Exploring the Relationship between Administrative Norms and Competence in Transnational Governance: ISO, ISEAL and Sustainability Standards

Stepan Wood
Professor and Tier 1 York Research Chair in Environmental Law and Justice,
Osgoode Hall Law School, York University, Toronto
swood@osgoode.yorku.ca

Abstract

I argue that competence is needed to join the burgeoning activity of developing and applying the administrative norms that are designed to keep contemporary transnational governance institutions in check, but that such competence is not conferred only by states. Using the example of the asymmetric relationships among the International Organization for Standardization (ISO), the ISEAL Alliance (ISEAL) and the World Trade Organization (WTO) in the field of sustainability standards, I argue that competence is the contingent product of an ongoing process of interaction among rule-makers and a variety of relevant audiences. General administrative norms play a central but complicated role in the quest for competence. To illustrate this complexity, I investigate two apparent paradoxes: that competence is sometimes withheld from rule-makers despite their apparent conformity with transnational administrative norms, and that competence is sometimes conferred on rule-makers despite their apparent nonconformity with those norms.

1   Do You Need No Competence to Join in?[1]

My goal in this article is to offer a constructive challenge to the proposition that no competence is required to develop and apply norms of participation, transparency and due process in contemporary transnational governance institutions. The workshop at which these articles were originally presented was entitled 'You need no competence to join in'.[2] It was premised upon the observation that more and more non-state actors pronounce and apply such norms without any formal competence to do so. The workshop sought to explore the significance of this phenomenon of governance 'without competence'.[3]

In this article I question the premise that actors need no competence to articulate and apply norms for participation, transparency and due process in transnational governance—what I call 'transnational administrative norms'. I argue that actors do indeed need competence to join in this activity, but not competence in the narrow sense of a formal mandate conferred by states or intergovernmental organizations. Rather, competence to make or apply such norms is conferred by a range of audiences beyond states and interstate institutions. Competence is the continually negotiated product of a reciprocal process in which putative governors assert competence and relevant audiences respond. On this account, the articulation and application of transnational administrative norms occur in a context that is far from competence-free.

In Part 2, I present my theoretical argument. I describe the prevailing view that many non-state actors have no competence to participate in the burgeoning activity of pronouncing and applying norms of transparency, accountability and due process in transnational governance schemes because they lack a

---

2   Anne Meuwese and Phillip Paiement, 'You need no competence to join in: Alternative sources, contents and monitoring arrangements of horizontal governance norms' (Workshop program, Tilburg University, November 2014).

3   Ibid.

formal delegation of authority from a state or intergovernmental organ, and I argue that this view is based on a narrow, statist conception of competence that obscures important aspects of transnational governance (Part 2.1). In Part 2.2, I argue that a broader conception of competence, grounded in theories of legitimation, provides a better account of transnational governance. This broader approach theorizes competence as the contingent, continually negotiated result of an ongoing process of interaction among putative governors and audiences. In Part 2.3, I introduce the concept of transnational administrative norms and argue that they play an important role in the politics of competence.

In Part 3, I illustrate the interactive dynamics of competence with reference to two of the leading transnational governance actors in the field of sustainability and social responsibility, the International Organization for Standardization (ISO) and the ISEAL Alliance (ISEAL). I show how both organizations invoke transnational administrative norms to assert their own competence and to evaluate the competence of other standards-setting bodies. The administrative norms they embrace are generally similar but differ significantly in terms of the degree of openness, transparency, accountability and participation they require. I explore how the responses of relevant audiences, including the organs of the World Trade Organization (WTO), have consolidated ISO's dominant position in the world of standardization. I also examine briefly audience reactions to ISEAL's distinctive approach to sustainability standards. Finally, I consider these two global standards-setters' asymmetric interaction with each other.

The dynamics of competence are far from straightforward. After advancing my basic claim that competence is the contingent, continually negotiated outcome of an interactive legitimation process and illustrating this claim with reference to ISO and ISEAL, I explore two empirical puzzles in Part 4: why is competence sometimes withheld from rule-makers despite their apparent conformity with transnational administrative norms; and why is competence sometimes conferred on rule-makers despite their apparent nonconformity with those norms? The first puzzle applies to numerous industry-led transnational governance schemes in sectors such as apparel, forestry and food. The second puzzle seems to apply to ISO. The solution to the first puzzle emerges readily: although many industry- and civil society-led transnational governance schemes in forestry and other sectors appear to converge on the same transnational administrative norms, the convergence is often superficial and some audiences—mostly in civil society—withhold legitimacy from schemes that embrace the norms superficially. The answer to the second puzzle may be that a putative governor's accumulated social capital, combined with relevant

audiences' ingrained cognitive frames, might confer competence even in the face of evident failure to live up to widely accepted transnational administrative norms.

2   You Need Competence, but not in the Conventional Sense

2.1   *The Problem of Competence in Transnational Governance*

This collection of articles, like much legal scholarship on globalization and transnational governance, is animated by the observation that non-state actors play increasingly important roles in a public sphere that was until recently governed primarily by states or by intergovernmental organs that are ultimately accountable to states.[4] This perspective relies on a conceptualization of public and private spheres that remains remarkably powerful despite its historical specificity and its increasingly attenuated connection to reality. In this conceptualization, competence to govern in the 'public' sphere has its ultimate source in the state. This assumption is confronted by the fact that increasing numbers of non-governmental actors and institutions appear to exercise effective governance authority in more and more areas of the global public sphere.[5] The puzzle in this context is to explain how governors are proliferating in the transnational public sphere without any apparent delegation of competence from states.[6] The explanation must be that competence is superfluous: 'you need no competence to join in' the activity of promulgating and applying transnational norms.[7]

I argue, by contrast, that competence, far from being superfluous, is crucial to transnational governance but must be understood in broader terms than a formal mandate conferred unilaterally by state or interstate organs. Competence is better understood as the contingent product of interactive processes in which putative governors assert their authority to govern while regulatory targets, beneficiaries, states and other audiences endorse or deny those assertions. This broader conception of competence directs attention to aspects of transnational governance that are obscured by the narrow conception. The

---

4   Anne Meuwese and Phillip Paiement, 'Horizontal Transformations in Administrative Norms and Procedures: An Introduction' (2016) 21 *Tilburg Law Review*, 101.

5   See Stephen Clarkson and Stepan Wood, *A Perilous Imbalance: The Globalization of Canadian Law and Governance* (University of British Columbia Press 2010), 25.

6   Meuwese and Paiement (n 4), 103–104.

7   Meuwese and Paiement, 'Workshop Program' (n 2), 1. See also Meuwese and Paiement, 'Horizontal Transformations' (n 4), 104.

narrow conception gives no analytical weight to claims of competence that cannot be traced to state delegations of authority, and yet such claims are pervasive in transnational governance. Transnational governance actors do not simply govern; they assert their competence to govern. And they frequently contest or acknowledge one another's claims of competence. If such claims are of no analytical consequence, why do so many transnational governance actors devote so much time and energy to making and responding to them? The narrow statist conception of competence offers no answer. The broader conception answers that they do so because the quest for competence is inherent to governance, and attending to the dynamics of this quest can shed light on important aspects of transnational governance.

Before articulating this broader conception of competence, I should clarify that this article is concerned with competence as a jurisdictional rather than functional attribute. As a jurisdictional attribute, competence denotes an actor's authority to declare and apply norms for particular actors or activities in a particular social arena. Competence answers the question 'who decides what, for whom, and under what conditions?' Competence can also be understood functionally as an actor's capacity to perform a given task or role effectively. Kenneth Abbott and Duncan Snidal use competence in this functional sense when they propose four 'essential competencies'—independence, representativeness, expertise and operational capacity—for an institution to act effectively in the regulatory process.[8]

The relationship between jurisdictional and functional competence is complicated. On the one hand, enjoying competence in the sense of jurisdiction is no guarantee of functional competence. A state, for instance, may enjoy jurisdiction to govern yet lack effective governance capacity. On the other hand, some of the same attributes that confer functional capacity can also confer (or be evidence of) jurisdictional authority. Independence, openness, representativeness, expertise and observance of due process, for example, can confer functional effectiveness by facilitating participation by affected interests, encouraging consideration of multiple viable regulatory solutions, promoting adoption and implementation of norms and mobilizing the public to demand compliance.[9] An actor can also point to these same attributes as evidence that it has authority to do what it purports to do; in other words,

---

8   Kenneth W. Abbott and Duncan Snidal, '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 UP 2009) 44, 66.

9   Ibid, 46.

that it is or should be recognized as being appropriately engaged in its governance activities.[10]

The same attributes may therefore simultaneously confer competence in the functional and jurisdictional senses. The relationship between legitimacy and effectiveness is similarly complicated. An institution can be effective at achieving its goals without being legitimate—think of Nazi concentration camps. Conversely, the fact that an institution enjoys legitimacy does not necessarily mean that it is effective. Yet some of the same attributes that help it to acquire legitimacy can enhance its effectiveness, and the fact that it is effective at achieving its articulated goals can enhance its legitimacy. As I wrote with Stephen Clarkson:

> Effectiveness and ineffectiveness are not reliable gauges of legitimacy, although in the long run we can expect that effective authority will need to cloak itself in legitimacy in order to remain effective, and legitimate authority will need to demonstrate some effectiveness in order to remain legitimate.[11]

Further exploration of the relationship between legitimacy and effectiveness is beyond the scope of this article. The important point for present purposes is that this article focuses on competence as a jurisdictional attribute, while acknowledging the complex relationship among competence, legitimacy and effectiveness.

2.2   *The Quest for Competence and the Dynamics of Legitimation*

I now present a broader conception of competence in which the assertion of competence is an important component of the quest for legitimacy, and the quest for legitimacy is inherent to governance.[12] Nikolas Rose writes that

---

10   Ibid.

11   Clarkson and Wood (n 5) 39.

12   I join Michel Foucault and scholars of governmentality in insisting that governance always presumes and acts upon the governed subject's freedom to act. Where a subject's action is completely determined (for example, by physical violence) there is domination but no governance. While governance can encompass a substantial degree of coercion it must always, by definition, leave the governed some degree of freedom to act. Governance works by enlisting actors and resources that governors do not control directly, including governed subjects themselves. Legitimation, in turn, is necessary for successful enlistment of actors and resources. Governors are thus drawn inevitably to establish and maintain their legitimate authority in the eyes of relevant audiences. See generally Michel Foucault, *Essential Works of Foucault 1954–1984*, vol. 3: *Power*, (James Faubion ed, New Press 2000) 340–342; Nikolas Rose and Peter Miller, 'Political Power Beyond the State:

'to govern, one could say, is to be condemned to seek an authority for one's authority'.[13] This proposition is true for all governors but is more salient and controversial for non-state and transnational governors. Peer Zumbansen is not alone in pointing out that just as law itself has come loose from its moorings in a globalizing world, so have normative theories of law's legitimacy.[14] In this context, studying the social dynamics of legitimacy takes on urgency. Along these lines, Julia Black urges scholars to pay greater attention to how organizations in regulatory regimes respond to multiple legitimacy claims and how they seek to build legitimacy and 'regulatory share' in complex and dynamic situations.[15] This article seeks to do just this.

I adopt Steven Bernstein's definition of legitimacy as 'the acceptance and justification of shared rule by a community'.[16] This definition 'self-consciously combines an empirical measure of legitimacy (acceptance of a rule or institution as authoritative) and a normative argument concerning whether the authority possesses legitimacy (providing reasons that justify it)'.[17] It does so because the distinction between legitimacy as a normative proposition and as a positive fact is untenable: 'Arguments about why actors *should* accept a decision or rule as authoritative (…) necessarily include possible reasons why the decision *is* accepted, and vice-versa'.[18]

Legitimacy, on this account, is the contingent outcome of an ongoing process of legitimation that has both normative and positive dimensions.[19] In this

---

Problematics of Government' (1992) 43 British J. Sociology 173, 189; Graham Burchell, 'Peculiar Interests: Civil Society and Governing "The System of Natural Liberty"' in Graham Burchell, Colin Gordon and Peter Miller (eds.), *The Foucault Effect* (University of Chicago Press 1991) 119, 119; Stepan Wood and others, 'The interactive dynamics of transnational business governance: A challenge for transnational legal theory' (2015) 6 Transnational Legal Theory 333, 338.

13   Nikolas Rose, *Powers of Freedom* (CUP 1999) 27.

14   Peer Zumbansen, 'The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of "Context"' (2012) 13 German Law Journal 1269.

15   Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 Regulation & Governance 137; Julia Black, 'Legitimacy and the Competition for Regulatory Share' (2009) LSE Law, Society and Economy Working Paper 14/2009 <http://ssrn.com/abstract=1424654> accessed 12 August 2014.

16   Steven Bernstein, 'Legitimacy in Global Environmental Governance' (2004) 1 J Int'l L & Int'l Relations 139, 142.

17   Ibid.

18   Ibid.

19   See generally Clarkson and Wood (n 5) 31–39; Julia Black, 'Proceduralizing Regulation, Part I' (2000) 20 Oxford J Legal Studies 597; Julia Black, 'Proceduralizing Regulation, Part II' (2001) 21 Oxford J Legal Studies 33; Julia Black, 'Decentring Regulation: Understanding

process, putative governors seek to enroll other actors and their resources into desired roles.[20] Most obviously, the targets of a governance scheme must be persuaded to implement its rules. Putative governors might also seek to enroll actors to participate in rule-making, monitoring, verification, adjudication or enforcement. They might also wish to induce others who are not direct participants in the regulatory process to recognize or at least not actively dispute their authority.

As part of this legitimation process, putative governors often make normative claims of competence to make rules, monitor or enforce their observance, or adjudicate violations, as the case may be. Interested or affected audiences may accept these claims, ignore them, or respond with normative counter-arguments that seek to delegitimize the purported governor or its rules. Putative governors' authority claims must appeal to justificatory norms prevalent among relevant audiences, and governors must, for the most part, conform with those norms in practice to maintain legitimacy.[21]

Not all audiences have the same influence. Audiences that are organized, attentive, well funded and capable of threatening the putative governor's authority may have their legitimacy expectations taken more seriously and may be able to influence the definition of the relevant community from whom legitimacy is needed. Audiences that are disorganized, less attentive, dispersed, poorly resourced and in a weak position to threaten putative governors' authority are more likely to have their legitimation demands ignored or downplayed.[22] They may even find themselves left out of the definition of the legitimacy-granting community.

Audiences can confer three types of legitimacy: pragmatic, moral and cognitive.[23] These three types can be mapped onto familiar process- and

---

the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 Current Legal Problems 103.

20   Bruno Latour, *Laboratory Life: The Social Construction of Scientific Facts* (Princeton UP, 1986); Bruno Latour, 'The Powers of Association' in J. Law (ed.), *Power, Action and Belief: A New Sociology of Knowledge?* (Routledge & Kegan Paul 1986); David Szablowski, *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Hart 2007) 15.

21   Ibid Szablowski, 18–19; Bernstein (n 16) 144.

22   Ibid Szablowski, 20; Clarkson and Wood (n 5) 33.

23   Benjamin Cashore, Graeme Auld and Deanna Newsom, *Governing Through Markets: Forest Certification and the Emergence of Non-State Authority* (Yale UP 2004) 34–38; Mark Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 Academy of Management Review 571.

outcome-based conceptions of legitimacy.[24] First, an audience grants *pragmatic legitimacy* where it accepts a governor, rule or decision because the outcomes favour or are expected to favour its own self-interest.[25] In this scenario, outcome favourability is a source of legitimacy.[26] Second, *moral legitimacy* is granted when a governor, rule or decision conforms to the audience's moral values.[27] It is useful to distinguish between outcome- and process-based varieties of moral legitimacy. An audience grants outcome-based moral legitimacy when it believes that a governor, rule or decision produces outcomes that accord with its own moral values of distributive justice or substantive fairness.[28] An audience grants process-based moral legitimacy when it believes that the way a rule or decision was made (as opposed to the rule or decision itself) was right and proper.[29]

Outcome favourability and substantive fairness are often incapable, on their own, of legitimizing the regulation of 'large, heterogeneous groups and/or complex situations' because such regulation cannot favour all audiences' interests or accord with all values.[30] Shared perceptions of appropriate decision-making processes, on the other hand, can generate legitimacy even in the face of heterogeneity, complexity and disagreement over outcomes. Procedural justice therefore plays a central role in many accounts of legitimacy.[31] As we will see in Part 2.3, this includes general administrative norms of openness, accountability and due process.

Finally, an audience confers *cognitive legitimacy* when it takes a rule or governor for granted, accepting it automatically and unthinkingly due to habit, culture or identity.[32] This variety of legitimacy blurs the line between agency and social structure. Cognitive legitimacy is partly a product of the collective structures of knowledge, belief and opinion—or governmental mentalities, as

---

24   Clarkson and Wood (n 5) 36–39; Dana Brakman Reiser and Claire R. Kelly, 'Linking NGO Accountability and the Legitimacy of Global Governance' (2011) 36 Brooklyn J Int'l L 1011, 1015–1017.

25   Cashore (n 23) 34–35; Suchman (n 23).

26   Szablowski (n 20) 16–17; Tom R. Tyler and Gregory Mitchell, 'Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights' (1994) 43 Duke L.J. 703, 734.

27   Cashore (n 23) 36; Suchman (n 23).

28   Tyler and Mitchell (n 26) 735–736.

29   Ibid 736–738.

30   Szablowski (n 20) 17.

31   See Thomas M. Franck, *The Power of Legitimacy Among Nations* (OUP 1990).

32   Cashore (n 23) 37; Suchman (n 23) 583.

Foucault called them—in which actors are immersed.[33] Whatever label is used to describe them, these psycho-social structures condition what it is possible to think and hence how it is possible to act. They quickly become taken for granted and practically unthinkable.[34] For this reason, cognitive legitimacy is likely to be more durable and resilient than moral or pragmatic legitimacy.[35]

In short, the quest for competence can be analyzed as a component of an interactive process of legitimation in which putative governors assert their authority to govern while audiences such as regulatory targets, interested stakeholders and other governors endorse or deny those assertions. In these circumstances competence is often shared, interdependent and conditioned by relationships among different authorities, as Nicole Roughan argues.[36] Putative governors 'might, depending on context, need to cooperate, coordinate, or tolerate one another if they are to have legitimacy', or the conditions for legitimation might require them to conflict with one another.[37] Finally, competence in this account does not refer only to binding authority that commands obedience, it includes the softer forms of persuasive or influential authority that are prevalent in contemporary governance.[38]

Having introduced my broader, interactive conception of competence, I now consider how general norms of participation, transparency and due process fit into the quest for competence in transnational governance.

2.3   *Transnational Administrative Norms*

I join the organizers of this special issue in distinguishing between *vertical* and *horizontal* governance norms and focusing on the latter.[39] Vertical norms are

---

33   Stepan Wood, 'Three Questions about Corporate Codes: Problematizations, Authorizations and the Public/Private Divide', in Wes Cragg (ed.), *Ethics Codes, Corporations and the Challenge of Globalization* (Edward Elgar 2005); Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds.), *The Foucault Effect* (U Chicago Press 1991) 87.

34   Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (Sage 1999) 16; Frank Fischer and Maarten A. Hajer (eds.), *Living with Nature: Environmental Politics as Cultural Discourse* (OUP 1999).

35   Suchman (n 23) 583.

36   Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (OUP 2013) 6–8.

37   Ibid, 8, 10.

38   See Patrick Glenn, 'Persuasive Authority' (1987) 32 McGill Law Journal 261; Mayo Moran, 'Influential Authority and the Estoppel-Like Effect of International Law' in Hilary Charlesworth and others (eds.), *The Fluid State: International Law and National Legal Systems* (Federation Press 2005) 156.

39   Meuwese and Paiement (n 4).

promulgated by transnational governance schemes to govern the behaviour of their ultimate regulatory targets. Examples include standards for supply chain labour practices, sustainable forestry and organic agriculture. Horizontal norms, by comparison, govern the constitution and operation of transnational governance schemes themselves. They include norms about transparency, accountability, public participation and due process—norms typically associated with administrative law. They also include norms about the structure and composition of governance organs, fundamental rights of constituents, division of powers among governance organs, supremacy of certain rules over others, and review of some governance organs' actions by others—norms typically associated with constitutional law. These norms are horizontal in that they apply generically across governance schemes, issues, sectors or regions. In this article I use the shorthand 'transnational administrative norms' to describe these administrative and quasi-constitutional norms.

Two questions arise about the relationship between transnational administrative norms and competence. The first is: Who has the competence to promulgate these norms and evaluate governance schemes' conformity with them, and what is the source of this competence? Second: To what extent does conformity with transnational administrative norms affect a transnational governance scheme's competence as maker of vertical rules? I argue that claims of conformity with transnational administrative norms play an important part in establishing the competence to pronounce and apply both horizontal and vertical governance norms.

My starting point for answering the first question is the proposition (presented in the previous section) that states are not the exclusive sources of competence to develop and apply transnational administrative norms. This proposition should not come as a shock. The administrative and constitutional law norms that apply to modern constitutional democracies have always been articulated, and conformity with them evaluated, not just by formal state organs (most prominently, national courts performing judicial review) but also by intellectuals, activists and other non-state actors, from Locke and Rousseau to Transparency International. Competence to develop and apply administrative norms has long been shared by state and non-state actors and institutions. The fact that actors are now developing such norms for transnational governance institutions without any apparent delegation of competence from states should not seem exceptional in this light.

If competence to pronounce and apply transnational administrative norms need not be conferred by states, how is it acquired? I argue that an organization's perceived conformity with transnational administrative norms in its own activities plays an important role in establishing its competence to pronounce and apply transnational administrative norms for other organizations.

The more an organization can demonstrate that it adheres to norms of transparency, accountability, participation and due process itself, the more credibility it will have in applying such norms to others.[40] This is one reason why numerous major international nongovernmental organizations adopted the INGO Accountability Charter in 2006,[41] and why self-regulatory governance codes have sprung up among other transnational non-state and hybrid watchdogs and meta-regulators.[42]

Turning to the second question, I argue that transnational administrative norms also play an important role in establishing and contesting competence to pronounce and apply vertical governance norms in the transnational sphere. A long line of literature demonstrates that the legitimacy of global regulators can depend on the extent to which they approximate deliberative models of democracy, which emphasize representativeness, accountability, transparency, consensus-seeking and due process.[43] In their introduction to this special issue, Anne Meuwese and Phillip Paiement survey the proliferation of non-state and hybrid bodies that pronounce transnational administrative norms, evaluate compliance with them and seek to influence their development and interpretation.[44] The burgeoning literatures on global administrative law[45] and global constitutionalism[46] similarly document the global spread of certain norms associated with constitutional democracy and the administrative state.

---

40   For a detailed discussion of this point see Reiser and Kelly (n 24).

41   INGO Accountability Charter, <http://www.ingoaccountabilitycharter.org/> accessed June 22 2016. See also Jem Bendell, Debating NGO Accountability, UN Doc UNCTAD/NGLS/2006/1 (UN Non-Governmental Liaison 2006); Lisa Jordan and Peter van Tuijl (eds.), *NGO Accountability: Politics, Principles and Innovations* (Earthscan 2006).

42   E.g. Jacco Bomhoff and Anne Meuwese, 'The Meta-regulation of Transnational Private Regulation' (2011) 38 Journal of Law and Society 138.

43   E.g. David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford UP 1995); Thomas Risse, '"Let's Argue!": Communicative Action in World Politics' (2000) 54 Int'l Org 1.

44   Meuwese and Paiement (n 4).

45   Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15; Sabino Cassese, 'Global Administrative Law: The State of the Art' (2015) 13 Int'l J Const L 465.

46   Joseph H.H. Weiler and Marlene Wind (eds.), *European Constitutionalism beyond the State* (CUP 2003); Jeffrey L. Dunoff and Joel P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009); Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010); Christine E.J. Schwöbel, 'Situating the debate on global constitutionalism' (2010) 8 Int'l J Const L 611; Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law' (2013) 20 Indiana J Global Legal Stud 605.

David Szablowski makes explicit what these various bodies of literature recognize implicitly: all legitimation strategies 'seek to justify the exercise of power by claiming to set certain constraints upon its exercise'.[47] To be successful in the long run, legitimation processes must have some demonstrated effectiveness at curbing the putative governor's power.[48] In the face of the complex problems, conflicting interests and heterogeneous values that typify contemporary transnational governance, general administrative norms are among the most common candidates for supplying such constraints. As Szablowski writes, 'the key to supporting decision-making authority in these circumstances depends upon the development and dissemination of ideas regarding "*right process*".[49] The existing literature pays little attention, however, to the socio-legal process by which such administrative norms are actually deployed to construct or contest the competence of transnational governance schemes, a process I address in the remainder of this article.

3   Transnational Administrative Norms and Competence: The Case of ISO and ISEAL

To illustrate and substantiate my claim that general administrative norms play an important role in supporting or contesting transnational governance schemes' claims of competence, I present two examples related to voluntary environmental and social standards, the field with which I am most familiar. The first example is the International Organization for Standardization (ISO), a non-governmental federation of more than 160 national standards bodies (NSBS).[50] The second is the ISEAL Alliance (ISEAL), a non-governmental association of more than 20 multi-stakeholder sustainability standards systems and accreditation bodies.[51] ISO and ISEAL operate in the same policy space but have different constituencies and make different claims to competence. Yet both of them invoke transnational administrative norms to support their own competence and to evaluate the competence of other governance schemes.

---

47   Szablowski (n 20) 18.

48   Ibid 19.

49   Ibid 17.

50   International Organization for Standardization (ISO), 'About ISO', <http://www.iso.org/iso/home/about.htm> accessed 28 March 2016.

51   ISEAL Alliance, 'About Us', <http://www.isealalliance.org/about-us> accessed 16 April 2016.

3.1   *The International Organization for Standardization (ISO)*

ISO, established immediately after World War II, is the world's leading developer of voluntary technical standards for industry.[52] In the last two decades it has become a major developer of environmental and social standards.[53] Many ISO standards either explicitly address or have substantial impacts on public policy concerns such as consumer protection, trade liberalization, technology transfer, worker safety, environmental protection and social responsibility. ISO invokes transnational administrative norms to establish its own competence to promulgate such norms, to evaluate the competence of other standards-setting bodies, to promote its preferred model of standardization around the world and to consolidate its dominant position in the domain of standardization. Some audiences accept ISO's competence claims, others do not.

To support its own competence, ISO points to its compliance with transnational administrative norms. It claims to adhere to four key principles:

1.   **ISO standards respond to a need in the market**
     ISO does not decide when to develop a new standard, but responds to a request from industry or other stakeholders such as consumer groups (…).
2.   **ISO standards are based on global expert opinion**
     ISO standards are developed by groups of experts from all over the world, that are part of larger groups called technical committees (…).
3.   **ISO standards are developed through a multi-stakeholder process**
     The technical committees are made up of experts from the relevant industry, but also from consumer associations, academia, NGOs and government (…).

---

52   For an excellent general introduction to ISO, see Craig Murphy and JoAnne Yates, *The International Organization for Standardization (ISO): Governance through Voluntary Consensus* (Routledge 2009).

53   Examples include the ISO 14000 series of environmental management standards (comprising more than two dozen standards), the ISO 15392 and ISO 21929 standards for sustainability in building construction, the ISO 19600 guide to compliance management systems, the ISO 20121 sustainable event management system standard, the ISO 22000 series of food safety management standards, the ISO 26000 social responsibility guide, the ISO 37001 anti-bribery management system standard, the ISO 50001 energy management system standard, and the forthcoming ISO 37101 (sustainable community development management systems) and ISO 45001 (occupational health and safety management systems). See ISO, 'Standards', <http://www.iso.org/iso/home/standards.htm> accessed 3 April 2016.

4.   **ISO standards are based on a consensus**
      Developing ISO standards is a consensus-based approach and comments
      from all stakeholders are taken into account.[54]

Each of these principles evokes an administrative norm that should be familiar
to students of public law and administration. Principle 1 reflects the idea of ac-
countability to a constituency, albeit in a weak form. In ISO's case this constitu-
ent power resides in the market and especially in the business community, not
in a fully-fledged demos.[55] Principle 2 represents a norm of expert decision-
making that is common to many administrative agencies and international
organizations[56] and has long been implicated in the tension between admin-
istrative efficiency and democratic legitimacy.[57] Principle 3 reflects the model
of interest representation in American and, by extension, global administra-
tive law.[58] It explicitly invokes the concept of multi-stakeholder governance,
which has emerged as an influential administrative norm for transnational
rule-setters, especially in the sustainability policy space.[59]

---

54   ISO, 'How does ISO develop standards?' <http://www.iso.org/iso/home/standards_devel-
      opment.htm> accessed 24 March 2016.

55   ISO also grounds its claim to competence in its 162 national member bodies, each with
      roots in the private or public sector of a particular country. ISO, 'ISO members,' <http://
      www.iso.org/iso/home/about/iso_members.htm> accessed 24 March 2016. Kernaghan
      Webb argues that ISO is the pinnacle of a deep and broad standardization infrastructure
      spanning subnational, national and transnational communities. See Kernaghan Webb,
      'ISO 26000 social responsibility standard as 'proto law' and a new form of global custom:
      Positioning ISO 26000 in the emerging transnational regulatory governance rule instru-
      ment architecture' (2015) 6 Transnat'l Legal Theory 466, 473.

56   This principle is identified by some scholars as the main source of ISO's legitimacy. See
      Thomas A. Loya and John Boli, 'Standardization in the World Polity: Technical Rationality
      over Power' in John Boli and George M. Thomas (eds.), *Constructing World Culture: Inter-
      national Nongovernmental Organizations Since 1875* (Stanford University Press 1999) 168,
      180–181; Kristina Tamm Hallström, *Organizing International Standardization: ISO and the
      IASC in Quest of Authority* (Edward Elgar 2004) 16.

57   Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart 2007). In ISO
      and other technical standardization bodies, the tension is not so much between technical
      expertise and democratic legitimacy as it is between technical expertise and responsive-
      ness to market demands. Murphy and Yates (n 52) 14.

58   Mario Savino, 'What if Global Administrative law Is a Normative Project?' (2015) 13 Int'l J
      Const L 492.

59   Minu Hemmati, *Multi-Stakeholder Processes for Governance and Sustainability: Beyond
      Deadlock and Conflict* (Earthscan 2002); Nancy Vallejo and Pierre Hauselmann, *Governance

Finally, Principle 4's norm of consensus has been a core principle of voluntary standardization for a century.[60] It means that representatives of all interested and affected parties, including business, consumers, civil society, governments and developing countries, participate effectively in standards development. ISO defines consensus as:

> General agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments.[61]

ISO emphasizes that consensus 'is an essential procedural principle and a necessary condition for the preparation of International Standards that will be accepted and widely used'.[62]

These brief excerpts are sufficient to indicate the types of administrative norms ISO invokes to substantiate its own claim of rulemaking competence. Its invocation of the norm of market responsiveness can be understood as an effort to secure pragmatic legitimacy from a core constituency of global business.[63] The norms of expertise, multi-stakeholder decision-making and consensus can be understood as efforts to secure process-based moral legitimacy from a wider range of audiences. The norm of expert decision-making can, however, be in tension with norms of multi-stakeholder participation and consensus; and all three norms can be in tension with the norm of serving the needs of global business. ISO's multi-pronged legitimation claims exploit these tensions in an effort to accommodate the differing legitimation demands of heterogeneous audiences.

A more detailed statement of the administrative norms that ISO applies to itself is found in ISO/IEC Guide 59, ISO's Code of Good Practice for

---

and Multi-Stakeholder Processes (International Institute for Sustainable Development 2004).

60   Murphy and Yates (n 52).

61   ISO and IEC, *ISO/IEC Guide 2:2004, Standardization and Related Activities: General Vocabulary* (8th edn, ISO/IEC 2004), clause 1.7.

62   ISO, *ISO/IEC Directives, Part 1: Consolidated ISO Supplement—Procedures Specific to ISO*, 6th ed (ISO, 2015), ix. Clause 2.5.6 of this procedural rule book provides guidance on what consensus entails within ISO.

63   For a discussion of ISO's constituencies see Stepan Wood, 'The International Organization for Standardization' in Darryl Reed, Peter Utting and Ananya Mukherjee-Reed (eds.), *Business Regulation and Non-State Actors: Whose Standards? Whose Development?* (Routledge 2012) 81.

Standardization (Guide 59).[64] Importantly, ISO does not invoke these norms only to support its own competence, it also applies them to other standardization bodies, including ISO members (i.e., NSBS).[65] According to Guide 59, standards development procedures should be accessible to all materially and directly interested parties and ensure balanced representation of interest categories.[66] Standardization bodies should notify interested parties of proposed, ongoing and completed standards, give them an opportunity to contribute to their development, invite their comments on drafts, and consider all comments received.[67] Standardization bodies should coordinate to avoid conflict or overlap.[68] Standards should be developed on the basis of consensus; indeed consensus is a foundational administrative norm that ISO applies not just to its own activities but to all standardization.[69] Finally, standards development procedures and draft standards should be available to the public on request, while final standards should be published promptly and made available at a reasonable price.[70]

These administrative norms, and ISO's competence to declare and apply them, have been recognized by powerful global actors. Indeed recognition is a central element of ISO's own definition of a standard. ISO/IEC Guide 2, a global reference guide to basic standardization terms and concepts, defines a standard as a 'document established by consensus and approved by a recognized body'.[71] Standards may be developed by any organization that has 'recognized activities in standardization'.[72] A 'standards body', in turn, is a body that is recognized at a national, regional or international level and has as its principal function the development of publicly available standards.[73] The centrality of recognition to the ISO/IEC model supports my argument in Part 2 that competence is the outcome of interactions between putative governors and relevant audiences rather than something asserted or conferred unilaterally.

---

64   ISO and IEC, *ISO/IEC Guide 59:1994, Code of Good Practice for Standardization* (ISO/IEC 1994).
65   Guide 59 is 'intended for use by any standardizing body, whether governmental or non-governmental, at international, regional, national or sub-national level'. Ibid, clause 3.1.
66   Ibid, clauses 6.1 and 6.5.
67   Ibid, clause 4.
68   Ibid, clause 7.
69   Ibid, clauses 4.1 and 4.5.
70   Ibid, clause 4. It is worth noting that Guide 59 and the vast majority of ISO standards are available only for purchase, at prices often well over 100 Euros each.
71   ISO/IEC Guide 2 (n 61), clause 3.2.
72   Ibid, clause 4.3.
73   Ibid, clause 4.4.

Guide 2 does not specify how recognition is granted, on what basis, or by whom, but ISO's competence as a setter of both vertical and horizontal norms has been recognized by powerful audiences. Until the 1990s, recognition was not an issue because the three giants of 20th century voluntary standardization—ISO, the International Electrotechnical Commission (IEC) and the International Telecommunication Union (ITU)—had few contenders. They could claim credibly to be apex organizations coordinating the global voluntary standardization system.[74] They had close links with governments, the UN and the international trade law system. They embodied a 'one country, one member' model that mirrored the Westphalian structure of the international system, complete with unified national delegations. Things changed in the 1990s when standards-setting organizations began to proliferate that did not fit this mould, from self-regulatory industry consortia to broad, civil society-driven multi-stakeholder schemes. Many of these bodies structure their membership around stakeholder categories or economic sectors rather than countries. Some exclude governments from membership altogether. The standards produced by these bodies are used widely, often in preference to standards developed by conventional standards bodies like ISO and its members.[75]

With this proliferation of unconventional standards bodies came competing claims to standards-setting competence and increasing pressure to clarify which international bodies have competence to promulgate standards on what topics. Additional pressure came from proponents of economic integration, who sought to harmonize technical standards across jurisdictions so as to lower trade barriers. These pressures reinforced a pre-existing alliance between the established international standards bodies and the system of international trade liberalization. Guide 2 was originally drafted in 1976 by the United Nations Economic Commission for Europe (UNECE) to help advance its mission of pan-European economic integration.[76] It was amended in 1991 partly at the request of the General Agreement on Tariffs and Trade.[77]

The 1994 WTO Agreements heralded a renewed 'strategic partnership' between ISO, IEC, ITU and the World Trade System.[78] The Agreements give

---

74   ISO/IEC Guide 59 (n 64) clause 1.2.

75   Stephen P. Oksala, 'National Versus International Standards: Products and Processes', in Steven M. Spivak and F. Cecil Brenner (eds.), *Standardization Essentials: Principles and Practice* (Marcel Dekker, 2001) 91, 97.

76   ISO/IEC Guide 2 (n 61) vii.

77   Ibid.

78   ISO/IEC Information Centre, 'WTO, ISO, IEC and World Trade', <http://www.standardsinfo.net/info/inttrade.html> accessed 3 April 2016.

special status to international standards developed by these three giants and other 'recognized' international standards bodies. They also give ISO and IEC a key role in promoting and monitoring the implementation of their preferred model of standardization. The TBT Agreement presumes that technical regulations based on relevant international standards do not create unnecessary trade barriers.[79] It also requires member states to base their technical regulations on international standards, where they exist; to ensure that central government standards bodies comply with a Code of Good Practice for the Preparation, Adoption and Application of Standards (TBT Standards Code); and to take reasonable steps to ensure that other standards bodies do the same.[80]

The TBT Standards Code is modelled after ISO/IEC Guide 59 and contains many of the same administrative norms. It requires signatory standards bodies to, among other things, develop standards by consensus; publish their work programs; invite public comments on draft standards; and take all comments received into account.[81] The Standards Code applies only to domestic and regional standards bodies. It does not lay down rules for international standards bodies. The TBT Agreement's definition of 'standard' adopts Guide 2's reference to 'recognized body', though it departs slightly from the ISO definition in other respects.[82]

By tying international standards to trade disciplines, the TBT Agreement raises the stakes of recognition. Standards that qualify as 'relevant international standards' for the purpose of the TBT Agreement can shape government policy and international markets around themselves. For this reason, many transnational governance schemes desire to have their norms recognized as such.

The TBT Committee and the WTO Dispute Settlement Body play important roles in the politics of recognition of international standards bodies. In 2000,

---

79   Agreement on Technical Barriers to Trade, TBT Agreement (15 April 1994), article 2.5.<https://www.wto.org/english/docs_e/legal_e/legal_e.htm> accessed 25 June 2016.

80   Ibid, Articles 2.4–2.6, 4.1. Articles 5 and 6 contain analogous requirements for conformity assessment.

81   Ibid, Annex 3, Code of Good Practice for the Preparation, Adoption and Application of Standards (TBT Standards Code).

82   The key differences are, first, an international standard need not be developed by consensus to qualify as a 'relevant international standard' for the purposes of the TBT Agreement; second, the TBT Agreement only covers voluntary standards whereas Guide 2 also includes legally mandatory standards; and third, the TBT Agreement only covers standards for products or for processes and production methods whereas Guide 2 also covers standards for services and management systems. TBT Agreement (n 79) Annex 1, Terms and their Definitions for the Purpose of this Agreement, Article 2.

the TBT Committee adopted six principles for the development of international standards.[83] Five of the six principles embody administrative norms similar to those endorsed by ISO.[84] The principle of *transparency* requires that all essential information about proposed, current and final standards be easily accessible to all interested parties in the territories of all WTO members, that interested parties have opportunities to comment on draft standards and that these comments be taken into account.[85]

The principle of *openness* requires that participation in all stages of standards development be open to relevant bodies from all WTO member states.[86] In the case of intergovernmental standards bodies, the Appellate Body has held that membership must be open to all WTO members more or less automatically.[87] In the case of non-governmental standards bodies, the TBT Agreement and relevant ISO rules indicate that to be an international standard, a document must be approved by a body that has a quasi-Westphalian, one-country-one-member structure.[88] The principle of *impartiality and consensus* requires that the standards development process 'seek to take into account the views of all parties concerned and to reconcile any conflicting arguments'.[89] In this respect the Six Principles are in tension with the TBT Agreement, which does not require that standards adopted by a recognized body be approved by consensus.[90] The Appellate Body has emphasized that the international

---

83   Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement, in Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade since January 1, 1995, G/TBT/1/Rev.12 (January 21, 2015), 47 (the Six Principles).

84   The only one that does not clearly embody an administrative or constitutional norm is Principle 4, effectiveness and relevance, which relates to the content of standards rather than standardization structures or processes. Ibid, Principle 4.

85   Ibid, Principle 1.

86   Ibid, Principle 2.

87   United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R (16 May 2012) para 398 (US—Tuna II).

88   TBT Agreement (n 79) Annex 1, Article 4; US—Tuna II (n 87) para 359; ISO/IEC Guide 2 (n 61) clauses 1.6, 3.2.1, 4.3, 4.4; ISO/IEC Guide 59 (n 64) clauses 1.2, 1.3, 6.3. For an argument that transnational standards bodies with non-Westphalian membership structures can qualify under WTO rules, see Carola Glinski, 'Competing Transnational Regimes under WTO Law' (2014) 30 Utrecht J Int'l & Eur L 44.

89   Six Principles (n 83) Principle 3.

90   TBT Agreement (n 79), Annex 1, Article 2, Explanatory note. See also European Communities—Trade Description of Sardines, WT/DS/231/AB/R (26 Sept 2002) (EC—Sardines), para 227.

standardization community is nevertheless free to adopt a norm of consensus for itself,[91] and this is the approach taken by the Six Principles. The principle of *coherence* states that international standards bodies should cooperate to avoid duplication and overlap.[92] Finally, the *development dimension* requires international standards bodies to promote effective participation by developing countries.[93]

The WTO Appellate Body has held that an international body's observance of the Six Principles is evidence that it has 'recognized activities in standardization'.[94] It is not clear that strict observance of the Principles is required for recognition, however. The principle of openness needs to be weighed against standards bodies' interests in working quickly, financing their operations (e.g. via membership fees) and ensuring members are adequately qualified (e.g. via membership criteria and categories).[95] The principle of effective participation also needs to be sensitive to the reality of resource constraints. Actors may need to focus their resources on the international standards bodies that are most relevant to them. Resource-constrained actors like developing countries may wish to explore alternatives like regional representation.[96] In any event, the Appellate Body has held that other evidence is also relevant for recognition, including participation by WTO members or their NSBs in the body's activities and acknowledgement by WTO members or their NSBs of the validity of the resulting standards, for example via national adoption or regulatory incorporation.[97]

The influence of the TBT Committee and the Appellate Body extends well beyond the WTO. The main effect of this influence is to confer moral legitimacy on ISO, IEC and ITU and thereby reinforce their dominant positions in the wider standardization community by promoting a set of transnational administrative norms that favours their preferred paradigm of standardization.

Not all audiences accept ISO's claims of competence. Much of the criticism levelled at ISO since it began to move into social and environmental standard-setting in the early 1990s has been expressed in terms of its failure to live up to the very transnational administrative norms it invokes to support its own

---

91   Sardines, ibid.

92   Six Principles (n 83) Principle 5.

93   Ibid, Principle 6.

94   US-Tuna II (n 87) para 392.

95   Erik Wijkström and Devin McDaniels, 'Improving Regulatory Governance: International Standards and the WTO TBT Agreement' (2013) 47 J World Trade 1013, 1039-41.

96   Ibid.

97   US-Tuna II (n 47) paras 390, 392.

competence. A lawyer with the International Labour Office argues, for example, that 'ISO policies and procedures need re-evaluation (…) to ensure that [ISO's] standards meet the TBT Committee's threshold international principles of transparency, openness (meaningful participation), impartiality and consensus, effectiveness and relevance, and coherence'.[98] Critics complain that ISO's proceedings are secretive and dominated by developed countries and business, especially multinationals and consulting firms, while developing countries, environmental interests, labour, civil society, consumers and small business are marginalized. They claim that ISO standards therefore do not reflect a genuine consensus of all affected interests. They also lament the fact that ISO standards are not available to the public free of charge.[99]

The development of the ISO 26000 social responsibility guide ('ISO 26000')[100] is sometimes held up as evidence of ISO's progress on these points. The ISO Working Group on Social Responsibility (WGSR) had 'twinned' leaders from developed and developing countries. Participants were divided into six stakeholder categories whose members were encouraged to caucus transnationally. NSBs were encouraged to ensure balance across all stakeholder categories in their national deliberations and delegations. All working documents were available freely on the Internet. The WGSR operated in a relatively inclusive and consensus-seeking manner and at its height convened 450 individuals from 99 countries and 42 international organizations.[101] That said, there were few organized labour representatives and no major human rights groups. Some consumer and NGO spots were filled by consultants or NSB employees, many governments felt that their interests were inadequately respected and ISO explicitly refused to make ISO 26000 available free of charge in developing countries.

---

98   Janelle Diller, 'Private Standardization in Public International Lawmaking' (2012) 33 Michigan J Int'l L 481, 523.

99   See Naomi Roht-Arriaza, 'Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment' (1995) 22 Ecology L.Q. 479; Christopher Sheldon (ed.), *ISO 14001 and Beyond: Environmental Management Systems in the Real World* (Greenleaf 1997); Jennifer Clapp, 'The Privatization of Global Environmental Governance' (1998) 4 Global Governance 295; Riva Krut and Harris Gleckman, *ISO 14001: A Missed Opportunity for Sustainable Global Industrial Development* (Earthscan 1998); Jason Morrison and others, *Managing a Better Environment: Opportunities and Obstacles for ISO 14001 in Public Policy and Commerce* (Pacific Institute 2000); Halina Ward, 'The ISO 26000 International Guidance Standard on Social Responsibility: Implications for Public Policy and Transnational Democracy' (2011) 12 Theoretical Inquiries in Law 665.

100   ISO, *ISO 26000:2010, Guidance on Social Responsibility* (ISO 2010) ('ISO 26000').

101   Ward (n 99).

Whatever its merits,[102] the WGSR example has not been followed in subsequent ISO work, except for the practice of twinning developed and developing country leaders. Feeling pushback from NSBs, ISO decided not to change its established procedures and concluded that multi-stakeholder participation should be organized not at ISO but within NSBs:

> There, all stakeholders-ranging from major enterprises, SMEs, public authorities, research organizations to societal groups–can discuss their special interests and needs in their native language. Proper representation of various interests ensures the acceptance and democratic legitimacy of national positions. This diversity of thought can then be extended to the international level via the selection of NSB delegates and experts to ISO activities and in the consensus positions and comments advanced by NSBs.[103]

To implement this approach, ISO issued a guidance document for engaging stakeholders and building consensus within NSBs.[104]

In short, ISO's experimentation with more open, participatory standards development processes was short-lived. Indeed, ISO's explicit embrace of a multi-stakeholder approach as a core principle of standards development and its promotion of due process, transparency, openness, impartiality and consensus can be understood largely as an effort to bolster ISO's process-based moral legitimacy in the face of the proliferation of alternative standards systems that seek deliberately to be more open, transparent and multi-stakeholder than ISO.

Just as ISO is one of the leading exponents of the conventional paradigm of international standardization, ISEAL is one of the leading exponents of this alternative paradigm.

3.2   *The ISEAL Alliance*

Like ISO, ISEAL invokes transnational administrative norms to assert its competence and to evaluate the competence of other standards bodies. ISEAL is much smaller and newer than ISO: it was established in 2002, whereas ISO started operating in 1947. ISEAL has 21 members, one technical committee

---

102   Ibid; Diller (n 98); Webb (n 55).

103   ISO Technical Management Board, Process Evaluation Group, *Report and Recommendations to the ISO/TMB on Alternative Models of Standards Development Operations and Participation in ISO* (June 2011) 5.

104   ISO, *Guidance for ISO National Standards Bodies: Engaging Stakeholders and Building Consensus* (ISO 2010).

and three Codes of Good Practice.[105] ISO has more than 160 members, more than 3,500 technical bodies, and more than 20,000 published standards.[106] Unlike ISO, ISEAL focuses exclusively on sustainability standards. Its members include some of the best known multi-stakeholder sustainability certification schemes, including the Forest Stewardship Council, the Marine Stewardship Council and Fairtrade International.[107]

ISEAL is founded on the proposition that sustainability standards require a different approach than other standards. In a 2004 open letter to ISO about ISO's plan to develop ISO 26000, ISEAL insisted that 'social and environmental standards differ in a number of significant ways' from other types of standards, not least of which 'is that a broad range of stakeholders have an interest in the outcomes of these standards and must be adequately consulted during the standard-setting process'.[108] Moreover, because these standards-setters are concerned first and foremost with delivering positive social and environmental impacts, they must take credible steps to monitor and demonstrate their impacts and to improve their standards accordingly.[109]

ISEAL promulgates norms for sustainability standards via three Codes of Good Practice and ten Credibility Principles. The ISEAL Standard-Setting Code,[110] Assurance Code,[111] and Impacts Code[112] address three elements of a standards system, respectively: developing standards, assessing conformity with them, and demonstrating their impacts. The Standard-Setting and Assurance Codes build upon the widely accepted but—according to ISEAL—necessarily generic norms contained in ISO and WTO instruments, by including additional requirements that are relevant to social and environmental

---

105   ISEAL Alliance <http://www.isealalliance.org/> accessed 17 April 2016.

106   ISO, 'ISO in Figures' <http://www.iso.org/iso/home/about/iso-in-figures.htm> accessed 16 April 2016.

107   ISEAL Alliance, 'Full Members' <http://www.isealalliance.org/our-members/full-mem bers> accessed 18 April 2016.

108   Letter from Patrick Mallet, ISEAL Executive Director to Members of the ISO Technical Management Board and the ISO Central Secretariat (June 10, 2004) (copy on file with author).

109   ISEAL Alliance, 'Improving Impacts', <http://www.isealalliance.org/our-work/improving -impacts> accessed 17 April 2016.

110   ISEAL Alliance, *Setting Social and Environmental Standards: ISEAL Code of Good Practice*, Version 6.0 (ISEAL Alliance 2014) (ISEAL Standard-Setting code).

111   ISEAL Alliance, *Assuring Compliance with Social and Environmental Standards: Code of Good Practice*, Version 1.0 (ISEAL Alliance 2012) (ISEAL Assurance Code).

112   ISEAL Alliance, *Assessing the Impacts of Social and Environmental Standards Systems: ISEAL Code of Good Practice*, Version 2.0 (ISEAL Alliance 2014) (ISEAL Impacts Code).

standards.[113] The ISEAL Credibility Principles, published in 2013, provide a general underpinning for all three Codes and a high-level overview of what makes for a credible and effective sustainability standards system.[114]

ISEAL's Codes and Credibility Principles require significantly more openness, engagement, transparency and accountability than do the ISO and WTO norms described earlier. First, ISEAL's norms require all standards bodies to be open to all stakeholders, achieve balanced representation of stakeholder categories and afford all stakeholders meaningful and effective opportunities to participate in all stages of standards development.[115] ISO's Guide 59 contains broadly similar norms but defines stakeholders more narrowly.[116] Moreover, as we have seen, when push comes to shove ISO defers multi-stakeholder participation to the national level. Similarly, WTO norms only require international standards bodies to be open to relevant national bodies, which in turn are expected to engage relevant stakeholders and funnel their input via a single delegation.[117]

A second difference concerns proactive stakeholder engagement. ISEAL expects standards bodies to identify under-represented stakeholder groups, seek out their contributions and address their constraints.[118] It calls on standards bodies to make special efforts to enhance participation by all under-represented or disadvantaged stakeholders, to provide funding if needed to ensure balanced representation, and to facilitate capacity building and uptake among potential users.[119] Guide 59 has no such proactive requirements. The TBT Committee's expectations for proactive engagement are weakly worded and relate only to developing countries.[120]

Third, the ISEAL norms are more demanding in terms of transparency and accountability. They require standards bodies to define and communicate clearly the goals of proposed standards and assess the risks in implementing

---

113   ISEAL Alliance, 'Our Credibility' <http://www.isealalliance.org/about-us/our-credibility> accessed 17 April 2016).

114   ISEAL Alliance, *Principles for Credible and Effective Sustainability Standards Systems: ISEAL Credibility Principles* (ISEAL Alliance 2013) (ISEAL Credibility Principles).

115   ISEAL Credibility Principles (n 114) Principle 5, Engagement; ISEAL Standard-Setting Code (n 110) clause 5.6.

116   Compare Guide 59 (n 64) clause 6.1 ('materially and directly interested parties') with ISEAL Standard-Setting Code (n 110) clauses 3 and 5.6 (all individuals or groups that have an interest in any decision or activity of the organization).

117   Six Principles (n 83) Principle 2, Openness; Principle 3, Impartiality and Consensus.

118   ISEAL Standard-Setting Code (n 110) clause 5.4.4.

119   ISEAL Credibility Principles (n 114) Principles 5, Engagement and 8, Accessibility.

120   Six Principles (n 83) Principle 6, Development Dimension.

standards and how to mitigate them.[121] Standards bodies must monitor, evaluate, improve and publicly report their impacts.[122] They must make draft and final standards available to the public for free, along with a synopsis of how stakeholder input was addressed.[123] They must publicize the names and status of certified entities and entities whose certification has been withdrawn or suspended.[124] Finally, all communications must be clear, accessible, verifiable and truthful.[125] Guide 59, the TBT Standards Code and the Six Principles do not require standards bodies to define or communicate goals of standards, assess or mitigate risks, evaluate or report impacts, disclose how comments were considered, disclose certification status, or ensure clarity and accuracy of communication.[126] ISO and WTO rules permit standards bodies to charge for their standards.[127] Indeed, charging stakeholders for access to the rules that affect them is a basic feature of the entire standardization system over which ISO presides.

Fourth, ISO and WTO norms of impartiality relate primarily to trade and competition and preclude standards and standards developers from favouring the interests of particular products, firms, states or regions.[128] The ISEAL principles go further, requiring standards bodies to take proactive measures to identify, prevent, manage and mitigate potential conflicts of interest in all elements of a standards system.[129] There is one point, however, on which the ISEAL Credibility Principles could be seen as allowing more partiality than the ISO and WTO norms. Whereas consensus is the norm for ISO, the TBT Committee and the ISEAL Standards-Setting Code,[130] it is not required by the ISEAL

---

121   ISEAL Standard-Setting code (n 110) clause 5.1.1.

122   ISEAL Credibility Principles (n 114) Principles 1, Sustainability, 5, Engagement and 7, Transparency.

123   Ibid Principles 5, Engagement and 7, Transparency; ISEAL Standard-Setting Code (n 110) clauses 5.4.5 and 5.7.

124   ISEAL Credibility Principles (n 114) Principle 7, Transparency. TBT and ISO rules do not require publication of any of this information.

125   Ibid Principles 7, Transparency, 8, Accessibility and 9, Truthfulness.

126   The TBT Standards Code and Guide 59 only require standards bodies to explain their disposition of a comment upon request from the commenter. TBT Standards Code (n 81) Article N; Guide 59 (n 64) clause 4.4.

127   Guide 59 (n 64) clause 4.7.

128   Six Principles (n 83) Principle 3, Impartiality and Consensus; TBT Standards Code (n 81) Articles D, E; Guide 59 (n 64) clauses 5.1, 5.2, 5.5.

129   ISEAL Credibility Principles (n 114) Principle 6, Impartiality.

130   Guide 59 (n 64) clauses 4.1, 4.5 ; Six Principles (n 83) Principle 3, Impartiality and Consensus; ISEAL Standard-Setting Code (n 110) clause 5.6.3.

Credibility Principles because, in ISEAL's view, consensus may be inappropriate for 'gold-level standards that seek to recognize only the top performers'.[131]

ISEAL claims to be 'the global authority in defining good practice for sustainability standards'.[132] Like ISO, it traces the 'authority for its authority'[133] to its own observance of transnational administrative norms. Its governance structures and processes are designed to fulfill the ISEAL Credibility Principles. ISEAL also points to recognition by others to bolster its rule-making authority. It boasts that its Codes of Good Practice are 'internationally recognized (…) by governments, international organisations, businesses, and NGOs as the global reference for good practice'.[134] It publishes a periodically-updated list of references to ISEAL Codes by governmental, non-governmental and intergovernmental bodies including the UN Food and Agricultural Organization and the UK environmental regulator.[135]

One influential authority that has not recognized ISEAL and is not likely to do so in the near future, however, is the WTO, because ISEAL—like many transnational standards bodies—does not conform to the WTO's quasi-Westphalian membership norm. The TBT Committee has repeatedly expressed skepticism and concern about these unconventional standards bodies.[136]

Beyond invoking its preferred transnational administrative norms to assert its own competence, ISEAL also applies these norms to its own members (and prospective members) and to standardization generally. ISEAL members must comply progressively with the ISEAL Codes of Good Practice as a condition of membership.[137]

ISEAL also holds out its Codes and Credibility Principles as benchmarks for sustainability standards systems generally. Its Codes 'are intended to…push the whole standards movement to improve'.[138] The Standard-Setting Code purports to be a minimum bar for 'all sustainability standards that aim to

---

131   ISEAL Credibility Principles (n 114) Principle 5, Engagement.

132   ISEAL Alliance, *An Introduction to ISEAL* (ISEAL 2015) 2.

133   Rose (n 13) 27.

134   *An Introduction to ISEAL* (n 132) 2.

135   ISEAL Alliance, *References to ISEAL in Policy, Regulations and Reports* (ISEAL Alliance n.d.) <http://www.isealalliance.org/online-community/resources/references-to-iseal-in-policy-regulation-and-reports> accessed 18 April 2016.

136   Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade since January 1, 1995, G/TBT/1/Rev.12 (January 21, 2015) 12–17.

137   For an explanation of this requirement see ISEAL Alliance, 'Pathway to ISEAL membership', <http://www.isealalliance.org/our-members/pathway-to-iseal-membership> accessed 18 April 2016.

138   *An Introduction to ISEAL* (n 132) 2.

achieve social, environmental or economic outcomes and that are operating at the international, regional, national or sub-national level'.[139] The Credibility Principles are intended for use by standards systems everywhere to improve their performance; by companies, NGOs, governments and creditors to evaluate different standards systems; by corporate buyers in making sourcing decisions; and by consumers and others to 'distinguish good practice from good marketing'.[140]

In short, both ISEAL and ISO deploy their preferred transnational administrative norms to assert their own competence and to assess the competence of standards setters more generally. Both organizations operate in the same policy space—social and environmental standardization. How do they interact with each other, and how do these interactions affect their respective quests for competence?

3.3   *Asymmetric Interactions Between ISO and ISEAL in Pursuit of Competence*

The relationship between ISO and ISEAL is characterized partly by collaboration and complementarity, and partly by rivalry. What stands out most is the lop-sided character of their interaction: ISEAL pays much more attention and gives more recognition to ISO than the other way around.

As mentioned earlier, the ISEAL Standard-Setting and Assurance Codes supplement existing ISO standards. ISEAL 'recognises that ISO has effective and widely used standards' for developing standards and assessing users' conformity with them.[141] ISEAL's Codes and Credibility Principles are intended to complement these ISO standards with 'additional requirements that are specific to the development and revision of sustainability standards and that are based on more current understanding of good practice'.[142] ISEAL also participates in ISO's standards development activity. It was a liaison (observer) member of the WGSR[143] and is currently a liaison member of ISO technical bodies on cocoa, environmental labelling, and requirements for accreditation bodies.[144]

---

139   ISEAL Standard-Setting Code (n 110) clause 1.

140   ISEAL Credibility Principles (n 114) Objectives.

141   ISEAL Alliance, 'Our Credibility', (n 113); ISEAL Alliance, *A Comparison of ISEAL, ISO and IAF: ISEAL Fact Sheet—October 2013* (ISEAL Alliance 2013) 1.

142   ISEAL Standard-Setting Code (n 110) Introduction.

143   ISO, *Participating in the Future International Standard ISO 26000 on Social Responsibility* (ISO 2006) 11.

144   ISO, 'Organizations in Cooperation with ISO: ISEAL Alliance', <http://www.iso.org/iso/home/about/organizations_in_liaison/organizations_in_liaison_details.htm?id=542904&LiaisonList=True> accessed 18 April 2016.

On the other hand, ISEAL has been critical of ISO. In its 2004 letter about ISO's plan to develop a social responsibility standard, ISEAL stated that 'while ISO has taken some small steps to improve the openness and inclusiveness of your standard-setting procedures, significant additional steps must be taken when addressing the development of social and environmental standards'.[145] The letter argued that an 'open, transparent and inclusive stakeholder dialogue, that includes meaningful consideration of input, and participation by a balance of stakeholders in decision-making, is a necessary prerequisite for any future work by ISO in this area'.[146] ISEAL urged ISO to achieve broader participation by developing countries and a wider range of stakeholders; ensure national standards' bodies' creation of mirror committees with representative stakeholder participation; secure adequate resources to enable such national and international participation; and modify decision-making processes to take adequate account of differing stakeholder views.[147]

Seven months later, ISEAL wrote a follow-up letter to the newly-formed WGSR urging it to provide greater guidance to national member bodies on how to ensure meaningful and balanced stakeholder participation, fund developing country and NGO representatives, and give liaison members the right to comment and vote on all stages of the draft standard.[148] These concerns were never addressed fully, and ISEAL eventually stopped participating actively in the drafting of ISO 26000.

ISO, for its part, has little to say about ISEAL. ISEAL's liaison membership in several ISO technical bodies signals recognition by those bodies that ISEAL has a valuable contribution to make. In addition, ISEAL and several of its members are included in a massive informative Annex to ISO 26000 that lists more than seventy examples of international social responsibility initiatives but declares that inclusion does not imply endorsement.[149]

ISO's central organs, however, view ISEAL with skepticism. In a 2010 publication, ISO asserted the superiority of its 'formal' standardization system over the alternative system represented by ISEAL and its members.[150] It claimed that whereas the ISO system adheres to the TBT Committee's Six Principles and the alternative 'private' standards may 'meet the needs of specific sectors

---

145   Mallet (n 108).

146   Ibid.

147   Ibid.

148   Letter from Patrick Mallet, ISEAL Executive Director to ISO Working Group on Social Responsibility (February 28 2005), ISO/TMB/WGSR N14.

149   ISO 26000 (n 100) Annex A.

150   ISO, *International Standards and 'Private Standards'* (ISO 2010).

or segments of the population' and 'may be perfectly valid and relevant for their purpose, (…) they do not adhere to the above-described disciplines, nor do they share the other attributes of formal international standards'.[151] ISO trumpeted the virtues of its one country, one member model and its standards development processes.[152] It mentioned ISEAL as an initiative to 'improve the consistency of principles and criteria' supporting 'private' social and environmental standards and certification, but immediately went on to present its own international standardization system as a preferred platform to avoid 'confusion, fragmentation of the marketplace and potential dilution' of these standards' intended effects.[153]

It is important not to exaggerate the rivalry between ISO and ISEAL. The transnational administrative norms they promulgate and promote are broadly similar, evoking well known and widely accepted norms of openness, transparency, accountability and due process. Both organizations believe in the power of market-based transnational governance. Nevertheless, their differences are real and revolve partly around disagreement about the administrative norms that should govern transnational social and environmental standards.[154] They disagree about whether transnational multi-stakeholder governance needs to be organized along Westphalian lines and whether effective stakeholder participation must occur directly at the international level or may be delegated to national bodies. They also disagree on what degree of openness, transparency and accountability is required for credible social and environmental standard-setting, and what standards-setters ought to be accountable for (with ISO focusing on standardization processes while ISEAL also puts strong emphasis on goal-setting, genuine empowerment of marginalized interests, and on-the-ground impacts).

These rivalries are played out partly in the TBT Committee and related WTO organs. In this sense ISO's and ISEAL's competences are linked to the state and interstate system, but the politics of competence are also played out in a transnational realm of supply chains, markets, civil societies and governance schemes in which states and interstate organs are just two among the many stakeholders vying for influence. Being able to trace the competence of transnational governance actors to a discrete legal act of a state or interstate

---

151   Ibid 2.

152   Ibid 4–5.

153   Ibid 7.

154   I am grateful to the anonymous reviewers for pointing out another potentially relevant difference: ISEAL is only a meta-regulator and does not develop vertical standards itself, whereas ISO does both. Exploring this difference is beyond the scope of this article.

organ (e.g. a statute, decree, treaty, or decision of the TBT Committee or WTO Appellate Body) would certainly make analysis easier. But competence in the transnational domain is not that simple. It is the product of ongoing, complex interactions among a range of actors and institutions. It is neither purely subjective nor objective, but the intersubjective result of intersecting discourses and counter-discourses deployed by shifting coalitions.[155] It is difficult to measure with confidence. All of this makes it a fascinating subject for study.

Having explored how two leading international sustainability standards bodies deploy transnational administrative norms to assert their own rule-making competence, assess others' competence and promote their preferred paradigms of standardization, I devote the last section of this article to two empirical puzzles about the relationship between transnational administrative norms and competence.

4   Two Puzzles about Transnational Administrative Norms and Competence

I argued in Part 2 that the relevant puzzle is not how transnational governors can proliferate in the public sphere without any apparent delegation of competence from states. Rather, the puzzle is to explain the dynamics by which transnational governance actors' competence is constructed, contested, consolidated or lost. These dynamics often involve the deployment of general administrative and quasi-constitutional norms. Two specific questions that arise in this connection are: why competence is sometimes withheld from transnational rule-makers despite their apparent conformity with general administrative or constitutional norms; and why competence is sometimes conferred on transnational rule-makers despite their apparent nonconformity with those norms.

4.1   *Why is Competence Sometimes Withheld Despite Apparent Conformity with Transnational Administrative Norms?*

Numerous scholars have noted the convergence of competing sustainability certification schemes on a common set of norms for the design and operation of standard-setting bodies. These include norms of multi-stakeholder participation and engagement, reasoned decision-making and transparency.

---

155   Friedrich Kratochwil and John G Ruggie, 'International Organization: A State of the Art on an Art of the State' (1986) 40 International Organization 753; Maarten A Hajer, *The Politics of Environmental Discourse* (Clarendon 1995).

Some researchers believe competition among schemes can lead to a race to the top as industry-driven schemes seek to emulate certain features of multi-stakeholder schemes.[156] The pressure toward such convergence is real, according to Luc Fransen:

> There is indeed pressure in voluntary programme policy fields to organize governance with inclusion of various stakeholders in order to be seen as legitimate by an outside audience of governmental, intergovernmental and non-governmental organizations. As a consequence, leaders of business-driven programmes increasingly respond to this pressure by emulating some of the aspects of multi-stakeholder initiative (…).[157]

Nevertheless, Fransen finds that the convergence is superficial:

> They do this, however, in such a way that actual involvement of societal interest groups in decision-making and oversight is effectively kept at bay. Hence, a prominent consequence of legitimation politicking is a divergence between the surface appearance of governance models and the actual functioning of programmes.[158]

Lars Gulbrandsen reaches a similar conclusion in relation to the industry-led Programme for the Endorsement of Forest Certification (PEFC), finding that 'the PEFC has not adopted decision-making rules and structures that could reduce the influence of forest owners in standard development and operation'.[159]

---

156   Christine Overdevest, 'Codes of Conduct and Standard Setting in the Forest Sector: Constructing Markets for Democracy?' (2004) 59 *Industrial Relations* 172; Errol Meidinger, 'Competitive Supragovernmental Regulation: How Could It Be Democratic?' (2008) 8 Chicago Journal of International Law 513; Klaus Dingwerth and Philip Pattberg, 'World Politics and Organizational Fields: The Case of Transnational Sustainability Governance' (2009) 15 European Journal of International Relations 707; Christine Overdevest, 'Comparing Forest Certification Schemes: The Case of Ratcheting Standards in the Forest Sector' (2010) 8 Socio-Economic Review 47; Timothy M. Smith and Miriam Fischlein, 'Rival Private Governance Networks: Competing to Define the Rules of Sustainability Performance' (2010) 20 Global Environmental Change 511; Christine Overdevest and Jonathan Zeitlin, 'Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector' (2014) 8 Regulation and Governance 22.

157   Luc Fransen, 'Multi-stakeholder Governance and Voluntary Programme Interactions: Legitimation Politics in the Institutional Design of Corporate Social Responsibility' (2012) 10 Socio-Economic Review 163, 165.

158   Ibid.

159   Lars Gulbrandsen, 'Sustainable Forestry in Sweden: The Effect of Competition among Private Certification Schemes' (2005) 14 Journal of Environment and Development 338, 352.

Similar developments have been observed across numerous economic sectors including apparel, cocoa and coffee, and for a range of issues including deforestation, environmental protection, fair trade and labour standards.[160] Across all these contexts, the superficial convergence of industry-led schemes on norms of multi-stakeholder decision-making may secure some legitimacy from business and governmental actors but not from most civil society actors, who in general remain unconvinced and continue to dispute the legitimacy of the industry-led schemes.[161]

To summarize, superficial convergence around common administrative norms can mask substantial divergence at the level of practice, leading some audiences to withhold legitimacy from putative governors that embrace the norms superficially. This is not really puzzling at all. The reason competence is sometimes withheld from transnational rule-makers despite their apparent conformity with general administrative norms is that conformity is sometimes only skin deep. Some transnational governance schemes might seek to deflect and demobilize opposition rather than genuinely accommodate it. If audiences are insensitive to this difference, these schemes may enjoy the benefits of being seen to conform to general administrative norms without actually conforming to them.[162]

If, however, relevant audiences are attentive to differences in the actual functioning of transnational governance schemes, they may grant or withhold their support accordingly. This is why many social and environmental groups continue to question the legitimacy of industry-led certification schemes despite their apparent embrace of the administrative norms of multi-stakeholder governance. In short, the same administrative and quasi-constitutional norms that some schemes hold up casually to deflect criticism can be deployed more rigorously by critics to expose and discredit their obfuscation and to identify and reward other schemes that perform better.

4.2   *Why is Competence Sometimes Conferred Despite Apparent Nonconformity with Transnational Administrative Norms?*

The second puzzle emerges from my own research into audience perceptions of ISO's legitimacy. I spent a month in Colombia in 2008 researching local perceptions of the legitimacy of global social and environmental standards, with a

---

160   Fransen, 'Multi-stakeholder Governance' (n 157) 167.

161   For illustrative examples see Jean-Christophe Graz and Andreas Nölke (eds.), *Transnational Private Governance and its Limits* (Routledge 2008); Luc Fransen, *Corporate Social Responsibility and Global Labor Standards: Firms and Activists in the Making of Private Regulation* (Routledge 2012) 135–164.

162   Fransen, 'Multi-stakeholder Governance' (n 157) 188.

particular focus on ISO 26000, drafting of which was in full swing. I interviewed almost three dozen representatives of industry, government, academia, standards bodies, environmental, indigenous and human rights groups.

ISO's Technical Committee 207, which is responsible for the ISO 14000 family of environmental management standards, had its annual meeting in Bogotá while I was there. I attended the meeting as a member of the Canadian delegation. At this meeting, a long-standing debate over TC 207's openness to environmental non-governmental organization (ENGO) participation had its final climax. Since ISO began to develop environmental management standards in 1993, ENGOs questioned its competence to do so, partly because of its failure to observe administrative norms of openness, transparency and accountability.[163] At first some major ENGOs including WWF and the International Institute for Sustainable Development participated in TC 207's work. Several left in the late 1990s when ISO declined to develop a sustainable forestry standard. Smaller ENGOs like ECOLOGIA (Ecologists Linked for Organizing Grassroots Initiatives and Action) and the Pacific Institute, along with some consumer groups, joined or remained and tried repeatedly to convince TC 207 to enhance the effective participation of NGOs in its work.

Eventually, in Bogotá, a multi-stakeholder task group proposed new procedures to achieve more balanced participation and decision-making in TC 207.[164] The task group proposed regular collection and reporting of data about participants' stakeholder categories and developed or developing country affiliations; an advisory group to monitor and address imbalances in participation; assessment of stakeholder and regional balance when determining whether consensus has been reached; and efforts to secure liaison members' full and formal support for draft standards.[165]

The proposal was rejected decisively in one of the most hostile ISO meetings I have attended in more than fifteen years of involvement.[166] Representatives of some NSBs called the proposal an insult to ISO and its national member bodies, who have a duty to incorporate all relevant stakeholder interests at the national level. When the NGO members of the task group suggested that social

---

163   Harris Gleckman and Riva Krut, 'Neither International Nor Standard: The Limits of ISO 14001 as an Instrument of Global Corporate Environmental Management' in Christopher Sheldon (ed.), *ISO 14001 and Beyond: Environmental Management Systems in the Real World* (Greenleaf 1997) 45; see also the sources in (n 99).

164   *ISO/TC 207 Proposed Operating Procedures to Improve Stakeholder Involvement*, ISO TC 207/N 876 (May 15, 2008).

165   Ibid.

166   The information in this paragraph is based on personal observation.

and environmental standards have different stakeholders and require a more inclusive approach than traditional ISO standards, several delegates shouted 'A standard is a standard!'. When the NGO representatives referred to the process followed by the WGSR as a modest innovation, NSB representatives called it unworkable and illegitimate. This meeting marked the end of public interest NGOs' substantial engagement with TC 207. The few public interest NGOs that had remained to that point left and have not returned. TC 207, like ISO generally, continued more or less with business as usual.

Almost none of my interviewees were aware of these developments in TC 207. Yet these developments are helpful for understanding the interviewees' perceptions of ISO and its legitimacy. Many government, business and civil society interviewees told me that observance of general administrative norms was crucial for social responsibility standards development, and that in their view ISO failed in one way or another to live up to those norms. The large majority of respondents nevertheless concluded that it was legitimate for ISO to develop social responsibility standards.

An industry trade association representative, for example, told me: 'It is actually very important that all the involved parties are able to present their assessments and at the end the general interest has to take precedence'. A business-interest NGO opined that civil society participation is important to gain legitimacy. Numerous respondents stressed the importance of effective participation by developing countries. Many of these same respondents believed that ISO fails to conform to these expectations. A business-oriented NGO said, 'I think [ISO] represent businesses, companies'. An environmental NGO reported, 'I see ISO as the corporations. ...Anybody who is not part of the private sector is not sufficiently represented'. Similarly, a human rights NGO stated that 'ISO represent the private sector'. A chamber of commerce representative complained about the lack of consumer participation, while other interviewees noted labour's absence. Numerous respondents complained about the marginalization of developing countries. According to one respondent, 'ISO is a Europe-driven organization; developed countries, industrialized countries impose the standards upon us because we do not have the resources to participate fully'.

One might expect the conclusion of this line of logic to be that ISO lacks the competence to develop social responsibility standards. Quite the contrary: Notwithstanding ISO's perceived shortcomings, most respondents viewed ISO as competent to develop social responsibility standards. This view was expressed not just by business interests, as one might expect, but also by an environmental NGO and a human rights NGO. A business-oriented NGO stated that 'we accept they have the authority to make the standards. ... I know

some people say it is a private institution and that social responsibility is only a job of government. But I think we must work together, government, institutions and society to attain sustainability'. An environmental NGO opined that 'it could be ISO, it could be UN, any person, if it helps (…) The private sector wants to define better processes for improvement of what social responsibility is. It does not matter what the origin is, as long as it makes a contribution'. Finally, a human rights NGO stated point-blank: 'I think that it is legitimate for ISO to develop the standard'.

What explains the counter-intuitive assertion that observance of administrative norms like openness, transparency and impartiality is crucial for rule-making legitimacy, but a rule-maker that violates these norms is nevertheless legitimate? One explanation suggested by some interviewees' responses is that audiences confer legitimacy on the basis of outcomes rather than processes: it doesn't matter who develops the rules or how, so long as they have a positive impact. But if this is true, why do so many putative governors and audiences put so much emphasis on process-based legitimacy?

A more plausible explanation is that ISO's dominance of the standardization world and its penetration in the global marketplace compensate for its perceived procedural shortcomings. Because of ISO's pervasiveness and accumulated social capital, audiences may take its competence for granted and confer cognitive legitimacy upon it.[167] Cognitive legitimacy is more durable than legitimacy granted out of self-interest or moral conviction.[168] I suspect that this form of legitimacy is more common than previously thought,[169] and might help to explain not just my second puzzle but also the asymmetrical relationship between ISO and ISEAL that I described earlier.

5   Conclusion

Competence is central to transnational governance but is not conferred exclusively by states or interstate organs. As the still-unfolding tale of ISO, ISEAL and sustainability standards illustrates, competence is the contingent product

---

167   Suchman (n 23).

168   Cashore (n 23) 37.

169   Ibid, 37 Cashore and his coauthors asserted in 2004 that it was absent from the development of forest certification to date; but Büthe's work on the IEC suggests that it might be at work elsewhere. Tim Büthe, 'Engineering Uncontestedness? The Origins and Institutional Development of the International Electrotechnical Commission (IEC)' (2010) 12 Business & Politics Article 4.

of an ongoing process of interaction among rule-makers and a variety of relevant audiences, in which states play an important but not always determinative part. General administrative and quasi-constitutional norms play a complex and sometimes paradoxical role in the quest for competence. Some rule-makers' competence remains solid even in the face of widespread perceptions that they fail to comply with widely accepted administrative norms; others' remains fragile even though they are models of good practice. So, you need competence to join in the game of pronouncing and applying general administrative norms in transnational governance, but the quest for competence does not end when you join. Rather, the game itself is about getting, keeping and losing competence.