

International Research Workshop

Dynamics of Interaction in Transnational Business Governance Regimes

Friday, 22 October 2010

Hennick Centre for Business and Law
Osgoode Hall Law School and Schulich School of Business
York University, Toronto

Discussion Paper

Summary

From financial accounting to sustainability reporting and product labelling, and from human rights to environmental protection to corporate social responsibility writ large, vast numbers of private and public initiatives to govern business have emerged in recent years alongside conventional state and interstate forms of governance. These initiatives take many forms, from civil society codes of conduct to industry self-regulatory standards, transgovernmental networks of officials, and complex multi-stakeholder governance institutions.

In some economic sectors, distinct business governance programs have emerged that compete with each other to attract users. In forestry, for example, several social and environmental certification schemes coexist, including the Forest Stewardship Council's sustainable forestry certification scheme, the American Forest and Paper Association's Sustainable Forestry Initiative (SFI), the Canadian Standards Association's CSA Z809 Sustainable Forest Management standard, and the Programme for the Endorsement of Forest Certification (PEFC) (e.g. Meidinger 2006, Overdevest 2009). In other domains, such as accounting, we observe networks of large numbers of domestic and international standards-setting bodies interacting via interlocking membership and decision-making structures (e.g. Richardson 2009). Other examples abound across a variety of economic sectors (agriculture, financial services, e-commerce, etc.) and issue areas (from human rights to labour, corruption, privacy, product safety, and social responsibility).

As they multiply, these bodies and initiatives overlap and interact with each other and with traditional forms of governance in a variety of ways. In any given issue area, two or more regulatory schemes often emerge alongside each other: some driven by civil society, others by business; some transnational in scope, others domestic; some state-based, others non-state, and yet others combining private and public actors and institutions. These programs may be aimed at the same or similar regulated communities, serve the interests of overlapping constituencies, share institutional features, compete with each other for regulatory authority, or complement each other in various ways. Managing these interactions is becoming an everyday concern for the proponents of these initiatives, as well as for governments, implementing firms, legal advisors, and auditors.

These interactions have substantial implications for business strategy, political economy, regulation, democratic legitimacy, societal welfare, economic prosperity and environmental integrity. Yet these interactions have received very little scholarly attention, aside from the

question of how new forms of governance relate to “old,” state-based law and regulation. Most scholarly attention has focused on defining the phenomenon of transnational governance, studying individual schemes, developing taxonomies to classify them, and enhancing their accountability and legitimacy. Very little attention has been paid to how they – and the actors behind them – interact, coordinate and/or compete to gain “regulatory share” (Black, 2009) – and ultimately to how they may be constituting new patterns of governance at the macro level.

The subject of the dynamics of transnational regulatory interactions is therefore ripe for exploration.

The purpose of this multi-disciplinary workshop is to explore the forms, logics, drivers and possible outcomes of interaction among transnational business governance initiatives. The goals of the workshop are to establish a collaborative research network, refine a multi-disciplinary research agenda on this topic, lay the groundwork for follow-up academic activities including a conference and edited collection, and identify major collaborative funding opportunities.

Context

This project arises in the context of the massive growth of governance “beyond the state,” in the form of the increasing salience of private actors and institutions, trans-governmental networks, and hybrid public-private structures and processes in both domestic and global institutional arrangements. On the supranational or global level, these phenomena have received massive scholarly attention across various disciplines, primarily under the label of “global governance”. The key challenge of governing globally is to create political order in the absence of a global state. While ‘global governance’ and ‘transnational governance’ are often used interchangeably, it is important to distinguish the ‘transnational’ as a specific form of global governance. Transnational governance is defined as arrangement in which private (or non-state) actors are systematically involved in terms of rule-setting, rule implementation, or service provision across national borders. The involvement of private actors may range from purely private arrangements or regimes to various combinations of private and public actors (public-private partnerships, Börzel and Risse, 2005). The focus of much current scholarship has been on building typologies of transnational governance arrangements, and on investigating the emergence, effectiveness, and legitimacy of distinct types of novel governance arrangements.

While the relationship between “private,” “new governance” and “old,” state-based governance has been the object of some debate (revolving around on the question to which extent private arrangements depend on the “shadow of public hierarchy”), the *interactions* between different forms of transnational governance have received very little scholarly attention. A small number of scholars have begun to explore this topic (e.g. Meidinger 2008; Cashore, Auld & Newsom 2004; Gulbrandsen 2008, Black 2008, 2009; Abbott & Snidal 2009). More broadly, the study of the “manifold interactions” among different structures of governance, instead of the supposedly dichotomous relationship between state-based law and private governance, represents a “most promising research programme” (Herberg 2008, 20). Schneiberg and Bartley (2008, 51-52) hint at the variety of these interactions and the need for further research:

...multiple forms of regulation often intersect, raising questions about the extent to which they undermine or reinforce one another. ... In some situations, multiple forms coexist in tension or rivalry, whether because one is a drag on the other's development, because they

emphasize competing routes to upgrading, or because their goals are directly contradictory. It is also possible for two forms to be complementary but inert, meaning that the forms remain unaltered as they are hybridized. Finally, a more radical, transformative hybridity is possible, in which regulatory forms are reciprocally reshaped as they intersect.... At present, we know too little about these interplays to know what configurations are stable or potent. Generating this knowledge first requires moving beyond the common practice of examining a single regulatory form in isolation. Then scholars can proceed to compare multiple forms in the same domain...and, going further, to examine their interplay and coevolution. ... [B]y engaging with questions about rivalry, hybridity, and plurality, future research can more clearly specify how new configurations of forms might reshape organizational behavior.

Forms and Logics of Interaction

There is an implicit assumption in much of the “new governance” literature that novel forms of transnational governance, for lack of formal authority, operate in a fundamentally non-hierarchical and cooperative manner, relying mainly on positive incentives and communicative processes of non-manipulative persuasion. To the limited extent that forms of interaction have received attention, the view of these arrangements as collaborative seems to have carried over into the conceptualization of how these arrangements would interact with each other. There is, for example, the idea that non-state actors (NGOs and business) are united in a push for common transnational rules, even if they may have different interests regarding the content of these rules.

In our view, however, the repertoire of interaction needs to be conceptualized in a much broader fashion. Transnational business governance initiatives interact with each other and with state-based law and regulation in myriad ways. They may cooperate, but they also compete, imitate or differentiate, criticize or applaud, ignore or seek to influence each other. In some respects they interact as actors in their own right while in others they are institutional arenas through which other actors interact.

A logical but little studied starting point of a broader typology of interaction is the notion of regulatory competition, in a given issue area of transnational governance. Regulatory competition appears particularly salient in a context where would-be regulators do not enjoy exclusive regulatory authority within a particular territory. We wish to explore whether there is an analogy between interacting transnational governance initiatives and international regulatory competition, in which territorial states compete to attract or retain capital and jobs by adjusting their fiscal or regulatory regimes. Such competition may take the form of races to the bottom or top, or a more subtle form of regulatory “chill” in which states refrain from introducing new or strengthening existing regulation. Do transnational governance initiatives similarly compete with each other to attract or retain firms? If so, do they do so by adjusting their rules and standards? If so, in which direction (upward, downward or static)?

A contrasting form of interaction would be institutional mimesis. As they strive for legitimacy with similar audiences in a shared organizational field, defined by the regulatory domain, different transnational initiatives would begin to converge on similar models of governance. This occurs, for example, when industry-sponsored forest certification schemes imitate aspects of the Forest Stewardship Council.

A third form would be domination or hegemony where one initiative or set of actors can translate superior resources or entrepreneurial skills into gaining a dominating position vis-à-vis other initiatives. Quasi-monopolistic positions in global standard-setting may also arise from the political economy of an issue area, as in the case of the International Accounting Standards Board (IASB, Richardson and Eberlein, 2010), which, interestingly, owes much of its success to the endorsement of its standards by the powerful transgovernmental network of global securities regulators (International Organization of Securities Commissions, IOSCO).

Fourthly, collaboration is certainly an important form as well; different entrepreneurs and initiatives may share a common normative agenda, be members of the same “epistemic community” or advocacy coalition, but they have reasons to pursue separate organizational pathways to pursue this shared agenda. Examples of collaboration might include the Memoranda of Understanding between the International Organization for Standardization (ISO), the International Labour Organization and the United Nations Global Compact Office regarding their respective roles in setting standards for social responsibility.

Finally, different transnational arrangements or initiatives may simply co-exist, with little direct interaction.

Drivers

What accounts for the prevalence of different forms and logics of institutional arrangements in a given regulatory domain? We can distinguish between different drivers of the types of interactions. Questions to consider include:

- Do collaborative arrangements depend on shared normative understandings and the absence of distributive conflict between the parties involved?
- Is domination or hegemony the result of resource disparities in the context of the broader political economy?
- Does regulatory competition depend on a viable market for the global goods or services offered by transnational arrangements?

Outcomes

We assume that types of interaction are an important factor in accounting for outcomes of transnational governance arrangements. A first dimension of outcome is ‘political order’ (versus non-decision or pure market coordination and mutual self-adjustment). But it is an open question which forms of interaction (competition, mimesis, etc.) leads to a higher degree of global ‘political order’. The second dimension of outcomes is the distributive implication of different governance arrangements, across different jurisdictions and different social groups.

Units and levels of analysis

A key purpose of this project is to advance reflection on the conceptualization of novel transnational governance arrangements, including our own approach of locating the key dynamic at the level of governance initiatives in distinct regulatory domains. This involves asking the following questions.

Are these governance initiatives the appropriate unit of analysis? Are they actors in their own right? Do they interact strategically in pursuit of goals, or are they better viewed as institutional arenas through which other actors interact in pursuit of their own interests and goals (e.g. norm entrepreneurs; epistemic communities; discourse coalitions)? Apparent interactions among transnational regulatory institutions and programs may actually be effects of other actors' interactions. Shifting forms of transnational governance may be results of strategic moves in contests for power.

Dynamics

Finally, we are interested in the dynamics of interaction, rather than equilibrium or static cross-sectional analysis. What interests us are the processes and trajectories by which transnational governance bodies and initiatives emerge and interact over time in particular transnational regulatory spaces.

Analytical Perspectives

We build on some promising exploratory work produced mainly in legal, political science, international relations, and business scholarship. One of the goals of the workshop is to identify which theoretical frameworks and methodological approaches are most promising for studying the dynamics of transnational regulatory interactions.

Instructions for Participants

Workshop Format

This one-day workshop takes the form of a “memo conference” in which the participants all prepare short memoranda directed at the same set of questions, rather than presenting academic papers. The goal is to have an exploratory discussion of the proposed research agenda, with a view to creating a network of interested researchers, refining research questions, canvassing potential research activities, laying the foundations for follow-up conference(s) and publication(s), and identifying major collaborative funding opportunities.

In terms of participants, the workshop has both a local and a global dimension. It will bring Toronto-area researchers together with leading scholars from around the world who are working directly on the topic of transnational regulatory interactions. Some of the latter researchers who are unable to join us in person may participate via teleconference or Skype.

Participants' Memoranda

Each workshop participant will prepare a short (5 page) memo responding to this discussion paper in advance of the workshop, answering the following questions:

- Have we asked the right research questions?
- What academic disciplines, theoretical frameworks, analytical perspectives, and methodological approaches might help us to understand the phenomenon? Are there any theories or approaches you use in your own work that would seem relevant? Can you suggest one or two scholarly sources you think would be particularly helpful in approaching this topic?

- Can you suggest promising empirical contexts in which to explore the topic? This might take the form of transnational regulatory interactions within a particular economic sector (e.g. agriculture, fisheries, banking), issue area (e.g. workers' rights, gender equality, climate change), or cross-sectoral and cross-issue interactions.
- Can you suggest potential collaborators for this research program? Would you like to be an active collaborator?
- Can you suggest potential funding sources for workshops, conferences, projects or major collaborative research initiatives on this theme?
- Do you have any other feedback for us on this discussion paper or the broader research program?

Responses will be circulated to all participants in advance of the workshop.

Workshop Program

The workshop will be informal but structured around the questions posed above. The overall goal of the workshop is to develop a collaborative research agenda on the topic of transnational business governance interactions.

The first part of the workshop will be devoted to an introductory session, in which we explain what we think we're doing and invite discussion of research questions. This will be followed by a longer session focused on disciplines, theories, approaches, scholarly sources, etc.

After a working lunch, we will have a session to explore empirical contexts for research, followed finally by a session on logistics (e.g. structuring and operating a research network, planning follow-up projects, conferences and publications, and exploring funding opportunities).

We will stay in touch with participants afterwards on workshop outcomes and next steps.

References

Abbott, K. and D. Snidal. 2009. Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit. *Vanderbilt J. Transnat'l. L.* 42: 501.

Black, J. 2009. Legitimacy and the Competition for Regulatory Share. LSE Law, Society and Economy Working Papers No. 14/2009, online: www.ssrn.com.

--. 2008. Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes. *Regulation & Governance* 2: 137.

Börzel, T. and Risse, T. 2005. Public-Private Partnerships: Effective and Legitimate Tools of Transnational Governance?, In E. Grande and L.W. Pauly, eds., *Complex Sovereignty: Reconstituting Political Authority in the Twenty-first century*, pp. 195-216, Toronto: University of Toronto Press.

Cashore, B., G. Auld and D. Newsom. 2004. *Governing Through Markets*. New Haven: Yale U. Press.

Gulbrandsen, L. 2008. Accountability Arrangements in Non-State Standards Organizations: Instrumental Design and Imitation. *Organization* 15: 563-83.

Herberg, M. 2008. Global Legal Pluralism and Interlegality: Environmental Self-Regulation in Multinational Enterprises as Global Law-Making. In O. Dilling, M. Herberg & G. Winter, eds., *Responsible Business: Self-Governance and Law in Transnational Economic Transactions*, pp. 17-40. Oxford and Portland, OR: Hart.

Meidinger, E. 2006. The Administrative Law of Global Private-Public Regulation: the Case of Forestry. *European Journal of International Law* 17: 47-87.

-- 2008. Competitive Supragovernmental Regulation: How Could it be Democratic? *Chicago Journal of International Law* 8: 513-34.

Overdeest, C. 2009. Comparing forest certification schemes: the case of ratcheting standards in the forest sector. *Socio-Economic Review* 1-30.

Richardson, A.J. 2009. Regulatory networks for accounting and auditing standards: A social network analysis of Canadian and international standard-setting. *Accounting, Organizations and Society* 34: 571-588.

Richardson, A.J. and B. Eberlein. 2010. Legitimizing Transnational Standard-Setting: The Case of the International Accounting Standards Board", *Journal of Business Ethics*, 2010, forthcoming (online: DOI 10.1007/s10551-010-0543-9).

Schneiberg, M. and T. Bartley. 2008. Organizations, Regulation, and Economic Behavior: Regulatory Dynamics and Forms from the 19th to 21st Century. *Ann. Rev. Law & Soc. Sci.* 4: 31-61.

The organizing committee

Kenneth Abbott, Professor of Law, Sandra Day O'Connor College of Law, Arizona State University, Ken.Abbott@asu.edu

Julia Black, Professor of Law, Department of Law, London School of Economics, j.black@lse.ac.uk

Burkard Eberlein, Associate Professor, Policy, Schulich School of Business, beberlein@schulich.yorku.ca

Errol Meidinger, Professor, University at Buffalo Law School, State University of New York, eemeid@buffalo.edu

Alan Richardson, Professor of Accounting, Schulich School of Business,
arichardson@schulich.yorku.ca

Stepan Wood, Associate Professor, Osgoode Hall Law School, swood@osgoode.yorku.ca.