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The Role of Non-State Actors in Regulation

Bridget M Hutter



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Contents

Introduction.....	1
Analytical Frameworks: Non-state actors and regulatory roles.....	2
Substantive Discussion of Roles.....	4
Civil Society Sources of Regulation.....	7
International Transnational Actors.....	11
Evaluation.....	12
References.....	16

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Introduction

There is growing recognition that regulation is not the exclusive domain of the state. The regulatory capacities of non-governmental actors are increasingly recognized and on occasions formally co-opted by the state. This paper examines the ways in which a variety of economic and civil society actors contribute to the information gathering, standard setting and behaviour modification aspects of regulatory control. Particular attention is paid to the international aspects of this contribution and the limitations and advantages of different forms of non-state regulation.

Throughout much of the nineteenth and twentieth centuries regulation was regarded as inextricably related to the state's attempts to control economic activities. Indeed, for some authors, state regulation is a defining characteristic of modernisation (Hancher and Moran, 1989). But the growth in the use of the law to influence economic activities has been uneven and its use as a tool of government subject to changing political fashion. In the 1970s and early 1980s, Europe and America witnessed a proliferation of laws designed to regulate economic activities across a broad economic spectrum.² Sunstein (1990), writing of the American experience, refers to this as a 'rights revolution', in which there was a proliferation of social regulation concerned with quality of life issues (see also Rose-Ackerman, 1992; Sigler & Murphy, 1988). This is in stark contrast to the late 1980s, which witnessed a growing disillusionment with state regulation and calls for a dismantling or 'rolling back' of the regulatory state (Rose-Ackerman, 1992; Sigler & Murphy, 1988). In the United States and Europe there was a strong deregulatory rhetoric, centring on claims of overregulation, legalism, inflexibility and an alleged absence of attention being paid to the costs of regulation (Froud et al, 1998; Majone, 1990). This 'regulatory crisis' was followed in the mid 1990s by a period of re-regulation and regulatory reform. So marked was the trend to regulate that the mid 1990s onwards has witnessed what some commentators refer to as the rise of the regulatory state. This period has a number of characteristics, prominent amongst them is the decentering of the state. This involves a move from public ownership and centralised control to privatised institutions and the encouragement of market competition. It also involves a move to a state reliance on new forms of fragmented regulation, involving the

¹ A version of this paper was presented at the Global Governance and the Role of Non-State Actors Conference, CARR, in association with the Social Science Center, Berlin (WZB) and the Alfred Herrhausen Society for International Dialogue, Frankfurt, 4 - 5 November 2004, Bankside House, LSE and is published in F. Schuppert (2006) *Global Governance and the Role of Non-State Actors*, Berlin, Nomos. I am indebted to the anonymous referees of this paper for their helpful comments.

² The term economic is being used here broadly to refer to the market economy and its constitutive institutions and actors, it is not being used in the narrow sense that the term economic regulators is so often used in the UK to refer specifically to price regulation.

existing specialist regulatory agencies of state but increasingly self-regulating organizations, regimes of enforced self-regulation (Braithwaite, 2000) and American style independent regulatory agencies.³

These moves to decentralisation have been variously written about in terms of contracting out; the multiple occupation of regulatory space (Hancher and Moran, 1989), and more broadly in terms of a move from government to governance, where the state attempts to 'steer' or 'regulate' economic activities through co-opting non-governmental actors (Osborne and Gaebler, 1992). These changes are not simply related to disillusionment with command and control strategies to regulation, they are inextricably related to more general moves in public governance which veer to outsourcing and privatisation of public management functions. They also parallel changes in broader patterns of social control (Cohen, 1985; Hutter, 2001).

Contemporaneous with the changing fashions of state regulation has been a broadening conceptualisation of regulation. The growing recognition of the limits of public law approaches to regulation led governments and regulatory scholars to turn their attention to alternative methods and sources of regulation. So regulation is no longer regarded as the exclusive domain of the state and governments and the role of non-state actors in regulation is now widely acknowledged.⁴ Some non-state sources are new and represent a growth of regulation. But many of the sources of regulation are well established, they have existed for a very long time in one form or another. What is new is the growing recognition of these alternative sources as regulation, their formal co-option by the state and an increasing co-ordination of activities between various regulatory sources.⁵ And this is the subject of this paper. Who are these non-state bodies? What is the nature of their relationship with the state, if indeed they have a relationship? And what regulatory roles do they play?

Analytical Frameworks: Non-state actors and regulatory roles

This section will set out some basic distinctions to work with. The distinctions are analytical and heuristic and are used here to facilitate discussion of sources of regulation which are autonomous and independent from the state. In mapping out the variety of non-state actors it is useful to distinguish between the state, the economy and civil society.⁶ The economic sphere includes, for example, markets and a broad range of profit motivated organizations and activities embracing, for example, finance and industry. The civil sphere comprises non-governmental organizations (NGOs), charities, trusts, foundations, advocacy groups and national and international non-state associations (Hutter and O'Mahony, 2004: 2; Anheier, 2002; Bruyn, 1999).

³ Indeed for Majone (1994; 1996) it is the rise of these agencies at both state and EU levels which is the defining characteristic of the European regulatory state.

⁴ See Baldwin, Hood and Scott, 1998; Black, 2002; Hutter, 2001 for discussion of varying definitions of regulation.

⁵ We are referring here to the active and intentional involvement of these non-state actors in exercising control over business risk management practices. This is more than exercising some contextual influence over either regulatory policy or business practice (see below).

⁶ There are complicated definitional issues surrounding this topic (see Bruyn, 1999, for a good discussion of these). Some refer to 'three sectors' but objections arise because the use of the terms first, second and third is taken by some commentators to refer to a hierarchical ordering.

This paper will use concepts from Hood et al's work on risk regulation regimes to guide the analysis. They define risk regulation regimes as '...the complex of institutional geography, rules, practices, and animating ideas that are associated with the regulation of a particular risk or hazard' (2001:9). This is a flexible definition which refers primarily to public policy risk responses. It allows for varying scales of operation, from the local to international, varying levels of integration or fragmentation and differing levels of formality and practice. Risk regulation regimes are regarded as control systems of related parts which are relatively bounded. This potentially allows sufficient flexibility to permit analysis of situations where the state co-opts other parties into its regulatory regimes. Also the concept could be extended to take into account more independent non-state regulatory actors, most especially those who may avert the need for state regulation. Arguably any investigation of government responses to risk needs to take account of this possibility.

A further distinction drawn by Hood et al is between the context and content of regulation – the former refers to 'the backdrop of regulation' and the latter to 'regulatory objectives, the way regulatory responsibilities are organized, and operating styles' (2001: 28). The interest in this paper is the content of regulation, in particular, its structure and on this subject Hood et al (2001: 31) do note the importance of considering the extent to which regulation involves a mix of private and public sector actors. It is notable in the context of this paper that some of the non-state actors discussed may have moved from being part of the context of regulation, where they influenced state regulatory policy, to being part of the context of a more broadly defined risk regulation system.

For the purposes of this paper I want to focus on three regulatory roles drawn from Hood et al's (2001) work on regulatory regimes, namely the three control components of information gathering, standard setting and behaviour modification. Information gathering involves the collation and provision of information about policy issues and problem areas, standard setting refers to the process of setting goals through standards and targets, and behaviour modification to changing individual or organizational behaviour, for example, through compliance, deterrence or hybrid enforcement approaches (Hood et al, 2001). Thus we can consider the role of non-state actors in regulation according to a 3 x 2 table:

	Regulatory Role		
	Information gathering	Standard setting	Behaviour modification
Economic actors			
Civic actors			

Let us now consider in more detail some examples of non-state actors inhabiting economic and civil space and examine the different kinds of regulatory roles they undertake.

Substantive Discussion of Roles

Economic Sector

There are three main sources of regulation in the economic sector, namely industry or trade organizations, companies themselves and those whose business is selling regulatory and risk management advice or cover to companies.

Regulation by the industry or company is referred to under the heading of *self-regulation*. This is a broad concept which covers a wide range of arrangements (Ogus, 1994). This paper will concentrate on self-regulation as the decision of an individual firm, industry or market to set its own standards and enforce them.

Self-regulation is a prominent regulatory form although its popularity varies considerably across nations and between domains. Gunningham and Rees (1997) cite many contemporary examples of business self-regulation across a variety of countries and domains, ranging from self-regulation in financial futures markets in the USA through to self-regulation amongst the fishers of Alanya in Turkey. Often self-regulation is mediated through trade associations,⁷ a prominent global example of this being Responsible Care, which is a chemical industry initiative adopted by the voluntary trade associations of chemical manufacturers in 37 countries since the mid-1980s (Rees, 1997). The scheme aims to control their collective action so as to reduce chemical accidents, increase industry credibility and involve the community in decision-making through the establishment of codes of practice and a commitment to community participation and consultation. The scheme was created in response to declining public opinion of the chemicals industry following the Bhopal incident in the mid 1980s (King and Lennox, 2000).

Opinions about the success of Responsible Care are divided. For some the widespread global adoption of this scheme is a glowing example of the possibilities offered by industry self-regulation (Rees, 1997). For others it demonstrates the difficulties associated with self-regulatory regimes (see below). Gunningham (1995) argues that the scheme favours the interests of large industry players to the extent that they are better able to cope with the weaknesses of the scheme, most notably the divergence in the interests and regulatory capacities of transnational corporations and small and medium sized companies.⁸

The Institute of Nuclear Power Operations (INPO) is a prominent and arguably rare example of successful industry self-regulation. The case, which is discussed at length in Rees' book *Hostages of Each Other* (1994), is of the US nuclear industry in the wake of the Three Mile Island accident in 1979. Directly following the disaster, executives of the nuclear power industry in the US created INPO as a private industry regulator funded by the industry and with a remit to develop standards, conduct inspections and investigate accidents. Rees argues that INPO has led to the development of a 'new responsibility-centred industrial culture' and he attributes its success to its ability to develop a system of communitarian regulation. But an

⁷ Trade associations are classified as economic actors to the extent that they operate as meso level business associations which are non-state and not civil sector in nature (Doner and Schneider, 2000).

⁸ Other studies note the role played by trade associations in raising environmental standards. See Nash, 2002.

important observation is that this took several years to develop. Rees (1979: 515) explains how INPO gradually gained credibility and co-operation and how this was facilitated by peer pressure and the communication of both praise and shame through the industry. Interestingly, one of the vital ingredients of success pinpointed by Rees was the background presence of the state regulator who could be called upon for supports and intervention. Other work suggests that national and cultural differences may be worth investigating. Schaede (2000) for example, documents how Japanese trade associations have long assumed an important regulatory role independent of government.

There are important hybrid forms of self-regulation, for example enforced self-regulation which involves a mix of state and corporate regulatory efforts. The government lays down broad standards which companies are then expected to meet (Braithwaite, 1982; Hutter, 2001). This involves companies in developing risk management systems and rules to secure and monitor compliance. Where compliance is not being achieved then companies are expected to have procedures in place to deal with non-compliance. Regulatory officials oversee this process. They undertake monitoring themselves and can impose public sanctions for non-compliance. Moreover the state co-opts other sources and methods of regulation, notably in this case the regulatory capacity of the company. Ayres and Braithwaite (1992: 6, 103) describe this as a middle path between self-regulation and command and control regulation.

One feature of trade associations and regimes of enforced self-regulation is that they tend to be dominated by or favour larger businesses. Typically SMEs do not belong to trade associations and neither do they tend to cope well with systems of enforced self-regulation. SMEs do have some lobbying organizations acting on their behalf, but these are part of the context rather than the content of regulation so are therefore not considered to have a regulatory role.

Insurance companies are held to have a regulatory role in two important respects. First, according to Erikson et al (2003), insurance is a technology of governance beyond the state. They argue that the insurance industry shares similar goals to the state, employs similar methodologies and is subject to many of the same social forces. In these respects insurance is involved in two of the three aspects of regulation identified by Hood et al (2001). The first of these is information gathering, especially through risk surveillance based on probability statistics. Indeed, insurance companies are regarded by some as the original risk experts, producing information which is both used by the industry itself and is also a source of exploitation by governments (Freeman and Kunreuther, 1997). The second aspect is behaviour modification. Insurance acts as a control and seeks to influence behaviour by calibrating premiums according to desirable/undesirable characteristics. For example, higher premiums are charged to smokers; those without home security systems such as burglar devices and window locks; and those driving high performance cars. Indeed, in a very real sense insurance companies link standard setting with behaviour modification through pricing mechanisms.

The other important respect in which the insurance sector may be regarded as a regulator is in its role as third party enforcers. Insurance companies may be drawn into a third party role in a variety of ways, for example, through a state obligation that

regulated entities hold liability insurance (Grabosky, 1995). Here insurers may play a gatekeeping role by only agreeing to issue policies once certain conditions have been met or by adjusting premiums accordingly. Jweeping et al (1998) discuss another form of third party activity, namely a scheme adopted by the Environmental Protection Agency in the US to use third-party inspectors employed by insurance companies and to formally recognise and accredit them as inspectors, thus incorporating them into legitimate regulatory space and using them to monitor activities and check for compliance.

Auditors are another popular source of third party delegation. One argument is that there is a growing tendency for countries to require external auditors to report deficiencies they uncover in the course of their routine audits of corporate finances to both the bank's management and the supervisory authorities. Indeed this has been a European Union requirement since 1995. In some cases this is in lieu of direct supervisory monitoring and in others, as in Australia, Chile and the EU, it is complementary to it. Kunreuther et al (2000) argue that the use of auditors in a wide range of contexts is accelerating, for example, their use to inspect pressure vessels, approve mechanical devices, handle radioactive substances and in the prevention of major chemical accidents. These are in fact roles which insurance regimes may also be asked to undertake.

Often closely linked to auditing and accountancy are *consultancies*. These are private sector organizations which sell their declared expertise in business management. There is actually very little work on consultants despite their quite spectacular growth over the past 20 years. One of the most thorough studies is Denis Saint-Martin's analysis of the growth of management consultants in *Building the Managerialist State* (2000). In this book he identifies three characteristics of management consultancy: 1. they are independent from those who employ their services; 2. their work is advisory; 3. they are knowledge based organizations where the production of management ideas is key, indeed they may act as the 'conduit' of business school ideas to the business world (Saint-Martin, 2000: 48). The origins of management consultancy lie in engineering and accountancy and Saint-Martin tells the story of the tensions between these two professions and the ways in which an influx of accountants in the 1960s led to a major expansion of management consultancy, especially in countries where accountants were permitted to offer consulting services to their auditing clients. The 1980s witnessed another major growth in management consulting and a concomitant concentration in the US which represents both the largest market for management consultancy and the major base for the large consultancy firms. The 1980s also saw the growing employment of management consultants by the public sector, the subject of Saint-Martin's work. This was part of the move to the managerialist state and the growth of non-state sources of responsibility and expertise. While management consultants still have lucrative markets in the public sector it is estimated that some 80 per cent of their revenues still come from private sector work (Saint-Martin, 2000: 37) and here risk management consultancy appears to be a growing sector.

Management and other more specialist consultancies which are focused on selling risk management and regulatory compliance advice cover a range of risk management domains. One of the risks identified by these consultants is the risk of non-compliance with state regulatory systems. Many such organizations exist, their trade being to sell advice which will assist businesses understand state regulations and

guidance, ensure that they have compliance systems in place and even offer advice on how businesses should relate to regulators, especially in registering their businesses with regulators, licensing processes, complaints procedures or legal actions. Often these companies are heavily reliant on regulatory websites and documentation. One wonders how reliant they are upon former regulatory employees, presumably there is a path from state regulators to consultancy firms. It is less likely that this is two-way traffic given that regulatory salaries are often below commercial rates, although it is likely that this varies between regulatory domains. Given the growth in consultancy firms selling compliance advice and risk management advice this sector represents quite a growth area in market sector provision around the implementation of state regulation, self regulation and risk management and one whose regulatory role demands to be properly researched.

Management consultancies' main regulatory task is advisory and centres on the behaviour modification component of regulation. Their status is interesting as they may even be a source of 'regulatory creep' by encouraging firms to go beyond compliance (BRTF: 2004). Management consultancies are part of the economic sector which specialises in the behaviour modification aspects of regulation but as we can see from the following figure other economic actors do have the potential to cover all regulatory roles, this being especially the case with insurance companies and some cases of self-regulation. Before considering the potential of economic actors as regulators let us turn our attention to civil society sources of regulation.

Civil Society Sources of Regulation

The term civil society embraces a fairly broad range of actors and organizations. Accordingly the range of sources of regulation in the civil sector is diverse. Perhaps the best known regulatory sources in this sector are Non-Governmental Organizations (NGOs), a category which itself includes a diverse range of organizations. A useful definition is offered by Cohen (2003: 96) who regards NGOs as '...independent, non-profit, non-violent, voluntary organizations operating at the local, national, and/or transnational levels that are neither government nor businesses.' NGOs represent a fast growing sector - for example, today's Friends of the Earth International has groups in 68 countries compared to 4 in 1971 (Durbin and Welch, 2002:215), and over 100,000 NGOs are said to have emerged in Eastern Europe 1988-1995 (Cohen, 2003:95). This is a sector which works on a local, national and international level, embracing organizations of varying size, sophistication, and orientation (Hutter and O'Mahony, 2004).⁹ Despite this variability civil society organizations (CSOs) contribute to all three of the control components of risk regulation regimes.

Information gathering is an important activity for most NGOs. As Braithwaite and Drahos (2000) argue, at the most basic level they report 'the facts' and hope to influence, or to create opinion to accord with their own interpretation and ambitions, the conflicting interpretations they offer often, of course, being a source of conflict as they challenge more established views. They provide information about 'popular' views and perceptions and also advice about technical and strategic issues (Aldadeff, 2003: 101). NGOs also offer analysis and policy alternatives to state regulators (Charnovitz, 1997; Grabosky, 1995) and companies (Enderle and Peters, 1998:5).

⁹ Parts of this discussion are drawn from Hutter and O'Mahony, 2004.

Another form of information gathering NGOs engage in is a monitoring or auditing role, for example, monitoring governmental policies and evaluating their effectiveness (Charnovitz, 1997; Grabosky, 1995). NGOs are increasingly involved in the standard-setting aspects of regulation, being involved in consultation processes with governments and business and often being formally co-opted to help shape standards. The World Bank, for example, 'is now requiring as a condition of debt relief that evidence is provided to show that poor communities are fully involved in new programmes'. And the European Union has increasingly made provision for NGOs to be part of formal decision-making processes (Dunkerly and Fudge, 2004; Hutter and O'Mahony, 2004:109). Indeed the European Commission's White Paper on Governance advocates the involvement of civil society organizations in European decision-making.

Behaviour modification is perhaps the regulatory activity NGOs are best known for, most especially their use of a variety of forms of civil action such as protests, press conferences, demonstrations, organizing petitions, and sometimes even arranging publicity stunts. The key objective here is to mobilise mass opinion, something which NGOs are particularly successful at doing in time of disaster, and in an era of mass communication. Braithwaite and Drahos (2000: 500) argue that NGOs do not necessarily need large budgets to be effective but 'they do have to be able to convince regulatory policy-makers that they might, if push comes to shove, be able to mobilize mass publics around their concerns'. They aim to 'frame' the issue at stake, an example being Greenpeace's role in framing the Brent Spar debate as a normative issue rather than a purely scientific one (see Jordan, 2001 and Holzer, 2002). To the extent that their activities aim to influence state policies they are part of the regulatory context, to the extent that they influence business directly they may be regarded as regulatory content. Indeed NGOs may become involved in formal processes aimed at behaviour modification.¹⁰ For example, where CSOs find persistent non-compliance with regulations, they may become directly drawn into the formal legal system. A notable example of this is their involvement in private legal actions in pursuit of regulatory objectives (Boyer and Meidinger, 1985). They may also have quite sophisticated lobbying skills (Greenwood 2003: 56).

Standards organizations are a more focused source of regulation. They are discussed extensively by Brunsson et al (2000) as a form of regulation and one which is largely located in the private sector. Standards organizations produce standards about product quality, quality assurance, and risk management. Examples of such organizations include the British Standards Institute (BSI) which '...is the National Standards Body of the UK, responsible for facilitating, drafting, publishing and marketing British Standards and other guidelines' (<http://www.bsi-global.com/News/Information/index.xalter>).

The BSI has a long history. Its origins lie in the Engineering Standards Committee which first met in 1901. Over the years its remit expanded and formalised. In the 1930s it became the British Standards Institute and chemical standards were added to its remit and post Second World War it rapidly expanded. By 1998 it had become a global business which now also has an independent inspection, testing and analysis

¹⁰ Some commentators regard CSOs as a form of social control (Cable and Benson, 1993), and from a governmental perspective they are, of course, a cheap form of control.

service. An interesting feature of BSI is the way in which its position and work were formally embraced by the state in the form of a Royal Charter in 1929 and a renewing memorandum in 2001. During the twentieth century BSI became increasingly international in orientation, helping to found other transnational standards organizations such as the International Organization for Standardization (ISO) which is a non-governmental organization comprising

‘...a network of the national standards institutes of 146 countries...’
(<http://www.iso.org/iso/en/aboutiso/introduction/index.html#two>).

Another prominent international standards organization is the International Accounting Standards Board (IASB) which describes itself as ‘an independent, privately-funded accounting standard-setter based in London, UK’ which

...is committed to developing, in the public interest, a single set of high quality, understandable and enforceable global accounting standards that require transparent and comparable information in general purpose financial statements. In addition, the IASB co-operates with national accounting standard-setters to achieve convergence in accounting standards around the world. (<http://www.iasb.org/about/index.asp>).

Professional organizations have long played a very important regulatory role in terms of regulating entry conditions to the professions and also in terms of laying down standards of conduct. Notable examples include law, medicine and accounting – the last are particularly interesting as they not only regulate the entry conditions and codes of conduct of members but also issue voluntary codes which try to set broader regulatory standards. A prominent example of this is the Turnbull Report, a voluntary code of corporate governance introduced by the Institute of Chartered Accountants England and Wales in 1999.

Some professional organizations combine representation and licensing functions whereas others just do licensing. UK professional organizations which combine representation and licensing functions include the Law Society and the Pharmaceutical Society:

the primary functions of the Law Society are to regulate and represent solicitors in England and Wales, and campaign for law reform in the public interest.

Regulation is identified as a primary role – admission to the profession, continuing education and discipline.

(<http://www.lawsociety.org.uk/aboutlawsociety/howweare/abouthistory.law>)

The Royal Pharmaceutical Society of Great Britain (RPSGB) is the regulatory and professional body for pharmacists in England, Scotland and Wales. The primary objective of the RPSGB is to lead, regulate and develop the pharmacy profession.

The Society has responsibility for a wide range of functions that combine to assure competence and fitness to practise. These include controlled entry into the profession, education, registration, setting and enforcing professional standards, promoting good practice, providing support for improvement,

dealing with poor performance, dealing with misconduct and removal from the register. (<http://www.rpsgb.org.uk/>)

Professional organizations which just engage in licensing include UK medical organizations such as the General Medical Council:

The GMC is the regulator of the medical profession. Our purpose is to protect, promote and maintain the health and safety of the community by ensuring proper standards in the practice of medicine. (<http://www.gmc-uk.org/about/role/index.asp>)

The GMC has statutory authority under the Medical Act 1983. Its duties include registering doctors to practice medicine in the UK and issuing Licences to Practice and revalidation. The Nursing and Midwifery Council is the nursing equivalent of the GMC:

The Nursing and Midwifery Council is an organisation set up by Parliament to protect the public by ensuring that nurses and midwives provide high standards of care to their patients and clients. (<http://www.nmc-uk.org/aSection.aspx?SectionID=5>)

Both doctors and nurses in the UK have their own representative organizations which serve their interests, namely the Royal Colleges of Nursing and Midwives and the British Medical Association.

Another highly relevant set of professional groupings has grown up around internal consultants – compliance officers, risk officers, environmental officers, health and safety officers – who have increasingly tried to enhance their status by professionalising. Examples of these organizations include The Association of Insurance and Risk Managers (AIRMIC) which described itself in 2004 as ‘...the UK's sole organization dedicated to the wide-ranging interests of all professionals practicing or responsible for insurance and risk management. AIRMIC was founded in 1963 as the Association of Insurance Managers in Industry and Commerce’. (<http://www.airmic.com/>). Another example is the Institute of Risk Management:

Established as a not-for-profit organisation, the Institute is governed by practising risk professionals and has strong links to leading universities and business schools across the world. IRM Associateship (AIRM) is recognised worldwide as the sign of a risk management professional and is achieved through examination: Fellowship (FIRM) follows through accredited practical experience. (<http://www.theirm.org/>)

The Institute's three key objectives reflect well the hallmarks of professional organizations, namely education, provision of qualifications and the promotion of good practice.

The standard setting and behaviour modification roles played by professional organizations relate to professionals who themselves may represent a source of regulation within the organization for which they work (Hutter, 2005). So they take to the workplace their professional norms and expertise which they may then use to

influence the risk management practices in the workplace. The tensions this can create are well illustrated with reference to risk officers (Power, 2005) and compliance officers (Weait, 1994), who are caught between the internal world of corporate management and external regulatory controls.

International Transnational Actors

The international dimensions of non-state regulatory activity are prominent. Many of the risks subject to regulation go beyond state boundaries, for example, nuclear, environmental, chemical, food and competition issues. Indeed, some theorists link the growth of managerialism and the hollowing out of the state with the expansion of market boundaries and globalisation (Saint-Martin, 2000: 14). Erikson et al (2003: 35) explicitly link the growth of insurance to governance beyond the state and the need for private sector alternatives to formerly state activities. And the alternatives which emerge are often transnational with their institutional territories transcending state boundaries. Thus we have many examples of transnational actors in the non-state regulatory categories we have discussed so far.

Transnational Civic and Economic Regulators

Category	Examples
Economic sphere	
TNCs	Citigroup Deutsche Bank General Electric General Motors Shell Samsung Mitsubishi Walmart Exxon Texaco
Insurance and reinsurance companies	AON Marsh & McLennan Munich Re Suisse Re
Trade associations	Responsible Care
Consultants	McKinseys PriceWaterhouseCoopers Deloittes Booz-Allen
Civic sphere	
NGOs	Friends of the Earth World Wildlife Fund
Standards organizations	International Organization for Standardization European Telecommunications Standards Institute

The relationship between increasingly transnational activity and the growth of non-state actors is a complex one. As Brunsson et al (2000: 69) indicate, the activities of non-state actors such as international standard-based organizations are ‘not merely a response to increasing globalization, but a globalization process in itself’ (2000: 66ff). Brunsson identifies the majority of standardising organizations as private sector, not controlled by states but more inclined to want to control state policies. He argues that

the emergence of these organizations is partly a substitution for the non-existent world state.¹¹ Transnational multinational insurance companies have taken over roles previously occupied by nation states. Erikson et al (2003: 44) argue that private insurance ‘..is *the* institution beyond the state most responsible for risk assessment, population management, and security provision’. Indeed, it should also be noted that risks are pooled not just at national level but internationally through multi-national banking and reinsurance companies. So while customer-firm relationships operate at a national level, pooling takes place at the international level.¹²

Another imperative to the growth of non-state voices and responsibilities is the call for greater democratic debate. This emphasises the importance of NGOs and other civil society organizations. Many NGOs are international and focused on issues where nation states are thought to be failing, for example environmental protection, human rights, the protection of wildlife, anti-nuclear and fair trade issues. By the judicious use of the world’s media NGOs are able to target global populations at minimal cost. This said, it should be recognised that the majority of international NGOs are European (Braithwaite and Drahos, 2000) and that the North and West are the areas of the world with the loudest voice. Notwithstanding this, some commentators still regard the growth of NGOs and other civil society organizations as a highly significant international force. Lester Salamon regards the growth of this sector as ‘.. significant a social and political development in the twentieth century as the rise of the nation state was in the nineteenth century’ (Salamon and Anheier, 1996: 32) and Braithwaite and Drahos (2000) regard them as key to future regulatory developments. The growth of non-state regulators is thus related to changes at both the nation state level and transnationally.

Evaluation

Any assessment of the role of non-state regulatory activity is necessarily mixed. Let us take the various regulatory roles we have considered and assess each in turn.

Information gathering is a dimension of regulation where non-state actors may well have a comparative advantage. Economic non-state regulators may, for instance, have higher levels of expertise and technical know-how than any other sector. It should be remembered that one of the major difficulties encountered by state regulators centres on the regulatory capacity between them and many businesses. This impacts on varying financial resources, levels of expert knowledge and training and is most essentially a difficulty in relation to large, affluent companies where the ability of regulators to elicit accurate information may be particularly difficult. Economic forms of non-state regulation may also suffer some difficulties in this respect as companies may be reluctant, for competitive reasons, to share information. One area where economic and civil non-state actors may both be significant is their ability to disseminate information efficiently, for example, information about standards (Brunsson: 170).

¹¹ Nation states do operate to some limited extent as transnational actors through organizations such as the EU, the UN and the OECD, cases which would be analytically categorised as belonging to the political sphere and hence not the subject of discussion here.

¹² Thanks to Michael Huber for his help with this.

Standard setting is another dimension of regulation which can be well served by non-state actors. If the knowledge and regulatory capacity of economic actors can be marshalled to consider standards and forms of regulation which are more flexible and sensitive to the market and technical innovations, then the role of non-state in regulation is indeed substantive and significant. This is especially so if this can be done in ways which align regulatory and risk management goals with other business objectives.

One criticism of standard setting by economic actors is a suspicion that it may be biased towards weak standards which favour business. It is for this reason that some prefer civil standard setting which is often regarded as more rigorous than standard setting involving economic players. This said, civil standard setting is sometimes itself criticised for a lack of rigour, especially in comparison to standard setting by state regulators (Brunsonn et al, 2000: 172). In many respects these criticisms reflect a general inclination and will vary on a case by case basis. It is also important to remember that there are key differences in regulatory capacity between businesses, with large affluent companies generally having greater capacity to self-regulate while small and medium sized enterprises (SMEs) typically struggle to understand the basics. Indeed, it should be borne in mind that there may be anti-competitive pressures that may be exerted by established and stronger members of an industry to the detriment of smaller and medium sized companies with respect to standard setting.

A number of benefits may also apply to the *behaviour modification* aspects of regulation. Civil society regulators, for example, may suggest more innovative regulatory approaches and they may contribute to the democratisation of regulation. The involvement of NGOs, for example, can potentially empower citizens and help to build political support and legitimacy for regulation (Grabosky, 1995; Hutter and O'Mahony, 2004). Some authors argue that the high regulatory capacity which may reside within industry may make enforcement and monitoring both easier to achieve and less costly. Braithwaite (1982) for example, observes that in the pharmaceuticals industry, company compliance officers may be better trained than the regulatory inspectors while the product quality standards they produce and audits they undertake may be more detailed than those of the state regulators. Jweeping et al (1998) similarly argue that third party inspection and insurance offer voluntary contractual relationships where the inspector may be better placed than the state regulator to help companies manage risks. This is for a number of reasons, notably their technical and specialist expertise and the assumed willingness of firms to provide more accurate information to third parties and the third party being able to provide more accurate risk assessments and advice because of their specialist training and knowledge. Jweeping et al (1998) also argue that the use of objective third party inspectors may instil the community with confidence.

Non-state regulation may have a strong normative dimension which may help the behaviour modification aspects of regulation. These centre on industry morality and institutionalising responsibility (Gunningham and Rees, 1997). Interestingly, one of the main advantages of non-state regulators is said to be the responsabilisation which these sources may engender. The involvement of economic actors may underscore the very real responsibilities which this sector should carry for the risks generated by its activities. And civil society is seen to have the potential to help build up the moral basis for risk management and regulation by encouraging ethical business approaches.

Bruyn (1999: 30) for example, believes that CSOs have ‘...the potential to infuse the economy with a new morality’.

Yet it is precisely on the efficacy of non-state regulators in the area of behaviour modification that most criticism emerges. Commentators on the Responsible Care programme, for example, identify lack of enforcement as a major difficulty, which exacerbated the difficulties attending collective action, namely, ensuring that all companies participate and eliminating ‘free riders’. Brunsson (2000: 68) also comments that large international standards based organizations find enforcement especially problematic. Numerous authors conclude that self-regulation is difficult to maintain without explicit sanctions (see also Gunningham, 1995; King and Lennox, 2000).

Issues of trust are paramount here, that is, the degree to which we are prepared or able to trust industry to regulate itself and also the willingness to self-regulate. Self-regulation is open to abuse and is marked by a lack of accountability. Third parties are not democratically accountable for their activities. Moreover third parties may not be as efficient as some commentators suppose (Gilboy, 1998). CSO regulation may also be problematic, for while CSO regulation has the potential to increase democratisation and to widen participation in regulation it is often the case that these organizations are not themselves democratic (EPF, 2003; Saint-Martin, 2000).

The partisan approach of these groups is reflected in another criticism of their regulatory role, namely that they do not typically take a sufficiently broad view of the world. It has been argued that audits are limited as they are backward looking rather than anticipatory and that auditors are seldom qualified to employ more anticipatory tools such as on-site inspections. Indeed, taking a broad world view may be in contradiction to the purpose of some of these institutions. Erikson et al (2003) note that insurance companies – like other businesses – are discriminatory rather than redistributive in their orientation. This said, there are many long running debates about in whose interest the state operates. The important point to recognize is that each sector has its own particular set of ‘takes’ on the world and these need to be considered when evaluating contribution to regulatory and risk management issues.

There are other issues that need to be taken into account in considering the advantages of regulatory actors beyond the state. One major attraction for states of non-state regulatory activity is the cost saving that may be achieved on behalf of the public when the costs of standard setting and enforcement are internalised by the trade or handled by CSO organizations. These sources can act as a supplement or even alternative to limited or absent state resources. They can also be regarded as an efficient way of coping with a lack of agency resources which means that monitoring compliance across the full range and quantity of regulated forms may be sporadic and infrequent.

Taking all of this together it is perhaps not surprising that most regulatory commentators argue for a regulatory mix – embracing both state and non-state sources of regulation – to maximise the potentials of each sector. Indeed, we should remember that governance at a distance does not imply complete severance between the state and other actors. Often the state is acting in partnership with civil and economic institutions through a form of regulatory partnering which involves the state

overseeing or sharing regulatory responsibility. Regimes of enforced self regulation, for example, typically involve the state harnessing corporate regulatory capacity with enforcement and oversight remaining with state authorities (Braithwaite, 1982; Coglianesi et al, 2004). The second form of co-option involves the state delegating regulatory duties traditionally undertaken by regulatory agencies to non-state sources. It may involve the direct delegation of tasks such as standard setting or enforcement to third parties or it may involve indirect delegation whereby businesses are mandated to employ third parties to undertake these tasks. More indirectly, the state creates conditions in which civil society and market economies can operate (Erikson et al, 2003). Indeed regulation beyond the state may take place in the shadow of real or imagined future state activity. The precise nature of the relationships between the state and non-state actors is an important topic and one which warrants much closer analysis and research.

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