objectives in the same issue areas. This opens up opportunities for forum shopping in two senses. Actors involved in the activity (both NGOs and firms) can choose to participate in alternative governance schemes to address the problem, while governance schemes themselves can “shop” for business by competing for participation on different margins (e.g., content of rules, use of consumer and other pressures, mergers among schemes).

We highlight these three different conceptions of relationships among regimes in Table 1. The middle three rows describe their key defining characteristics, while the bottom row (discussed below) addresses the relation between governance schemes under the three types. Nesting is a hierarchical relationship within an issue area where hierarchical rules (sometimes supplemented by dispute settlement procedures) resolve any conflicts among layers of the regime. Overlap is a nonhierarchical relation among regimes in multiple, otherwise separate issue areas, where any conflicts are resolved through the implementation process (Raustiala and Victor, 280), the results of which may ultimately be codified into an overarching rule, creating a nested relationship. Parallelism entails nonhierarchical relations among governance schemes working toward roughly similar goals within a single issue area, where any conflicts are both created by and resolved through competition among the schemes. Of course, these differences in general properties are deliberately drawn starkly here to emphasize the analytic distinctions; in practice, real regimes contain continuous blends of these ideal types.

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

Table 1: Different Forms of Relations among Government Schemes

How conflicts are resolved among institutions

The bottom row of Table 1 summarizes the different implications of conflicts among governance schemes in the different models. Before elaborating, it is important to note that the language of “forum-shopping” emphasizes strategic behavior by parties subject to (conflicting) regimes, whereas another important possibility is that inconsistencies generate competition among governance schemes themselves. Such competition lies behind “race-to-the-bottom” arguments, although these have been usefully supplemented by “race-to-the-top” arguments (Vogel 1995), which make clear that the consequences of regime competition need to be investigated, not assumed. Below we discuss how the competitive aspects of governance schemes can have both negative and positive effects.

Conflicts Resolved through Nesting

One of the main goals in the construction of nested regimes is to prevent conflicts by creating a hierarchy of rules and providing clear means of resolving conflicts among rules when they arise. Rules of nested regimes should be reinforced by these interconnections, since violations of any single rule now have broader implications. There may be competition within the rule system, however, as interests and organizations associated with different parts of the nested rules seek to adapt and change them in ways that work best for their concerns. But this competition is regularized by the rules for change within well-established nested regimes. Effective nesting thereby reduces or eliminates incentives to shop among regimes in ways that might undermine them. Forum shopping is only possible to the extent that nesting is incomplete or imperfect.

Resolving Conflicts in Overlap

Overlap creates incentives for forum-shopping and also creates incentives for schemes to competitively structure their interactions to ensure their rules take precedence. Raustiala and Victor discuss how these problems are avoided in the development of regime complexes with overlapping issues, through deliberate choices to leave certain things ambiguous until differences can be worked out in implementation and then

through codification in an overall agreement.⁸ In a sense, the ultimate resolution of the overlap problem is to create an overarching arrangement in which the original treaties are “nested.”

Overlapping also creates incentives for what Raustiala and Victor label “strategic inconsistency,” whereby actors deliberately craft rules in one regime that conflict with those in another in order to promote change in the latter. Actors may also take advantage of overlaps – including the promotion (or perhaps creation) of overlap that had not earlier been appreciated – to create connections and even nest the rules of one area in another. Efforts to use trade arrangements such as WTO and NAFTA to achieve labor, environmental or human rights goals provide an example.⁹ The extent to which these are true rather than “strategic” overlaps is, of course, a matter of contention, with opponents arguing that false linkage will simply undermine the rules in the first regime. Especially if overlap between issue areas is determined not simply by material and technological factors but also by ideational and cognitive factors, then the room for strategic maneuvering is great.

Negative and Positive Conflicts in Parallelism

Because actors in parallel governance schemes are each trying to achieve (roughly) the same goal, many of their interrelations are mutually reinforcing. But there are also several sources of more conflictual competition among parallel schemes. We begin with the more positive aspects and move to the negative aspects of this competition

Sometimes the presence of multiple parallel schemes leads to relations that are mutually reinforcing. Many NGOs, IGOs and states share fundamentally similar goals and are eager and able to coordinate their efforts. Where standards schemes pursue distinct yet complementary approaches (e.g., ILO conventions address states, while NGO and business schemes address firms), greater progress toward shared goals can often be made. Moreover, the nature of standards regulation often benefits from or even requires collaboration among different actors. For example, only business has certain technical

⁸ This is a form of soft law process whereby imprecision is used in an early agreement in order to begin a learning process whereby a harder legal arrangement can be implemented later (Abbott and Snidal 2001, 2003).

⁹ See Hafner-Burton’s work on the use of PTAs to enforce human rights agreements.

expertise and access to facilities (including even knowledge of their location) that is sometimes necessary for effective standard-setting and implementation. At the same time, even if technically feasible, business-based governance may not be credible without the participation of independent third parties such as NGOs or IGOs to verify adequate performance. Such collaboration often takes place across different governance schemes, although sometimes it is achieved by integrating efforts through a single scheme that brings all parties inside.¹⁰ Such blended governance schemes turn potential conflicts into synergies. Finally, competition among schemes based on parallel but independent efforts to address the same problem may generate important learning opportunities and diffusion effects through sharing information regarding success and failure across different schemes.

Competition in parallelism can also undermine the objectives of some or all of the parties. One source of competition is the need to obtain firm participation, which is a key to the success of a governance scheme in terms of both organizational goals and the ability to raise resources. Because production standards governance arrangements typically entail voluntary or soft law rules, their impact depends on willing participation by business. Even where competing schemes fully share goals, this creates incentives for them to change themselves in order to attract greater participation, and raises the danger that they will end up not providing effective responses to the problem. The Global Compact has been so accused because it has been relatively undemanding of firms to entice their participation. While Global Compact officials argue in response that this is part of a “learning process” to bring firms along, outside activists see it more as “bluewash,” which undermines rather than promotes key governance objectives.

Another source of competition arises when different schemes share a general purpose but have different strategies or beliefs about how to achieve these goals. This is surely one source of the dispute between the Global Compact and NGO activists noted above. Moreover, even when actors agree on general goals they may differ on specific goals. Most prominent here are questions regarding the exact content and depth of the standards, what tradeoffs to make, and what form governance should take. For example,

¹⁰ We have begun to work out these interconnection in (cite St Gallen paper).

at what age and for how many hours should children be allowed to work? What are appropriate safety standards in an occupation and (how) should costs to the employer be weighted? What should the reporting requirements be and what monitoring arrangements should be adopted? These issues go beyond the simple “firms want less regulation, activist want more regulation” (although that is generally true) to deeper social issues about appropriate activities as well as to tradeoffs between development and other values.

The potential for conflict is most apparent when firms set up industry-based governance schemes or individual self-regulatory codes and procedures. Such schemes could be sincerely intended to achieve the same goals through more business-compatible approaches and would thus provide a fairly positive form of competition. Business organizations such as Business for Social Responsibility and the Prince of Wales International Business Leaders Forum seem to fall squarely in this category, although they are often criticized by suspicious NGOs. However, business-based schemes at the industry or firm level can also be relatively insincere efforts, whose primary purpose is to preempt more restrictive governance by states or other schemes (e.g., “higher” standards) or, in a few cases, forms of deliberate deceit designed to cover up the issue – thus justifying suspicion. Regardless, firms can be expected to search out governance schemes that address their needs as well as the goals of governance itself. Thus forum-shopping is a characteristic phenomenon of parallel schemes, more so than in either nesting or overlapping regimes.

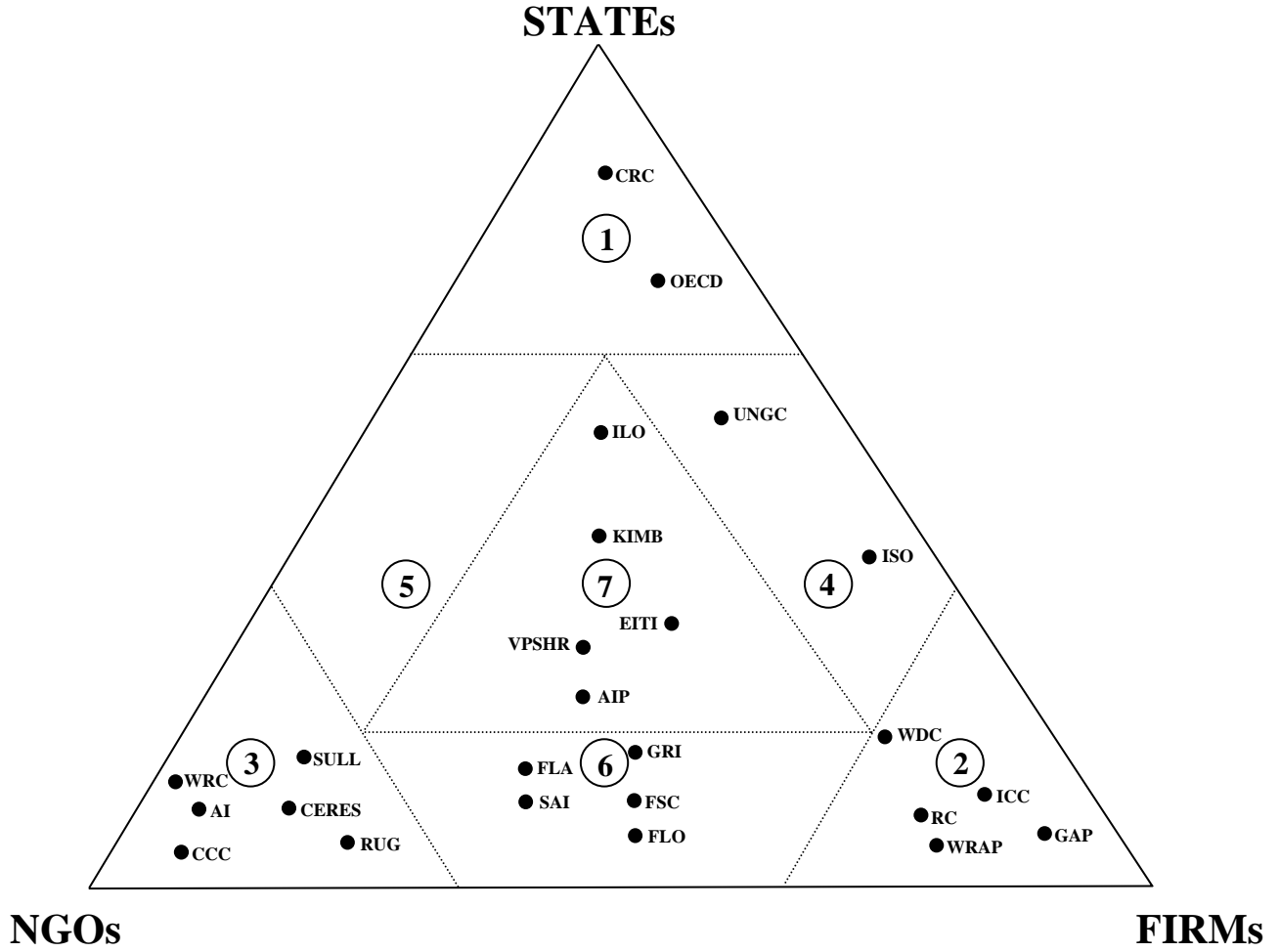


Figure1: The Governance Triangle

Location is determined by share of each vertex actor in the governance scheme.