



Title	Regulating in Global Regimes
Authors(s)	Scott, Colin
Publication date	2011
Publication information	Scott, Colin. "Regulating in Global Regimes." Edward Elgar Publishing, 2011.
Publisher	Edward Elgar Publishing
Item record/more information	http://hdl.handle.net/10197/6775
Publisher's statement	This material is copyrighted and any download is for private use only.
Publisher's version (DOI)	10.4337/9780857936110.00060

Downloaded 2024-04-17 17:45:59

The UCD community has made this article openly available. Please share how this access benefits you. Your story matters! (@ucd_oa)



© Some rights reserved. For more information

Regulating in Global Regimes

Colin Scott

Professor of EU Regulation and Governance

University College Dublin

Belfield

Dublin 4

Ireland

Colin.scott@ucd.ie

T +353 1 7168799

Abstract

An increased emphasis on global regulation is a response to the recognition of economic, social and cultural interdependence between the world's nations and peoples. Policy problems as diverse as reckless behaviour by financial institutions, exploitation of sweat-shop labour in emerging economies, and the threat of climate change present collective action problems which cannot be resolved through the deployment of the state's authority, capacity and legitimacy alone. Global regulatory regimes which have emerged to address these issues are frequently characterised by participation of both governmental and non-governmental organisations. The chapter addresses concerns about coherence, effectiveness and legitimacy of such regimes. I suggest that a degree of fragmentation is inevitable and may bolster both effectiveness and legitimacy through the enrolment of a wider range of instruments and actors. The analysis of effectiveness highlights the significance of contractual mechanisms, alongside more traditional legal and soft law instruments for regulating. The issue of legitimacy highlights problems created by the mix of instruments and actors within global regulatory regimes and the ways in which actors involved seek to manage their legitimacy. The chapter concludes that further adaptation to the inevitably fragmented and hybrid character of global regulatory regimes might further exploit the potential of broad proceduralization to engage actors involved both in a degree of learning and of self-determination as central aspects of such regimes.

1. Introduction

An increased emphasis on global regulation is a response to the recognition of economic, social and cultural interdependence between the world's nations and peoples. Policy problems as diverse as reckless behaviour by financial institutions, exploitation of sweat-shop labour in emerging economies, and the threat of climate change present collective action problems which cannot be resolved through the deployment of the state's authority, capacity and legitimacy alone (Cerny 1995: 597). In common with others I suggest it is helpful to think in terms of regulatory regimes rather than regulators, where regime is understood to constitute the range of policies, institutions and actors which shape outcomes within a policy domain (Eisner 2000; Eberlein and Grande 2005; Scott 2006). Even at domestic level few regulatory regimes operate in this classic style, as regulatory power is more typically fragmented not only amongst state bodies, but also between state and non-state organisations. Given the even more fragmented quality of supranational governance structures we should not expect global regulation frequently to be characterised by the emergence of powerful public agencies to make and enforce rules. Rather regimes with global reach frequently involve a high degree of fragmentation in which many actors are involved in the key activities which together may constitute a more or less effective regime.

The fragmented character of many global regimes involves both a variety of organisations in exercising the various requirements of a viable regulatory regime and a diffuse range of instruments or mechanisms through which the norms of the regime are created and made effective. A regimes approach to global regulation recognises that global regulatory practices date back to antiquity but highlights the proliferation of regulatory norms with global reach, particularly since the 1970s and the fragmented governance structures through which such norms are made, monitored and enforced (Braithwaite and Drahos 2000: 3). Such a conception of regulation in global regimes is not inconsistent with analysis of contemporary global governance generally which emphasises the displacement of state-centred and hierarchical models, by the emergence and or recognition of the centrality of networked forms of governing which engage a wide range of actors including state organisations and actors beyond the state (Slaughter 2004; Lazer 2005).

Global regulation, in this regimes sense, elides two significant trends which deviate significantly from classical conceptions of state regulation. First, there is a trend towards supranational regulatory governance, and in particular the setting of rules and standards by intergovernmental organisations (Braithwaite and Drahos 2000). Second there is a trend towards the establishment of regulatory regimes by non-governmental actors, which has been particularly marked at the supranational level – engaging both NGOs and firms (Haufler 2001; Abbott and Snidal 2009). Much discussion on the

evolution of global regulation focuses on the distinction between regulatory regimes which are fundamentally governmental in character, established by states or more typically associations of states or intergovernmental organisations, on the one hand, and regimes which are predominantly non-state in their origins and character, involving NGOs and firms or associations of firms (Ronit and Schneider 1999; Brunsson and Jacobsson 2000). The bifurcation of inter-governmental and non-governmental regulatory regimes underpins a widespread assumption, particularly within policy circles, that governmental regulation may both be more effective and more legitimate.

These trends have raised concerns about the increasing significance of non-governmental regulation and its effects on coherence, effectiveness and legitimacy. I suggest in this chapter that this distinction between intergovernmental and non-governmental regulation is increasingly unimportant. First, concerns about lack of coherence in global regulation are of equal and perhaps more relevance to governmental than non-governmental regimes. Few global regulatory regimes resemble classical national regulatory models in the sense of combining all the regulatory functions - setting, monitoring and enforcing norms - in a single powerful agency. Indeed many national regulatory models lack this coherence – this was a major criticism levelled at the US regime for regulation of financial services in the *post mortem* on the global financial crisis of 2007-9. Fragmentation occurs in part because of the interdependence between governmental and non-governmental actors in establishing the capacity for effective action in particular domains. Paradoxically non-state regimes are more likely to engage all the characteristics of a viable regulatory regime in a single organisation with global reach than is true of inter-governmental organisations in which typically the capacity to monitor and enforce is not co-located with the capacity and authority to set norms.

Second, there is a concern that weaknesses in instruments and in particular their lack of bindingness may undermine the claims to normative effectiveness of non-governmental regimes. Again this argument obscures the potential that non-governmental regimes have to invoke legal rules, for example through contracts, and other normative pressures, for example through markets and community. Indeed many legal regimes which operate inter-governmentally appear to lack legal reach to those actors whose behaviour is to be shaped. With both governmental and non-governmental regimes there are plenty of examples of non-binding instruments taking on substantive effects through a variety of extra-legal processes.

The third concern relates to the diminished legitimacy of non-governmental activity. Legitimacy is of importance to both inter-governmental and non-governmental actors because, with limited sovereignty and authority, coercive capacity is limited and support for initiatives is required (Abbott

and Snidal 2009: 48). Here there is an important debate as to whether the procedures for enrolling stakeholders in the making of norms and their implementation creates a basis for both legitimate and effective action that may at least equal that of inter-governmental actors. These debates are of particular importance during a period of tensions surrounding regulatory objectives and effects because of a reaction to a financial crisis which tends to blame, and seek to reduce, the role of self-regulation and other non-governmental regimes, whilst playing up and perhaps over-stating the potential for effectiveness of governmental and inter-governmental activity.

Taken together these observations call for a reconceptualization of global regulatory regimes which embraces and works with their inevitably fragmented character. Arguably political science has been more effective in understanding the role of diffuse actors within policy making processes than in implementation and enforcement. Indeed, Mattli and Woods suggest that NGOs have strong incentives to focus on agenda-setting as it offers high visibility for their activities with a lesser commitment of resources than is required to attend to the detail of implementation (Mattli and Woods 2009: 29). It has been argued that political science has been less able than some other disciplines, notably sociology, to take full account of non-state activity in such implementation processes (Rosenau 2000: 167-168). This is not to ignore the capacity and role of states in global regulation. Important empirical studies have concluded that governments are central both to the initiation and implementation of much transnational regulatory activity (Braithwaite and Drahos 2000), but governmental activity is far from being the only show in town. Effective regimes are also to be found, for example amongst the 'green clubs' of businesses which seek to enhance market reputation through devising norms and appropriate monitoring and enforcement mechanisms to deliver on those commitments (Prakash and Potoski 2006). The trend for institutionalising regulatory capacity within non-governmental regimes so as to bolster their legitimacy is also targeted at extending their reach and effectiveness. The concluding part of the chapter addresses some of the legitimacy challenges associated with both implicit and explicit delegation upwards to intergovernmental bodies and towards non-governmental actors such as companies, trade associations and other civil society organisations. In the remainder of this chapter I address how patterns of emergence of regulatory regimes tend towards a fragmented quality and then follow this with an evaluation of the effectiveness and legitimacy of such regimes.

2. Emergence of Global Regulatory Regimes

Processes of emergence of regulatory regimes provide part of the key to their fragmented quality. One aspect of the rise of global regulation involves changes in the way that problems are perceived,

and in particular a sense that problems which might once have been conceived of as national or regional now have a broader transnational character. Financial markets are only the most prominent examples of vigorous international markets which simultaneously address problems for market actors (such as limited national demand) whilst generating new problems (such as creating stress on traditional trust within markets). Other key examples include the perceptions of unacceptable degrees of variation in terms and conditions arising from the growth in international labour markets in areas as diffuse as merchant shipping, call centres and garment production. In the environmental domain, we may think of the externalities which flow across borders as a result of production and/or international trade, not limited to CO2 emissions, but including also marine pollution and threatening stability to sustainable forestry. Other externalities generated by international markets include the costs associated with product defects which, because of transactions costs in pursuing them, are not attributed to the producer responsible for them. The costs associated with international trade facilitated by the internet include the difficulties of attributing responsibility to originators of products ordered and/or delivered via the medium of the world wide web. More generally, though it is not the only source of such problems, a good deal of concern about human rights violations arises as a consequence of the effects of international trade.

Policy problems do not achieve the status of requiring responses on their own, of course. Rather they are the subject matter of discourse and often campaigning involving not only national governments but also interest groups such as businesses, civil society organisations and others. A key question is what are the variations in conditions that produce regimes which appear to protect employees, consumers or other large and diffuse groups (such as the mass of people adversely effected by environmental degradation), on the one hand, as compared with significant number of regimes which appear to entrench dominant producer interests, on the other (Mattli and Woods 2009: 8-11). As with domestic regulation, there may be a tendency towards the regime benefiting narrow and powerful interests where the demand for the regime is narrowly-based among such interests. Whilst the nature and extent of procedures for enrolling the various actors affected by policy choices makes some difference to outcomes, the most important difference between regimes captured by dominant producer interests and those which serve some broader conception of the public interest is the extent to which there is a broader and sustained level of activity by coalitional groups seeking a better public interest outcome (Mattli and Woods 2009: 16). Political contestation over appropriate norms and processes of implementation is emergent across a wide range of sectors engaging market and community actors, and within which traditional electoral politics may have a limited role (Bartley 2007). The presence and activity of 'policy entrepreneurs' both in developing

ideas and providing leadership has been significant in some domains, such as environmental protection(Canan and Reichman 2002) .

In those policy domains which are characterised by broad participation of stakeholders beyond governmental and industry interests, non-governmental organisations have emerged at transnational level both as demanding change and as bearers of change through their activities , for example in developing regimes for engaging in one or more of the core regulatory functions of setting, monitoring or enforcing compliance with norms(Mattli and Woods 2009: 28-29). Firms are also amongst key civil society actors who play a role in agenda-setting, though their roles are varied in different policy domains (Mattli and Woods 2009: 32-36). For example, the global reforms of telecommunications regulation were substantially driven by the interests of large multinational enterprises seeking the benefits of liberalization on the provision of services and pricing to them as *consumers* of those services (Sandholtz 1998). Other actors instrumental in liberalization processes were those firms who sought to challenge dominant incumbents, either from a position of diversifying into telecommunications services from a related industry or presenting themselves as new entrants in many countries where they remained a dominant incumbent in one country. In other instances firms initiate or support regulation to protect their viability, for example by maintaining confidence in markets or products. Where such demands are met there may be close alignment between public and producer interest, as with the emergence of self-regulation in the US nuclear power industry following the three mile island accident in 1979 (Rees 1994). A fourth class of corporate entrepreneurship involves firms subject to tight domestic regulation seeking to export those higher standards in order to level the playing field for their products (Mattli and Woods 2009: 35-36).

Whilst it is possible to identify organisations involved with global regulation that are primarily inter-governmental in character (for example the OECD), significant numbers of global regulatory regimes predominantly involve NGOs or firms, and a growing number engage both, with or without governmental involvement as well (Abbott and Snidal 2009). So, for example, in the domain that addresses workers' rights in developing countries, NGOs leading on rule making include Amnesty International (Human Rights Guidelines for Companies , established 1997), the Clean Clothes Campaign (Code of Labour Practices for Apparel, 1998) and the Workers Rights Consortium (2000). There are also individual businesses and associations of businesses involved in regulating in the same policy area. These include the GAP individual labour rights scheme (1992) and the Worldwide Responsible Accredited Production Apparel Certification Program (2000) (Abbott and Snidal 2009: 50-51). A number of organisations active in this policy domain combine governmental, NGO and

business involvement. These include the tri-partite International Labour Organisation ((ILO, established in 1919) and the Apparel Industry Partnership (AIP, 1996) (Abbott and Snidal 2009: 50-51). These regimes have emerged in the face of concerns about weaknesses in state capacity to regulate employment rights in developing countries and out of market processes in which multinational businesses have suffered reputational damage (risking reductions in market share) because of revelations about the conditions under which products are made in sweatshop conditions (O'Rourke 2003: 4). A key driver of these regimes is a recognition that some consumers in the industrialized countries are exhibiting a 'preferences for processes' such that the price/quality ratio of a product is less important than confidence that it was produced ethically (Kysar 2004). Governance within this policy domain is characterised as diffuse, heterarchical and networked in character (O'Rourke 2003:6). Indeed, in the absence of strong governmental capacity, it is argued that the success of such regimes is likely to be dependent on their ability to invoke the capacity of the diverse network participants to engage in monitoring and enforcement (Braithwaite 2006: 890-891). The issues of variety in modes of regulating are addressed in the next section of this chapter.

3. Instruments of Global Regulation

Regulation has traditionally been characterised as the policy instrument which places central emphasis on law as steering the behaviour of its target. This characterisation is in turn linked to ideas about not only the effects of law, but also the sovereignty of states in making and enforcing law. Trends in global regulation do not require a rejection of the idea of the centrality of law to regulation, but rather a re-evaluation of the nature and effects of law in regulatory settings. There has been, it is argued, a 'blurring of the distinctions between normative forms', involving both the growth of soft law and the blurring of a simple public-private divide in the promulgation and enforcement of law' (Picciotto 2006: 11). The fragmented institutional picture, noted in the previous section, is mirrored by diffusion in the instruments through which norms, standards and rules are set down (Busch, Jörgens et al. 2005) .

The classic supranational legal instrument is the Treaty created by agreements between governments in which norms, standards or rules are set down which apply to the signatory governments themselves. A key example of such a Treaty is the Kyoto protocol ratified by a majority of states and setting down targets and mechanisms for reducing emissions of greenhouse gases. It is striking that the contest over the Kyoto Protocol has continued since its adoption in 1997 and that

the Treaty has been very uneven in its implementation by the states which adopted it. Notwithstanding the setting down of obligations within a legal instrument it must be questioned whether the Kyoto Protocol establishes a regulatory regime or not. In particular there are weaknesses in arrangements for monitoring and enforcement, creating a degree of fragmentation that causes some to think that it would be more effective to displace legal instruments with more explicit processes of bargaining and cooperation (Asselt, Sindico et al. 2008). The question of reach of international treaties can be addressed through changing the mechanisms and processes through which they are implemented (Mitchell 1994). The limited reach of treaties, which are generally addressed to states and are typically restricted in their monitoring and enforcement mechanisms, creates a gap in global governance which has been filled by a variety of other instruments.

At the other end of the scale from treaties, in terms of legal bindingness, are technical standards set by bodies such as the International Organisation for Standardization (the ISO) and numerous international and national standard-setting bodies, the majority of which are non-governmental. The globalization of markets has increased the demand for standardization in the absence of more complete global regulatory regimes (Brunsson 2000: 38). Standard-setting regimes typically do not carry with them mechanisms for monitoring and enforcement (although such standards are sometimes incorporated into enforceable legal instruments such as legislation and contracts) but are substantially dependent upon the market for standards in determining their take-up and effectiveness. It is these market requirements that has driven a high degree of institutionalization in the enrolment of expertise in the development of technical standards (Hallström 2004). Whilst the relative bindingness of instruments which express regulatory norms is significant, the issue of bindingness is frequently deployed as a proxy for effectiveness (Kerwer 2005: 612). The more important question is not are the rules enforced or capable of being enforced, but rather are they followed. The nature and provenance of regulatory norms is, arguably, as important to understanding the extent to which they are likely to be followed as their potential for formal enforcement. Concerning the issue of fragmented capacity, the variety of stakeholders affected by a particular policy domain may be seen as a virtue of global regulation in the sense that stakeholders who are enrolled in determining, for example, the broad objectives and norms of a regime are, other things being equal, likely both to better understand and commit to the applicable norms (Black 2003).

Indeed in his assessment of the effectiveness of a range of non-state regulatory regimes the core problem identified by David Vogel is not about the following of the norms by the participants in the regime, but rather limited enrolment of industry actors to regimes in such issue areas as fairly traded

coffee and sustainable forestry (Vogel 2009). Accordingly a key question concerns the factors which pull and push businesses towards engagement with legally voluntary regimes - a central push factor being pressure from NGOs and a threat to reputation of leading brands (Marx 2008). Vogel suggests that the engagement of a variety of active stakeholders enhances the credibility of regimes and thus their value to those who buy into them as regulatees (Vogel 2009: 183) This credibility issue is centrally linked to the market reputation and market access of regulatees. So, for example, many homewares stores in the United States and the UK find it advantageous within their markets to sell only wood products certified under the Forest Stewardship Council regime, whilst suppliers of wood products find it difficult to access those markets without such certification (Meidinger 2003). There is a social dimension also to the development of and compliance with norms. Analyses of the relationship between firms within extractive industries and their neighbours has been extended to develop the idea that there is a 'social licence to operate' which invokes implicit expectations on businesses as to how they affect the communities within which they operate (Gunningham 2002: 160-162). Without community support businesses are unable to operate effectively and serious breaches of implicit social licences may result in business disruption through both boycotts and direct action.

A central question of much research is what distinguishes the effective from the ineffective regimes (Gunningham and Sinclair 2002) . The conclusion of a major study of 'green clubs' which engage in voluntary environmental regulation is that the nature and quality of institutionalization and the market environment are key factors in their effectiveness (Prakash and Potoski 2006: 17). The key variables in institutionalization concern the rules and their enforcement. In their analysis the institutionalization of effective monitoring and enforcement is central to effectiveness (Prakash and Potoski 2006). The stringency of the norms is less important, they argue, though it may affect the attractiveness of the regimes for members - regimes with reputation for stringency are likely to better enhance the market reputation of members (Prakash and Potoski 2006: 55).

Key mechanisms of applying and enforcing new codes include supply chain contracts , for example in the clothing industry (O'Rourke 2003: 6) and in respect of environmental protection (Vandenbergh 2007). Thus, though codes of conduct are frequently presented as voluntary, compliance with them can be converted into a compulsory condition of market participation through the imposition of contract terms by purchasers. Many multinational enterprises have substantial groups within their firms involved in monitoring and enforcing contract terms over suppliers , frequently engaging third party monitors also, such as accounting and consultancy firms (O'Rourke 2003: 7). The credibility of

such contractually enforced regimes frequently depends on a sense of independence in the monitoring function (O'Rourke 2006).

The issues of soft law, voluntariness and privateness are frequently conflated in both policy and academic discussion of regulatory norms, so it is necessary to set out some terminological classifications here. Within the term 'soft law', soft refers to a lack of legal bindingness and law refers, somewhat inaccurately, to the official provenance of the applicable norms (Mörth 2004:7). Attempts to equate soft law with self-regulation or non-state voluntary or associational initiatives are apt to be misleading (see for example (Kirton and Trebilcock 2004: 9)). Equally a more expansive conception of softening to take in not only obligation, but also softening of precision and delegation in legal instruments (Abbott and Snidal 2000: 422) may be conceptually unhelpful (Mörth 2004: 5-6). Soft law instruments comprise the normative measures deriving from governmental and inter-governmental sources which are intended to change behaviour, but which are not legally binding (Snyder 1993: 198). Such instruments derive their authority and effectiveness from their governmental or inter-governmental provenance. Key examples of global soft law include the various codes issued by the OECD relating to such matters as electronic commerce and the conduct of transnational corporations. Such codes provide the basis for behavioural change both by national governments and by firms, and may involve the establishment of monitoring mechanisms, but not of legal enforcement.

Self-regulatory regimes, established, for example, by trade associations, typically engage rules which are binding on the members of the association. An example is Responsible Care, the regime of the global chemical industry, established following the Bhopal disaster in 1984 (Rees 1997). From the industry perspective the regime was established voluntarily, but from the perspective of the firms who are members of trade associations involved compliance with the rules of the regime is compulsory as a condition of membership. Membership of trade associations is important to firms in the chemical industry for market access and credibility.

The diffusion of mechanisms for setting down norms is an uncoordinated response to the absence of anything resembling a global legal system and is sometimes characterised in terms of global legal pluralism (Perez 2004). Actors involved in developing regimes have routinely engaged in processes which generate norms in a form that offer some degree of workability in the particular context. Those who are subject to these diffuse norms may comply variously because they are incorporated with national law and mechanisms from monitoring and enforcing, because members of a community (whether formalised within an association or less formally) expect it, because a buyer requires it as a condition of contracting, or because market access or market reputation is enhanced

through such compliance. Such mechanisms are likely to be reinforcing of each other to some degree (Lehmkuhl 2008).

4. Reconceptualizing Legitimacy in Global Regulatory Regimes and Processes

Whatever the mix of actors and outcomes emerging from global regulatory regimes, the effects of a regime by themselves do not necessarily determine the extent of its legitimacy. Legitimacy is concerned with the nature and extent of acceptance that institutional arrangements and normative choices, from among the possible configurations, are more or less right for the time being. Sufficiency may be assessed by reference to 'compliance with government policies even if these violate the actor's own interests or normative preferences, and even if official sanctions could be avoided at low cost' (Scharpf 2003). Global regulatory activity presents particular challenges to legitimacy because of a widespread sense that it is far removed from well understood principles and processes associated with domestic democratic politics. The mature institutional structures of the European Union, for example, even though they engage both an elected European Parliament, and an important and direct role for the governments of the member states through the Council of Ministers, are, nevertheless, perpetually on the defensive against claims of a glaring 'democratic deficit' (Follesdal and Hix 2006). Resort to a technocratic or outputs-based legitimacy for democratically weak EU regulatory decision making processes have increasingly been challenged. It has been suggested that the EU experience 'may not be *sui generis*, but rather reflective of the democratic legitimation problems of supra-state governing generally'. (Skogstad 2003:335) .

Solutions to the legitimacy problems associated with global regulation need to adapt to the diffuse and networked character of contemporary governance rather than to seek to impose a traditional model of state accountability on the emergent structures (Ladeur 2004: 5-7, 10-12). A recognition of the normative force of nominally non-binding norms accentuates the need for legitimacy structures to attach to standard-setting regimes which fall outside traditional public governance (Kerwer 2005: 620-628). In other ways the effectiveness of regimes based on diffuse norms of uncertain effects is likely to be premised on the legitimacy of the key actors engaging in promulgating or implementing the norms (Black 2008: 148).

The kind of broad networks that generate some of the legitimacy concerns arising from increasingly fragmented regulatory governance, do themselves offer an answer to the accountability deficit through the kind of mutual interdependence which is generated within such regimes (Kerwer 2005: 625-626). Within the context of eco-labelling regimes it has been suggested that an equilibrium

based on the institutionalized interdependence of the various stakeholders enhances both the credibility and the authority of the regime (Boström 2006). This is an example of the kind of extended accountability which I have previously argued creates a functional equivalent to more traditional hierarchical accountability regimes (Scott 2000). Julia Black goes further in arguing that the actors within a regulatory regime can take responsibility for constructing their own legitimacy with other stakeholders. This may be done on a pragmatic basis (the activities suit the interests of others), a normative basis (the 'right thing to do') or cognitive basis (nothing else is imaginable) (Black 2008: 147).

Pragmatic legitimacy is frequently likely to be based on outcomes for the actors involved - suggesting the weakness that it may not sustain a regime through decisions that may be normatively justifiable but against the interests of key stakeholders. Indeed psychological research on compliance with the law suggests that a sense of procedural fairness in the promulgation of rules may be more important than fear of the consequences for breach (Tyler 2006). An important strand of thinking about the construction of normative legitimacy focuses on the development of procedures for inclusiveness and engagement with key stakeholders in transnational governance regimes through the development of a set of procedural norms. Dubbed a 'global administrative law', such proceduralization trends may go some way towards tackling the normative legitimacy issue. Key features of these arrangements include much-enhanced transparency and widespread engagement in key processes such as rule-making and the development of reasoned decision-making and review processes (Kingsbury, Krisch et al. 2005: 37-41), and might be extended to address also other concerns such as the protection of human rights (Harlow 2006). This proceduralization is often restricted to rule making, and does not extend to monitoring and enforcement procedures. Where there is a concentrated organisational focus to a regime transparency may be both feasible and attractive. But the disinfective properties of sunlight reach less into more diffuse structures such as networks of national regulators which are often characterised by degree of opacity (Maher 2002; Eberlein and Grande 2005) (Mattli and Woods 2009: 19-20). A further limit to the global administrative law is that it while it addresses private regulatory organisations (Kingsbury, Krisch et al. 2005: 20), it has little to say about firms which use their contracting power to regulate others, such as their suppliers.

Arguments for stronger proceduralization as a guard against capture of regimes by powerful producer interests might be strengthened by extending the concept of capture beyond a mutual identification of interests, to recognise that regulators, even where they reject any direct attempts at capture by producers, nevertheless experience a form of epistemic dependence on those

powerful stakeholders (Hardwig 1985). To the extent that regulators experience such dependence what is thinkable and doable is substantially shaped by the producers, in the absence of transparent mechanisms for testing those assumptions through exposure to a broader cohort of stakeholders (Power 2003). For this reason authority is incompletely defined and is effectively shared within the regime. The whole appeal of proceduralization is not simply the inclusion of broader interests within key decision making processes, but the inclusion and perhaps creation of a broader community shaping and re-shaping what counts as knowledge in the particular policy domain. Both accountability and authority are diffused within such proceduralized regimes (Bohman 2004: 332). The epistemic dependence of key actors within regulatory regimes bears not only on the normative legitimacy of a regime, but also on the cognitive legitimacy which flows from a sense that roles, issues, processes and outcomes could not be other than they are. More inclusive and reflexive processes may be positive both from the perspective of learning, but also because they engage participants with opportunities for self-determination (Lenoble and Maesschalck 2010).

5. Conclusions: Where Next for the Politics of Global Regulation?

The financial crisis of 2007-9, together with other pressing concerns such as climate change, have resulted in increasing clamour for more stringent, coordinated and centralized global regulation. Without wholly precluding the possibility of such regimes, experience suggests that global regulatory regimes tend to emerge in a fragmented manner, with aspects of their origins and implementation diffused between different levels of government and between state and non-state actors. In policy domains such as human rights and the environment key regulators and principal targets of regulation are found in both public and private sectors and this kind of mixed and fragmented model appears more typical.

Consistent with this analysis future investigations might focus on understanding better the relations between state and non-state actors within global regimes, moving beyond analysis of policy making and norm setting to examine processes of implementation more thoroughly. Such examination would include questions as to who monitors behaviour and why, and what are the processes through which regulatory norms (whatever their provenance or legal status) become more or less effective. Such an approach must consider the significance of contractual mechanisms for setting and enforcing regulatory norms, alongside more traditional public law and soft law instruments. Whilst they have significant potential, regulation by contract raises particular issues concerning both the concentration of power and the relative opacity of the relationships involved. Accordingly a role for governmental and inter-governmental organisations engaged in observing such processes might

be to establish ground rules for the acknowledgement of regulation by contract within governmental regimes.

The effects and effectiveness of global regulatory regimes are not simply technocratic matters. Inter-governmental and non-state organisations which operate with a degree of global reach typically have in common a degree of distance from the democratic processes which characterise and legitimate domestic government. Examples of regimes which structure the engagement of affected participants so as to promote not only understanding but also mutual learning about the objectives and mechanisms which lie behind regulation provide an indication of how more reflexive governance at global level might also engage revised forms of democratic decision making, characterised by better participation and communication between those affected. The emergence of such processes is resulting in part from the active attempts by NGOs to manage the legitimacy of the regulatory regimes in which they participate. A broad concept of proceduralization might extend beyond the processes for setting norms, which show significant evidence of proceduralization, to address also monitoring and enforcement, each of which provides opportunities both for wider participation and for learning about the regime through feedback about its operation. Broad proceduralization provides a set of mechanisms for reconciling an understanding the strong presence of non-governmental actors in a manner which effectively reconceptualises global regulation as a phenomenon which is inevitably both hybrid and fragmented.

References

- Abbott, Kenneth, and Duncan Snidal (2009), 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State', In Walter Mattli and Ngaire Woods (eds), *The Politics of Global Regulation*, Princeton: Princeton University Press, pp 44-88.
- Abbott, Kenneth W., and Duncan Snidal (2000), 'Hard and Soft Law in International Governance', *International Organization* **54**: 421-56.
- Asselt, Harro Van, Francesco Sindico, and Michael A. Mehling (2008), 'Global Climate Change and the Fragmentation of International Law', *Law & Policy* **30**: 423-49.
- Bartley, Tim, (2007), 'Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions', *American Journal of Sociology* **113**: 297-351.
- Black, Julia (2008), 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes', *Regulation & Governance*: 137-64.
- Black, Julia (2003), 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation', *Public Law* 2003: 63-91.
- Bohman, James (2004), 'Constitution Making and Democratic Innovation', *European Journal of Political Theory* **3**: 315-37.
- Boström, Magnus (2006), 'Regulatory Credibility and Authority through Inclusiveness: Standardization Organizations in Cases of Eco-Labeling', *Organization Studies* **13**: 345-67.
- Braithwaite, John (2006), 'Responsive Regulation and Developing Economies', *World Development* **34**: 884-98.
- Braithwaite, John, and Peter Drahos (2000), *Global Business Regulation*. Cambridge: Cambridge University Press.
- Brunsson, Nils (2000), 'Organizations, Markets and Standardization', in Nils Brunsson, Bengt Jacobsson and & Associates (eds) *A World of Standards*, Oxford: Oxford University Press, pp21-40.
- Brunsson, Nils, and Bengt Jacobsson (2000), 'The Contemporary Expansion of Standardization', in Nils Brunsson, Bengt Jacobsson and & Associates (eds) *A World of Standards*, Oxford: Oxford University Press, pp 1-17.
- Busch, Per-Olof, Helge Jörgens, and Kerstin Tews (2005), 'The Global Diffusion of Regulatory Instruments: The Making of a New International Environmental Regime', *Annals of the American Academy of Political and Social Science* **598**, 146-67.
- Canan, Penelope, and Nancy Reichman (2002), *Ozone Connections: Expert Networks in Global Environmental Governance*. Sheffield: Greenleaf.
- Cerny, Philip G (1995), 'Globalization and the Changing Logic of Collective Action', *International Organization* **49**, 595-625.
- Eberlein, Burkard, and Edgar Grande (2005), 'Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State' *Journal of European Public Policy* **12**, 89-112.
- Eisner, Marc Allen (2000), *Regulatory Politics in Transition*. 2nd ed. Baltimore: Johns Hopkins University Press.
- Follesdal, Andreas, and Simon Hix (2006), 'Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' *Journal of Common Market Studies* **44**, 533-62.
- Gunningham, Neil (2002), 'Voluntary Approaches to Environmental Protection: Lessons from Mining and Forestry Sectors, in OECD (ed) *Foreign Direct Investment and the Environment*, Paris: OECD.
- Gunningham, Neil, and Darren Sinclair (2002), *Leaders and Laggards: Next-Generation Environmental Regulation*, Sheffield: Greenleaf Publishing.
- Hallström, Kristine Tamm (2004), *Organizing International Standardization: Iso and Iasc in Quest of Authority*, Cheltenham: Edward Elgar.

- Hardwig, John (1985), 'Epistemic Dependence', *The Journal of Philosophy* **82**, 335-49.
- Harlow, Carol (2006), 'Global Administrative Law: The Quest for Principles and Values', *European Journal of International Law* **17**, 187-214.
- Haufler, Virginia (2001), *A Public Role for the Private Sector*. Washington DC: Carnegie Endowment for International Peace.
- Kerwer, Dieter (2005), 'Rules That Many Use: Standards and Global Regulation', *Governance* **18**, 611-32.
- Kingsbury, Benedict, Nico Krisch, and Richard B. Stewart (2005), 'The Emergence of Global Administrative Law', *Law & Contemporary Problems* **68**, 15-61.
- Kirton, John J., and Michael J. Trebilcock (2004), 'Introduction: Hard Choices and Soft Law in Sustainable Global Governance' In Kirton and Trebilcock (eds) *Hard Choices, Soft Law*, Aldershot: Ashgate, pp3-29. .
- Kysar, Douglas A (2004), 'Preferences for Processes', *Harvard Law Review* **118**, 525-642.
- Ladeur, Karl-Heinz (2004), 'Globalization and Public Governance - a Contradiction?' Ladeur (ed) *Public Governance in the Age of Globalization*, Aldershot: Ashgate, pp1-22.
- Lazer, David (2005) 'Regulatory Capitalism as a Networked Order: The International System as an Informational Network', *The Annals of the American Academy of Political and Social Science* **598**, 52-66.
- Lehmkuhl, Dirk (2008), 'Control Modes in the Age of Transnational Governance' *Law & Policy* **30**, 336-63.
- Lenoble, Jacques, and Marc Maesschalck (2010), 'Renewing the Theory of Public Interest: The Quest for a Reflexive and a Learning-Based Approach to Governance, in Olivier de Schutter and Jacques Lenoble (eds) *Reflexive Governance: Redefining the Public Interest in a Pluralistic World*, Oxford: Hart Publishing, pp3-22.
- Maher, Imelda (2002), 'Competition Law in the International Domain: Networks as a New Form of Governance' *Journal of Law and Society* **29**, 111-37.
- Marx, Axel (2008), 'Limits to Non-State Market Regulation: A Qualitative Comparative Analysis of the International Sports Footwear Industry and the Fair Labor Association', *Regulation and Governance* **2**, 253-73.
- Mattli, Walter, and Ngaire Woods (2009), 'In Whose Benefit? Explaining Regulatory Change in Global Politics', in Mattli and Woods (eds) *The Politics of Global Regulation*, Princeton: Princeton University Press, pp1-43.
- Meidinger, Errol (2003), 'Forest Certification as a Global Civil Society Regulatory Institution', in Errol Meidinger, Chris Elliott and Gerhard Oesten (eds) *Social and Political Dimensions of Forest Certification*, Regmagen-Oberwinter: Forstbuch, pp 265-89.
- Mitchell, Ronald B (1994), *Intentional Oil Pollution at Sea*. Cambridge, Mass: MIT Press.
- Mörth, Ulrika (2004), 'Introduction', in Mörth (ed) *Soft Law and Governance in Regulation: An Interdisciplinary Analysis*, Cheltenham: Edward Elgar pp1-10.
- O'Rourke, Dara (2006), 'Multi-Stakeholder Regulation: Privatizing or Socializing Global Labor Standards?' *World Development* **34**, 899-918.
- O'Rourke, Dara (2003), 'Outsourcing Regulation: Analyzing Non-Governmental Systems of Labor Standards and Monitoring', *Policy Studies Journal* **49**, 1-29.
- Perez, Oren (2004), *Ecological Sensitivity and Global Legal Pluralism*. Oxford: Oxford University Press.
- Picciotto, Sol (2006), 'Regulatory Networks and Global Governance' paper presented at the W. G. Hart Legal Workshop, 27-29 June 2006, London.
- Power, Michael (2003, 'Evaluating the Audit Explosion' *Law and Policy* **25**, 185-205.
- Prakash, Aseem, and Matthew Potoski (2006), *The Voluntary Environmentalists: Green Clubs, ISO 14001, and Voluntary Environmental Regulations*. Cambridge: Cambridge University Press.
- Rees, Joseph (1997), 'The Development of Communitarian Regulation in the Chemical' Industry. *Law and Policy* **19**, 477-528.

- Rees, Joseph (1994), *Hostages of Each Other: The Transformation of Nuclear Safety since Three Mile Island*. Chicago: University of Chicago Press.
- Ronit, Karsten, and Volker Schneider (1999), 'Global Governance through Private Organisations', *Governance* **12(3)**, 243-66.
- Rosenau, James N. (2000), 'Change, Complexity and Governance in Globalising Space', in Jon Pierre (ed) *Debating Governance*, Oxford: Oxford University Press.
- Sandholtz, Wayne (1998), 'The Emergence of a Supranational Telecommunications Regime' in Wayne Sandholtz and Alec Stone Sweet (eds) *European Integration and Supranational Governance*, Oxford: Oxford University Press.
- Scharpf, Fritz W (2003) 'Problem-Solving Effectiveness and Democratic Accountability in the EU', Köln: Max Planck Institute for the Study of Societies.
- Scott, Colin (2000), 'Accountability in the Regulatory State', *Journal of Law and Society* **27**, 38-60.
- Scott, Colin (2006), 'Privatization and Regulatory Regimes', in Michael Moran, Martin Rein and Robert E Goodin (ed) *Oxford Handbook of Public Policy*, Oxford: Oxford University Press.
- Skogstad, Grace (2003), 'Legitimacy and/or Policy Effectiveness?: Network Governance and GMO Regulation in the European Union' *Journal of European Public Policy* **10**, 321-38.
- Slaughter, Anne-Marie (2004), *A New World Order*. Princeton, NJ: Princeton University Press.
- Snyder, Francis (1993), 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' *Modern Law Review* **56**, 19-54.
- Tyler, Tom (2006), *Why People Obey the Law*. Princeton: Princeton University Press.
- Vandenbergh, Michael (2007), 'The New Wal-Mart Effect: The Role of Private Contracting in Global Governance', *UCLA Law Review* **54**, 913-70.
- Vogel, David (2009), 'The Private Regulation of Global Conduct', in Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation*, Princeton: Princeton University Press.