

Interviews With Private Governance Experts

by Linda Breggin

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Corporations and other nongovernmental entities now regularly work to develop voluntary agreements, standards, and other practices aimed at fostering sustainability and reducing environmental impacts. This growth in "private governance" is implemented through various vehicles, including collective standard-setting, certifications, supply chain agreements, and other mechanisms. The influence of private governance is broad, impacting industries from electronics to forestry to apparel, as well as many others.

On June 10, 2013, the Environmental Law Institute (ELI) and the Advertising Self-Regulatory Council of the Better Business Bureau hosted: "A Summit on Private Environmental Governance: Facing the Challenges of Voluntary Standards, Supply Chains and Green Marketing." The conference provided an overview and initiated a dialogue about the legal issues taking shape amidst the growing popularity of private governance approaches. The conference identified, for stakeholders across affected industries and nongovernmental organizations, how sustainability initiatives, standard-setting, consumer protection, and competition law work together in this important and rapidly developing area.

In order to share more broadly some of the key issues discussed at the conference, several speakers agreed to respond to questions posed by ELI Senior Attorney Linda Breggin.

I. Background on Private Governance

Breggin: What is private environmental governance and why does it matter?

Case: Social norms are almost as important in regulating personal and corporate behavior as laws and regulations. Private environmental governance is an organized attempt,

issue-by-issue, industry-by-industry, and sector-by-sector, to formalize the informal social norms. Formalizing the norms makes it easier for businesses to identify accepted practices and to identify and correct those that are violating accepted practices.

Tisch: Private environmental governance is a process by which firms arrive at environmental norms (in the form of voluntary or binding standards, protocols, or procedures) by which they conduct their businesses. At its best, private environmental governance is responsive to consumer preferences, and helps companies who wish to better compete for the business of consumers who care about environmental issues.

Breggin: How do private and public governance systems interact?

Case: Forgive the inappropriately simplistic analogy, but I think of the two systems like a children's playground. The children are completely capable of developing games and rules that fit within their understanding of what the adults will permit. Things work fine until one of the children cries: "That's not fair! I'm telling mom and dad!" At that point, the adults enter the picture to settle the dispute and the game continues. I don't mean to suggest that all of us on the private governance side of the analogy are child-like, but I think the analogy holds. We are certainly capable of managing a self-regulatory system, but occasionally, one of the actors has a different interpretation of what is acceptable. It's nice to have the public governance systems in place to maintain consistency of interpretations and to enforce, when necessary, conformance with acceptable behavior.

Tisch: From an antitrust perspective, interaction between government and private standard-setting is key. Govern-

ment incorporation of private standards can help improve the overall quality of governance, since a given industry will often have the most experience with its own environmental profile and impacts. And, if government regulations are adopted as a result of joint lobbying and outreach, this can reduce or even eliminate antitrust risk under the Noerr-Pennington doctrine. But government adoption of an industry-devised standard can be a double-edged sword under the antitrust laws; when government adopts a standard, it often greatly increases that standard's reach and competitive impact. If the standard wasn't devised as part of an effort to persuade the government to adopt it, Noerr-Pennington immunity may not apply, so you may have higher risk: a potentially anticompetitive standard with the government's imprimatur behind it, but without legal protection most would just assume was available.

Breggin: Why do companies undertake private governance actions?

Case: Private governance systems can be faster and more responsive than public governance systems because the actors in a private governance system are typically more familiar with the respective industries.

Tisch: At its best, private environmental governance is responsive to consumer preferences. Companies often use it to better compete for the business of consumers who care about environmental issues. Private environmental governance can in many instances be used to increase the competitiveness and output of an entire industry while reducing first-mover costs.

Breggin: What is the role of government in private governance?

Case: I believe government's role in a private governance system is to step in when the private governance system is unable to address issues. Examples would include situations in which the private governance solutions violate federal, state, provincial, or local laws, or situations in which the private governance solution is harmful or not in the best interest of the public.

II. Supply Chain Management

Breggin: What factors and influences are driving your company to use the supply chain to improve corporate sustainability?

Case: It's the growing recognition that supply chain impacts are likely to be the largest impacts. In the retail sector, for example, it's estimated that 90% of a retailer's sustainability impacts are a result of supply chain deci-

sions—which products are selected and from which suppliers. Making higher quality products takes higher quality components from higher quality suppliers. The same is true for greener, healthier, more sustainable products.

Condon: Over 10 years ago, as our supply chain expanded globally, we did a thorough audit of a number of our global suppliers and concluded that relying on the contract terms to require compliance with local law and minimally acceptable environmental, health, safety, and labor practices was not enough. We followed up by designing a risk-based assessment process that covers environment, human rights, safety, wage and hour, labor, and security issues. In these assessments, we primarily track compliance with local laws and regulations or our higher GE expectations while encouraging the suppliers to develop long-term management systems.

Breggin: What are the barriers to using the supply chain to improve corporate sustainability?

Case: The most significant barrier is lack of full supply chain transparency. There are various tools, including the UL [Underwriters Laboratories] Transparency Platform, that are making it possible to understand how supply chain decisions affect quality, safety, and sustainability. Supply chain solutions are the most important and impactful way to improve sustainability, but implementing them successfully requires access to information that organizations have only recently begun requesting: What is the source of the suppliers' raw materials? What are the human health impacts of the materials used to make the products? How efficient are their factories? What energy sources do they use to power the factories? What are their labor practices?

Condon: We don't own or operate our suppliers. Our "influence" is indirect, and we have had suppliers decide they simply don't want to make the changes we suggest. In those cases, we either won't start a relationship or will exit the supplier as quickly as possible. The good news is that the vast majority of suppliers are willing to improve and come into compliance. In most cases, they were unaware of the local requirements or lacked basic environment, health, safety, and human relations skills to come into compliance on their own.

Breggin: What legal risks can be incurred in managing and enforcing requirements for supply chains?

Case: I'll leave the legal risks to the lawyers to debate. There are, however, very clear reputational risks that are likely to have more potentially damaging long-term impacts than the legal risks, as consumers have increasing access to product information. The days of a company controlling

all information about its product are rapidly disappearing. Consumers have access to a broad spectrum of information that they can use to inform their opinions about a product or company. The child labor crisis faced by a well-known apparel company in the mid-1990s could prove quaint in a few years. It is important for companies to understand their supply chains better than their consumers do. In an age of social media, anyone with a small camera, access to your suppliers, and access to the Internet can cause significant damage to a company's reputation.

Condon: There are always concerns about crossing a line with a supplier. We train our teams on how to: discuss findings and solutions; provide advice, but not direction; and ensure the supplier understands that the solution is up to them. At the same time, it is clear that many of the suppliers need help, and we've developed a number of approaches to provide assistance without breaching the corporate structures. For example, since 2006, GE has been working together with peer companies and the GE Foundation to support the development of Environmental, Health and Safety (EHS) Academies in China. The first EHS Academy in Guangdong Province, developed by the Institute for Sustainable Communities (ISC) and Lingnan College of Zhongshan University, provides training to factory managers on how to meet and exceed expectations of multinational brands. The Academy is owned and taught by locals, but coursework draws on the expertise of EHS managers from GE and other companies that enabled the Academy to develop long-term, high-quality training. Students from more than 70 companies have participated in courses covering EHS concepts and values, laws and regulations, and risk assessment. The success of this approach led to the development of a second Academy in Jiangsu, with a goal of training 4,000 EHS professionals per year between both schools. ISC is currently working on establishing a third EHS Academy in Bangladesh. To me, this is an example of how a collaborative approach between companies, academics, and nongovernmental organizations is much more impactful than what we could accomplish on our own.

Tisch: One key risk is that excluded suppliers may allege an antitrust violation. One key type of risk is that a particular requirement is being enforced at the behest of competing, colluding suppliers. Allegations about this kind of "hub-and-spoke" conspiracy can pose substantial litigation risk and cost to efforts to improve the environmental profile of a supply chain. But that risk can be mitigated using protocols for formulation and enforcement of supply chain requirements, and by carefully managing communication with supply chain participants.

III. Collective Voluntary Standards

Breggin: What are some key principles and best practices, based on your experience, for developing and implementing standards?

Case: There are a variety of best practices:

- Standards must be publicly available. Consumers should have access to the requirements of the standard.
- Standards should be developed in an open, consensus-based process. Consumers want to know who developed the standard and how. Standard development processes should be open to industry members, trade associations, academic experts, experts from environmental nonprofit groups, and members of the public.
- An independent third party should develop standards. Sustainability standards developed by industry for industry will always be suspect.
- Third-party verification of compliance with a standard remains important. The U.S. government's Energy Star program faced a crisis in 2009 when Consumer Reports announced that products claiming to meet the Energy Star criteria failed to do so. As a result, the Energy Star program switched from a self-declaration program in which manufacturers were allowed to determine which of their products met the Energy Star criteria to a mandatory third-party review of compliance claims.

Cooper: Some key principles for developing and implementing standardization solutions are the following:

- Inclusion: All potential stakeholders need to be apprised and involved in efforts to create standards in order for that effort to be credible and recognized.
- Transparency: The process needs to be transparent and the result openly arrived at if it is to have acceptance by stakeholders, policymakers, and the public.
- Public-private partnerships: Standardization solutions are increasingly designed to be part of governance solutions that include both public and private uses and are often globally applicable.

Millar: The most important criterion is that the standard is based on sound principles. In the environmental sphere, performance standards require a basis in valid data or science. Adoption of performance standards through third parties, or verification of compliance through testing or auditing, may enhance credibility. However, developing a standard through a third party doesn't necessarily assure that standards invariably meet requirements of "independence" or lack some type of bias, nor is it the case that company- or industry-sponsored standards or self-certifications automatically lack validity. In the latter situation,

it simply may mean that a disclosure should be provided to clarify that the company or industry group developed the standard to avoid consumer confusion, if it is not otherwise clear.

Certainly, in the advertising arena, there is a tradition of true industry-lead self-regulation, which has proven to be extremely effective. Standards or guidance for advertisers developed by organization like the International Chamber of Commerce (ICC) have enormous credibility because they are based on established principles of truthful advertising. The other advantage is speed. The ICC's Framework Guides for Environmental Marketing were developed and adopted in about one year. It took the FTC about five years to update the Guides for the Use of Environmental Marketing Claims.

Breggin: What are the greatest challenges on the horizon for voluntary standard-setting efforts?

Case: I think the biggest challenge is the sheer number of standards that are needed. The current standard development process is not easily scalable, and the currently available standards cover only a small percentage of the goods and services in commerce. As a result, we might see a transition toward information-based systems that collect large volumes of sustainability data about products and the companies making them. The data can then be analyzed to determine which are the "greener" products. There will always be a role for standards; they will inform the filters used to analyze the data.

Cooper: There are increasing opportunities for private-sector standards and conformance activities to help monitor and protect global supply chains. Nation-states are resistant to allow inspectors from another nation-state into their countries for the purposes of testing, inspecting, and auditing global supply chains. Accredited third-party conformance activities—based upon internationally recognized standards—will often be an acceptable and credible alternative for ensuring the health, safety, and quality of goods and services in global supply chains.

Tisch: I think one unusual place from which risk may come is conflict between dueling systems of standards. Until now, we have worried more about risk from a party that cannot or will not meet a given environmental standard. But as the competitive power and "brand value" associated with some standards increases, real revenue is at stake from certification and other efforts, and upstart standards bodies may perceive themselves to be excluded by existing, older standards bodies.

Another key risk area is the internationalization of standards. As organizations push beyond their country of origin, they need to be cognizant that what one antitrust regime tolerates very well may rankle regulators elsewhere.

Breggin: What factors should companies consider from an antitrust perspective when they engage in developing and implementing voluntary standards?

Case: This is a question for the lawyers. Many of the anti-trust issues that I have heard discussed, however, are avoided when the best standard-setting processes are followed. Those processes ensure wide stakeholder input into the development of a standard and prevent any one company from using the standard-setting process to illegally limit competition. Some argue that any sustainability requirement is automatically suspect because it promotes products with specific attributes. The institutionalization of these standards will favor some products over others. That is an obvious point, but I do not see any difference between sustainability standards and other standards for quality, performance, or physical dimensions, which are widely accepted and legal. The value of a standard is that it establishes clear thresholds open for any company to meet.

Tisch: From the point of view of antitrust risk, my watchwords are *breadth* and *substance*. It's hard to argue with standards that have broad buy-in from industry, and harder when that consensus extends even further to environmental or consumer groups. Broad consensus adds legitimacy at the same time it eliminates potential plaintiffs (all the firms and other entities that "bought in" upfront). So, the broader-based a standard-setting process is, the lower the risk. Likewise, making standards substantial by seeking input from experts—and in particular disinterested experts with nothing to gain—helps demonstrate that standards are motivated by real environmental concern, not a desire to exclude competitors.

IV. Green Claims and Advertising

Breggin: What factors drive companies to make green claims?

Case: Companies ultimately make environmental, human health, and related sustainability claims because it increases profits by providing a competitive advantage. The competitive advantages vary, but the two primary advantages are typically:

- Providing a desired green feature that competitive products and services lack (e.g., recycled content, energy efficiency, less hazardous materials, environmental leadership).
- Enhancing the value of the brand (e.g., "We are a greener company and care about your health and the health of the planet. Please buy our products.").

In the not-so-distant future, however, it is possible that providing environmental information will be as commonplace as providing financial information to shareholders. More and more retailers and large customers are seeking product- and company-level sustainability information as

part of their decisionmaking processes. Consumers are learning that companies have and are willing to share the information. As a result, demand for greater clarity about how to measure and audit green claims will continue to increase.

Millar: There is a combination of factors. Product differentiation and innovations are two of the most important. When companies innovate and improve their products, or develop new products with an environmental value proposition, they want to tell their customers about the benefits. And sometimes business customers demand products that have reduced environmental impacts. An ability to advertise environmental benefits can be key to market entry and success.

Breggin: What are the greatest challenges that companies face in using labels to communicate information?

Case: There are a number of important challenges:

- (1) Companies must decide which environmental features are relevant and meaningful to their customers. Different customers have different understandings of environmental issues, have different environmental values, and want different environmental information. Knowing which customers are most likely to be influenced by an environmental message and the best way to reach them is a challenge for companies. Third-party environmental labels are evolving to provide specific, relevant, FTC-compliant information while also providing access to additional environmental information online. This approach provides companies with additional flexibility in marketing green.
- (2) The sheer number of competing environmental labels is huge. According to the EcoLabel Index, there are almost 450 labels on the global market. How can any consumer keep track of that many labels? How do they know which labels are relevant? It makes it challenging for companies to know how to cut through the “green clutter” in the marketplace. Now that a few global companies with strong brand recognition, like UL, are entering the environmental labeling space, it is getting easier to cut through the clutter.
- (3) Not all environmental labels are created equally. The revised *FTC Green Guides* have clarified rules on environmental labels. An FTC enforcement action led one particularly egregious “fake” label to shut down. Despite the additional clarity, there is still a wide range of environmental labels. The labels vary based on:
 - a. The standard supporting the label. What does the standard cover? Does it focus on a single issue or multiple issues? Is the standard clear, meaningful, relevant, and publicly available?

- b. The way the standard was developed. Was the standard developed in an open, public, transparent process or was it developed without public input?
- c. The verification methodology. Is it a self-declared label in which a manufacturer making the product determines whether the product meets the relevant standard or does the label require independent, third-party verification?

Companies must choose labels that their customers will respect.

Millar: There are two. One is in communicating complex environmental information in a simple way. That’s why we do often see broad, general environmental claims, like “eco-safe” or “environmentally friendly.” The problem is that there is considerable misunderstanding about what a general environmental claim means. We see that the most successful seals or labels are those that can develop meaning in the marketplace. The Energy Star logo is one example. It is perhaps the most recognized label available. Why? Because consumers understand the meaning: it’s all about saving money over the lifetime of a product in terms of energy consumption. It has focused meaning. And many major retailers increasingly carry only Energy Star appliances in the marketplace, which also enhances recognition. In contrast, the U.S. Department of Agriculture (USDA) biobased program is less known and perhaps more controversial, partly because the tenets of the program preclude materials that were already in the marketplace prior to 1972 from carrying the seal. That simply means that certain materials that might objectively be described as “biobased” simply do not qualify for the USDA seal program. The second issue is overreliance on seals and labels, or the suggestion that seals are necessary in the environmental space. We simply do not require seals as a basis for advertising claims under our legal system. What we do require is substantiation, which can be developed in many ways. Especially because we know that consumers are often reluctant to pay more for products that have certain environmental attributes, advertisers carefully consider the cost implications in making decisions about participating in seal programs where they are not essential to the market.

Breggin: What are the respective roles of government regulation and self-regulation in ensuring the integrity of green seals and claims?

Case: I see government regulation as defining the “rules of the game.” Self-regulation does a good job of interpreting the rules and creating systems of checks-and-balances, like the National Advertising Division at the Better Business Bureau, or the Global Ecolabelling Network within the environmental labeling community, to ensure that all of the actors are interpreting the rules similarly. The government regulators and court systems are always there to

step in and settle disputes. They are the ultimate arbiters of what is allowed and what is not.

Millar: Both play a role. Regulatory agencies like the FTC have a big job. They are dealing with major frauds and scams that bilk consumers out of thousands of dollars, misuse of credit reports, and issues like identity theft—actions that have the potential to directly affect an individual’s financial well-being, ability to earn a living, or fundamentally who they are. The advertising industry has a long history of effective self-regulation. Advertisers want this because it helps maintain trust in the marketplace and maintains a level playing field among competitors. Effective self-regulation builds trust in the marketplace, freeing the regulators to focus on other priorities, but to act if there is a referral or conduct or claims appear to be misleading. Seal programs have to be credible, and the standards they implement have to be grounded in facts and science as appropriate, just as claims have to be substantiated. Accordingly, scrutiny by self-regulatory groups and regulators is an important component of making sure that there’s a level playing field among competitors and that trust in the marketplace is advanced.

Breggin: Do consumers look for the same environmental attributes or are there regional differences in claims?

Millar: Consumers in different regions do look at claims differently. Claims about reducing contributions to global warming are more common in some parts of the world, like the European Union, than in the United States, for example. While the FTC has looked closely at degradable claims and suggested that these claims should be qualified unless the products degrade under conditions of customary disposal, when I talk to international audiences, they generally interpret the claim to mean that the product won’t remain in the environment if the product is littered. There are also differences among regions in what consumers are willing to pay to get a product they view to be better for the environment. Particularly in the United States, consumers are not always willing to pay more for products that offer environmental benefits. An exception involves products that they think will save them money over time, as with energy consumption of appliances. Energy efficiency and energy savings claims are important globally because consumers look for ways to save money. Consumers also look for products they think will offer a health and safety benefit to their children or to them. That’s why “free-of,” “natural,” “organic,” “non-toxic,” and similar claims are so important for foods, children’s products, and many others.

Those claims are also related to the fear of chemicals that has driven green chemistry and similar laws.

Breggin: How do we determine when products are “environmentally preferable”?

Millar: That is a challenging question to answer because there is no one-size-fits-all response. If we live in a region where landfill area is abundant and water resources limited, is it “environmentally preferable” to use disposable products rather than reusable products? If disposable is “preferable,” is it better to have recyclable, compostable, or degradable products? These are important choices that don’t lend themselves to a uniform environmental label. The talk of some type of environmental “nutrition label” is both unrealistic and likely to be meaningless to most consumers.

Breggin: What are some of the differences in regulation and self-regulation of environmental claims in the United States and elsewhere?

Millar: Policy goals of advertising regulation and self-regulation are similar around the world: avoiding false, deceptive, and misleading claims. However, procedural protections and utilization of the systems vary. For environmental advertising claims, self-regulatory bodies are handling complaints about environmental claims, but the types of claims that are of concern may vary because consumer perceptions and the importance of claims may differ among markets. In the United States, competitors bring most advertising challenges before the National Advertising Division of the Better Business Bureau. In contrast, in Europe, consumers bring a significant proportion of challenges, partly because there is a different tradition of comparative claims and challenges. There of course is one other key difference between the United States and other markets: the First Amendment. The constitutional protection afforded by the First Amendment creates a legal framework where we encourage truthful and nonmisleading claims. Traditions in other countries sometimes result in instances where entire categories of products—cars, for instance—are actively discouraged or barred from making at least some types of environmental claims, and advertising policies are used to promote environmental objectives. Culturally and legally, our tradition of free speech has been an important component of a commitment to innovation. That takes us full circle to the drivers for making environmental or other claims: the desire to tell consumers about new products or product innovations.