

Regime complexity and expertise in transnational governance: Strategizing in the face of regulatory uncertainty

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Abstract

The rise and spread of transnational governance arrangements has added to the legal indeterminacy of existing regime complexes. The combined regulatory uncertainty resulting from international regime complexes and transnational polycentric governance heightens the role of expertise in managing this institutional complexity. The rising importance of knowledgeable actors with claims to policy-relevant expertise, according to many scholars, is expected further to advantage well-resourced and powerful actors. However, attention to recent developments in accounting and copyright, as two transnational governance fields that have been dominated by a small group of powerful actors for more than three decades, sheds doubt on the generalizability of such arguments. Although representing least likely cases for change, the empirical evidence presented in this paper shows how apparently weak or marginalized actors – whether they are part of public bureaucracies or civil society – developed expertise-based strategies to claim greater involvement and influence in rule and standard-setting. Their strategizing on regime complexity opened up previously shielded policy spaces to broader audiences, thereby transforming actor constellations, preferences and problem definitions in the two policy fields. These findings suggest that under conditions of complexity, indeterminacy and uncertainty, claims to expertise-based rule are becoming increasingly contested – even in transnational governance fields that

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have a long-established trajectory of rule-setting and rule-implementation monopolized by small groups of professionals, industrialists or technical diplomats.

Key words

Transnational governance; expertise; regime complexity

Resumen

El surgimiento y la difusión de las disposiciones de gobierno transnacional ha contribuido a la indeterminación jurídica de los complejos regímenes existentes. La incertidumbre regulatoria resultante de los complejos regímenes internacionales y del gobierno policéntrico transnacional realza el papel de la experiencia en la gestión de esta complejidad institucional. Según muchos estudiosos, la creciente importancia de los actores bien informados con pretensiones de experiencia en políticas relevantes, se espera más para favorecer a los actores poderosos y dotados de recursos. Sin embargo, la atención a los acontecimientos recientes en materia de contabilidad y derecho de autor, como dos campos de gobierno transnacionales que han sido dominados por un pequeño grupo de poderosos actores durante más de tres décadas, arroja dudas sobre la generalización de tales argumentos. Aunque representa menos casos probables de cambio, la evidencia empírica presentada en este trabajo muestra cómo los actores aparentemente débiles o marginados - si son parte de las burocracias públicas o de la sociedad civil - desarrollaron estrategias de especialización basadas en reclamar una mayor participación e influencia a la hora de establecer normas. Su formulación de estrategias sobre la complejidad del régimen abrió espacios políticos previamente blindados para públicos más amplios, transformando así las constelaciones de actores, las preferencias y las definiciones de los problemas en los dos ámbitos de actuación. Estos resultados sugieren que bajo condiciones de complejidad, indeterminación e incertidumbre, las pretensiones de dominio basado en conocimientos son cada vez más discutidas - incluso en los campos de gobierno transnacionales que tienen una larga trayectoria- y la aplicación configuración y puesta en práctica monopolizada por pequeños grupos de profesionales, industriales o técnicos diplomáticos.

Palabras clave

Gobierno transnacional; experiencia; complejidad del régimen

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1. Introduction

The proliferation of transnational regulation, sometimes of a law-like nature, has generated overlapping, partly competing, sometimes complementary sets of rules that frequently operate without a single source of authority (Djelic and Quack 2003, Djelic and Sahlin-Andersson 2006, Morgan and Quack 2010). Complexity is enhanced by growing numbers and types of actors involved and the resulting variety in nature and scale of rules produced (Djelic 2011, p. 43). Polycentric regulatory regimes are also pervasive in the realm of traditional international law, where increasing density, rule specificity and functional differentiation have produced regime complexity. Among the most prominent approaches that have tried to make sense of these phenomena are theories of legalization in world politics (Goldstein *et al.* 2001, Zangl and Zürn 2011), international regime complexity (Alter and Meunier 2009, Raustiala and Victor 2004), transnational governance (Djelic and Sahlin-Andersson 2006, Djelic and Quack 2009) and critical legal theories of polycentric governance (Black 2008, Picciotto 2011). These approaches identify widening and intensifying regulatory activity in fragmented policy fields as a source of recurrently generated regulatory uncertainty.

This paper explores two propositions discussed in much of this literature. The first proposition is that growing pluralism and complexity of regulatory orders make them more permeable to strategic use of expertise. The second proposition is that better resourced and powerful actors can make more effective use of expertise than weaker and less powerful actors. Hence expertise-based strategizing in the face of legal uncertainty will typically favour dominant actors. Although there is some plausibility to each of these propositions, they are also problematic in a number of ways. Firstly, expertise tends to be treated as an abstract and naturalized rather than a socially constructed and historically situated phenomenon. Secondly, the strategic use of expertise is frequently identified with a specific understanding of power, i.e. 'power over', rather than also considering other faces of expert power. Taken together, both propositions result in relatively static accounts of the role of ideas, knowledge and expertise in political struggles over transnational institutions. From this perspective it is difficult to grasp how weak and peripheral actors could potentially draw on knowledge or expertise to mobilize in favour of their aims, and thereby gradually expand policy space in such way that they gain more influence.

The aim of this paper is to contribute to a more nuanced assessment of the usages of knowledge and expertise as a resource for actors in making sense of the complexities of transnational governance, and particularly in contestation and conflicts relating to the creation, development and reform of governance schemes involving non-state actors. The paper is organized as follows. The first part shows that although global and transnational governance schemes are created with the aim of reducing uncertainty about mutual expectations of the actors in relation to their transactions, the way in which these are developed – functional fragmentation, absence of unified authority, plurality of actors and types of regulation involved – constantly creates new regulatory uncertainties. The second part deals with the role of expertise in transnational governance. I propose to conceptualize expert power as a relational and processual phenomenon rather than static resource. If we think about expert power as a potential capacity rather than a given state of influence we can envisage stability as well as change. It is suggested that claims to expertise can empower actors in at least three different ways: as *power over*, *power with* and *power to*. Of these, the two later ones have potential transformative capacity that can help to understand why apparently weak groups can under certain circumstances gain influence through claims to governance relevant knowledge.

The third part suggests that the strategic use of expertise should be analysed as situated in historical trajectories of transnational governance fields. I propose to distinguish between two broad trajectories, characterized by a predominantly

monopolistic or *pluralistic* culture and infrastructure of expertise, which have developed out of repeated and recursive interactions between categories of knowledgeable actors and the institutionalization of knowledge-related criteria for access, information gathering and decision-making in governance schemes. The fourth part presents illustrative evidence from two governance fields that emerged and developed for several decades along the monopolistic trajectory: accounting and copyright. In both fields dominant actors and their use of expertise have recently been challenged by peripheral actors drawing on different sets of knowledge to advance political projects aimed at opening up new policy spaces which would provide them with greater influence over future rule-setting and implementation.

The results point to two constellations of factors which might be also relevant for future studies in other fields. As private regulation exclusively legitimized by particularistic professional or technocratic knowledge becomes more generally binding, and intertwined with the work of public institutions, public actors can use different types of knowledge to challenge the dominance of private actors and demand greater oversight and involvement (exemplified in this paper by accounting). Faced with an overwhelming dominant industry-state coalition, loose and less powerful civil society coalitions can gain influence by shifting from intergovernmental arenas to private arenas, particularly when there is a confluence of a critical epistemic community, effective framing, and resonance with everyday practices of large numbers of non-elite actors (exemplified in this paper by copyright).

2. Dialectics of global and transnational governance

The literature on global governance presents an interesting paradox. On the one hand, studies provide rich evidence for the increasing density of international regulation since 1945, and the proliferation of international and transnational law since the 1990s more specifically. Ever more rules, be they laws, regulatory standards or codes of conduct, are created, interpreted and applied with the aim to govern the behavior of a variety of actors across national borders, including state, business and civil society. In some cases rules target exclusively corporate actors, but in others they also address individuals, increasingly also granting individual entitlements and rights that can be claimed in front of international or supranational courts. This ever expanding scope and depth of global governance seems to suggest that soon there will be a rule to be followed for nearly everything.

On the other hand, we know of a wide range of instances in which a lack of mutual understanding of rules hampers implementation and effectiveness, parties struggle to coordinate under a given set of rules, and actors strategize to gain interpretative authority over indeterminate rules. For all the abundance of global governance seems to increase rather than reduce legal uncertainty, as perceived from the viewpoint of the actors involved. The multiplicity, functional specialization and co-evolution of global rule-making in different fora and different forms create new uncertainties about how rules apply to specific categories of instances, how competing rules should be prioritized and how rules will be implemented by national and local authorities.

Yet, seemingly paradoxical findings about an ever expanding process of legalization and concurrently proliferating legal uncertainty in world politics are not as contradictory as they might appear at first glance. In fact, both phenomena are part of the same process. They point to the need to revise our understanding of global law-making. Cottrell and Trubek (2010), among others, have argued that we need to broaden our analysis of the global regulatory space to bring in a number of actors, processes and forms of regulation that normally might not be labelled law. The more actors, processes and forms of regulation, however, the less likely top-down enforcement of law is to generate compliance. Instead, there is constant

demand for all actors to continuously manage and mediate legal uncertainty arising from indeterminate, overlapping and partly contradictory rules in such a polycentric regulatory space. As will be shown below, claims to expertise as authoritative knowledge that can help to deal with and manage legal uncertainty in global regulatory spaces are an important device for actors aiming to gain more leverage in the attribution of shared meaning to international treaties, transnational standards or other forms of cross-border regulation.

Reviews of different approaches towards legalization and transnational standard-setting abound and there is no need to duplicate them here. What follows is a discussion of some of the most well-known approaches – legalisation, international and transnational regime complexity, and critical legal studies of transnational governance – to inform the perspective taken in this paper. The aim is to show how legal indeterminacy, perceived as legal uncertainty by relevant actors, opens up social spaces for knowledge-based contestation and coordination over the interpretation, appropriation and renegotiation of rules. These social spaces are fundamentally open to the strategizing of both, powerful and what is typically perceived as weak actors.

2.1. Legalization

According to Zangl and Zürn (2011, p. 529), legalization of world politics refers to the institutionalization of secondary rules for rule-making, rule application and rule enforcement. While Zangl and Zürn emphasize legalization as a process, other authors have taken a more output-oriented view. In a frequently cited special issue of *International Organization*, Goldstein *et al.* (2000) suggest a three-dimensional operationalization of legalization that focuses on legal form and distinguishes between obligation, precision and decentralization of international institutions. For Abbott *et al.* (2000), in the same volume, ideal-type legalization is reached when all three dimensions are high:

‘Highly legalized institutions are those in which rules are obligatory on parties through links to the established rules and principles of international law, in which rules are precise (or can be made precise through the exercise of delegated authority), and in which authority to interpret and apply the rules has been delegated to third parties acting under the constraint of rules.’ (Abbott *et al.* 2000, p. 418)

According to these authors, legalization of global governance should reduce legal uncertainty. By increasing consistency and reliability, legalization should make subjects more certain of their defined rights and duties, as well as of the procedural fairness they can expect in terms of dispute resolution. Goldstein *et al.* (2000, p. 398), for example, assume that legalization goes hand in hand with higher legal certainty in their discussion of its Janus-faced implications for international cooperation: increased certainty produced by legalization is seen as potentially reducing risk of disagreement and fostering cooperation. Yet, because of the higher legal certainty legal arrangements have higher negotiation cost and are harder to achieve. In both cases, legalization is firmly assumed to improve legal certainty.

This view, however, has been challenged on a number of grounds. Braithwaite (2002, p. 47) argues that as regulated phenomena become more complex, specific rules deliver less consistency than principles, or combinations of rules and principles. In a similar vein, Finnemore and Toope (2001) observe that international law encompasses a much wider range of legal processes than covered in this formalist and traditional top-down enforcement perspective. Pointing to the wide range of customary international law and the complex relationship between obligation, precision and delegation, they question whether increased legalization always translates into decreased uncertainty. Finnemore and Toope (2001, p. 747ff.) highlight that international law often entails general norms and principles rather than precise prescriptive rules and frequently does not depend on extensive

delegation of decision-making to courts or court-like institutions. However, if that is not the case, then legal certainty cannot be read off from the formal features of international treaties or governance arrangements but requires more knowledge about the mechanisms through which it becomes effective.

In consequence, determining to what extent law-like treaties and agreements produce more or less legal certainty requires a broader analysis of the interpretations and practices through which different actors relate to them. It also demands for an exploration of the processes through which such agreements become considered as legitimate by the actors who are supposed to act according to their principles and rules. Within the framework of legalization approaches, primary actors involved are government officials and diplomats negotiating international agreements, as well as lawyers and judges formulating, interpreting and adjudicating legal texts. To the extent that conflicts over the content and meaning of agreements arise, they are expected to unfold in a realm that is shaped by expertise in international negotiations and law.

2.2. Regime complexity

Scholars working on regime complexity acknowledge that the rising density of international institutions is accompanied by a proliferation rather than reduction of legal uncertainty. Regime complexity research aims at understanding the sources and consequences of this legal uncertainty in world politics. Raustiala and Victor (2004, p. 277), in their seminal article on the 'Regime Complex for Plant Genetic Resources', observe that increasing legalization and density of international institutions generate regime complexes, i.e. 'a collectivity of partially overlapping and nonhierarchical regimes.' Because rules in one regime are often not well coordinated with overlapping rules in other regimes, regime complexes tend to be 'laden with legal inconsistencies.' These inconsistencies occur in spite of joint efforts of diplomats, negotiators and lawyers for consistency. In fact, the search for broad encompassing norms that allow multiple interpretations is often driven by their aim of consistency. Yet, once in place they provide space for different forms of interpretation and implementation which tend to drive subsequent rounds of negotiation about revisions and expansions of existing regimes.

While only a temporary phenomenon within regimes, Raustiala and Victor (2004, p. 301) emphasize that it is at the 'joints' between overlapping regimes that legal indeterminacy and inconsistency of rules are ubiquitous and persistent. These joints become focal points for the strategizing of states, either attempting to absorb and manage legal uncertainty arising from inconsistency during implementation, or – if such attempts fail – striving to renegotiate the rules of regimes. Furthermore, anticipated inconsistencies can also shape negotiation strategies. In sum, the authors highlight how legal uncertainty arising from overlapping regimes opens up social spaces for actors to compete, contest or cooperate in giving meaning to existing regulation. Raustiala and Victor (2004) present such contestation as driven by material interests, coalition building and conceptual shifts that allow groups to align behind new frameworks of thought. Although the authors do not study negotiations and deliberations in detail, their framework hints at the importance of expertise in these negotiations.

Alter and Meunier (2009) develop a whole set of propositions about how regime complexity might give rise to various strategies of forum-shopping and regime-shifting – which constitute in their words 'chessboard politics.' These authors are interested in the mechanisms through which regime complexity influences the politics of international cooperation, and empowers or weakens different interest groups. Helfer (2009, p. 39), in the same special issue, distinguishes further between forum-shopping, involving changes in venue with the purpose of reaching a single favorable decision, and regime-shifting, an 'iterative, longer-term strategy'

that aims at 'broadening the policy spaces within which relevant decisions are made and rules are adopted.'

According to these authors, legal ambiguity becomes enduring when preferences of states diverge. Under these circumstances, national governments choose their preferred rules or interpretations. In consequence, Alter and Meunier (2009) see 'implementation politics' as decisive for the salience and meaning that international agreements gain on the ground, and argue that scholars need to give more attention to how rules are defined and redefined in the course of their implementation (compare also Mosley 2010).

Alter and Meunier (2009, p. 18) give particular attention to the heightened role of 'informers' in situations of regime complexity. Experts, lawyers and NGOs are considered to be such informers because they help states to manage the legal uncertainty arising from regime complexity. More generally, ideas are seen as important devices that groups can use to leverage their position and to shape what happens at the joints of regime complexity. Since it is often difficult to identify clear cause-and-effect relationships, networks of experts and epistemic community may gain disproportionate influence on governments. In the extreme, they can monopolize the information that governments receive or 'dwarf the influence of governments' altogether (Alter and Meunier 2009, p. 17). While the authors see a danger in small group environments of groupthink evolving, they also point to potential openings for weaker actors to play out their influence through coalition building and spill-over effects.

While emphasizing the political implications of regime complexity, Alter and Meunier (2009) continue to focus predominantly on the interaction of state actors. Similarly, Keohane and Victor (2011, p. 8) in their study of the climate change regime complex concentrate on governmental actors to show that this regime complex is a rather loosely coupled one without 'an overall architecture or hierarchy that structures the whole set.' Their discussion of advantages that loosely coupled regimes can produce in terms of flexibility and adaptability engages with a broader array of enforcement mechanisms than those typically treated in top-down approaches but still remains bound to a framework of intergovernmental world politics.

2.3. Transnational regime complexity

Research on how actors mobilize around law through various forum and regime-shifting strategies and implementation politics remains incomplete so long as it focuses exclusively on intergovernmental organizations and the role of national governments. Although regime complexity research provides interesting insights, it neglects the rise of private authority in transnational rule-making (Cutler *et al.* 1999) and the role of non-state actors in both private rule-setting and rule-implementation (Djelic and Sahlén-Andersson 2006, Graz and Nölke 2008, Picciotto 2011). The literature on transnational governance documents a rapidly spreading variety of diverse arrangements and norms of law-like character across different issue fields (Djelic 2011, Djelic and Quack 2010), ranging from business initiatives regulating market exchanges and financial transactions (see for example Botzem 2012, Morgan 2009), multi-stakeholder initiatives in labour and forest certification (see for example Bartley 2007, Tamm Hallström and Boström 2010, Zajak 2010, Malets 2011, Fransen 2012) and hybrid arrangements at the intersection of public and private regulation (for illegal logging see for example Overdevest and Zeitlin 2012). Abbott and Snidal (2009a, p. 54) document an increase in what they call 'regulatory standard-setting' since the mid-1980s, with density augmenting particularly among NGO, firm and mixed initiatives.

There are several reasons why a more encompassing perspective on transnational governance is useful to gain a better understanding of the role of expertise in conflicts, struggles and mobilization in the international political economy. A first

set of reasons is that regulatory uncertainty is likely to be even more ubiquitous in transnational governance. The absence of a hierarchy of norms and institutions in global governance implies that 'command theories, under which law consists in the commands of a single determinate sovereign (a person or institution) backed by efficacious sanctions, are unlikely to produce very fruitful or comprehensive results...' (Kingsbury 2009, p. 27). Regulatory indeterminacy, rightly highlighted by regime complexity theory for legalized regimes, is likely to be even more prevalent in policy areas where different forms of legal and law-like arrangements coexist, compete and overlap.

In order to capture this more diverse reality of transnational governance, Brüttsch and Lehmkuhl (2007, p. 10) suggest the notion of 'complex legalization' that – independently of legal form – is advanced through the spread of legal reasoning¹. For them, legalization encompasses three different dimensions: the increase of international law-making, variation in legal regimes, and differentiation of legal and law-like arrangements. The outcomes do not necessarily converge towards a unified constitutionalized order but can also take the form of multiple overlapping and possibly conflicting regulatory realms.

In a similar vein, but tying in more directly with regime complexity theory, Abbott (2011) argues that previous studies have given too much emphasis to legally binding rules, and ignored regulatory standard-setting. In studying the field of climate change, he shows that there are many more regimes than previously recognized. The prevalence of loosely coupled regimes in this field might be characteristic of the architecture in other transnational governance fields. Seen from a functional perspective, such loose coupling raises questions about the actors and modes through which orchestration is possible to reap its advantages in terms of flexibility and adaptability. According to Abbott and Snidal (2009a, 2009b), such orchestration requires the sharing and combination of different types of knowledge that are typically held by different actor groups.

A second set of reasons why we need to take transnational governance into account when studying the role of expertise is that feedback effects and recursive processes between rule-setting and implementation are also more likely to occur than in classical legal regimes (Botzem and Dobusch 2012). Halliday (2009, p. 268) highlights the dynamics of so-called 'soft law', 'which sets standards, develops precedents, and institutionalizes principles without being binding, and, over iterations of norm-making, harden into hard law, which is binding'. This author also points to the opposite process in which norms may start out as hard law and 'soften as they confront exigencies of implementation' (ibid.). Halliday's model focuses predominantly on international organizations and national governments as key actors (see also Halliday and Carruthers 2009). However, similar interactions between 'soft' regulations with potentially 'hard' consequences (Djelic and Sahlin-Andersson 2006, p. 377) and 'hard' regulations with relatively 'soft' implementation (Suchman and Edelman 1996) have been identified in transnational legal fields which are populated predominantly by private and civil society actors. Quack (2007, p. 644) shows that in the face of weak or 'loose' government at the international level, the development of transnational legal norms in the commercial and financial area follows a pattern of dispersed rule-setting that has affinities with the common law system and is 'led by legal practitioners in large law firms and an internationalized legal profession.'

All this means that global regimes and transnational governance arrangements, under conditions of increasing density and complexity, endemically generate rule inconsistency and ambiguity. The regulatory uncertainty inherent in these global

¹ In a similar vein, Kingsbury (2009, p. 57) recognizes the coexistence of specific law-like techniques and ways of legal reasoning in different governance fields as part of a broader evolution of "global administrative law." Fischer-Lescano and Teubner (2004) and Teubner (1997) identify wholly private regimes of global law production and recognition.

and transnational architectures can have positive and negative effects: it can produce unproductive fragmentation, but also generate flexibility and adaptability where actors otherwise cannot achieve agreement. Most importantly for the question under study in this paper, however, such regimes and governance arrangements open up spaces for different actors to make sense, use and adapt global rules to their local circumstances. While in global governance, the key actors strategizing for influence are diplomats, negotiators and lawyers who more or less all represent state interests in one way or another, in transnational governance a broad variety of stakeholder groups, including business, NGOs and civil society actors strive to shape transnational rules and their implementation on the ground.

2.4. *Critical legal theory and polycentric transnational governance*

Taking into account this multiplicity of rule-making beyond legalization narrowly defined requires a reconceptualization of what we understand as legal or regulatory uncertainty. The work of scholars in the field of critical legal theory is helpful here because it provides a more socialized version of this type of uncertainty than positive law does, and also includes a rich body of research on the strategies that actors employ to absorb or manage uncertainty arising from rule indeterminacy and ambiguity.

Critical legal scholars emphasize the indeterminacy of law, the incompleteness of rules or the ambiguity of meaning in law. The meaning of legal principles and rules is not simply written into the legal text but also depends on the interpretations and uses that actors make of them. Following this line of argument, legal certainty can only exist as a matter of degree. For example, a certain degree of mutuality of understanding and interpretation by various groups of constituents is constitutive for the 'rule of law' to be regarded as legitimate by its addressees. Only if there is a sufficiently similar (yet not necessarily identical) application of rules to different situated problems will constituents consider them as guiding legal norms for their behavior. Consequently, Black (2002, p. 179) refers to legal certainty as a 'mutuality of understandings and interpretation' (Black 2002, p. 179) rather than a rule-inherent feature as suggested by the Goldstein *et al.* (2001).

In the context of polycentric transnational governance, boundaries between legal and non-legal regulations are becoming increasingly fluid which in itself is a source of additional uncertainty. In order to capture this whole range of transnational rules, in this paper I will use the term *regulatory uncertainty*, referring to indeterminacies of regulation (law, law-like, or of a different nature) arising from the absence of a universally recognized singly authority and variety and distinctiveness of local contexts in which rules have to be applied.

Major devices for managing regulatory uncertainty are 'regulatory conversations'. Following Black (2002, p. 163), regulatory conversations are 'communicative interactions that occur between all involved in the regulatory 'space': regulators, regulated and others involved in the regulatory process. Such conversations proliferate wherever rule uncertain and ambiguity prevail, problem definitions are complex and difficult, and consequences of regulation are open ended. Picciotto (2011) maintains that abstract principles create a field in which parties pursue their competing and conflicting strategies. Conflicts are mediated by different interpretations of rules – many of which are provided by lawyers as gate-keepers and norm entrepreneurs in transnational governance networks. While Picciotto focuses primarily on the role of lawyers in managing regulatory uncertainty, Black emphasizes that other groups involved in regulation may mobilize their own interpretations. In her view, different interpretative communities, ranging from lawyers, over regulators to lay groups, enter regulatory conversations to resolve inconsistencies and ambiguities. Such regulatory conversations can transform actor constellations because they produce and change individual and collective identities. Framings or storylines that make complex regulatory problems more coherent and

accessible provide a space in which a 'specific actor can locate his or her own knowledge or social preference in the light of others, and can influence actors in their own production of knowledge' (Black 2002, p. 189). The possession of a certain knowledge may provide the ability 'to render the uncertain certain' (Black 2002, p. 192). While institutional and decision-making structures can also mobilize bias in favor of certain groups, both authors highlight that struggles over interpretative control of regulatory situations and processes have their own dynamic in which apparently weaker actors can leverage on their knowledge in contingent situations.

2.5. Global and transnational governance as a dialectic processes

Contrasting and combining findings from these different literatures highlights the dialectical nature of global law and rule-making activities in absence of a single source of authority: legalization of global governance is both uncertainty reducing and uncertainty creating. Transnational governance similarly aims at reducing uncertainty, but its complexity often generates new uncertainties. The confluence of expanding legalization and transnational governance hence recurrently spurs actors to develop strategies for coping with this uncertainty. Several features of the global regulatory sphere contribute to this dialectical process. International agreements and treaties, and transnational governance principles and schemes are generated with the aim of producing mutual commitments to shared rules in specific areas, yet the multiplicity, functional specialization and co-evolution of global rule-making in a variety of policy domains tends to create new uncertainties about how rules apply to specific categories of instances, how competing rules should be prioritized and how rules will be implemented by national and local authorities. While rule-makers often pursue a strategy of increasing precision to reduce potential deviations in implementation, within differentiated law systems this often results in rule overload, internal inconsistencies and contradictions, loopholes (Black 2002) and the strategizing over rules highlighted by Alter and Meunier (2009). In policy domains where legalization is relatively advanced in terms of the creation of adjudication and arbitration bodies, and/or enforcement mechanisms, these are bound to generate a breath of interpretations in the course of the legal process which potentially can generate new uncertainty while aiming to reduce it.

A more in-depth discussion of possible future trajectories of these different versions of legalization goes beyond the scope of this paper. Here it suffices to point to the dialectical processes inherent in the process of legalization of global governance as potential sources of destabilizing entrenched power structures in the international political economy. Notions of elite actors reproducing their structural power have difficulties in capturing the multiple and shifting opportunities for various actors to mobilize regulation for their aims and purposes, and the fact that there is always a possibility for weaker actors to challenge structural power holders by mobilizing notions of procedural and substantial justice inherent in the rule of law. There is a need to study these processes more specifically to understand their outcomes in terms of empowering or disempowering different actor groups. Global and transnational governance provides ever more complex and fluid open spaces for legal and political mobilization, as well as for conflicts and struggles. In the first instance, perceived regulatory uncertainty opens opportunities for various actors to engage in what Julia Black (2002) calls regulatory conversations, or what other authors have referred to as diagnostic struggles (Halliday 2009, p. 270). Far beyond this, regulatory uncertainty also opens various spaces for actors' strategizing towards law and regulation. Dobusch and Quack (2013) suggest that research should address regime-shifting strategies between public and private regulatory regimes, as well as forum-shopping between different private fora. The advantage of expanding the analysis of regime shifting and implementation politics to private regulation is that it overcomes misleadingly associating political activity in the public sphere, occupied by governments, with non-political activity in the

economy and markets (see Cutler *et al.* 1999, p. 285). Incorporating the strategizing of non-state actors in private arenas into the analysis will provide a more encompassing perspective on political struggles because in the words of Armstrong and Bernstein (2008, p. 93), 'a great deal of the strategizing of contemporary movements will center on figuring out how to best exploit ... contradictions' in multi-layered and polyarchic systems. Above all, it will add a whole range of highly relevant, though so far neglected, channels and mechanism of rule implementation, including the acceptance or rejection of standards by consumers and users in market-based or other decentralized arenas.

3. Strategizing in the face of regulatory uncertainty: The multifaceted power of expertise

Against this background, it is not surprising that the literature typically refers to complexity and uncertainty as scope conditions under which knowledgeable actors are likely to gain influence in rule-setting and implementation. Haas (1989) has argued that the knowledge of epistemic communities becomes particularly influential in situations where uncertainty about the right choice of options prevails. Abbott and Snidal (2009a) explain the current spread of mixed forms of governance in which state and non-state actors participate by reference to the fact that none of the actors alone has the necessary competences. In addition to specialized technical knowledge, social skills (Fligstein 1997) and orchestration capacities (Abbott and Snidal 2009b) are held to be equally salient for transnational governance.

Broadly speaking, two reasons for the salience of expertise in transnational governance arrangements are discussed in the literature. The first is functional. Assumptions about a functional need for knowledge about complex regulatory problems and a multiplicity of national contexts run as a common thread through the literature on transnational regimes and governance. Accordingly, the proposition is that growing pluralism and complexity of regulatory orders make them more permeable to strategic use of expertise, and that better resourced and powerful actors can make more effective use of expertise than weaker and less powerful actors (Raustiala and Victor 2004, Alter and Meunier 2009).

The second reason discussed is the quest for legitimacy (Buchanan and Keohane 2006, Black 2008, see also contributions in Quack 2010). The underlying assumption here is that in absence of a world state, transnational governance schemes have to promote, maintain and defend their claims for legitimacy in relation to their potential jurisdictional communities on an ongoing basis. This offers actors who can mobilize specialized knowledge the opportunity to establish a reputation as "experts". Having the right expertise becomes then a source of output-based legitimacy for a transnational governance scheme. This can generate broad acceptance as long as those governing and those being affected by their governance share common perceptions of what constitutes relevant expertise.

Both the functional and the legitimacy approaches provide explanations for the ubiquity of expertise in transnational governance. One might even argue that potential tensions between functional and legitimacy demands for knowledge generate recursive cycles of negotiation, debate and sometimes open conflict [regulatory conversations, discursive struggles and sometimes also open conflicts] over what constitutes relevant knowledge, who should contribute in which way, whether and how border lines should be drawn between inner circles of rule-setters and outer circles of informants, and whether informants should also be given decision rights or just consultation status. As described by Powers (1997) for reinforcing cycles of auditing, these tensions are not only the result but also a driver of a further proliferation of expert knowledge in transnational governance (for scientization see Djelic and Sahlin-Andersson 2006, Djelic 2011).

For example, functional demands for knowledge, if narrowly defined, can lead to the exclusion of knowledgeable actors. Yet, functional demands might also be strategically used by those excluded to raise counter-claims for their expertise to be included, hence opening up new opportunities for strategizing on knowledge. As inclusiveness becomes a more salient criterion against which the legitimacy of transnational governance is measured, this pushes in the same direction. Yet, in so far as claims to expertise-based governance rely on output performance, they tend to foster claims of small groups of experts to exclusive knowledge. If successfully institutionalized, such social closure of incumbent expert groups vis-à-vis other knowledgeable constituencies and in consequence, result in what Alter and Meunier (2009) refer to as 'small group politics'. Similarly, Fischer (1990, p. 17) has emphasized how technically trained experts have successfully established and defended rule by virtue of their specialized knowledge (Fischer 1990, p. 17).

3.1. Conceptualizing expertise

While explaining the proliferation of expertise in transnational governance, these accounts do not tell us much about the conditions and processes which allow certain actor groups to convert their knowledge into widely recognized expertise while other actor groups might fail to do so. They tend to focus on narrowly defined types of expertise, such as diplomatic negotiation skills, legal qualifications and regulators' knowledge, that are closely linked to office-holding and occupational position. Where taking into account other forms such as normative knowledge, coordination and mobilisation skills, expertise is still often conceived off as a pre-given resource rather than something that needs to be explained in the first instance. Most importantly, however, struggles over knowledge claims are rarely taken fully into account. How do actors manage to establish social recognition for a special type of knowledge as "expertise" among those involved in transnational governance and a wider general public? How stable are such claims to expertise once they have been established? Can we rightly assume that there are widely recognized expert groups in a given transnational governance area, or do we need to extend the analysis to downstream processes such as ubiquitous conflicts about who is an expert and what kind of knowledge should count?

In order to deal with this kind of questions we need to reconsider not only our understanding of expertise but also the notions of power which are explicitly or implicitly connected to the strategic use of expertise in transnational governance. Let us begin with a working definition of expertise that highlights its relational character. I suggest that we should conceive expertise as a relational concept for two reasons: When talking about expertise we typically refer to specialized knowledge that stands out from more commonly shared forms of knowledge. At the same time, expertise typically also refers to a claim for authority vis-à-vis a broader community or public. Scholarly definitions of "expertise" refer in different ways to these two relational dimensions. For example, Page (2010, p. 4) focuses on the first dimension when he defines expertise as "a high level of familiarity with a body of knowledge and/or experience that is neither widely shared nor simple to acquire". On the contrary, Fischer (2009, p. 17) also includes the second dimension when he states that expertise refers "to a widely acknowledged source of reliable knowledge, skill, or technique that is accorded status and authority by the peers of a person who holds it and accepted by members of the larger public". This definition highlights that a claim to expertise is always a claim to legitimacy that in order to become effective needs to be met by a legitimacy belief of peers and larger public.

Recent findings on the changing relationship between expertise and policy-making accentuate that analysing how claims to expertise become established in the first place is an important requisite to understanding its strategic use in transnational governance. Maasen and Weingart (2005) found that in many policy fields expertise is no longer taken as a "true certainty". Often different groups with specialized and not widely available knowledge pursue competing claims for recognition and

authority from their peers and larger publics. The growth of knowledge-based service sectors has led to a multiplication of knowledge institutions (Drori and Meyer 2006) which goes far beyond the role that universities had in the past, including a rapid growth of consultancies and think tanks. An abundant plurality of experts not only offers their services to policy-makers but are also motivated and incentivised to claim authority to set the rules by themselves. At the same time, expansion of tertiary education has also promoted a democratization of expertise. Citizens are less willing to except unquestioned expert judgements, and citizen groups, associations and non-governmental organizations are keener to articulate their knowledge as relevant expertise in governance and regulation (Fischer 2009). While all these trends are most pronounced in developed and emerging countries, they also can be observed in developing countries. Overall, they foster explicit recourse to partisan advice rather than objective knowledge (Maasen and Weingart 2005).

This short and incomplete excursus indicates that struggles over the recognition and legitimacy of certain types of knowledge are constitutive for the strategic use of expertise - at the national, but even more so at the transnational level. Critical legal studies and social movement studies offer a rich repertoire of concepts and methods for the analysis of such legitimacy struggles over expertise. Diagnostic struggles over problem definition (Halliday and Carruthers 2009), naming and framing strategies (Sell and Prakash 2004, Snow 2007), and the use of collective action frames for building coalitions and obtaining support from bystanders and larger publics (Gamson 2007) are concepts that applied to transnational governance can help to better theorize the so-far underspecified downstream elements of the strategic use of expertise in regime complexity approaches. They provide promising avenues to explain why attempts to strategize on legal indeterminacy via expertise is often only of limited and temporary success and frequently produces a new round of knowledge-based struggles over influence.

3.2. Three facets of expert power

Under conditions of uncertainty, actors are likely to use their knowledge to claim authority in transnational rule-setting and implementation. To gain authority they have to convince peers and larger publics that their expertise is relevant and possibly more relevant than that of other groups with competing knowledge claims. In so far as actors' strategies are motivated by the aim to influence governance outcomes via rule-setting and implementation, they naturally involve the exercise of power. While it would go beyond the scope of this paper to provide a comprehensive review of the debate on different concepts of power (see Scott 2002), a brief discussion of dominant interpretations of power and the respective role assigned to expertise in different forms of power in transnational governance seems in place to set the stage for the empirical analysis of the two unlikely cases of transformative use of expertise in the following section.

The concept of power is an essentially contested concept and takes multiple forms (Lukes 1976). While some analysts regard resources as the basis for *dispositional* power, others define power as achieving outcomes in specific relations, or *situational* power. Some authors focus exclusively on *distributive* power in zero-sum games where the gain in power of one party necessarily leads to the loss of power of the other party. Others also include processes of collaboration in which *collective* power of a group of actors can grow, expand or intensify which ways which might transform existing power relations (Mann 1986, p. 6). In addition, authors disagree on whether power should be regarded as a question of *agency* or *structure*, as well as on the nature of its *sources* and its *dimensions* (Arts 2003, p. 12).

A representative example of such conceptual plurality is the fourfold typology developed by Barnett and Duval (2005), based on an intersecting pair of oppositions between *interactional vs. constitutional* forms of power on the one hand

and *direct vs. diffuse* forms on the other. Accordingly, *compulsory* power refers to direct relations 'between actors that allow one to shape directly the circumstances and/or actions of another' (Barnett and Duval 2005, p. 13). *Institutional* power arises from actors controlling others in more diffuse ways, particularly through formal and informal institutions that constrain interest-seeking action. *Structural* power describes direct constitutive effects of social positions on actors' capacities and interests – in short: how social structures constitute unequal opportunities. *Productive* power, which overlaps with structural power, refers to diffuse constitutive effects of systems of knowledge, including ideology and discourse, on the subjectivity and identities of actors. In sum, for these authors, 'Power is the production, in and through social relations, of effects that shape the capacities of actors to determine their own circumstances and fate.' (Barnett and Duval 2005, p. 3).

This typology is helpful for conceptualizing the role of expertise in 'power over', particularly along the institutional, structural and productive dimensions of power. It also provides concepts that help to identify knowledge-related factors which can limit 'power to' (in terms of socially constituted subjectivity, interest and capacity). If we perceive of expertise as socially constituted and supported by institutional infrastructures, unequal access to the latter, including universities and think tanks, but also to more mundane information channels such as print media or the internet, is likely to affect capacities of actors in different ways. Yet, Barnett and Duval's taxonomy also has several limitations. Firstly, it does not distinguish between intentional and unintentional effects of power and thereby tends to conflate outcomes with the capacity to exert power. Moreover, it has little to say about resistance and counter-mobilisation, apart from a general 'human inclination to resist in the face of power and to seek greater capacity to influence the social forces that define them and their parameters of action' (Barnett and Duval 2005, p. 22). The framework lacks a generative mechanism which can explain how previously weak and subordinate actors can use their knowledge and expertise in processes of mobilization and coalition-building to become potentially more powerful. It neglects what Mann (1986, p. 6) called 'collective power', and what Parsons (1957) described as the possibility for persons in cooperation enhancing their joint power over third parties or over nature.

Bas Arts (2003), in his study of the role of non-state actors, engages explicitly with expertise as a resource and the capacity of actors to use it to achieve certain outcomes in global governance. He distinguishes between three interdependent faces of power: Decisional power (the capacity to influence), discursive power (the capacity to (re)frame) and regulatory power (the capacity to (re)make rules). His analysis shows how nongovernmental organizations, depending on different starting conditions, employ various strategies (lobbying, framing, standard-setting) to influence global governance.

Partzsch and Fuchs (2012, p. 360) go one step further in their critique of structuralist analyses of power. In their analysis of donors and their foundations, they argue that there are situations in which power is neither attributed to one of the involved parties, but rather to both. They present the concept of 'power with' that refers to 'processes of finding common ground among diverse interests, developing shared values and creative strength by organizing with each other.' In pointing to similar processes as highlighted by Parsons and Mann as 'collective power' these authors point to the need to introduce a third type of 'power with' that encompasses the transformative potential of collective action and its discursive strategies on identities, preference and capacities.

Based on these considerations, I suggest to distinguish between three dimensions or 'facets' of expert power: Expertise as an instrument of domination ('power over') which coincides with traditional views of technocratic rule as claiming the right to monopolistic use of knowledge; expertise as a practical capacity ('power to') which

refers to capacity development of wider publics and potentially affected actors to engage with and take ownership of transnational governance schemes; and expertise as a means of mobilization ('power with') which forms part of countervailing strategies of peripheral or weak actors challenging monopolistic uses of knowledge.

Expertise as 'power over': Discussions about the rule of knowledge elites go back to the 17th century. The basic idea is best encapsulated in the model of technocracy which, according to Fischer (1990, p. 18) pertains 'to the use of experts and their technical disciplinary knowledge in the pursuit of political power and the 'good society', in the spheres of both the state and the economy.' The use of this kind of expertise is monopolistic in the sense that it claims to know better than others, and hence derives the primacy of telling others what to do. In many ways, contemporary critique of elite use of expertise as 'power over' in transnational governance goes back to Habermas's (1970) argument of politics being increasingly replaced by scientifically rationalized administration. In transnational governance, the rule of knowledge elites is often justified by a combination of professional credentials and specific career paths (see for example Dezalay and Garth (2010) for the elite of international arbitrators, Marcussen (2006) for central bankers, Botzem (2012) for accountants, Fourcade-Gourinchas (2001) for economists). As a result of professionalization and scientization, decision-makers, not only in domestic politics but also in transnational governance, depend increasingly on scientific knowledge for the resolution of complex problems. Kinchy (2010), for example, describes how governance in global agricultural-food systems increasingly depends on scientific knowledge. There has been extensive critique in the literature of the barriers to democratic participation raised by professionalization and scientization of transnational governance (Kinchy 2010, p. 506) and of the power held by elites controlling legal and technical information. In the context of legal pluralism and regime complexity theories, the dominant argument has been that this expertise as 'power over' provides (materially) resourceful business and political actors with distinct advantages in influence because they have the means to gain such expertise.

Yet, as Weingart (1999) already observed, the increasing use of (professional and) scientific knowledge to legitimate forms of governance, has become self-undermining because (professional and) scientific experts do not agree upon definitive answers. This leads to an escalating competition for scientific advice invited by courts and regulatory bodies. Miller (2007) identifies similar dialectics in international knowledge institutions designed specifically to produce and validate knowledge in global politics. While in his view these institutions reflect a desire on the part of global publics to replace the logic of states pursuing arbitrary and ad hoc national interests with a logic of deliberative democracy, they also set in motion a continuous struggles over the truth status of knowledge claims. As disputes over knowledge claims have become an 'endemic element of modern and post-modern politics' (Miller 2007, p. 330), the required competences and knowledge for non-scientific non-elite informants to successfully participate in these discursive struggles are high. Yet, the very fact of governance being knowledge-based opens the potential to challenge it with and based on alternative knowledge.

Expertise as 'power to': This last dimension of expert power relates to necessary skills and capacities that are required to understand and participate in legally pluralistic and complex regimes. These requirements are high and not negligible. The literature on global and transnational governance has recently paid increasing attention to skills, competences and capacity building which is required to make notions of transparency, accountability and legitimacy credible (for complex accountability see Buchanan and Keohane 2006). The recognition that transnational governance institutions come with a whole set of auxiliary knowledge institutions and have high entry barriers in terms of substantial and procedural knowledge has also fostered considerations of how capacity building in developing countries can be

achieved (Pérez-Alemán 2011). Expertise as 'power to' is closely interconnected with expertise as 'power with' since the latter often fosters individual and collective skill development.

Expertise as 'power with': This notion of power draws on new social movement theory, but can also be traced back to pragmatist theorizing. Critiques of technocratic systems and apolitical decision-making were one of the major targets of the counter-cultural opposition in the 1970s and 1980s. It was connected with concepts of empowerment and self-help and aimed to challenge the classical professional-client relationship. This went hand in hand with a critique of expertise as 'power over' and experiments with alternative ways of organizing expertise (Fischer 1990, p. 355-6). Among the early American pragmatists, it was organizational scholar Mary Parker Follett (1924) who critiqued the exercise of 'power over'. Instead, she suggested using a concept of 'power-with', i.e. shared control of groups that intermingled and exchanged views and ideas in a continuing social process in order to produce the collective thought and the collective will (Parker 1984, p. 740, citing her earlier work).

Applying the concept of 'power with' to the use of knowledge by individual and collective actors in what Epstein calls 'contests of credibility' (Epstein 1996) provides a useful tool to conceptualize a whole range of discursive strategies described in the literature on transnational advocacy and social movements. They range from using scientific and professional knowledge as a resource for counter-claims and public comparisons (Overdevest 2010), participating in scientific research (Kinchy 2010), and reframing policy problems as broadly social rather than solely scientific or technical (Sell and Prakash 2004). What these strategies have in common is a process of project formation in which actors develop a collective capacity to interpret and coordinate their actions in accordance with the motives and projects of others (Mische 2009, p. 698). From social movement research, it is well known that such collective future projections can have enormous mobilizing effects on previously uninvolved actors. Movement intellectuals, cultural brokers, knowledge intermediaries and institutional entrepreneurs play an important role in bridging the divide between highly specialized and scientized transnational governance issues and everyday experiences of larger audiences. In some ways they become experts of 'experts of solidarity' (Amsterdamska 1987). Expertise as power with, therefore, offers a conceptual approach which might help to better understand how apparently resource-poor actors are nevertheless able to raise their voices and gain influence in raising claims for a more pluralistic and inclusive forms of transnational governance.

If we combine these three facets of power of expertise, it becomes apparent that definitions of expertise and usages of knowledge are not static but tend to be in flux in a given governance field. While output-oriented technocratic expert rule based on exclusive use of highly special knowledge can produce rather stable and buffered forms of governance, they nevertheless always carry the possibility of being challenged by a critical knowledge communities, negatively affected actor groups and wider publics. Such challenges are catalyzed if the system runs into serious performance problems which provide an opening for these groups to use knowledge and expertise to protest, counter-mobilize or develop alternative forms of governance. Such more inclusive strategies of knowledge and expertise are likely to foster practical capacities among wider audiences to engage with a given governance scheme, or transnational regulation more generally, thereby facilitating developments towards more inclusive and reflexive forms of governance. Yet, a too wide opening of governance arrangements to a very large group of unrelated or contradicting types of knowledge and expertise, if not orchestrated by effective organizational and procedural architectures, can also produce collective action, communication and decision-problems and give rise to counter-claims that governance should be more focused on a smaller circle of information providers.

Hence, technocratic governance and monopolistic use of knowledge (expertise used as 'power over') is, in the long run, likely to evoke the use of knowledge as means for the formation of critical communities, protest movements, alternative governance projects (expertise used as 'power with'). Expertise as a practical capacity cuts across these two countervailing tendencies. On the one hand, it tends to emerge in response to functional necessities despite and in potential conflict with monopolistic uses of knowledge in a technocratic mode of governance. As such, it might even provide the trigger for critical group mobilization against such exclusive use of expertise. On the other hand, it can also be produced as a byproduct of knowledge-based mobilization.

Applying these three dimensions of power should contribute to a more nuanced assessment of the usages of knowledge and expertise by actors in making sense of the complexities of transnational governance, and particularly in contestation and conflicts relating to the creation, development and reform of governance schemes involving non-state actors. The following section will present empirical evidence on the transformative effects of expertise as 'power with' drawing on two transnational governance fields that have been dominated by a small group of powerful actors with a reputation as 'experts' for more than three decades. Although representing least likely cases for change, the empirical evidence shows how apparently weak or marginalized actors – whether they are part of public bureaucracies or civil society – developed expertise-based strategies to claim greater involvement and influence in rule and standard-setting. Their strategizing on regime complexity opened up previously shielded policy spaces to broader audiences, thereby transforming actor constellations, preferences and problem definitions in the two policy fields. Before engaging in this analysis, I want to lay out what distinguishes these monopolistic from more pluralistic fields of transnational governance and how I perceive of change processes at the cross-section of national and transnational fields of governance.

4. How actors develop and make sense of regulatory uncertainty: Monopolistic and pluralistic field trajectories

Transnational governance has emerged and developed around specific and partly overlapping issue fields such environment, labour, corporate reporting, intellectual property, human rights and others (Hale and Held 2011). Hoffman (1999, p. 351) suggested that fields are formed around issues that 'become important to the interests and objectives of a specific collective of organizations.' Individual and organizational actors can make claims about being part of an emerging or developing field, but in the end their membership in the field is defined by their effective interactions patterns with other actors in the field. Over time, the boundaries of fields are changing not only because different actors are entering or leaving the field but also because of strategic manoeuvres by which actors attempt to re-draw the boundaries of a field (Lamont and Molnar 2002, Kleiner 2003). Transnational governance fields, as analysed by Djelic and Sahlin-Andersson (2006), have a spatial, relational and meaning dimension. They span across national borders and connect actors situated in different societies that engage in a variety of forms of transnational regulation.

Within a given transnational governance field and at a given point in time, the availability and accessibility of knowledge and expertise of what and how to regulate varies as a result of historical trajectories, as does knowledge about the possible effects on constituencies (Bourdieu and Wacquant 1992, p. 98 ff., Auld 2009). The same is true for ecologies of knowledgeable actors, including critical communities, public intellectuals and non-governmental organizations (Fleck [1935] 1980, Rochon 1998, Black 2008, Djelic and Quack 2009). The latter are relevant as possible spokespersons for aspirations of groups that are not in a position to voice their concerns themselves. A whole auxiliary infrastructure for knowledge about governance and the governance of knowledge becomes increasingly

institutionalized at the field level as result of repeated interactions, categorization, standardization and formalization of procedures (Malets 2011). Demortain (2012, p. 3) equally highlights that transnational governance schemes do not operate in a cultural and social vacuum. On the contrary, their development is closely interwoven with the emergence of cultural, social and material 'infrastructures' that constitute what is considered as relevant expertise and what not, who is included as expert and who not.

Thus, there is a close interaction between governance structures and the use of knowledge, and the use of expertise in particular (Auld and Bull 2003). Similarly, transparency in the sense of providing relevant and usable information to smaller or wider audiences and publics can be linked in different ways to accountability and legitimacy. As Auld and Gulbrandsen (2010, p. 98) show, transparency can be used instrumentally (as illustrated in their study by the Marine Stewardship Council) or can be 'ends in themselves' (as illustrated by the Forest Stewardship Council).

Building on this literature, I suggest that taking into account these historical trajectories of transnational governance fields will provide a better situated and nuanced understanding of the potentials and limits of strategizing over expertise in contexts of regulatory uncertainty. I propose to distinguish between two broad trajectories, characterized respectively by a predominantly *monopolistic* and *pluralistic* culture of expertise, which developed out of repeated and recursive interactions between categories of knowledgeable actors and the institutionalization of knowledge-related criteria for access, information gathering and decision-making in governance schemes. They became institutionalized in the form of knowledge-related criteria for access, information gathering and decision-making in governance schemes. Constitutive of the formation of these trajectories are four dimensions:

- Actor constellations during the emergence of the field: selectivity or comprehensiveness of different societal groups and their capacity to bring knowledge the project;
- Which face of power of expertise does the project aspire towards and how does it become institutionalized in the organizational and procedural framework, thereby mediating the recursive law-making process;
- Sustained protests and conflicts raising demands for greater publicness in the course of the development of the governance field, often arising from perceived crisis or from mismatch between regulatory and life world possibilities, idea brokers and critical communities as catalysts;
- Responsiveness or resistance of the governance organization to these kinds of demands.

While there are many transnational governance fields which emerged and evolved along the lines of what is typically considered as technocratic expertise with a claim for overriding influence in designing, developing and implementing legal and non-legal rules, there are also fields in which governance schemes from the very beginning incorporated a pluralistic approach towards the usage of expertise, both in its variety and in its focus on the second and third faces of expert power. The first group includes a number of governance institutions in the field of global finance, such as the Basle Committee, the International Accounting Standards Board, intergovernmental regimes for intellectual property, private international commercial law, and derivatives associations (Quack 2007, Cohen 2008, Morgan 2008). The forerunner of the second group is the Forest Stewardship Council (FSC) whose principles were subsequently followed – at least partially – by other certification schemes in the environmental and labour rights area (Bartley 2007). Malets and Quack (2013) present an attempt to compare the role of expertise in trajectories of governance in the field of accounting and forest certification along the dimensions presented in Table 1.

Table 1: Usage of expertise in different trajectories of transnational governance

	Monopolistic use of expertise	Pluralistic use of expertise
Examples	International Accounting Standards Committee/Board	Forest Stewardship Council
Classification of expertise of key constituencies	Certified professional knowledge/technical expert knowledge	NGO, business and professional knowledge, increasingly also knowledge of affected communities
Criteria of membership in rule-setting body	Professionalism and technical excellence	Those who are involved with the issue
Modes of bringing in other types of knowledge	Due process, consultation, right to be heard but no obligation to be considered	Grievance and complaint procedures
Procedures of deliberation, justification etc.	Increasingly publicly disclosed, yet in a language and format that is difficult to enter for those who do not have professional/technical knowledge; no or very limited informed publics	Publicly disclosed and communicated in a generally understandable way, has to engage with informed publics
Public disclosure of reasoning	Very limited	Relatively developed

As outlined above, many authors in international political economy see material and discursive power as self-reproducing in the maintenance of what I have called here the monopolistic expertise trajectory. Other authors keep theoretically open the possibility that the overall field structure can be transformed and that mobilizing expertise to challenge dominant groups might play a role in this. Helfer (2009, p. 39), for example, writes about regime-shifting as an 'iterative, longer-term strategy' that aims at 'broadening the policy spaces within which relevant decisions are made and rules are adopted.' Following Nedelmann (1987, p. 181) mobilizing for more pluralistic usages of expertise can consist of attempts by individuals, groups, or organizations to influence the existing distribution of power by swaying preferences, using communication processes, or changing or inspiring practices of uninvolved or adversarial actors to the benefit of one's own aims. So far, however, we have very few systematic and comparative studies about the processes and mechanisms which might facilitate or hinder such strategizing on regime complexity.

5. Pathways towards more pluralistic usages of expertise

As a first foray into this topic, this section will discuss recent developments in accounting and copyright, two transnational governance fields that have been dominated by a small group of powerful actors for more than three decades. These two governance fields represent critical cases because they followed a monopolistic trajectory in the past. However, while transnational governance fields display a certain degree of path generation (Djelic and Quack 2007), they continue to provide fluid opportunities for iterative, longer-term strategies of less powerful actors to broaden their space of political maneuvering. If we find evidence in these cases of challenger groups successfully mobilizing knowledge and counter-expertise to question the dominance of the incumbent group of experts, the conditions under which and the ways in which they did so might also be illuminating for other

governance fields. The following sections draw on collaborative work on the development of governance in the field of international accounting standards and international copyright (Botzem and Quack 2006, 2009, Dobusch and Quack 2009, 2012, Lagneau-Ymonet and Quack 2012, Nölke and Quack 2013).

5.1. Diagnostic struggles as a key to greater accountability?

Since 1973, when the International Accounting Standards Committee (IASC) was founded, the field of accounting standards has been dominated by professionals claiming that their certified (as accountants) and practical (as partners and employees in international accounting firms) expertise is key to cross-border harmonization (Botzem and Quack 2006). The IASC was not only created as a professional counter-project to early European attempts to harmonise by directive, its procedures of information gathering and decision-making were also from the start inclusive of professionals and exclusive of other potential constituencies. Over time there have been several periods in which the IASC, and its successor the International Accounting Standards Board (IASB), have considered integrating representatives of international financial organisations, other financial professions, regulators of stock exchanges, and finally also of the European Union (Tamm Hallström 2004, Nölke and Perry 2007, Posner 2010, Botzem 2012). Yet although significant changes in transparency occurred (Richardson and Eberlein 2011) the core area of standard-setting was successfully buffered against influences of other constituencies and, hence remained reserved for accounting professionals (Nölke and Quack 2013).

Nevertheless, rising numbers of countries adopting International Financial Reporting Standards (IFRS), and in particular the decision of the European Union to make IFRS binding for all publicly listed companies in its member states from January 2005 onwards, gave rise to demands for greater political accountability of the standard-setter and the rules-setting process itself (Nölke 2009, Botzem 2010). Yet, it was only following the financial crisis of 2007/8 that the dominance of professional technical knowledge was more seriously challenged by politicians, financial regulators and the wider public. Interestingly, these challenges targeted the performance of the standards themselves as well as the accountability of standard-setter. The IASB, in response, has revised some of its standards, and the establishment of a Monitoring Board has made the governance structure of the IASB more publicly accountable (Lagneau-Ymonet and Quack 2012).

The financial crisis, critical questions about the performance of IFRS in the course of the crisis, and diagnostic struggles between different groups of experts played an important role in the process towards these reforms. My argument is that demands for greater accountability were partly played out indirectly by questioning the adequacy of accounting rules, which were entirely informed by technical knowledge of accountants rather than incorporating knowledge from adjacent fields of expertise, particularly from regulators in charge of the overall robustness of the financial system. The financial crisis offered a window of opportunity to be exploited by different actors in their struggle over interconnected problem, politics and policy streams (Kingdon 1995) in order to identify which issues are relevant for 'the active and serious consideration of authoritative decision makers' (Cobb and Elder 1983, p. 86).

Knowledge-related factors became very important in the subsequent diagnostic struggles (Halliday 2009) over what had been the role of accounting standards in the course of the financial crisis. As Stone (1989, p. 282) points out, problem definitions always imply causal stories and potential solutions, and they provide images that attribute cause and responsibility. Weiss (1989, p. 118) agrees that problem definition is 'concerned with the organization of a set of facts, beliefs and perceptions - how people think about circumstances.' In debates about the possible pro-cyclical effects of IFRS which unfolded in 2007 and 2008, problem definition

became a 'weapon of advocacy' that actors used strategically as an 'overture' towards building an 'intellectual framework' for further action, forming coalitions with other actors that had the potential to shape decision-making (Weiss 1989, p. 98-99).

First, given the urgent need to act and the complexity of global financial markets, proposals to fix the problems underlying the financial turmoil were developed under conditions of high epistemic uncertainty. As shown elsewhere (Lagneau-Ymonet and Quack 2012), the reform process concerning international accounting standards unfolded as continued struggles over two competing diagnoses – arising from a transparency and a prudential approach – and gave rise to shifting and sometimes fairly counterintuitive coalitions across typical industry–regulator or private–public divides.

The results indicate that there has been no stage in the process at which actors have converged on a single joint problem definition, and no single global reform project. Instead, problem definitions have evolved and changed over time, some actors have aligned their views and strategies, others have continued to articulate a different view of cause–effect relations, and reforms have developed step by step, at times merely responding to uncoordinated short-term pressures. As problem definitions have gone hand in hand with specific recommendations on standard-setting and governance reform, they have given rise to shifting actor coalitions.

As the crisis unfolded, national governments, the European Commission, and prudential regulators saw accounting rules no longer merely as a means to achieve transparency but also as a macro-prudential tool. Under the stress of the crisis, this brought them in line with the goals of large parts of the commercial banking sector. However, investment banks, securities regulators, analysts and investor associations, as well as the standard-setters, with some modifications in the case of the IASB, maintained that the principal goal of accounting standards was to provide a timely and accurate picture of the economic performance of a business entity to its investors. Thus coalitions coalesced around problem definitions arising from a transparency and a prudential approach cross the traditional divides between industry and regulators, or private and public actors.

The results furthermore suggest that changes in problem definition, as well as their prioritization or deprioritization in the public debate, can be attributed to two main factors: exogenous changes in the economic context – particularly the worsening of the crisis – and the endogenous dynamics of the reform process itself. Two events mark critical moments in the evolution of struggles over problem definition: the collapse of Lehmann Brothers on September 15, 2008, which escalated the systemic risk involved in the financial crisis; and the announcements by the IASB and the FASB of their respective proposals on measurement on July 14 and 15, 2009, made visible the potential for divergence between the responses of the United States and international standard-setters to the G20 agenda. While the first event triggered an alignment of views in response to systemic risk, the second event and its aftermath are outcomes of the accounting reform process.

In sum, diagnostic struggles over the role of IFRS in the crisis have altered the policy field insofar as accounting rules have become a topic of political (and not merely technical) concern. It remains to be seen how far these debates will open up the standard-setting process itself to a greater plurality of knowledge and perspectives. Although there have been some reforms, moves towards more public accountability so far have brought in mainly securities regulators and less prudential regulators, while the underrepresentation of emerging market economies and developing countries persists. The broader lessons to be learned from this case, however, are that diagnostic struggles between different types of 'elite actors' can open political space for the consideration of broader societal and macro-economic concerns in fields where effects on larger groups of consumers, citizens and users are rather implicit and hard to popularize. The case also presents an

example where public actors claim back some say in a regulatory field characterized by a private authority trajectory dominated by technical expertise as the standards become more closely intertwined with the work of public institutions. Parallels in other fields with monopolistic trajectories such private international law, discussed by Caruso (2006) and Cohen (2008, 2012), are worth exploring in future research, as well as negative cases in which diagnostic struggles over problems of private regulation do not seem to have the same opening effect (see Morgan 2009 on derivative trading).

5.2. Broadening policy spaces by 'positive regulatory example'

Since the 1970s, the field of copyright regulation, like that of intellectual property rights as a whole, has developed from a very specialized legal field dominated by an elite of government officials and specialized lawyers, as well as a small group of highly influential business lobbyists, into one of the most controversial areas in international politics. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) concluded in 1995, which created for the first time a regulatory regime that was legally binding on all 153 member states of the World Trade Organization (WTO) and contained enforcement mechanisms for intellectual property rights, was still negotiated behind closed doors. Drahos with Braithwaite (2002, p. 10) reports a senior US negotiator stating that 'probably less than 50 people were responsible for TRIPS'. Yet, matters have changed since then. In the patents field, Sell and Prakash (2004) found that a transnational NGO network successfully strategized around ideas in a campaign linking TRIPS patent regulation to issues of public health. In the copyright field, joint research with Dobusch² found that following TRIPS, conflicts over enforcing copyright interestingly shifted from the political arena, understood as rule-setting by national legislators and governments as well as intergovernmental organizations and treaties, to arenas of private standard-setting, i.e. forms of voluntary rule-setting involving non-state actors from business and civil society. Paradoxically, the strategies of the industry-based copyright coalition, which had been highly successful in political lobbying, encountered resistance in private standard-setting and implementation, whereas the coalition of civil society actors, which had been less successful in the political arena, succeeded in initiating and spreading an 'alternative copyright' standard among a significant number of producers and users of immaterial goods.

Several knowledge related factors contributed significantly to this outcome. Firstly, the emergence of an epistemic community of critical IP lawyers, originally in the US and later at a transnational scale, was crucial in 'popularizing' the issue field. The members of this community played several roles as public intellectuals, civic professionals (Fischer 2009) and institutional entrepreneurs (Levy and Scully 2007). What previously had been an unintelligible issue for most producers and users of creative content, as well as the large majority of citizens, was now translated into catchy problem definitions and slogans. 'Copyleft' instead of 'copyright'; 'free culture' (Lessig 2004); 'Remix. Making art and commerce thrive in the hybrid economy' (Lessig 2008) were only a few of the short hands that made complex legal problems intuitively understandable to broader audiences. At the same time these short hands were positively framed, they projected an alternative project into the future and promised a flourishing alternative in which everybody could participate with a low entry threshold (Mische 2009). Finally, as institutional entrepreneurs they engaged in building a transnational non-profit organization 'Creative Commons' with the aim to diffuse worldwide a 'copyleft' license which would practically demonstrate how an 'intellectual commons' could be built in the absence of overly narrow copyright restrictions. By combining these roles, the growing transnational epistemic community of critical copyright lawyers increasingly challenged the position of incumbent actors and stable fields.

² This section builds on Dobusch and Quack (2009, 2013).

Secondly, the mobilization of this critical epistemic community was addressing issues which increasingly perceived as a 'grievance' by growing numbers of internet users in their everyday life practices. The mismatch between possible usages of creative content in the internet and increasing restrictions by legal and technical means (digital rights management) created a general climate among internet users and the public that resonated with the framings of copyright problems provided by the critical epistemic community.

Thirdly, what had been initially a rather loose fair use coalition of public libraries, newly founded digital rights NGOs and the epistemic community, coalesced into a rather successful strategy for the promotion of a unified Creative Commons license for open content (Elkin-Koren 2005), and related projects of peer-based commons production of content, like Wikipedia (Okediji 2000).

Taken together, the case of 'Creative Commons' shows that the strategic use of organizational forms and collective action frames can be more decisive than material resources for the mobilization of users, and that the success of collective action frames depends on their compatibility with user practices. While studies in international political economy have analyzed how powerful business actors use strategies of organizing and framing exert their influence, or how weaker civil society actors and activists mobilize the broader public to challenge national governments and international organizations, the results of our study underline the importance of mobilizing large numbers of citizens who with their small everyday choices can make a difference (cf. Trumbull 2012).

The findings of our study also add to discussions of the advantages and disadvantages that regime complexity offers for the mobilization strategies of weaker actors. Developments in the copyright field demonstrate how regime shifting from intergovernmental to private governance can open up new and favorable spaces for weak actors to experiment with alternative forms of regulation. Standardization opens a powerful avenue for implementation politics by 'positive example': the introduction of a visible and practical alternative mode of producing and using content under a 'copyleft' licence. Many similar examples can be found in other fields of private regulation such as fair trade or socially responsible investment.

Politics by 'positive example' typically has a low behavioral threshold for participation and can, once set in motion, produce considerable momentum by rapidly increasing the usage of a standard. Such network effects can be an effective lever through which civil society coalitions can increase their influence on transnational rule setting.

This is not to deny that other forms of 'cat and mouse' politics of powerful industry actors in bi- and multilateral governmental negotiations are still ongoing (Sell 2009, 2012). Yet, it is important to note that implementation politics of the kind undertaken by the fair use coalition have the potential to affect broader political debates through shifts in political identity, public debates and the emergence of new political actors. The rise of Pirate Parties in several European member states and their success in parliamentary elections could be seen as an illustration. The recent decision of the European Court of Justice to privilege privacy rights and the ability of people to freely exchange information over the enforcement of copyright rules by internet service providers might be seen as another indication of a shifting balance in public debates.

6. Conclusion

This paper aimed at developing an analytical framework for a more nuanced assessment of the usages of knowledge and expertise of actors faced with complexities of transnational governance. In particular, it was motivated by the search for a better understanding of the usages that more or less powerful non-

state actors make of expertise and knowledge in the course of contestation and conflicts over the creation, development and reform of governance schemes. The paper critically engaged with underlying assumptions of dominant accounts of regime complexity such as the abstract consideration of expertise and the nearly exclusive identification of usage of expertise with 'power over' others. Opposing a static view of power of reproducing power, the paper strove to develop an approach which enables us to analyse the use of expertise and knowledge as socially constructed and historically situated. Furthermore, it suggested that equal consideration of three different forms of power - 'power over', 'power to', and 'power with' – might be helpful in overcoming the limitations of existing accounts.

Dialectical processes inherent in the process of legalization of global governance were identified as potential sources of destabilizing entrenched power structures in the international political economy. In this context, regulatory uncertainty in transnational governance, referring to indeterminacies of regulation arising from the absence of a universally recognized singly authority and variety of rule application in different local contexts, provides complex and fluid opportunities for social and political mobilization. Such mobilization often involves the skilled deployment of expertise and knowledge, not only by materially and symbolically powerful but also by less powerful actors striving to gain more influence in shaping the directions of transnational governance.

In this paper, I proposed that taking into account historical trajectories of transnational governance fields might provide a better situated and nuanced understanding of the potentials and limits of strategizing over expertise in face of regulatory uncertainty. Two broad trajectories of governance fields characterized by a predominantly *monopolistic* and *pluralistic* culture of expertise were identified. Based on empirical evidence from two transnational governance fields that had followed monopolistic trajectory in the past it was demonstrated that apparently weak actors – no matter whether part of public bureaucracies or civil society – developed expertise-based strategies to claim greater involvement and influence in rule and standard-setting. Their strategizing on regime complexity opened up previously shielded policy spaces to broader audiences, thereby transforming actor constellations, preferences and problem definitions in the two governance fields.

While in accounting, diagnostic struggles between banking regulators and accounting professions – both representing a transnational governance elite – led to a partial opening of policy discourses, in copyright loose coalition of critical intellectuals, NGOs and diffuse internet-based social movements achieved significant changes. In the case of the latter, the shift from intergovernmental to private governance opened up new and favorable spaces for weak actors to experiment with alternative forms of regulation. The transnational diffusion of the 'copyleft licence' provided an instructive example of the social momentum that implementation politics by 'positive example' can achieve.

The comparison of the accounting and copyright field presented in this paper provides a starting point for a more systematical comparison of different facets of expert power across a larger number of transnational governance fields. The findings suggest that under conditions of complexity, indeterminacy and uncertainty, claims to expertise-based rule are becoming increasingly contested – even in transnational governance fields that have a long-established trajectory of rule-setting and rule-implementation monopolized by small groups of professionals, industrialists or technical diplomats. In future research, more attention should be given to how less powerful actors use expertise in processes of collective mobilization ('power with') to enhance their influence in transnational governance.

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