

SPECIAL ISSUE

Law, expertise and legitimacy in transnational economic governance: an introduction

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The increasing relevance of transnational governance for the regulation of cross-border economic relations in many public policy fields has given rise to debates about its legitimacy. This paper provides an introduction to normative and empirical approaches and suggests to bridge between them by exploring normative perspectives through the views and strategies of actors practically involved in transnational governance. Based on a synthesis of contributions from different fields of transnational governance, it is suggested that a perceived lack of fit between the regulators' legitimacy claims and the addressees' expectations, if expressed as protest and criticism by the latter, can lead transnational governance institutions to adjust to demands for more inclusiveness, expertise and procedural fairness. However, the rising level of expertise required from participants, stakeholders and publics to meet normative criteria for greater participation and procedural fairness creates new and yet unresolved problems.

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It is commonly believed that economic globalization has generated a governance gap, with markets outgrowing regulation by national institutions. But there is also increasing recognition of the proliferation of transnational rule-making and institution-building—some of which has a law-like and quasi-judicial character—as well as of its relative effectiveness (Djelic and Sahlin-Anderson, 2006; Graz and Nölke, 2008). More controversially, the normative and empirical legitimacy of transnational governance arrangements has been discussed among scholars in the social sciences and legal studies (Bernstein, 2005; Krisch and Kingsbury, 2006; Hurrelmann *et al.*, 2007). Many scholars have taken a pessimistic normative view and have highlighted the fact that transnational governance—particularly in the form of private self-regulation or stakeholder

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initiatives—lacks democratic legitimacy in terms of direct representation of and accountability to clearly defined national electorates or global publics (cf. Zürn, 2004). Others have argued, however, that for the working of transnational governance it matters more how legitimacy is claimed, by whom and through what means, on the one hand, and how claims are perceived by and responded to by those affected, as well as by broader publics on the other (Suchman, 1995; Black, 2008). Of equal interest is how criticisms, protest and intervention from various constituencies can delegitimize previously widely accepted governance arrangements, and with what ensuing material effects (Smith, 2008). Altogether, there is a growing awareness of the need for empirical studies of legitimacy dynamics and their impact on the effectiveness of transnational governance regimes.

This special issue of *Socio-Economic Review*¹ addresses this problem by bringing together a series of papers which explore the empirical processes and underlying social mechanisms through which legitimacy is produced, maintained and questioned in a variety of transnational governance fields. The fields chosen by the contributors reflect broader developments commonly seen as important drivers of the emergence and spread of transnational governance institutions: economic globalization, together with ensuing global environmental problems and new security challenges (Held *et al.*, 1999). The most recent phase of economic globalization has not only given rise to the internationalization of markets and firms (Socio-Economic Review, 2009), but also to heightened economic and financial interdependence, with potential spillover of systemic risks, as highlighted by the current financial crisis (cf. Helleiner *et al.*, 2009). In many fields, these developments have increased demand for cross-border coordination and transnational regulation, involving private, civil society and state actors to different degrees.

Glenn Morgan's paper directly addresses the struggles between different actors about how to reform transnational governance of over-the-counter derivatives markets, one of the key areas held responsible for the recent financial market crash. Christine Overdevest, in her paper, studies the competition between different forest certification schemes which, like similar programmes for the certification of labour standards, were initiated by civil society coalitions, prompted by the perceived inability of governmental and intergovernmental institutions to achieve effective international harmonization of environmental, labour and human rights standards. The contribution by Terrance Halliday, Susan

¹The idea for this special issue arose from the June 2008 Conference 'Law and Legitimacy in the Governance of Transnational Economic Relations' at the German–Italian Centre for European Excellence at Villa Vigoni, Lovenjo di Menaggio in Italy, where some of the papers were presented in an earlier version.

Block-Lieb and Bruce Carruthers analyses the history of various initiatives for the production of harmonized norms for governing cross-border insolvency of multinational companies. Yves Dezalay and Bryant Garth describe the construction of a private international commercial arbitration, while Joseph Conti explores the operation of the system of WTO dispute resolution, both of which deal with potential conflicts arising from the intensification of international trade relations in the absence of unified global legal norms in commercial or public administrative law. Athena Claire Cutler examines how shifts in world politics and increasing international intervention in military conflict zones have given rise to the emergence of a transnational market for private security and force which raises delicate questions about the limits of private governance in an area key to state sovereignty.

The notion of transnational economic governance, as used in this issue, crosses both geographical and institutional boundaries (Djelic and Quack, 2003, 2008). The reference to 'transnational' as distinct from 'global' governance acknowledges that not all rule-setting or policy-making that goes beyond the nation state is necessarily global in reach. As exemplified by the so-called 'global' markets for finance, certified wood or security studied by the authors in this issue, participants are often clustered in specific nation-states or geographical regions, and private, semi-private and public governance arrangements are partly shaped, though not determined, by interests and strategies arising from and negotiated between the socio-political and institutional features of prominent domestic and host countries. However, as actors from different national contexts engage in recurrent interactions of cross-border policy-making, transnational governance institutions also turn into opportunity structures for preference changes which, in turn, affect national contexts.

Equally, the contributions in this issue nicely illustrate that transnational governance comprises a variety of arrangements ranging from private self-governance, as in the case of industry- and stakeholder-based certification schemes (Overdeest, in this issue), through mixed or hybrid governance forms including state, civil society and private actors—such as the dialogue on how to apply international law to private military and security companies initiated by the International Committee of the Red Cross (Cutler, this issue)—to public forms of governance in which nation-states and international organizations are dominant actors, as exemplified by WTO dispute resolution (Conti, this issue). Transnational governance in this broad sense of the term involves a variety of individual and collective actors, including multinational corporations, non-governmental organizations, professionals, international organizations, governments and public agencies engaging in rule-making, monitoring and enforcement activities. As documented by various authors, the proliferation of transnational governance initiatives in recent decades—which is, in many ways, interconnected with broader trends of

liberalization and re-regulation (Vogel, 1996; Bartley, 2007)—has resulted in polyarchic and overlapping governance structures in which multiple actors and bodies often claim a legitimate right to engage in policy-making.

To the extent that many transnational governance schemes remain fluid, the publics, audiences, communities and constituencies which they address and affect are also still very much emergent. In many ways, this mirrors the polyarchy of the governance schemes themselves: processes of social interaction and mobilization connect people from different countries, strata and sectors into collectivities that share, at a minimum, the experience of being addressees of a set of rules issued by a transnational governance scheme. The degree to which this may give rise to social mobilization or even transnational community building in the active sense of a shared—however limited—common identity varies across issue fields (Tarrow, 2005; Djelic and Quack, 2010). The emerging social formations very often take the form of transnationally *interconnected* movements, communities or publics rather than unified global ones.

Insofar as transnational governance arrangements and their constituencies are still in the making, and characterized by varying degrees of institutionalization, they nevertheless have a manifest and significant impact on developments in national political economies and on policy-making in nation-states. For this reason, historically nationally focused research programmes, such as the ‘varieties of capitalism’ approach, consider it increasingly necessary to take them into account in analysing institutional change (Deeg and Jackson, 2007; Socio-Economic Review, 2007).

The increasing relevance of transnational governance for the regulation of cross-border economic relations in many public policy fields has given rise to debates about its legitimacy. While national regulation has been closely connected to state authority, norms and rules in the transnational sphere arise from a much more complex set of interactions between private, civil society and public actors and institutions (Abbott and Snidal, 2009). Furthermore, the polycentric and overlapping distribution of authority among public and private actors in transnational governance arrangements often raises unresolved questions about their accountability (Black, 2008). Legitimacy, in this context, has been discussed both in a normative and an empirical sense, the former being more prominent in political and legal debates and the latter used more frequently in sociological analysis.

Legitimacy as a normative concept points to the rightfulness and acceptability of political authority. It is typically evaluated in terms of the legitimacy criteria of liberal theories of democracy which stipulate that the right of a ruler to set and enforce binding rules in relation to a public or demos depends on their direct accountability through representative democracy means, especially elections and party competition. While there is growing recognition that direct democratic representation is

neither realizable nor desirable² in transnational governance institutions in the near future, the question remains which alternative normative criteria or standards should be applied to evaluate their legitimacy (cf. Buchanan and Keohane, 2006; Bohman, 2007). From the comprehensive literature which, for reasons of space, cannot be reviewed here, three alternative standards emerge for normative evaluations of legitimate rule-making by transnational governance institutions: inclusiveness of participation, expertise-based effectiveness and procedural fairness.

These criteria correspond to what Scharpf (1999) and Risse and Kleine (2007), in the context of European governance, denote as input, output and throughput legitimacy. Authors approaching the normative legitimacy of transnational governance from an input-oriented perspective suggest that, in the absence of a clearly identifiable transnational policy community, the criteria should be to maximize the inclusiveness of potentially affected stakeholders and the responsiveness of decision-makers so that they have a realistic chance of being heard (Hurrelmann *et al.*, 2007). In contrast, output-oriented approaches evaluate the legitimacy of transnational governance schemes against their ability to produce effective solutions for public policy problems, which is typically regarded as a direct function of the technical, professional, epistemic and bureaucratic expertise involved in decision-making (Moravcsik, 2004). In addition, claims for output legitimacy are often based on the assertion that private schemes are engaged in the production of public goods. The most prominent criteria for validating the legitimacy of transnational governance from a throughput-oriented perspective are procedural fairness and impartiality. From this viewpoint, the proliferation of transnational governance institutions which operate according to the rule of law and have quasi-judicial conflict resolution mechanisms is seen as enhancing their normative legitimacy (Goldstein *et al.*, 2000; Dilling *et al.*, 2008), particularly if they also provide for actionable rights on the side of the subjects.³ Obviously, the criteria for evaluating legitimacy along these three dimensions are not mutually exclusive. In fact, different versions of public deliberation recast all the three criteria in new combinations, though they remain in possible tension with each other (cf. Cohen and Sabel, 2005; Buchanan and Keohane, 2006).⁴ Although normative legitimacy

²One line of argument is that transnational governance institutions while issuing rules in specific policy fields do not perform the full range of governmental functions (Buchanan and Keohane, 2006, p. 406). Another line of argument points to existing deficits of accountability in national representational democracies which would only be accentuated by extending lines of delegation into the transnational sphere (Van Kersbergen and Van Waarden, 2004).

³See Stryker (2003) for a general treatment of the importance of legal legitimacy for institutional and socio-economic analysis.

⁴In these approaches, the right for as many affected as possible to be heard approximates inclusiveness, the principle of persuasion by the best argument builds on expertise and the rule of considering all

deficits have been identified as generating problems with social acceptance (Zürn, 2004), and perceptions of normative legitimacy flagged as influential for the effectiveness of transnational governance (Hurrelmann *et al.*, 2007; Beisheim and Dingwerth, 2008), normative approaches to legitimacy have generally paid little attention to the study of such claims and beliefs in real-life situations.

Empirical approaches to legitimacy differ from normative ones insofar as they highlight the relevance of people's perceptions of the rightfulness and appropriateness of authority for their acceptance and support for political and social order. Max Weber ([1921] 1978, p. 213) pointed out that every system of domination—no matter whether of the rational-legal, traditional or charismatic type—in addition to establishing administrative structures to enforce obedience also depends on its subordinates' 'belief in its legitimacy'. It follows that both the legitimacy claims of rule-setters and the legitimacy beliefs of subjects are worth studying. This is particularly pertinent in the transnational sphere, where it is not at all evident which institutions have the authority to issue rules, which constituencies should be addressed and how those affected will respond to such legitimacy claims. As Julia Black (2008, p. 143) points out, 'mandates [of regulators in the transnational context] are uncertain, and it is not clear on whose behalf they purport to act and to whom accountability should be owed'. In the transnational legal field too, there is considerable disagreement and ambiguity about the mandates of different law-makers (Quack, 2007), and it is often, as also indicated by the contributions of Cutler, and Dezalay and Garth in this issue, unclear which law applies to which cases. As a consequence, processes of legitimacy-building have to be understood as unfolding in tandem with the rule-setting activities of transnational governance bodies. In the course of these processes, the latter need to delineate what they consider as their relevant communities and to take into account the evaluation criteria their audience care about.⁵

Much of this is likely to take the form of public justifications of transnational governance organizations directed towards their environment. Suchman (1995) suggests that such organizations, particularly in situations of high uncertainty, strategically manage their legitimacy in response to expectations of and reactions from their stakeholders and audiences. In view of the vulnerability to challenges, he distinguishes between pragmatic legitimacy, on the one hand, resting on alterable self-interested calculations of an organization's most immediate audiences and moral legitimacy, reflecting more resilient normative evaluations, and

arguments seriously encompasses procedural fairness. As stated by Nanz and Steffek (2004, p. 321), deliberation in closed expert circles tends to emphasize expertise over participation, while public deliberation with stakeholders seeks to increase inclusiveness.

⁵Burr (2006) highlights the importance of community-building for legitimating specific markets in national contexts.

highlights that both forms of legitimacy rest, to a large extent, on discursive evaluations in public discussions. It is through justification in such debates that transnational governance schemes work towards achieving support from a broader public than just their immediate stakeholders, or what can be seen from an empirical perspective as ‘political legitimacy’, that is, acceptance and support from society at large and interrelated transnational publics (Boltanski and Thévenot, 2006; Steffek, 2007).

In this special issue, normative perspectives on legitimacy are approached through the views and strategies of the actors practically involved in transnational governance. Questions that run through all the papers are how, by what means and towards which audiences do actors claim legitimacy for rule-setting and monitoring, on the one hand, and how do these audiences respond to their claims on the other? As shown by the authors’ findings, transnational governance bodies do indeed refer to participation, expertise and procedural fairness as sources of their claims to be legitimate regulators, though they vary in the degree of attention given to each dimension and the mix between them. The same is true of the legitimacy beliefs in terms of which audiences evaluate and validate these claims. In this respect, then, the contributions underline that, while often treated separately or as opposed to each other, normative and empirical legitimacy should be considered in interaction.

While approaching a variety of governance issues from different theoretical perspectives and drawing diverging conclusions, the papers in this special issue converge on a number of common findings:

Legitimacy of transnational governance as an empirically contested issue The contributions to this special issue represent cases on a continuum of more or less contested legitimacy. In many respects, international arbitration, dispute resolution in the WTO and other quasi-judicial arrangements, as analysed in the contributions of Dezalay and Garth, and Conti, have gained general support which makes corporate and state actors willing to accept the system’s decisions, even if they run against their interest. There is, thus, a certain degree of institutionalization that seems to go hand in hand with legalization of transnational governance. This, however, does not mean that these governance institutions are not contested from within, as the criticisms and opposition from developing countries indicate in both cases. Forest certification schemes, too, appear to be increasingly accepted by landowners, wood-processing industries, wholesale buyers and consumers, whether for the inclusiveness and transparency of their procedures or for the underlying moral justifications of ‘doing something’ environmentally friendly. Again, however, the substantive and procedural standards remain an issue of ongoing struggles and contestation among the actors involved, while the overall regime seems to be broadly accepted. The contributions by

Morgan and Cutler stand at the opposite extreme. Morgan's treatment of governance of the global derivative markets deals with an explicit legitimacy crisis prior to which a private governance regime of global financial markets was widely regarded as rightful and acceptable by both private and public actors around the globe. After the legitimacy of laissez-faire and free markets collapsed, the normative assumptions of what could constitute a legitimate governance regime for global financial markets are up for re-negotiation—that is still an open-ended process at the time of publication of this special issue. Cutler's contribution on unresolved governance and control issues of the international activities of private military and service firms reveals an ongoing struggle between private actors' claims for effectiveness and continued criticism from academic audiences, international humanitarian organizations and governments.

Limitations of expertise-based output legitimacy An argument frequently used by both private transnational governance schemes and international organizations is that they possess the necessary expertise to provide effective problem solutions. This expertise is often of a specialized and technical character, and its claimed superiority is difficult to assess for outsiders, not least because the borderlines between the pursuit of commercial self-interest and the provision of expertise are often blurred. The papers in this special issue, however, cast doubt on the viability of expertise-based output legitimacy, if taken apart from other criteria. For one thing, such legitimacy claims tend to be scrutinized by political and civil society actors when confronted with evidence of deteriorating performance. Even if private actors, as described by Morgan for the case of derivative markets, rapidly engage in material and rhetorical strategies to rebuild their effectiveness claims, such a legitimacy crisis nevertheless leaves lasting questions about their competence and, hence, the legitimacy of self-governance. Cutler's analysis of the constant public scrutiny that claims for private governance of transnational markets for security face points in a similar direction. It reveals that despite contrary claims the goods provided are often private. As argued by Dezalay and Garth, and Conti, legal expertise, if distributed unequally, becomes a challenge for the legality-based legitimacy claims of the WTO or international arbitration institutions. At the same time, the findings of Halliday *et al.* and Overdevest suggest that authority claims based on expertise, in combination with inclusiveness and procedural fairness, tend to do better in terms of social acceptance than those that rely exclusively on expertise.

Claims to procedural fairness and legality—a double-edged sword All the contributions in this issue refer to transnational governance institutions grounding their legitimacy in arguments about procedural fairness, transparency and impartiality. Interestingly, such claims play hardly any role in the papers which

deal with the legitimacy crisis of financial markets and the constant questioning of the legitimacy of a transnational market for private security services. In contrast, procedural legitimacy ranks high in the interorganizational competition and comparison between the international organizations developing global insolvency norms studied by Halliday *et al.* and forest certification schemes explored by Overdeest. Not surprisingly, fair, impersonal and equal treatment under collectively agreed upon rules and dispute settlement by third parties based on legal reasoning are central claims of quasi-judicial transnational bodies for dispute resolution. Dezalay and Garth, as well as Conti analyse often neglected competition for legitimacy within the transnational legal field. Both papers highlight how the legitimacy of arbitration and dispute resolution bodies is built on the social credibility and professional expertise of lawyers and trade practitioners. Their claim to legality, however, generates an inherent tension, since access to this kind of process requires significant legal expertise, which has led developing countries to question its legitimacy altogether. While this critique resulted in a partial opening and pluralization, complexity seems to increase the level of necessary legal expertise further, thereby perpetuating inequalities of access.

Inclusiveness claims as a trump? The contributors provide a somewhat polarized account in respect of transnational governance institutions' claims about participation and inclusiveness and their audiences' responses. Halliday *et al.*, in their analysis of the rhetorical legitimation strategies of international organizations producing global insolvency norms, conclude that the representativeness of nations and non-state actors in the United Nations Commission on International Trade Law made its legislative guidelines more successful than those of competing organizations. Overdeest finds that the highly participatory governance procedures of the Forest Steward Council's certification scheme exerted external benchmarking pressure on originally less inclusive private industry schemes. While the findings of these authors suggest that international organizations and transnational governance bodies are responding to requests for more participation by those affected by their decisions, bringing in a wider range of civil society as well as state actors, the papers by Morgan and Cutler point to a continued lack of inclusiveness, as well as to principled problems in identifying who should be included. Plans for the overhaul and reform of the transnational financial governance regime, as detailed in Morgan's paper, tend to unfold along the lines of improved international coordination of government regulation, thereby bringing state actors back in, but so far have not included a broader participation of other stakeholder groups, such as consumers, or checks and balances on both private and state actors, by external benchmarking and public comparisons (see what follows). Nor is it clear who are the relevant parties to be included in such processes in the case of the transnational private security industry studied

by Cutler. Despite their divergent results, the contributions in this issue nevertheless converge insofar as they point to often neglected links between inclusiveness and expertise. In complex polyarchic governance regimes, participation, particularly in public deliberation, requires a certain level of expertise and competence on the side of those affected (cf. Koehn and Rosenau, 2002), and the construction of policy-relevant knowledge is a significant source of power in its own right which, as Miller (2007) suggests, should be subjected to its own democratic critique. Inclusiveness in transnational governance therefore requires not only organized civil society actors as mediators (Nanz and Steffek, 2004), but might also need a new type of democratic professional (Fischer, 2009) who sees his or her public role in serving informed and competent publics.

Rhetorical legitimacy claims and public justification. Contributions in this special issue highlight that international organizations and transnational standard-setters accord high relevance to rhetorical legitimation in the reports and texts which they produce in their quest for recognition and acceptance. They also point out how inter-related transnational audiences and constituencies engage in public comparisons of such reports, as well as occasionally producing them, with the aim of comparatively evaluating the rightfulness and acceptability of an organization's legitimacy claims. Although some of this may remain at the level of window-dressing, the articles by Halliday *et al.* and Overdeest indicate that such public comparisons can generate external pressures on transnational governance institutions to take on board demands of stakeholders or broader audiences for substantial or procedural improvements. Public comparisons of global norms or standards, no matter whether they primarily address policy-makers, as in the insolvency field, or companies and consumers, as in the field of forest certification, can lead to mutual adjustment between competing governance schemes. Such an outcome is all the more likely if, as indicated by Overdeest, a credible expectation can be generated that powerful actors care about such external benchmarking and comparison (cf. Cohen and Sabel, 2005). Another, but related, strategic use of publicly available reports for purposes of delegitimation is described by Morgan. In the context of the financial market crisis, expert and government reports played a crucial role in questioning and undermining the previously widely accepted self-governance of private market actors. Publicly available reports, as issued in this case by highly credible individuals or institutions, strategically displayed information pointing to the limits of market actors' capacity to manage the accumulation of systemic risk, thereby preparing the ground for proposals to give governments and international financial institutions a more influential role in regulatory reform than they had before. Along similar lines, Cutler refers to the reports of non-governmental organizations, media and governmental committees on the misconduct of private security firms as one of the key sources of scrutiny which cast serious doubt on the legitimacy of the claims of private security firms to deliver services effectively in the public interest.

In sum, the contributions in this issue show that transnational governance institutions use normative arguments about inclusiveness, expertise-based effectiveness and procedural legitimacy in various mixes to substantiate their legitimacy claims towards specific audiences and publics and to distinguish their own claims positively from those of competitors. The addressees of legitimacy claims, also refer to such normative concepts to evaluate the validity of these claims, as do wider publics concerned about the effects of specific governance regimes. While a perceived lack of fit between the regulators' legitimacy claims and the addressees' expectations is likely to hamper the effectiveness of a transnational governance regime's problem-solving capacity, if expressed as protest and criticism it can also lead transnational governance institutions to adjust to demands for more participation, expertise and procedural fairness. The papers, however, also point to new problems arising from the rising level of expertise required from stakeholders and publics in order for transnational governance to meet these demands for greater participation and procedural fairness. One possible conclusion, thus, is that the empirical use of normative legitimacy concepts might enhance, in the long run, the normative legitimacy of transnational governance while at the same time raising new challenges to be met along the way.

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